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Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends

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ABSTRACT

The International Tribunal for the Law of the Sea (ITLOS) has a residual compulsory jurisdiction regarding the prompt release of seized vessels. This procedure is one of the novelties introduced in the UN Convention on the Law of the Sea and is unique in the international judicial universe because of both its procedural characteristics and its functions. This article highlights how prompt release cases do not necessarily stem from a dispute. This has a direct consequence for those whose interests the procedure protects and who can submit an application. The last part of this article discusses the recent trend where the release of vessels and crews has been requested in the context of provisional measures applications.

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Introduction

The International Tribunal for the Law of the Sea (ITLOS or the Tribunal) has residual compulsory jurisdiction in cases that require a particular expeditiousness, such as prompt release.¹ This procedure is one of the novelties introduced by the United Nations Convention for the Law of the Sea (hereinafter LOSC or the Convention) and is unique in the international judiciary universe on account of both its procedural characteristics and its functions.

Pursuant to LOSC Article 292(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 the 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.*²

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The prompt release of a vessel can be requested on the ground of the violation by the coastal state of LOSC Article 73,³ 220,⁴ or 226.⁵

The procedure of prompt release is neither incidental nor prejudicial to the procedure on the merits before the national courts. It is an autonomous procedure. Article 292(3) underlines the fact that the competent court or tribunal “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 final judgment in a prompt release case, however, is designed to take effect before the case on the merits is resolved by the domestic authorities, provided that this occurs before the national courts have determined the matter.⁶ The international procedure may have an impact on the procedure on the merits at the domestic level because, for instance, it can overrule a decision to confiscate the vessel or cargo.⁷ The prompt release procedure is thus not subject to the prior exhaustion of local remedies.⁸ The requirement of expedition justifies the exemption. If all the local remedies must be exhausted, it would undermine the whole purpose of prompt release.⁹

States have sometimes granted international courts or tribunals an exclusive jurisdiction, which has the effect of precluding the exercise of power by domestic courts.¹⁰ This phenomenon can be explained by a “lack of faith in the capability or will of national courts to provide for independent and impartial adjudication of international claims.”¹¹ Nollkaemper points out that Article 292 of the LOSC is an example of such a phenomenon.¹² Other authors have highlighted that the powers exercised by ITLOS in prompt release cases correspond to functions ordinarily exercised by national administrations and reviewed by the domestic judiciary.¹³

This article analyzes the ITLOS prompt release case law in order to indicate the nature of the functions exercised by the Tribunal regarding this peculiar procedure. There are three main steps to the analysis. First, the article examines admissibility issues. Second, the article scrutinizes the jurisdiction of the ITLOS and argues that it is wider than what might be suggested by a strict literal interpretation of the LOSC. Third, the article discusses the recent practice of requesting the prompt release of vessels and their crews in the context of applications under the LOSC pursuant to Article 290 for provisional measures. This recent practice may influence the use by flag states of prompt release.

Admissibility issues in the prompt release procedures

The protection of which interests?

The purpose of the prompt release procedure is to balance the interests of, on the one hand, coastal states in protecting their sovereign rights and, on the other, flag states in the maritime activities of their fleet. The prompt release procedure was introduced into the LOSC as a response to the extension of coastal states’ rights in the exclusive economic zone (EEZ).¹⁴ In the *Volga Case*, besides fixing a bond, Australia, the coastal state, “made the release of the vessel conditional upon the fulfilment of two conditions: that the vessel carry a VMS [Vessel Monitoring System], and that information concerning particulars about the owner and ultimate beneficial owners of the ship be submitted to its authorities.”¹⁵ Australia justified these further requirements in consideration of the “serious problem of continuing illegal fishing in the Southern Ocean, the dangers this poses to the conservation of fisheries resources and the maintenance of the ecological balance of the environment,” and the Commission for the

Conservation of Antarctic Marine Living Resources conservation measures.¹⁶ ITLOS dismissed Australia's claims and affirmed that

The object and purpose of article 73, paragraph 2, read in conjunction with article 292 of the Convention, is to provide the flag State with a mechanism for obtaining the prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose.¹⁷

In his separate opinion, Judge Cot emphasized the “considerable margin of appreciation” that exists for the coastal State in exercising its sovereign rights with regard to the conservation of living resources.¹⁸ But he also pointed out that “attaching conditions to the bond would transform the very nature of the procedure established by article 292,” that it “would inevitably have the effect of complicating and slowing down the procedure, which would lose its *prompt* character,” and that it “would be tantamount to deflecting the article 292 procedure from its purpose and distorting its meaning.”¹⁹

