

DECLARATION OF JUDGE NELSON

I take this opportunity to make some brief remarks on paragraph 76 of the Judgment. The paragraph reads as follows:

A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.

This provision brings very much into play article 292, paragraph 3, of the Convention which states:

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.

This mechanism for prompt release is designed to isolate the prompt release proceedings from those taking place in the domestic forum and this must be a logical consequence arising from the very nature of the proceedings. As the Tribunal has itself asserted, it provides for an independent remedy and not an appeal against a decision of a national court ("*Camouco*", para. 59). In other words, it is not the business of the Tribunal to act as a court of appeal.

To what extent does the Tribunal have the power to examine the facts of the case? It will be recalled that in the "*Monte Confurco*" Case the Tribunal had this to say on the matter:

[T]he proceedings under article 292 of the Convention, as clearly provided in paragraph 3 thereof, can 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. Nevertheless, in the proceedings before it, the Tribunal is not precluded from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond. Reasonableness cannot be determined in isolation from facts.

(*"Monte Confurco"* (*Seychelles v. France*), *Prompt Release, Judgment, ITLOS Reports 2000*, para. 74)

Judge Mensah, in his Declaration, warned, correctly in my view, "that any 'examination' of the facts must be limited to what is strictly necessary for an appreciation of the reasonableness or otherwise of the measures taken by the authorities of the arresting State". He proceeded pertinently to add that "the Tribunal should exercise *utmost restraint* in making statements that might plausibly imply criticism of the procedures and decisions of the domestic courts". (emphasis added) (Mensah, Separate Opinion, "*Monte Confurco*", p. 121. To the same effect see also Jesus, Separate Opinion, *ibid.*, p. 140, para.10.)

The Judgment in paragraph 76 seems to suggest that this Tribunal has the power to examine whether the shipowner was prevented from having recourse to available domestic judicial procedures, to find out whether the proceedings were inconsistent with due process of law and so on.

The approach taken by the Tribunal in this paragraph runs the risk of "straying into territory which more properly belongs to the local court".¹ Perhaps these are not matters to be dealt with within the system contained in article 292.

(signed) L.D.M. Nelson

¹ Lowe, "International Tribunal for the Law of the Sea: Survey for 2000", (2001) *16 International Journal of Marine and Coastal Law*, p. 549 on 566.