International Journal of Legal Information
the Official Journal of the International Association of Law Libraries

Volume 33
Issue 2 *Summer 2005*

Article 8

1-1-2005

Prompt Release of Detained Foreign Vessels and Crews in Matters of Marine Environment Protection

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Article 292 of the United Nations 1982 Convention on the Law of the Sea (Convention) reads:

> 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 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.
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> 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.
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> 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining state shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

This article provides for a special prompt release procedure (PRP) as an international proceeding in cases of detained foreign vessels and crews. "The purpose of these new rules," says Rainer Lagoni, "is to balance the interests of the detaining state in its measures against the flag state with the

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interests of the flag state in preventing an excessive detention of vessels flying its flag."[1] PRP aims to protect vessels' owners or charterers' economic interests and the humanitarian needs of crews. It is also intended to blunt the impact of the newly established institution – exclusive economic zones (EEZ) in the Convention.[2]

It will serve private individuals and provide them with a measure to challenge actions by coastal states, and avoid serious consequences for the individual resulting from an infringement of the coastal state's respective rights. Consequently, it is seen as "compensation" by coastal states for extended jurisdiction.[3] In other words, it is "aiming at completing the balance of rights in the EEZ by preventing conduct of the coastal state which rises strong concerns of other states, and which could, in a broad sense, be considered as abusive."[4] Generally speaking provisions on release of the vessel and its crew accommodate economic and humanitarian as well as safety and environmental concerns.[5]

The essence of Article 292, carefully negotiated novelty in the contemporary law of the sea, is that PRP is applicable where substantive provisions of the Convention specifically foresee prompt release of detained foreign vessels and their crews upon posting reasonable bond or other financial security.[6] The right of detention of foreign vessels is permitted or denied in several substantive provisions of the Convention.[7] By contrast, the

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[1] See: Rainer Lagoni, "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 147 (1996).

[2] In this context, B.H. Oxman writes: "In particular, the 200-mile exclusive economic zone represents a dramatic geographic and functional expansion of coastal state jurisdiction bringing a third of the marine environment within the limits of coastal state jurisdiction." See, Bernard H. Oxman, "Observations on Vessel Release under the United Nations Convention on the Law of the Sea," 11 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 202 (1996).

[3] See, Florian H.Th. Wegelein, "The Rules of the Tribunal in the Light of Prompt Release of Vessels," (1999) 30 OCEAN DEVELOPMENT & INTERNATIONAL LAW 265, 266.

[4] Tullio Treves. "The Exclusive Economic Zone and the Settlement of Disputes." THE EXCLUSIVE ECONOMIC ZONE AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982-2000: A PRELIMINARY ASSESSMENT OF STATE PRACTICE. Eds. Erik Franck and Philippe Gauthier. Brylant, Brussels, 2003. 90.

[5] See: Bernard H. Oxman, op.cit. 203.

[6] see: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982. A COMMENTARY. Vol.V. Ed. Myron H. Nordquist. Martinus Nijhoff Publishers. Dordrecht, 1989. 66-71.

[7] The term "detention" used in Article 292 of the Convention "is to be read according to its broadest meaning covering all cases in which the movement of a vessel or of persons is prevented by an authority." See, Tullio Treves, "The

prompt release is only prescribed in five cases of permitted detentions: Article 73(2), Article 220(7) and (8), Article 226(1) "b" and "c."[8] Article 292(1) stipulates as precondition for PRP that "the detaining state has not complied with the provisions of this Convention for the prompt release of the vessel or its crew" which makes the commentators of the Convention say: "Thus the right to complain about detention is restricted to the cases expressly provided for in the substantive parts of the Convention."[9]

PRP are the proceedings before an international court or tribunal between the states' parties to the Convention, in principle, "independent from domestic as well as from other international proceedings."[10] These can "only be excluded by agreement."[11] PRP is of compulsory nature in the sense that a unilateral action of the flag state concerned is sufficient to institute proceedings. If the flag state and the detaining state have failed within 10 days of the detention to reach agreement on the court or tribunal to decide the dispute, the flag state will have the right to submit the question of release unilaterally to the court or tribunal accepted by the detaining state under Article 287.[12] Alternatively, it can submit the question to the International

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Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea," 11 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 182 (1996).