Some 30 years after the adoption of the LOSC, and in light of developments in international environmental law, it may be appropriate to rethink the purpose of the prompt release procedure, even perhaps to distort its original meaning. The prompt release procedure appears to be a strictly bilateral proceeding, but the procedure must be understood in the context of the value that the LOSC attaches to the protection of the marine environment. First, two of the provisions the violation of which by a coastal state may trigger a prompt release procedure, namely Articles 220 and 226, pertain to Part XII of the LOSC, “Protection and Preservation of the Marine Environment.” Moreover, the LOSC sets out a number of obligations for the protection of the marine environment that provide part of the normative context of the prompt release procedure. Protecting the marine environment and conserving marine living resources should combine the interests of both coastal and flag states and should have an impact in prompt release matters.²⁰ Even if the ITLOS considered that neither the problem of illegal fishing nor the protection of the marine environment should influence the interpretation of the prompt release procedure,²¹ these common interests should not be ignored in giving effect to the promptness imperative.²²

Applications by the flag state or on behalf on the flag state

Only three of nine ITLOS prompt release cases have been directly brought by the flag state of the detained vessel—the *Volga*,²³ *Hoshinmaru*,²⁴ and *Tomimaru Cases*.²⁵ The prompt release procedure, though not strictly a case of diplomatic protection, does allow the flag state to espouse a private claim for persons (the crew) linked to it by the nationality of the vessel.²⁶ However, there are two unique elements to the prompt release procedure. First, the arrested vessel may be owned or chartered and operated by a private actor who does not have the nationality of the flag state. Second, given that the detention of the vessel entails considerable economic and financial losses for the shipowner (more pressing than the interests of the flag State²⁷), LOSC Article 292(2) permits the application for release to be made “by or on behalf of the flag State of the vessel.”

The flag state espouses a private claim of persons linked to it by the nationality of the vessel, and those persons can enjoy a delegation of sovereignty if authorized to act on behalf of the same state.²⁸ The “on behalf” clause preserves the interstate nature of the dispute and

the litigation²⁹ even if the private party is protecting his or her own interests.³⁰ However, the clause erodes the legal fiction that once a state espouses a private claim, that claim belongs only to that state. The “on behalf” clause attaches international procedural rights to the material rights consisting of the merits of the dispute that the private party considers violated by the coastal state.³¹

The private party does not have an independent right to act, however. In the *Grand Prince Case*, ITLOS decided to examine *proprio motu* the basis of its jurisdiction because doubts existed concerning the nationality of the vessel when the application was made.³² The existence of the nationality link in the relevant phases of the procedure provides for the jurisdiction of the Tribunal and, consequently, the right of the private party to act on behalf of the flag state.

Private parties also play an important role in the postadjudication phase since the bond or other financial security fixed by the Tribunal will likely be paid either by the ship owner or by his or her insurance company.

In the light of these considerations, it is clear that the prompt release procedure is atypical in the international judicial panorama. It is formally an intergovernmental procedure but materially blurs the distinction with transnational proceedings. It aims at guaranteeing flag states’ rights, but concretely protects ship owners from undue economic and financial losses.

The limited jurisdiction of ITLOS in prompt release procedures

Article 292(3) states that the court or tribunal competent to deal with the prompt release of a vessel

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 separation between the release of the vessel and crew and the merits of a case poses a series of challenges for the tribunal seized with the application while the case is pending before the national authorities. Moreover, in establishing criteria to assess the reasonableness of the bond, the ITLOS has heavily relied on the applicable national law.

Discretion of ITLOS versus discretion of the coastal state

In the *Camouco Case*, the Tribunal affirmed that “Article 292 provides for an independent remedy and not an appeal against a decision of a national court.”³³ For the same reason, a prompt release decision cannot be challenged within the national court system. Otherwise, “a decision under article 292 of the Convention to release the vessel would contradict the decision which concluded the proceedings before the appropriate domestic fora and encroach upon national competences, thus contravening article 292, paragraph 3, of the Convention.”³⁴

