DECLARATION OF JUDGE LAING

There is no doubt that this new institution of prompt release is designed to do precisely what is stated in article 292 of the Convention – to ensure the prompt release of vessels and their crews from detention (by coastal or port States). Such release is an important objective, given the necessity of ensuring that legitimate maritime transportation and marine exploitation should not be stymied and that the global economy and human welfare should be as uninhibited as is reasonably feasible and proper.

Given the importance of prompt release, article 292 exhibits no diffidence about describing in prompt release proceedings the action of a respondent State by its proper name – detention. In fact, the word "detain" and words based on that word are unequivocally used seven times in article 292. It is thereby made abundantly clear that the issue for decision is related to detention.

Nothing pejorative about or even critical of detaining States is implied in article 292. It simply deals with whether, from the perspective of international law, there is a detention in a particular sense, depending on the circumstances, including an arrest, or a hindrance, holding, keeping in custody or a retardation or restraint from proceeding – synonyms mentioned in *Black's Law Dictionary*. In applying article 292, the Tribunal should not be unduly concerned with a detaining State's categorization of its actions under its law. Therefore, formulations of domestic law which, in good faith, deny the apparent objective international reality of arrest or detention or are based on particular domestic concepts are of limited consequence.

The Tribunal is obliged to come to its conclusions about detention and to order prompt release without distraction or equivocation if, given the standard of appreciation that the Tribunal applies in prompt release proceedings (see paragraph 51 of this Tribunal's Judgment of 4 December 1997 in the *M/V "SAIGA" Case*), it concludes that the allegation of detention is well-founded.

It bears repeating that, at this stage of a possible dispute, the Tribunal is concerned about the fact of detention and about a fairly broad allegation of the sort specified in such other provisions of the Convention as subparagraphs (a), (b) and (c) of paragraph 1 of article 297 and subparagraphs (b) of paragraph 2 and (b) of paragraph 3 of the same article. Thus, paragraph 3 of article 292 states that the 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 ...

the authorities of which, the paragraph states, remain competent to release the vessel or its crew at any time.

It is my view that, while the commercial importance of maritime transportation and marine exploitation are the primary motivating forces, the prompt release institution is undergirded somewhat by the venerable freedom of the high seas including, *inter alia*, the freedom of navigation. These are eminently counterbalanced and reinforced by various other legal institutions favouring coastal States, including that concerning the exclusive economic zone. It seems to me, too, that there cannot be any gainsaying that prompt release is also reinforced by its significant humanitarian underpinnings, ranging from the economic rights or concerns of ship owners to the civil rights or concerns of detained crews. These considerations underscore what I have said about the unequivocal nature of the institution of prompt release, the importance of effectuating releases that are prompt and not being preoccupied with domestic law notions of whether or not there has been detention, in the sense of article 292, or imprisonment or corporal punishment – expressions used in a portion of article 73 (paragraph 3) that is not directly the subject of the Tribunal's decision-making in article 292 proceedings.

It is therefore regrettable that the Tribunal has not made a categorical finding that there has been a detention. Without casting any aspersion whatever, this would have contributed to better understanding of article 292 and the development of the procedures for prompt release from detention.

Nevertheless, I venture to predict that prompt release proceedings will become relatively routine, as far as concerns the points that I have mentioned so far.

I suspect that somewhat more difficult will be the Tribunal's task of evaluating the reasonableness of bonds or other financial security required by detaining States as a condition for release and the further task of determining whatever (presumptively reasonable) bond or other financial security, if any, the Tribunal decides to order.

I must first repeat that, even in this connection, the points that I earlier made are crucial. Secondly, I must note that every day judicial bodies everywhere must objectively and impartially determine whether or not actions are reasonable, which is a neutral and unpejorative expression. According to *Black's*, it carries the connotation of proportionality, balance, fairness, propriety, moderateness, suitability, tolerableness and or inexcessiveness. Among the synonyms which one can add is consistency. In the case of prompt release proceedings, the appropriate perspective is that of an international standard determined to be proper by the Tribunal. Generally, this will be on a plane and have a content that differs from those of domestic law. Certainly, in making determinations of reasonableness in prompt release cases, the Tribunal should never seek or appear to enforce the domestic laws of the detaining State or even substantive aspects of the Convention. I believe that the Judgment satisfies these tests. Equally and importantly, in determining reasonableness, the Tribunal must not and does not normally imply criticism of the domestic law or institutions of either litigant State. For one thing – prompt release proceedings are in no way akin to situations in which the international minimum standard is applied in substantive proceedings involving assertions of State delictual responsibility.

In view of what I have just said, it must be noted that the required bond of 8,000,000 FF represents 26% of the aggregate potential liability under domestic law of 30,000,000 FF – assuming that potential charges against the ship owners, not yet brought, are included. Alternately, 8,000,000 FF represents 40% of the 20,000,000 FF bond required by the French court.

On the other hand, in the *M/V "SAIGA" Case*, the aggregate financial security (the discharged gasoil worth some US$ 1,000,000 plus the US$ 400,000 guarantee) represented 9% of the potential liability of over US$ 15,000,000. There therefore appears to be a significant difference in approach between the two cases that is not fully explained in the Judgment in terms of: the criterion of reasonableness adumbrated in paragraph 82 of the Judgment in the *M/V "SAIGA"*, the gravity of and possible penalties for the alleged offences or the value of the cargo seized. Furthermore, some of the evidence in these proceedings is consistent with the possibility that the value of the *Camouco* apparently was less than that of the *Saiga* and, perhaps, of the amount of an 8,000,000 FF bond.

It is important that the Tribunal should carefully develop its jurisprudence on the issue of reasonableness. In so doing, the values of consistency and proportionality, among the other attributes of reasonableness, will loom large. In all probability, this latest phase of the Tribunal's jurisprudence on reasonableness represents a fine-tuning. This will be revealed in the fullness of time.

It should be added that peculiar aspects of such other proceedings as provisional measures and preliminary proceedings have no relevance in prompt release proceedings, an independent and autonomous institution which is unique in international adjudication. Thus, there is no requirement to preserve or balance the respective rights of the parties (as in provisional measures proceedings) or to determine whether a claim constitutes an abuse of process or whether it is *prima facie* unfounded (as in preliminary proceedings).

In conclusion, the Judgment and this Declaration reveal that prompt release proceedings evidently concern several aspects of the interpenetration of international and domestic law and institutions. As long as each is held to apply within its own sphere, the potential for the appearance of conflict between the two will be diminished and the conditions for a harmonious balance will be strengthened.

(*Signed*) Edward A. Laing