DISSENTING OPINION OF JUDGE VUKAS

1. I concur with the considerations of the Tribunal concerning its jurisdiction in this case (paragraphs 45 to 48 of the Judgment), and therefore, I voted in favour of the first operative provision in paragraph 78 of the Judgment. However, as I do not share the opinion of the Tribunal that the Application of Panama was admissible, I voted against the second operative provision in paragraph 78 of the Judgment. As a consequence thereof, I had to vote also against the remaining operative provisions.

2. Before explaining the arguments for my Dissenting Opinion, I would like to express the fundamental reason for my decision to deny the admissibility of the Application of Panama. The Application is based on article 292 of the Convention concerning the "prompt release of vessels and crews". Yet, Panama has invoked the provisions on the prompt release in a manner which is not in accordance with the provisions of the Convention, and which was not envisaged by the Third United Nations Conference on the Law of the Sea (hereinafter "UNCLOS III"), which introduced this innovation into the international law of the sea.

3. The reason for the introduction of the procedure for prompt release at UNCLOS III was the idea that in some cases of detention, vessels and crews could be promptly released "without prejudice to the merits of the case, and without in any way ousting the jurisdiction of the detaining State".[1]

As the need for promptness of the release is the main purpose of this new procedure, there are several essential components which contribute to this goal:

(a) It is not only the flag State of the vessel that may make the application for release; the application may be made also on behalf of the flag State (article 292, paragraph 2). Thus, a State can give an authorization

[1] A.O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea, A Drafting History and a Commentary*, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1987, p. 161.

to make the application to one of its officials, to the captain or to the owner of the vessel.[2]

(b) Although article 292, paragraph 1, recognizes the equality of the procedures contained therein, and the right of the parties to agree on the choice of a court or tribunal, one of them – the International Tribunal for the Law of the Sea – has been selected for the situation when the parties cannot agree.

(c) A third element contributing to promptness is the short period in which all the subjects concerned (the detaining State, the flag State and all those concerned with the treatment of the detained vessel and the crew, the competent courts and tribunals) should act. Within 10 days from the time of detention, the detaining State should arrange for the release of the vessel or its crew, upon the posting of a reasonable bond or other financial security. The situation, in case the vessel and the crew are not released in this initial period, is best described by Shabtai Rosenne and Louis Sohn:

> If the local tribunal rejects the request for a release on bond, or the bond is considered by the party concerned to be unreasonable, that party should try to obtain a reversal of the decision if there is still time in the 10-day period. If there is no possibility of appeal, however, or no chance for that appeal to be decided before the expiration of the 10-day period, the parties should try to agree on the court or tribunal to which the question of release should be referred. If no agreement on such a court or tribunal can be reached before the expiration of the 10-day period, then the Convention's provisions on the selection of the tribunal apply.[3]

[2]Center for Oceans Law and Policy, University of Virginia, *United Nations Convention on the Law of the Sea 1982, A Commentary,* Vol. V, M.H. Nordquist, Editor-in-Chief, S. Rosenne and L. B. Sohn, Volume Editors, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1989, pp. 70–71.

[3]*Ibid.*, pp. 69–70.

(d) If the ship and the crew are not released, and the question of release from detention is submitted to a court or tribunal in accordance with article 292, paragraph 1, it is provided that "[t]he court or tribunal shall deal without delay with the application for release" (paragraph 3). In conformity with this provision, the Rules of the Tribunal contain provisions ensuring that an application for the release of a vessel and its crew from detention is dealt with without delay (Rules, articles 110 to 114).

(e) Finally, upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State must "comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew" (Convention, article 292, paragraph 4).

4. Taking into account all the above, it is clear that the prompt release procedure was conceived by UNCLOS III in order to permit the flag State, or somebody on its behalf, to submit the question to an international court or tribunal as soon as all the conditions under article 292, paragraph 1, are satisfied. This does not mean that in every case when the vessel and/or the crew are not released, the case should be submitted to an international procedure immediately after the expiry of the 10-day time limit. There may be valid reasons for a postponement, such as a promise from the detaining State that the vessel will be released soon, with or without the posting of a bond, or the existence of a lengthy procedure for obtaining the authorization to act on behalf of the flag State, etc.

Thus, the flag State can institute proceedings under article 292 when it deems appropriate for the benefit of its detained vessel and/or its crew, or it can make use of the local remedies. Of course, the purpose of the provisions on prompt release in article 292 does not require the exhaustion of local remedies (article 295) as a condition for the submission of a request for prompt release to an international court or tribunal.[4]

[4]See R. Lagoni, "The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report", *The International Journal of Marine and Coastal Law*, Vol. 11, No. 2, 1996, p. 152.

Yet, there may be shipowners and/or flag States which would prefer to bring the case of detention of their vessel and its crew to a local court or other authority competent under the national laws of the State which has detained the vessel. This was exactly the attitude of the shipowners of *Camouco* and its flag State, Panama.