As pointed out by Judge Cot in the *Volga Case* in assessing the reasonableness of a bond, “the Tribunal does not have to substitute its discretion for that of the coastal State ... nor is it the hierarchical superior of an administrative or government authority.”³⁵ Instead, in prompt release cases, ITLOS is asked to control and evaluate the discretionary exercise of sovereign rights by the coastal state.³⁶ ITLOS is required to consider whether the arrest of

the ship and the bond are in compliance with the relevant LOSC provisions (Article 73, 220, or 226). ITLOS is then called upon to review how the coastal state has applied international law to the facts.³⁷ Some authors assert that in such cases the competent international tribunal should defer to prior assessments of the domestic courts; in other words, it should apply the margin of appreciation doctrine.³⁸ In the *Camouco Case*, both Judge Wolfrum and Judge Anderson highlighted in their respective dissenting opinions that the discretionary powers of the coastal state and the related margin of appreciation should limit the power of ITLOS review concerning the reasonableness of a bond.³⁹ Considering that the LOSC does not regulate in detail the enforcement powers of coastal states,⁴⁰ which often, as mentioned in the preceding, have a wide margin of discretion in defining and enforcing their EEZ regulations, the ITLOS should not consider the reasonableness of such a system without taking into consideration the enforcement policy of the coastal state⁴¹ and the context of the enforcement measure.

The discretion of coastal states also applies concerning the procedural requirements and guarantees to be applied to the detained vessel and crew, both at the moment of the arrest and to the request for a prompt release before the competent national authorities. Consequently, the circumstances of the seizure of the vessel “are not relevant to ... proceedings for prompt release under article 292 of the Convention.”⁴² However, in the *Juno Trader Case*, the Tribunal affirmed that “The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.”⁴³ In his separate opinion, Judge Treves pushed this argument somewhat further and claimed that the concepts of the abuse of law and the due process of law as applied by national courts should be appreciated by the Tribunal.⁴⁴ Judge Treves subsequently pointed out how, in the *Juno Trader Case*, the Tribunal used the reference to considerations of humanity as “a substitute for human rights.”⁴⁵

What may seem to be an extension of the ITLOS field of concerns, and consequently of its jurisdiction, corresponds to what has been defined as the “human rights consequences of expanding the bases of jurisdiction.”⁴⁶ If the LOSC has provided coastal states with extended jurisdiction to their adjacent sea, it has also limited their discretion in consideration of the rights not only of the other states but also of individuals.⁴⁷ This is more evident in the field of maritime pollution, as the LOSC sets specific limitations and requirements concerning the proceedings before domestic courts (e.g., Articles 228 and 230). In the field of fisheries, the LOSC is vague. As already mentioned, LOSC Article 73 does not detail the procedure to be followed by the domestic authorities, but merely rules out imprisonment. In light of this and of the already-quoted “considerations of humanity,” the ITLOS has elaborated certain procedural and substantive guarantees to be applied in domestic decisions that might have an effect on the prompt release procedure.⁴⁸

In the *Tomimaru Case*, the ITLOS affirmed that the “confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.”⁴⁹ The Tribunal went further by specifying that a confiscation 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.”⁵⁰

The criteria for assessing the reasonableness of the bond

The Tribunal assesses the reasonableness of the bond determined by the competent authorities of the detaining state.⁵¹ A bond provides assurance to the detaining state as to the effectiveness of the final judgment of its authorities.⁵² The ITLOS is called upon to assess whether the bond or other financial security is reasonable with respect to the meaning of Article 292 of the LOSC; and whether the bond consists of a fair balance between the rights of the flag state, the ship owner and the crew, to prompt release and the right of the coastal state to try and punish.⁵³ But the LOSC does not provide any criterion to be used in performing such a task by either the ITLOS or the competent domestic courts. The Tribunal has consequently elaborated its own criteria for assessing the reasonableness of the amount, nature, and form of the bond or other financial security.⁵⁴

In the *Camouco Case*, the Tribunal listed the elements that are relevant in order to assess the reasonableness of a bond: “the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.”⁵⁵ In the *Volga Case*, it specified that the gravity of the alleged offenses may be evaluated by reference to “the penalties that may be imposed for the alleged offences under the laws of the Respondent.”⁵⁶ In the *Monte Confurco Case*, the ITLOS affirmed that “The balance of interests emerging from articles 73 and 29 provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond.”⁵⁷