[8] No author is considering Article 220(8) of the Convention as a provision which violation makes PRP applicable. See, e.g. Tullio Treves, op.cit. 179; Rainer Lagoni, 147-164; David H.Anderson. "Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements," 11 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 165 (1996); Erik Jaap Molenaar, COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION. Kluwer: The Hague, 1998. 490,491.

[9] A Commentary in footnote nr.6, 69 (paragraph 292.5).

[10] See: Tullio Treves, op.cit. 179.

[11] See: Rainer Lagoni, op.cit. 147.

[12] Article 287 (1) of the Convention gives a State to choose, by means of a written declaration at signing, ratifying or acceeding to this Convention or at any time thereafter, one or more of the following means for the settlement of disputes:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII;
(d) special arbitral tribunal constituted in accordance with Annex VIII for one or more categories of disputes specified therein.

We note that the following paragraphs of that Article give three important rules for submission of a particular dispute to a court or tribunal mentioned above. Firstly, in cases when choices of procedure of the parties to the dispute differ, or where one of them had not previously indicated its choice – the procedure to be followed is arbitration in accordance with Annex VII of the Convention. Secondly, if the parties to the dispute have accepted the same procedure for settlement of the dispute, this procedure shall be followed. Both rules are subject to the right of parties to agree

Tribunal for the Law of the Sea (ITLOS), established in Hamburg in 1996.[13] Such action could be brought "only by or on behalf of the flag state."[14] Article 292(2) is a very strict one and allows the application for release only *by or on behalf of the flag state of the vessel.* Determing who has the authority to bring an issue before an international tribunal on behalf of a particular state is purely a matter of domestic law.[15] Nevertheless the release can be asked not only for the vessel but also for crews, and, as we know, detained members of a crew could have different nationalities. Because of the imperative nature of paragraph 2, Article 292 of the Convention the only conclusion is that the flag state, but not the state of nationality of the members of the crew is granted *locus standi.*[16]

PRP is an extremely speedy procedure for an international forum of dispute settlement.[17] The procedure could be commenced immediately after ten days have lapsed from the date of detention and should be dealt by a court or tribunal "without delay."[18] PRP has a certain priority stipulated for it in Article 112(1) of the Rules of the ITLOS, as well as short time-limits for

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otherwise. Thirdly, when a state party (to the Convention) which is party to the dispute has not made any declaration (in force), it shall be deemed to have accepted arbitration in accordance with Annex VII. This resolution embodied in Article 287 of the Convention is actually called "the Montreaux (Riphagen) Compromise"– see: United Nations Convention on the Law of the Sea 1982. A Commentary. Vol.V. Ed. Myron H.Nordquist. Martinus Nijhoff Publishers. Dordrecht, 1989, 8; or professor Alan E.Boyle is calling "the cafeteria approach" – see: Alan E.Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 39, 40 (1997).

[13] Article 292(1) of the Convention makes ITLOS the "default body" or gives him the competence of "last resort." See, Tullio Treves, op.cit., 187; Florian H.Th.Wegelein, op.cit., 265; Shabtai Rosenne, "Establishing the International Tribunal for the Law of the Sea," 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 813 (1995).

[14] See, e.g., Bernard H. Oxman, op.cit. 211-213.

[15] See, A Commentary in footnote nr.6, 70, 71 (paragraph 292.9).

[16] See, Tullio Treves, op.cit., p.182; Erik Jaap Molenaar, op.cit., 489.

[17] In this context use of the term *prompt* is correct but it goes only for the procedure itself while instituted. In the "*Camouco*" case (Panama v. France; List of cases nr.5) in paragraph 54 of the Judgement of 7 February 2000 the ITLOS confirmed that there is no time limit for a flag state to present an application for release while the respondent argued that the applicant has been inactive 3 month and has created a situation akin to estoppel. It is noteworthy that in the case of *Volga* (Russian Federation v. Australia; List of cases nr.11 for the ITLOS), the detention was effected on February 7th, but the application for prompt release was made on December 2nd, 2002 (almost 10 months later).

