

## DISSENTING OPINION OF JUDGE ANDERSON

1. To my regret, I have felt obliged to cast negative votes on the main operative paragraphs of the Judgment. However, my difficulty concerns a single issue, namely the validity of non-financial conditions in bail bonds. I am pleased to have been able to concur with the terms of the Judgment on the remaining issues, including issues of the kind which led me to dissent in both the “*Camouco*” and “*Monte Confurco*” cases. In short, apart from the one issue which has divided the Tribunal, I see positive trends in the development of the Tribunal’s jurisprudence in prompt release cases. Before explaining the reasons for taking a different view from the majority on the one issue, I should like to identify these positive trends.

2. In **paragraph 68**, the Tribunal has gone further than it did in the “*Monte Confurco*” Case. Two years ago, the Tribunal simply took note of concerns of the Respondent about the serious situation caused by IUU fishing in the CCAMLR Area without drawing any conclusions. I fully concur, therefore, with the expressions of understanding and appreciation of the international concerns over IUU fishing in the CCAMLR Area. In this connection, I would note that the Respondent submitted to the Tribunal some relevant extracts from the Report of the recent meeting of CCAMLR,<sup>1</sup> as well as diplomatic notes addressed to Australia by several Contracting Parties, including Chile, France (Kerguelen), New Zealand and South Africa from the southern hemisphere, all expressing concern about the conservation and management of the living resources of the CCAMLR Area.<sup>2</sup> Other documentation submitted by the Respondent and not challenged by the Applicant indicates clearly that the *Volga* had been fishing in the Statistical Division 58.5.2 of the CCAMLR Area (including the EEZ around Heard Island<sup>3</sup>) during the greater part of the 2001-2002 Austral summer as part of a large fleet of Russian and other vessels. In my opinion, the duty of the coastal State to ensure the conservation of the living resources of the EEZ contained in article 61 of the Convention, as well as the obligations of Contracting Parties to CCAMLR to protect the Antarctic ecosystem, are relevant factors when determining in a case under article 292 whether or not the amount of the bail money demanded for the release of a vessel such as the *Volga* is “reasonable.”

3. In **paragraph 73**, the Tribunal has held that the full value of the vessel, including its gear and stores, represents reasonable financial security for the release of the vessel. I fully share the finding. The material available to the Tribunal disclosed no grounds for departing from the standard of full value. The Respondent has submitted a great deal of factual material which was not contested. The information consisted of affidavits from Australian and Spanish witnesses as to the fishing by the *Volga* in the 2001-2002 Austral summer; certain documents found on board the *Volga*; and data recovered from the hard disk of the vessel’s computer. There was no dispute that when arrested in sub-area 58.5.2 of the

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<sup>1</sup> Statement in Response, Annexes 4 and 5.

<sup>2</sup> *Ibid.*, Annex 3 and attachments to the letter of the Agent for the Respondent dated 10 December 2002. There is a precedent for the submission of such diplomatic correspondence in Annex 4 to the Common Rejoinder of Denmark and the Netherlands in the *North Sea Continental Shelf* cases: *I.C.J. Pleadings*, etc., 1968, Vol. I, p. 546.

<sup>3</sup> Heard Island is clearly an island and not a rock. As such, an EEZ can be validly established.

CCAMLR Area the vessel was not carrying a VMS<sup>4</sup> but did have on board over 131 tonnes of Patagonian toothfish, worth almost AU\$ 2m, caught by longlines.<sup>5</sup>

4. In **paragraphs 81 to 83**, the Tribunal concludes that the circumstances surrounding the arrest of the *Volga* are not relevant in assessing the reasonableness of the security sought by Australia for the vessel's release. Again, I share this approach since the Tribunal is not in possession of all the facts and its task under article 292 is to deal with "the question of release" [emphasis added], not *arrest*, and to do so "without prejudice" to the merits of any case before the domestic forum. The same principle of non-prejudice must apply equally to any other wider issues outstanding between the parties.

5. In **paragraphs 84 to 87**, the Tribunal concludes that the proceeds of the sale of the catch have no relevance to the bond to be set for the release of the vessel and that the question of including those proceeds in the bond does not arise, whilst emphasising the consideration that the final destination of the proceeds depends upon the outcome of domestic legal proceedings. In regard to this same issue in the "*Monte Confurco*" Case, I dissented along with Judge Jesus for reasons which he was able to explain most persuasively in his declaration. I added in my own that the proceeds of sale could be taken into account in a general way, but without purporting to make them part of the bond. Accordingly, I consider the approach now adopted in paragraphs 86 and 87 to be a positive development and I fully concur in those findings.