Pursuant to LOSC Article 293(1), “a court or tribunal having jurisdiction under this section shall apply this Convention and other rules of *international law* not incompatible with this Convention” (emphasis added). Consistently, the Tribunal has stated that “When determining whether the assessment made by the detaining State in fixing the bond or other security is reasonable, the Tribunal will treat the laws of the detaining State and the decisions of its courts as relevant facts.”⁵⁸ However, once the gravity of the alleged offense is evaluated on the basis of the domestic legislation, which is an expression of the coastal state policy, how is it possible to determine a reasonable bond without again referring to domestic legislation?⁵⁹ Moreover, the bond set by the detaining state is a relevant factor in order to assess whether a bond is reasonable. ITLOS evaluates the reasonableness of the bond determined by the domestic court(s) within the meaning of Article 292 of the LOSC by reference, once again, to the relevant domestic legislation and its application in the case. The domestic legislation and the decision of the domestic court(s) seem to be more than just “relevant facts.”⁶⁰

With the lack of a precise provision in the LOSC concerning the assessment of a reasonable bond, ITLOS has rightly been looking at the practice of the states concerned in each specific case and has attempted to deduce therefrom, in the light of the relevant international legal context, some useful criteria. However, as pointed out in the preceding, ITLOS has so far substantially relied on domestic legislation and decisions. This means that domestic courts cannot rely on clear international rules in order to establish bonds that will be in compliance with international law. Gallala has provocatively suggested: “Tant que le tribunal estime que le terme ‘raisonnable’ doit être interprété d’abord et essentiellement au regard du droit international, ne serait-il pas approprié de mettre à la disposition des juridictions des Etats immobilisateurs une procédure de question préjudicielle auprès du [Tribunal]?”⁶¹ [As long as the Tribunal considers that the term ‘reasonable’ must be interpreted first and essentially in the light of international law, would it not be appropriate to allow the detaining

state's jurisdictions referring a question for preliminary ruling to the [Tribunal]?] This solution is interesting because it would prevent, in part, the emergence of disputes concerning the reasonableness of a bond. But what would happen if the flag state, or whomsoever on its behalf, requests the ITLOS to consider the reasonableness of a bond that the national court has fixed on the basis of the preliminary ruling? Would the ITLOS then become a sort of "supreme court" in bond issues and not only on prompt release? Perhaps this is what is already happening.

Recent trend: The release of vessels as a provisional measure

In cases not falling under Article 292, when the release of the vessel is not requested on the basis of the available procedure or when the detention of the vessel and its crew is not based on a breach of Article 73(2), 226(2), or 220(6) of the LOSC, the prompt release of a vessel can be ordered by a competent court or tribunal pursuant to Part XV of the LOSC as a decision on the merits of the dispute or as an order of provisional measures. Even though provisional measures have a different objective, namely, the protection of the rights of the parties to a dispute pending the final decision, they can be an "effective and timely procedure ... to obtain the release of a vessel."⁶² The parties to a dispute are called to "comply promptly with any provisional measures prescribed under this article."⁶³ The usefulness of the provisional measures procedure in this regard is evidenced in two recent cases: the *ARA Libertad Case*⁶⁴ and the *Arctic Sunrise Case*.⁶⁵

In the first case, pending the constitution of a competent arbitral tribunal under Annex VII of the LOSC, Argentina submitted to ITLOS a request pursuant to Article 290(5) for a single provisional measure: "that Ghana unconditionally enables the Argentine warship Frigate *ARA Libertad* to leave the Tema port and the jurisdictional waters of Ghana and to be resupplied to that end."⁶⁶ The *ARA Libertad* is a training vessel of the Argentinian Navy that was on a cadet-training trip when it was seized by Ghana's authorities at the port of Tema.⁶⁷ Argentina considered that the detention of the frigate had violated Articles 18(1)(b), 32, 87(1)(a), and 90 of the LOSC.⁶⁸ Consequently, Article 292 was not available. Recognising the gravity and urgency of the situation,⁶⁹ the ITLOS unanimously prescribed that "Ghana shall forthwith and unconditionally release the frigate *ARA Libertad*."⁷⁰ The Tribunal based its order on the immunity of warships as guaranteed by both Article 32 of the LOSC and customary international law.⁷¹

Similarly, the order for the release of the *Arctic Sunrise* and its crew was adopted two months after the arrest of the vessel by the Russian authorities.⁷² The release, however, was conditional upon the posting of a bond of 3.6 million Euro.⁷³ The method of calculating the amount of the bond is not in the order.