[18] See Article 292(3) of the Convention.

every important element of the procedure, including adoption of the judgement.[19]

F.Wegelein has calculated in 1999 that there be no more than 32 days between a detention and the judgement. However, today this figure is 41 days because of the amendments of the Rules of March 15th, 2001 where an additional five days was provided for commencement of a hearing and four days more to adopt a decision. With these time-limits, even provisional measures provided for in Article 290 of the Convention could not compete. [20] One could agree that "arbitral tribunals are generally not appropriate for urgent detention cases."[21] It is also noteworthy that PRP is a separate procedure from any domestic one and therefore the principle of exhaustion of local remedies which is provided for in Article 295 of the Convention is conceptually not applicable to PRP cases (see Article 292(3)).[22]

The concept of PRP was first proposed by the United States in 1973 in its 9-article draft for a chapter on the settlement of disputes for the Convention.[23] Article 8(2) states:

> The owner or operator of any vessel detained by any state shall have the right to bring the question of the detention of the vessel before the Tribunal in order to secure its prompt release in accordance with the applicable provisions of this Convention, without prejudice to the merits of any case of any case against the vessel.[24]

This proposal, which may have been inspired by the experience of US tuna vessels in the Pacific, was later changed at the Third UN Conference on the Law of the Sea in details only, though they were important details.[25] Thus,

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[19] The provision reads: "The Tribunal shall give priority to applications for release of vessels or crews over all other proceedings before the Tribunal." However, if the Tribunal is seized of an application for release of a vessel or crew and of request for the prescription of provisional measures, it shall take the necessary measures to ensure that both the application and the request are dealt with without delay." The full text of these Rules are available on World Wide Web at http://www.un.org/Depts/los/ITLOS/Rules-Tribunal.htm (hereinafter - Rules);

[20] See, F.Wegelein, op.cit. 263-265, 266.

[21] See, Rainer Lagoni, op.cit. 151; there are of course other substantive reasons giving priority to PRP (commenced unilaterally, judgement is final, etc.) over provisional measures.

[22] Inapplicability of this principle for PRP is also the view of ITLOS, stated in paragraph 57 of the 7 February 2000 Judgement on *Camouco* (Panama v. France; List of cases nr.5).

[23] For more detail, see, A Commentary, note 6, 66-71.

[24] REPORT OF THE COMMITTEE ON THE PEACEFUL USES OF THE SEA-BED AND THE OCEAN FLOOR BEYOND THE LIMITS OF NATIONAL JURISDICTION. Volume II. General Assembly, Official Records: Twenty-Eight session, Supplement Nr.21 (A/9021).United Nations. New York, 1973, 22, 23.

[25] See, David H.Anderson, op.cit. 167.

PRP has kept some of its basic approaches, like PRP is not to intervene into any domestic procedure in the detaining state. PRP retained the rules prohibiting any selection of the availability of PRP among possible detentions or arrests (permitted or prohibited) within Article 292 of the Convention, but left this issue for the substantive provisions to decide in any particular case.

There has not been much written on the prompt release of detained foreign vessels and crews in legal literature. It should first be mentioned that the Law of the Sea and Maritime Law Institute of the University of Hamburg together with the Hamburg Chamber of Commerce and German Maritime Law Association organized a workshop, *The International Tribunal for the Law of the Sea: Establishment and "Prompt Release" Procedures,* held on 17 November 1995 in Hamburg. This resulted in published papers of speakers Professor Rainer Lagoni, Judge David H.Anderson, Professor Tullio Treves, Professor Bernard H.Oxman, and others in 11 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW (1996). Professor Florian Wegelein analysed in detail the procedural aspects of prompt release with the purpose of evaluating the newly adopted Rules of the ITLOS in the light of the first case, the *M/V Saiga*. On the other hand, Erik Jaap Molenaar concentrated his attention on the substantive articles of the Convention. The commentators of the relevant part of the Convention dealt with the "birth" of the unusual Article 292 in only five short pages of commentary. There are a small number of well respected authors touching on the PRP subject in general, but no author has yet made a comprehensive analysis of all the different aspects of this procedure.[26]

Analysis of current flag state practice of using PRP shows that there have been six cases brought before and five decided by ITLOS.[27] The reasons for the detentions have been exclusively related to violations of coastal states' laws on fisheries.[28] Why have there been no PRP cases in ITLOS so far? First, PRP is not the only remedy in public international law to resort for the flag state in order to help an owner of a ship to get her and her crew released. In

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[26] See, Gudmundur Eirikson. THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. Martinus Nijhoff Publishers. The hague.2000, 118-121. See also, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. LAW AND PRACTICE. Ed. by P. Chandrasekhara Rao and Rahmatullah Khan. Kluwer Law International. The Hague, 2001, 55 (L.D.M. Nelson), and 152-155 (Tullio Treves).