6. I turn now to **the question of non-financial conditions under article 73, paragraph 2**, on which I part company with the majority. This question arose for the first time in this case. The question is whether or not a coastal State is entitled to include in a bond or other security for the release of a vessel and its crew conditions which are non-financial in nature. This is an important question of interpretation, possibly with wide implications, and it had to be considered under time pressure, allowing limited opportunity for research and reflection. Having - to my regret - come to a different conclusion from the majority, I will first set out my interpretation before reviewing the alternative interpretation contained in paragraphs 75 to 80 of the Judgment.

7. My reading of the plain words of article 73 in their context and in the light of the object and purpose<sup>6</sup> shows that the article contains no explicit restriction upon the imposition of non-financial conditions for release of arrested vessels. Where the Convention does limit the rights of coastal States in the matter of enforcement, it does so in express terms: article 73, paragraph 3, prohibits imprisonment and corporal punishment. In my view, further limitations upon the rights of States Parties in what are important matters of domestic criminal procedure, are not to be easily implied. The implication must be a necessary one.

8. I agree that in its context the reference to "other security" is probably confined to financial security, but it is not necessary to express a final view on this point. The expression "the posting of reasonable bond" is somewhat unusual to my mind. The issue turns on the true meaning of this phrase.

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<sup>4</sup> As required for vessels flying the flag of a Contracting Party by Conservation Measure 148/XX, with effect from 31 December 2000 at the latest. Such vessels are also required by Conservation Measure 119/XX to hold a special licence to fish in the CCAMLR Area.

<sup>5</sup> Conservation Measure 222/XX specifies that in that area during the 2001-2002 season fishing should be "conducted by vessels using trawls only."

<sup>6</sup> Following the approach set out in article 31 of the Vienna Convention on the Law of Treaties, read as a whole.

9. Now, in *Webster's Dictionary*,<sup>7</sup> the term “bond” as a noun has no fewer than 12 different meanings. In particular, the word can mean either a deed by which one person binds himself or herself to pay another without any further conditions, or alternatively a security for a released person’s return for trial in the future. This distinction between the two meanings of “bond” is brought out clearly in the tenth and eleventh definitions contained in that dictionary:

10 *Finance* an interest-bearing certificate issued by a government or business, promising to pay the holder a specified sum on a specified date ...

11 *Law b)* an amount paid as surety or bail.

10. In the context of article 73, the relevant meaning of the word “bond” is the legal one, not the financial or commercial one. We are not dealing with investment matters. Nor are we concerned with the release of a ship pending the resolution of some maritime claim, as that term is defined in the Convention on the Arrest of Ships of 1952.<sup>8</sup> Rather, the word “bond” in this provision speaks the language of criminal procedure.

11. This interpretation is consistent also with the French text. The term “*caution*” refers to the equivalent in French criminal procedure of bail in England and bond in the USA. As is well known, article 292 was based on a proposal first submitted by the delegation of the USA.<sup>9</sup> The American influence probably explains why the American term “bond” was included (and without the benefit of the indefinite article) in the English version of article 292 and the related article 73, paragraph 2, rather than the English term “bail.”

12. A leading American legal dictionary contains the following:

*Bail bond.* ... A written undertaking, executed by the defendant ... that the defendant ... will, while at liberty as a result of an order fixing bail and of the execution of a bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required ...<sup>10</sup>

The US Code provides for release “upon execution of an unsecured appearance bond” or “on a condition or combination of conditions” designed to ensure the appearance of the accused for trial and the safety of the community.<sup>11</sup> In English law too, bail may be made conditional: the Bail Act 1976 authorises courts to impose such requirements as appear to the court to be necessary to secure that released persons surrender back into custody at the time

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<sup>7</sup> *Webster's New World College Dictionary*, 3<sup>rd</sup> ed. (1997). There are as many as 14 different meanings in the *Shorter Oxford Dictionary*, including the name of the type of special paper used for the originals of the Judgment in this case.

<sup>8</sup> International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, in Berlingieri's *Arrest of Ships*, 3<sup>rd</sup> ed. (2000), at p. 215.

<sup>9</sup> The legislative history is set out in the commentary by Rosenne and Sohn in volume V of the *Virginia Commentary*.

