

### SEPARATE OPINION OF JUDGE TREVES

1. I voted in favour of all points of the operative part of the Judgment. I wish, nevertheless, to make some observations on one aspect of the reasons that I consider important. In my view, the statement in the Judgment that considerations of humanity, of due process of law and of fairness are aspects of article 73, paragraph 2, of the Convention, marks a very relevant and welcome new development in the jurisprudence of the Tribunal. The reasons given are, however, too elliptical in my view and require further development. I will also deal with the consequences that may be drawn from this statement. The Judgment draws such consequences only implicitly in considering the question whether the claim is “well founded” according to article 113, paragraph 2, of the Rules of the Tribunal, while, in establishing the reasonableness of the bond, it does not give any indication that the statement is relevant.

2. Article 73, paragraph 2, of the Convention, is to be read, as the Judgment states, in the context of the article as a whole. As the Tribunal stated in the “*Monte Confurco*” Judgment, article 73 “strikes a fair balance” between “the interest of the coastal State to take appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other” (*ITLOS Reports 2000*, p. 108, para. 70). Looking more deeply into the way this balance is obtained, it appears that article 73 sets out rights of the coastal State in paragraph 1 and rights of flag States in paragraphs 2, 3 and 4. While paragraph 1 includes a broad and non-exhaustive list of measures the coastal State may take to ensure compliance with its laws and regulations, the three paragraphs that follow have the purpose to ensure that these measures will not have the effect of limiting the freedom of the persons involved (prompt release of the crew, prohibition of imprisonment as a penalty) and of unduly jeopardizing the rights of shipowners and of the flag State (prompt release of the vessel), while ensuring timely protective action by the flag State (obligation to notify in case of arrest and of the imposing of penalties).

3. Seen together in light of paragraph 1, paragraphs 2, 3 and 4 show clear concern for what has been called “the human rights consequences of expanding the bases of jurisdiction”.<sup>1</sup> As the Judgment correctly states, the requirement that the guarantees must be reasonable is a further indication that a concern for fairness is one of the purposes of these provisions. Paragraph 2 stands at the centre of this group of provisions: prompt release is more likely if the flag State is informed promptly under paragraph 4 and the conditions of the crew are more bearable while waiting for release if no imprisonment is involved under paragraph 3. The obligation of prompt release that emerges from examining paragraph 2 in light of paragraphs 3 and 4 is an obligation of result and at the same time, at least in part, of means: prompt release of the vessel and crew is the result that must be obtained, but the means to obtain it are not without importance. Prompt release must be obtained, and the bond or other financial security must be fixed, through a procedure that respects due process.

4. The reminder, set out in the Judgment, of the close connection between paragraph 2 and paragraph 4 of article 73 of the Convention, already mentioned “in passing” by the Tribunal in the “*Camouco*” Judgment (*ITLOS Reports 2000*, p. 29, para. 59), is significant in a case as the present one in which it is not contested that the notification to the flag State provided for in paragraph 4 has not been effected. This is particularly so as this reminder appears in the part of the reasoning supporting the conclusion that the Respondent has not complied with article 73, paragraph 2, of the Convention. Claims of non-compliance with paragraph 4 (as well as 3) of article 73 remain in my view inadmissible as independent claims in prompt release proceedings, as the Tribunal has stated (in the “*Camouco*” and in the “*Monte Confurco*” Judgments, *ITLOS Reports 2000*, p. 29, para. 59 and p. 106, para. 63). They are nevertheless relevant as aspects of non-compliance with paragraph 2, in light of the common human rights and due process dimension.

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<sup>1</sup> B.H. Oxman, “Human Rights and the United Nations Convention on the Law of the Sea”, in J.I. Charney, D.K. Anton, M.E. O’Connell, *Politics, Values and Functions: International Law in the 21st Century, Essays in Honor of Professor Louis Henkin*, Nijhoff, The Hague, 1997, pp. 377–404, at p. 398; similar observations in B. Vukas, “Droit de la mer et droits de l’homme” in Vukas, *The Law of the Sea, Selected Writings*, Nijhoff, Leiden-Boston, 2004, pp. 71–79 at pp. 75–77.

5. In a prompt-release case unnecessary use of force and violations of due process and of human rights in general may be relevant in various ways. In particular, lack of due process, when it consists in late communication of charges, in delay and uncertainty as to the procedure followed by the authorities, in lack of action by the authorities, may justify a claim that the obligation of prompt release has been violated even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements. The same may apply when lack of due process is used to reach quickly the conclusion of domestic proceedings without seriously affording a possibility to consider arguments in favour of the detained vessel and crew. In both cases unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a bond or guarantee that can be considered as reasonable. The idea of abuse of rights is very close to that of lack of reasonableness and consideration of article 300 of the Convention should not be outside the scope of the complex process that brings the Tribunal to fixing a guarantee it considers reasonable. In a similar vein, Vice-President (as he then was) Nelson, in his Separate Opinion to the "*Monte Confurco*" Judgment, observed that in article 292 "the notion of reasonableness is . . . used to curb the arbitrary exercise of the discretionary power granted to coastal States" (*ITLOS Reports 2000*, p. 124).

6. In the present case, the essential fact seems to me to be that between the time of the arrest of the ship and the time of the application to the Tribunal (and also up to the hearing before the Tribunal) all domestic procedures held in the case (whatever other possibilities might have been open under the local law) have been *inaudita altera parte* (namely, without giving the accused party the possibility of being heard). In light of the above-mentioned due-process component of article 73, paragraph 2, this aspect is relevant not only in reaching the conclusion that indeed this provision has not been complied with, but also as regards the two consequences that follow the determination of such lack of compliance in the framework of proceedings under article 292. These are: the order of release and the fixing of the reasonable bond or other financial security. In the present case, the Tribunal has reached the conclusion – that I do not dispute – that confiscation has been suspended. Considering, nevertheless, the question in more general terms, confiscation obtained in violation of due process would seem to me abusive so that it cannot preclude an order for



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release. Fines imposed without procedural guarantees might also be seen as abusive and should not be taken as an automatic component of the bond or security. To my regret, this aspect appears not to have been considered as relevant by the Tribunal in the admittedly brief reasons given for the determination of the amount of the bond.

*(Signed)* Tullio Treves