[27] See, http://www.itlos.org/cgi-bin/cases/list_of_cases.pl?language=en, case number 9, the *Chaisiri Reefer 2* (Panama v.Yemen) was discontinued by the parties to the dispute according to the Article 105, paragraph 2 of the Rules of the Tribunal.

[28] Actually, in the first case of ITLOS – prompt release of *mv Saiga* – the coastal state of Guinea claimed that the *Saiga* was engaged in smuggling and customs violations for refuelling three fishing vessels within the EEZ of Guinea prior to arrest. But the Tribunal found that offshore bunkering of fishing vessels is related to fishing activities. See also, F.Wegelein, op.cit. 275-277.

cases of pollution of the marine environment beyond the territorial sea of the detaining state, there has not been a case of *major* damage to the coastal state. The flag state has the protection of the normal enforcement record Article 228 (1) of the Convention, providing the flag state with a right of pre-emption. Namely, the flag state can request suspension of the proceedings already instituted by the port or coastal state (within six months of that institution) and take over handling of this violation.

Second, following the *Torrey Canyon* disaster of 1967 the international community has established a more or less satisfactory regime for oil pollution liability by adopting the 1969 Convention on Civil Liability for Oil Pollution Damage (hereinafter CLC) and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and by amending them both by protocols into new 1992 Conventions.[29] While oil pollution by discharges from vessels occurs and causes damage, nothing prevents aggrieved individuals or governments from instituting respective civil proceedings against the owner of the vessel.[30] This usually begins with the arrest of that vessel in order to obtain security for the maritime claim.[31] The latter right is based on the 1952 or 1999 international arrest conventions as well as the right that the vessel shall be released by the arresting court in cases where sufficient security is given in satisfactory form by the owner of the vessel or his insurer.[32] The owner of the delinquent vessel, in order to get her released, could also rely on a procedure provided for in the London 1976 International Convention on the Limitation of Liability on Maritime Claims (hereinafter LLMC-76).[33] There are similar arrangements in national laws which give him or his insurer the right to establish with the court a compensation fund covering his limited liability in full.[34]

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[29] See for example, Patricia Birnie and Alan Boyle. International Law & the Environment. Second edition. Oxford, University Press. 2002, pp.385-389.

[30] Article 229 of the Convention says: "Nothing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment."

[31] In cases like the grounding of the Maltese flagged tanker *Tasman Spirit* in July 2003 at the entrance to the port of Karachi, Pakistan. In this incident, there was a spill of 29,000 tons of oil. The vessel was arrested first by the cargo interest for loss of cargo. See, "Pakistan under fire over Tasman Spirit Karachi response," in: LLOYD`S LIST, Friday, October 17, 2003.

[32] About these arrest conventions see, Francesco Berlingieri, ARREST OF SHIPS. A COMMENTARY ON THE 1952 AND 1999 ARREST CONVENTIONS. Third ed. CMI, LLP, London, 2000.

[33] Text of LLMC-76 see, Ignacio Arroyo, INTERNATIONAL MARITIME CONVENTIONS. Kluwer, Dewenter (1991), 1401-1412.