<sup>10</sup> *Black's Law Dictionary*, 6<sup>th</sup> ed., 1990.

<sup>11</sup> Title 18, Part II, Chapter 207, Section 3142 (Release or detention of a defendant pending trial), subsection (c) (Release on Conditions). Available on the internet at <http://www4.law.cornell.edu/uscode/18/3142.html>.

of the trial and do not commit an offence whilst on bail.<sup>12</sup> Australian legislation appears to be similar.

13. To recapitulate, the ordinary meaning of the word “bond” depends upon its context. In article 73, paragraph 2, the context is clearly not the financial meaning of “bond” as a simple deed. Rather, the context is legal and precisely that of release of an accused person against a bail bond which may, and often does, contain non-pecuniary conditions. Conditions may be temporal, financial or non-financial. All conditions form integral parts of a bail bond and are valid *prima facie*. No particular type of condition should be excluded *a priori*. The transaction consists of the release of the vessel, pending the resolution of legal proceedings, in exchange for the provision of financial security and the observance of appropriate conditions designed to ensure that those proceedings are not prejudiced or frustrated. The legitimacy of this aim in the context of article 73, paragraph 2, is confirmed by article 292, paragraph 3, which provides for release “without prejudice to the merits” of the case before the domestic forum.

14. The correct question to ask is whether or not the bond sought for the release of the vessel is “reasonable” in each and every respect. There are several elements: the amount, the form and the conditions of the bond. The legislation of many States empowers courts to impose conditions of bail upon persons who are released from detention pending trial. The conditions as to the deposit of passports with the Australian Embassy in Spain are typical examples of bail conditions, designed to ensure the return of the accused to face trial and to prevent illegal fishing in Australian waters in the meantime. In my opinion, it would require clear words in the Convention to exclude all non-financial bail conditions. Such words are not there. All that the Convention requires is that every term of the agreement represented by the bond or other security, including the amount of money, the conditions and the form of the security, be reasonable in the circumstances of the case.

15. Having thus set out my interpretation, I turn to that advanced in **paragraphs 76 to 80** of the Judgment.

16. First of all, I would have been prepared to have made a finding in **paragraph 76** to the effect that a coastal State is entitled by article 73 to impose non-financial conditions in bail bonds in exercise of its sovereign rights. The power is contained notably in article 73, paragraph 1, where reference is made to judicial proceedings and measures to ensure compliance with the coastal State’s legislation adopted in conformity with the Convention.

17. I have several difficulties with the process of reasoning contained in **paragraph 77**. The argument based on the inclusion in the Convention of article 226, paragraph 1(c), rather overlooks the historical background. During the 1970s there was concern about sub-standard oil tankers, often flying flags of convenience, just as there is today. The reaction of the international community then was to draw up the MARPOL Convention and to make two special provisions for sub-standard vessels in articles 219 and 226. As regards fisheries, the situation was different. The new maximum limit of 200 nm was just being introduced in many States and there were far less obvious problems with fishing vessels flying flags of convenience than there are today. It goes too far, in my respectful submission, to conclude that the inclusion of special provisions to deal with sub-standard tankers implicitly excluded non-financial conditions from bonds in the case of fishing vessels.

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<sup>12</sup> *Halsbury’s Laws of England*, 4<sup>th</sup> ed. (1990), Vol. 11(2), paragraph 884.

18. Next, the description in paragraph 77 of the “object and purpose” of article 73, paragraph 2, read in conjunction with article 292, is cast in terms which refer only to one side – the flag State. This description strikes me, with respect, as too narrowly stated. An additional element in the object and purpose is to provide the safeguard for the coastal State contained in the phrase “without prejudice to the merits of any case before the appropriate domestic forum” in article 292, paragraph 3. Protecting the merits of the case and the domestic legal proceedings from prejudice or actual frustration is a legitimate interest of the arresting State which the exclusion of non-financial conditions would make more difficult to achieve. To the extent to which there is some sort of a balance in these provisions between the interests of the two States concerned, that balanced treatment should not be tilted in favour of one or the other.

19. Turning to **paragraph 80** of the Judgment, it is true that article 73 “envisages enforcement measures in respect of violations of the coastal State’s laws and regulations alleged to have been committed.” However, in my opinion, the wording of that article, read together with article 292, is cast in terms sufficiently wide to allow for the possibility of imposing conditions in a bond designed to protect from possible prejudice any ongoing legal proceedings in the appropriate domestic forum.