5. The "Factual background" in the Judgment (paragraphs 25 to 42) clearly shows that on 8 October 1999, shortly after the seizure of the vessel (29 September 1999), the *tribunal d'instance* at Saint-Paul ordered that the release of the arrested vessel shall be subject to the payment "of a bond in the amount of 20,000,000 FF in cash, certified cheque or bank draft" (paragraph 36 of the Judgment).

Although the owner of *Camouco*, the company Merce-Pesca, considered the fixed bond as not being "reasonable", neither the shipowner nor the flag State did anything to institute the proceedings envisaged in article 292, paragraph 1. Instead, Merce-Pesca and the Master of the vessel filed a summons for urgent proceedings before the *tribunal d'instance* at Saint-Paul, in order to challenge the previous decision and to secure prompt release on the basis of a "reasonable bond" (22 October 1999).

Even when the *tribunal d'instance* at Saint-Paul issued an order rejecting the request (14 December 1999), Merce-Pesca lodged an appeal against this order before the *cour d'appel* at Saint-Denis. The appeal was lodged on 27 December 1999, and it is not surprising that it is still pending before the *cour d'appel* at Saint-Denis.

What comes as a real surprise is the fact that just before exhausting all French local remedies, the shipowner and the flag State "discovered" the procedure for prompt release in article 292 of the Convention. Namely, it was only on 7 January 2000 that the Applicant addressed a letter to the French Ministry of Foreign Affairs inviting it to release *Camouco*, and mentioning the proceedings under article 292.

6. Such behaviour of Panama (i.e. the use of the prompt release procedure under article 292 not immediately after the lapse of 10 days from the time of detention, but more than three months after that event), caused France to claim that "by its conduct, Panama allowed a situation of estoppel to arise and also that its Application is inadmissible".[5]

[5]Statement in Response of the French Government, 25 January 2000, paragraph 10 of the section relating to the law (English translation of the Statement in Response).

The possibility that because of its initial inaction, the flag State would be estopped from instituting the proceedings under article 292, has been commented upon by scholars. Although he does not support such an interpretation, Rainer Lagoni suggests that the flag State may be well advised to reserve its right to submit the question of release in due time to the Tribunal.[6]

7. In my view, the inadmissibility of the Application of Panama is not based on estoppel, but on a misinterpretation by Panama of the general concept of prompt release in the Convention and of the main provisions of article 292.[7] Namely, by addressing in January 2000 the Government of the French Republic and the Tribunal, the Republic of Panama *did not initiate a prompt release procedure*. Such a procedure, according to the Application of Panama itself, was initiated in a French domestic forum – the *tribunal d'instance* at Saint-Paul:

> On 22 October 1999, *in order to secure the prompt release of the vessel and the crew*, counsel for the owner, Merce-Pesca, filed a summons for urgent proceedings ... .[8]

As established in paragraph 5 above, over the following two months, Merce-Pesca continued to address the French domestic fora. Then, for an unknown reason, before the decision of the *cour d'appel* at Saint-Denis, Merce-Pesca, with the assistance of Panama, decided to submit the case to an international court or tribunal. By doing so, Panama acted against the doctrine of litispendence, according to which two courts should not exercise concurrent jurisdiction in respect of the same case (i.e. same parties, same issue).

Naturally, litispendence does not prevent parallel action in absolutely every case. Such action may be permitted on the basis of a treaty, or the parties may have some vital reason for resorting to one jurisdiction before exhausting the remedies available in the other jurisdiction. However, in the present case, I do not see any reason for addressing the Tribunal 100 days from the time of detention of *Camouco*. There were no new circumstances in respect of either the vessel or the Master at the time of the action by Panama in January 2000. Moreover, it is logical to expect that the appeal

[6]Lagoni, *op.cit.*, p. 150.

[7]As to how the Applicant interprets the 10-day limit, see the Application of Panama, paragraph 4 (English translation of the Application).

[8]Application of Panama, paragraph 40 (English translation of the Application). See also paragraph 42 of the Judgment.

pending before the *cour d'appel* at Saint-Denis should be resolved soon, and that the decision of the French court will contain different conclusions from those in the Judgment of the Tribunal, relating to the release of the vessel and the Master and to the amount and form of the bond or other financial security. It is impossible to foresee all the complications resulting from two different judgments, notwithstanding the appealing conclusion that the international judgment prevails over the national judgment.

8. As already mentioned at the very beginning, the procedure for the prompt release of vessels and crews is an innovation in the international law of the sea, created by UNLCOS III. The concise provisions of article 292, and the fact that to date the Tribunal has decided only one case, may result in misinterpretations in respect of the details of this procedure. However, the main scope of article 292 is clear: it should be used only in order to ensure promptness of release of detained vessels and crews in the situations provided for by the Convention.

Taking into account all the above-mentioned facts, the Application of Panama should have been declared inadmissible. Its interpretation of the prompt release provisions of the Convention is not in accordance with their "object and purpose" (article 31, paragraph 1, of the Vienna Convention on the Law of Treaties).

(*Signed*) Budislav Vukas