[34] Nevertheless, Article 3 (b) excludes LLMC-76 rules for application in claims of oil pollution damage "within the meaning of abovementioned CLC 69/92," but this mechanism of a compensation fund is also used by nations for oil pollution

In cases of a civil arrest it is normal to consider that the owner of the delinquent vessel should have to resort to those remedies provided in the national civil law of the arresting court firstly and consequently PRP has secondary importance.[35] But, it seems possible and sometimes reasonable for vessel owners to resort to PRP in cases of major, long-lasting disputes over such issues as whether the owner has lost the right to limit his liability at all, or the arresting state has extraordinarily severe laws on loss or damage compensation, and punishment of responsible members of a crew for any pollution damage it caused (all of which all are of great importance in determining the amount of security necessary for the release). Therefore, a question arises whether it was necessary to formulate Article 220(7) in such a way and duplicate private law obligations of states to release a vessel under public international law obligations and subject it to PRP, especially while the latter is applicable for states' parties to the CLC. There are three different reasons aimed at speeding up the release:

1) CLC does not deal with the release of crews at all;
2) civil proceedings could not have been started at all and a vessel and its crew is detained in the coastal state by a competent executive body;
3) a vessel is arrested in civil proceedings, but nevertheless the fund is constituted and the release is denied because of a lasting dispute over whether the owner has the right to limit his liability.

We now turn to the main questions of applicability of PRP in the field of prevention, reduction and control of pollution of the marine environment. This paper does not consider such issues as applicability of PRP in different maritime zones, and substantive provisions in the Convention providing for prompt release. Nor does it consider bonds or other financial security as preconditions for a vessel's release.

PRP as part of the dispute settlement system of the Convention

One of the significant achievements of the Third United Nations Conference on the Law of the Sea (the Conference) has definitely been the development of a comprehensive system for the settlement of the disputes that may arise with respect to the interpretation or application of the Convention.[36] Notwithstanding the criticism of Judges Oda and Guillaume, Professor Alan

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cases, obviously with other limits of liability. See, e.g. the Maritime Law Act of the Republic of Estonia of June 5th, 2002, Articles 78 and 83 (RT I 2002, 55, 345).

[35] "Arrest" according to Article 1 (2) of the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going ships, 1952 means "the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgement."

[36] See, A COMMENTARY in note 6, 5.

E. Boyle considers this system "as the most important development in the settlement of international disputes since the adoption of the UN Charter and the Statute of the International Court of Justice."[37] This dispute settlement system in the Part XV of the Convention is predicated on the general principle that agreement between the states' parties to the dispute on the choice of procedure among any peaceful means is always prevailing (Article 280).[38] Only where no settlement has been reached by recourse to those "peaceful means of their own choice," including lack of any agreement on procedure,[39] any state as a party to the dispute is entitled to submit it to any court or tribunal having jurisdiction under section 2 "Compulsory Procedures Entailing Binding Decisions" of the Convention (see Article 286).[40]

At the same time the provisions of Section 3 of Part XV of the Convention (Articles 297 and 298), "Limitations and Exceptions to Applicability of Section 2," exclude or provide states with the right to opt out of certain types of issues arising in the interpretation and application of the Convention or other international agreements related to the purpose of it from the compulsory dispute settlement procedures of Section 2 (Articles 286 et seq.), including Article 292. For the purposes of this article, it is important to note that Article 297(1)© confirms unequivocally that such disputes on the protection and preservation of the marine environment are subject to the procedures provided for in the Section 2 "Compulsory Procedures Entailing Binding Decisions." Such protection of making available third-party dispute settlement procedures was achieved in the text of Article 297 during the Conference as certain balance of the interests of the coastal states and those of the states with major navigational interests, as well as those of the landlocked and geographically disadvantaged states.[41]

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[37] Judges S. Oda and G. Guillaume have argued that the ITLOS is a futile institution and that creation of a specialized tribunal may destroy the unity of international law. See, S. Oda, "The ICJ Viewed from the Bench," 244 II HAG. REC. 127-155 (1993); and S. Oda, "Dispute settlement Prospects in the Law of the Sea," 44 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 863 (1995); G. Guillaume, "The Future of International Judicial Institutions," 44 *International and Comparative Law Quarterly* 848 (1995).

[38] Article 280 of the Convention states: "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice."

[39] There is obligation to States Parties to proceed expeditiously to exchange views regarding the settlement when a dispute arises, see Article 283 of the Convention.

[40] The whole of Section 2 is subject to limitations and exceptions in Section 3 (Articles 297 and 298).

[41] See, A COMMENTARY in footnote nr.6, p.105 (paragraph 297.19).