20. In my view, a so-called “good behaviour bond” represents a type of “bond” within the meaning of article 73, paragraph 2. It is financial and the non-financial condition about good behaviour serves a legitimate purpose (detering further poaching in the EEZ pending the determination of the legal proceedings). It balances the undoubted benefit that the owner of the vessel gains from its release – renewed access to fishing grounds.

21. I do not go so far as to contend that a good behaviour bond will necessarily be justified in all cases. The reasonableness of the demand has to be assessed against the facts of each case, as appreciated by the Tribunal in what are summary proceedings without full proof of facts. If we turn, therefore, to the question of reasonableness in this particular instance, the bond of AU\$ 1m has been demanded in pursuance of a legitimate aim: it is precisely intended “to ensure compliance with the laws and regulations adopted by [Australia] in conformity with this Convention,” within the meaning of article 73, paragraph 1, during the period between release of the vessel and the conclusion of the domestic legal proceedings. This concern is directly linked to the reasons for both the arrest and the outstanding charges. This element of the Australian bond would represent financial security which has to do with the duty of the coastal State to ensure the conservation of the living resources of the EEZ, in accordance with articles 61 and 64 of the Convention. Equally, it serves the legitimate aims of articles 116 to 120 in regard to CCAMLR.

22. The next question to address, following my approach, is whether or not the amount of the security and the condition requiring “good behaviour” are proportionate to the risk of re-offending. Australia says there is a risk of further fishing in the Australian EEZ during the period between the time of release of the *Volga* and the conclusion of the outstanding legal proceedings. In assessing this question, there are several relevant factors:

(a) The *Volga* had been sighted on the high seas and warned not to enter the Australian EEZ by the *Southern Supporter*, an Australian patrol vessel, on 5 January 2002. The *Volga*

clearly ignored this warning.<sup>13</sup> The *Volga* appears from the documentation to have spent much of the period between its warning and its arrest fishing in the CCAMLR Area, including the EEZ.

(b) The Annexes to the Statement in Response, including documents found on board the *Volga*, contain several indications that the *Volga* was not fishing alone, but rather it was fishing in concert with a fleet of other vessels which gave it logistic support (bunkers and transshipment of catch, for example); and that the entire fleet was coordinated from offices in Indonesia and Las Palmas. Other vessels in the fleet could be still be fishing in the area during the current Austral summer fishing season. There appears to be a clear risk of the *Volga* rejoining this fleet immediately or shortly after its release.

(c) The documentation contains indications that Olbers Co Ltd may be no more than the nominal owners of the *Volga* and that the true owners have taken care not to identify themselves and they have still not been charged.

(d) A recent example of what the Respondent fears, namely a released vessel returning to fish in the Antarctic and reoffending, is provided by the case of the *Camouco*.

(e) Once released, it may well be nigh impossible to keep track of the *Volga* in Antarctic waters, including the Australian EEZ, especially if it is not carrying a VMS.

23. In the light of these factors, the risks of reoffending seem real. The good behaviour bond and the conditions sought by the Respondent are not, in my opinion, unreasonable within the terms of article 73, paragraph 2. The amount may be on the high side, but it does not exceed the “margin of appreciation” to be accorded to domestic courts and domestic authorities.

24. My conclusions are, first, that the Applicant’s argument to the effect that non-pecuniary conditions cannot count for the purposes of article 73, paragraph 2, and are thus “unlawful” is not well-founded. It is based on an overly narrow, even legalistic, interpretation of article 73, paragraph 2, which takes insufficient account of the context of domestic criminal law and procedure in many States Parties, the overall balance between the interests of the owners of the vessel and the coastal State, and the “without prejudice” clause in article 292, paragraph 3. Secondly, in the light of the uncontested factual material before the Tribunal, the non-financial conditions are not unreasonable. For these reasons, I would dismiss the Application as not “well-founded” (Rules, article 113). In these circumstances, I voted against paragraphs 3, 4 and 5 of the operative part of the Judgment, notwithstanding my support for the Judgment’s finding on other points of substance. I would have voted for the latter had the opportunity been provided in the *Dispositif*.

25. To conclude, I would only add that I agree fully with and endorse the Opinion of Judge *ad hoc* Shearer.

(Signed) David Anderson

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<sup>13</sup> Annexes to the Statement in Response, Affidavit of G.V. Rohan, paragraph 29.