Access to a court or tribunal: jurisdiction Ratione Personae and Ratione Materiae

The first question relating to applicability of PRP is whether Article 292 (1) shall be interpreted to mean that only states' parties to the Convention may invoke the PRP procedure. This basic problem has not yet been fully elaborated in detail in the literature. Article 288 dealing with the question of jurisdiction of a court or tribunal referred to in Article 287 (1), confers in paragraph 1 jurisdiction over any dispute concerning the interpretation or application of the Convention which is submitted to it in accordance with the provisions of Part XV. Of course, according to the international law of the treaties this principle is valid for the states' parties to the Convention. At the same time, however, paragraph 2 of Article 288 says:

> A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purpose of this Convention, which is submitted to it in accordance with the agreement.

This extension of jurisdiction to "an international agreement related to the purpose of the Convention" is seen by some authors related to jurisdiction, but on substantive law or *ratione materiae* only.[42] However, professor Rainer Lagoni argues for the applicability of PRP for non-parties to the Convention and he stresses that "such agreement may…be on a permanent or *ad hoc* basis."[43] He is correct, because the relevant legal requirement is that application should be made according to such an "other agreement" with no request that parties to that agreement shall be the state parties to the Convention. Therefore, such an extension of jurisdiction goes also for the second aspect of jurisdiction – *rationae personae*, or, parties to an agreement.

This second question relates to the general conclusion of Professor Alan E.Boyle on jurisdiction of *ratione materiae* of the ITLOS. His work is based on the wording of Article 21 of its Statute that the ITLOS is "unintentionally made a court of general jurisdiction." He contends this on a basis that while Article 288(2) limits its compulsory jurisdiction to cases concerning the interpretation or application of the Convention or of any "international agreement related to the purposes of the Convention" then no comparable restriction is found in Article 21 of Annex VI (Statute of the ITLOS) which provides for "any other agreement;" In order to support this "doubt" he advances another argument based on Article 293(1) which likely allows for a tribunal "to decide matters of general international law that are

[42] See, Erik Jaap Molenaar, op.cit. 484.
[43] See, Rainer Lagoni, op.cit. 150.

not part of the law of the sea." [44] This reasoning is also faulty because that paragraph is dealing with applicable law only for a court or tribunal *having already established jurisdiction*. There is no doubt that the ICJ is the only international court of general jurisdiction.[45] ITLOS "thus possesses a general jurisdiction over all disputes relating to the law of the sea" (which it shares with the ICJ), according to the limitation provided for in Article 288(2), nevertheless, the latter is not repeated in Article 21 of the Statute of the ITLOS.[46]

Scope of application of PRP in cases of marine environment protection: general remarks

Article 292(1) stipulates as a precondition that "the detaining state has not complied with the provisions of this Convention for the prompt release of the vessel or its crew." This wording is the basis for the commentators to conclude that "[t]hus the right to complain about detention is restricted to the cases expressly provided for in the substantive parts of the Convention."[47] These substantive provisions in the Convention in matters of marine environmental protection are contained in Article 220(7) and (8), Article 226(1), b and c.

Application of PRP by analogy

Some authors predict difficulties for the operation of Article 292 because it remains unclear to them what its relationship is to cases where the detention violates the Convention but no substantive prompt release article applies.[48] Professor Rainer Lagoni argues that in cases where a detention of a vessel is obviously violating the Convention it would be appropriate to apply Article 292 by analogy "and it would serve the interests of the flag state more effectively than the uncertain possibility to request its release as a provisional measure pursuant to Article 290." He points out as an example Article 97 (3) which provides for "matters of collision or any other incident of navigation"

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[44]See, Alan E.Boyle, note 12, 49.

[45] See, Jonathan I. Charney. "The Impact on the International Legal System of the Growth of International Courts and Tribunals." 31 INTERNATIONAL LAW AND POLITICS 705 (1999).

[46] See, L. Dolliver M. Nelson. The International Tribunal for the Law of the Sea: Some Issues," in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. LAW AND PRACTICE. Eds. P. Chandrasekhara Rao and Rahmatullah Khan. Kluwer: The Hague. 2001. 53, 54.

[47] See, note 6, 69 (para. 292.5).

[48] See, Alan E.Boyle, "UNCLOS, the Marine Environment and the Settlement of Disputes," in COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION – FOCUS ON SHIP SAFETY AND POLLUTION PREVENTION. Ed. Henrik Ringbom. Kluwer: London, 1997, 245.

on the high seas that "no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state."[49] Professor Tullio Treves strongly agrees, stating:

> if a vessel or its crew has been detained in contravention of a provision of the Convention which prohibits detention, it seems reasonable to hold that the most expeditious procedure available should be resorted to in order to ensure the release of the vessel or crew, independently of the question of international responsibility for the violation of the Convention. It would seem absurd to me that the prompt release procedure should be available in cases in which detention is permitted by the Convention, such as those of Articles 73, 220 and 226, and not available in cases in which it is not permitted by it.

Additionally, regarding Article 97 (3) he uses Article 28 (2) as an example, which in certain cases prohibits enforcement of civil jurisdiction by the coastal state against foreign vessels passing through the territorial sea.[50] Erik Jaap Molenaar cites both authors on this issue, but his own point of view is lacking.[51]

Such application of PRP by analogy will definitely undermine the whole concept of Article 292 and compromise reached in it. We note in this respect too that paragraph 3 of Article 292 does not allow a court or tribunal to be burdened with the full evaluation of the legality of detention in question (as a question on the merits) at all.

Application of PRP in cases of several conflicting grounds for a detention or arrest

Presence of several maritime claims at the same time could create additional limitations on the applicability of PRP. Where a foreign vessel is detained or arrested for two reasons, only one of which gives to the flag state opportunity to apply for PRP and other not, it seems impossible to achieve the release.[52] In other words, the latter reason "prevails over others."[53] In such cases, Professor Rainer Lagoni concludes rightly that the ITLOS "has to take the submissions of the detaining state into consideration and it may enquire whether this was merely an excuse made in bad faith or that it constituted an

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[49] See, Rainer Lagoni, op.cit. 158.

[50] See, Tullio Treves (1996), op.cit. 186.

[51] See, Erik Jaap Molenaar, op.cit. 490, 491.

[52] David H.Anderson concludes that "release under Article 292 may not be possible, ibid" 177.

[53] See, Rainer Lagoni, op.cit. 159.

abuse of rights. If not, the Tribunal has to dismiss the question of prompt release."

Admissibility of applications for PRP

Except for Wegelein, admissibility of disputes under Article 292 (1) has not been particularly analyzed by authors yet. Others have considered it, if at all, to be sufficient to refer to Article 113 (1) and (2) of the Rules of the ITLOS, which state the following:

> (1) The Tribunal shall in its judgement 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 other financial security to be posted for the release of the vessel or the crew.[54]

F. Wegelein makes a lengthy analysis on admissibility and the standard of appreciation.[55] He also compares the ICJ practice in the *Ambatielos* case[56] and the ITLOS practice in the *Saiga* case no. 1 in considerable depth.[57] He writes:

> to be admissible the application in Prompt Release of Vessel proceedings it has only to "allege" a violation of an obligation to release the vessel. The tribunal decides whether or not an application is vexatious or an abuse of the Tribunal. …The Tribunal itself finds that the allegations have to be of a "sufficiently plausible character" in order to base a judgement on them.…Thus the interpretation of Article 292 (1) of the

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[54] See, Tullio Treves. "The Jurisdiction of the International Tribunal for the Law of the Sea," in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA. LAW AND PRACTICE. Ed. Chakndrasekhara Rao and Rahmatullah Khan. Kluwer Law International: The Hague, 2001. 155; Gudmundur Eirikson, op.cit. 121.
also in: Tullio Treves (1996), op.cit. 181.

[55] The standard of appreciation is the standard by which the Tribunal decides whether the allegation of the requesting party of an infraction by the coastal State is sufficient for an order of prompt release.

[56] See, Ambatielos Case (Greece v. U.K.), Merits: Obligation to Arbitrate, 1953 I.C.J. 10, 18 (Judgement of May 19).

[57] See, F.H.Th. Wegelein, op.cit. 269-275.

> 1982 Convention now has a second standard: "well-founded" gives an idea of the legal quality of the allegation, and "sufficiently plausible" gives an idea of what "well-founded" should mean and so introduces just another legal standard for the allegation.

In the first *Saiga* case, the ITLOS stated in paragraph 51 of the 4 December 1997 judgement that "the standard indicated ["sufficiently plausible"] seems particularly appropriate in view of the fact that, in the proceedings under article 292, the Tribunal has to evaluate "allegations" by the applicant that given provisions of the Convention are involved and objections by the detaining state based upon its own characterization of the rules of law on the basis of which it has acted." It was added that applying such standard allows the Tribunal in the short time available to exercise the required restraint in considering the necessary aspects of the merits in order to reach its decision on the question of release.

Conclusions

On the applicability of PRP in cases of detention of foreign vessels in matters of prevention, reduction and control of pollution from vessels we can say the following:

1. Analysis of Article 292 (1) clearly establishes that there is no alternative, but restrictive approach in interpretation and implementation of the provisions of this Article. PRP shall be applied only where the Convention contains in substantive parts specific provision (like Articles 73, paragraph 2; 220, paragraphs 7 and 8; or 226, paragraphs 1 "b" and "c") concerning the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. This applicability of PRP is sometimes extended. First, where one of the abovementioned articles contains a specific list of purposes of investigation of foreign vessels like Article 226, para.1 "a" refers to dumping, enforcement by a port state and by a coastal state, or, second, where one of those safeguard articles in Section 7 of the Part XII of the Convention (like Article 233) contains such an implied, but clear, reference for applicability. This appears not only from a textual but also conceptual analysis.

2. Evaluation of applicability of PRP in different maritime zones with specific limitations and exceptions in each of them seems to be useful and necessary in order to understand properly the rights and obligations of the flag state and the detaining state.

3. There could be different types of applications for PRP where a court or tribunal has to deny jurisdiction and admissibility on the case or it has to dismiss the case:
    - parties to the dispute should be state parties to the Convention, except in cases of other international agreements related to the purpose of the Convention;
    - registration of a detained vessel is not proved;
    - a detained vessel is confiscated by a court of the detaining state;
    - there are several conflicting grounds for the detention and arrest of the vessel and one of them "prevails" as a maritime claim different from a claim for pollution damage;
    - discharge(s) of pollutants have been affected within internal waters of a coastal state. Exceptions are possible in those parts of the waters which earlier had innocent passage available, but now have been enclosed by straight baselines;
    - willful and serious acts of pollution in the territorial sea which makes the passage of a foreign vessel non-innocent.

4. There may be several factors underlying the fact that the ITLOS has dealt with no cases of PRP in the matters of prevention, reduction and control of pollution from vessels. Among them are:
    - in cases of pollution damage from a foreign vessel, the vessel would most likely be arrested for a (or several) maritime claim(s). Or, the owner of the vessel or his liability insurer will arrange for the compensation fund for the full amount of his liability. In other words, the release of the vessel will be obtained also by means of private law, just as it would have done before the Convention entered into force;
    - any substantial maritime claim – other than for pollution damage – could invalidate all efforts and expenses made for realization of PRP;
    - in cases of smaller discharges beyond the territorial sea of a coastal state – and when the flag state has a normal enforcement record – the latter has six months from the detention for a so-called pre-emption right to take over these proceedings from the coastal state. PRP then will be not needed;
    - in cases of inspections of seaworthiness and detention of a foreign vessel on grounds that she is posing "unreasonable threat to the marine environment," it seems that national maritime administrations have so far not made mistakes in

> detention of foreign vessels because PRP would have been necessary and applicable.[58]

One can find more lengthy considerations in the SIMPLY-2004 (the Yearbook of The Scandinavian Institute of Maritime Law, University of Oslo).

[58] David H.Anderson notes the vessel called *Mostoles* which was detained by the Dutch Maritime Administration in Rotterdam in 1993 for suspected violation of MARPOL. After some repairs had been made, the detention was maintained by the competent officer because she still had on board some engine bilge water which had been pumped into cargo slop tanks. The officer also declined the offer to seal them because the next port of call was not disclosed or known. The owner's complaint to the Dutch Ministry of Transport did not help, and he had to order a lighter and empty the slop tanks of engine bilge water before he got permission for the vessel to continue her trip. See, David H.Anderson, op.cit. 175, 176.