Judge Jesus, in his separate opinion, did not have reservations on the release of the vessel but rather on the release upon the posting of a bond. He stated that "this amounts to a back-door prompt release remedy."⁷⁴ Highlighting how such a measure would consist of an unjustified interference with the pending procedure before the national courts, he added that "a bond imposed as a condition for the release of vessel and crew in the framework of provisional measures ... may not 'preserve the rights' of the detaining State in cases in which the imposed or impossible penalties may involve imprisonment terms which, under the applicable domestic law, are not convertible into monetary penalties."⁷⁵ Judge Kulyk shared this reasoning and emphasized how "the Request for provisional measures has lost its object"

and that the Tribunal was meant to deal with “a request for prescription of provisional measures to preserve the respective rights and not with the prompt release procedure.”⁷⁶

The *Arctic Sunrise Case* raises a series of questions as to whether there is a need to clarify the rules for release of vessels and crews ordered outside of Article 292 of the LOSC. The separate opinions of Judges Jesus and Kulyk draw attention to how the release of a vessel and its crew interferes with the ongoing investigations and proceedings at the domestic level and, for this reason, arguably should be limited to those situations explicitly provided for under the applicable international law. Judge Jesus does suggest that a tribunal could prescribe the release of a vessel upon the posting of a bond as a provisional measure when such a possibility is provided for by the domestic legal system in relation to the offense allegedly perpetrated by the vessel and its crew.⁷⁷ This approach would also allow the competent tribunal to rely on the applicable domestic law to set a reasonable bond, as ITLOS has been doing in the prompt release cases described in the preceding.

Concluding remarks

The ITLOS forms part of the institutional apparatus created by the LOSC. Its functions are not only those of settling disputes among states parties, but also of regime maintenance.⁷⁸ The prompt release procedure is emblematic of such a function. It aims at protecting the balance between the interests of flag states/the fishing industry and the sovereign rights the LOSC has granted to coastal states. The prompt release procedure can be activated even before a dispute between the coastal state and the flag state emerges. But, as discussed in the preceding, the balance between these interests needs a new equilibrium in light of the developments that have occurred in particular in the field of environmental protection.⁷⁹

Another point for further discussion is the relationship between ITLOS and the domestic legal order of the detaining state. The release of a vessel and its crew directly impacts the ongoing procedure at the national level. This is even more evident in an instance in which the release has been requested in a procedure for the prescription of provisional measures. To institutionalize the relationship between the legal orders through the creation of a preliminary procedure, as suggested by Gallala,⁸⁰ is surely an interesting proposal. Lastly, the recent cases analyzed in the fourth part of this contribution highlight how the procedure of provisional measures may also be used to secure the release of a vessel beyond the circumstances contemplated by Article 292.⁸¹ Some have expressed concerns that are understandable, given the regime maintenance function of ITLOS.⁸²

Notes

1. See the International Tribunal for the Law of the Sea (ITLOS) website at www.itlos.org, established pursuant to the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force on 16 November 1994), 1833 *U.N.T.S.* 396.

Aside from the prompt release procedure, the ITLOS has residual compulsory jurisdiction for prescribing provisional measures pending the constitution of an arbitral tribunal that will be competent on the merits. LOSC Article 290(5). Expeditionness is one of the characteristics of ITLOS judicial policy. See the ITLOS Rules of Procedure, Article 49: “The proceedings before the Tribunal shall be conducted without unnecessary delay or expense.” For a comment see T. Treves, “Le Règlement Du Tribunal International Du Droit de la Mer Entre Tradition et Innovation,” (1997) 43 *Annuaire Français de Droit International* 341.

2. Emphasis added.

3. LOSC, *supra* note 1, Article 73(1)-(2): “The coastal State may ... take such measures, including boarding, inspection, arrest and judicial proceedings ... to ensure compliance with the laws and regulations adopted by it Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.”
4. *Ibid.*, Article 220(6-7): “Where there is clear objective evidence that a vessel navigating in the [EEZ] or the territorial sea of a State has ... committed a violation ... resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State ..., that State may ... institute proceedings, including detention of the vessel [T]he coastal State if bound by [requirements for bonding or other appropriate financial security] shall allow the vessel to proceed.”
5. *Ibid.*, Article 226(1)(b): “If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly.”
6. In *The “Volga” Case* (Russian Federation v. Australia) (Prompt Release, Judgment of 23 December 2002), *ITLOS Reports* 2002, para. 49, members of the crew were released by the detaining state during the ITLOS deliberations.
7. *The “Tomimaru” Case* (Japan v. Russia) (Prompt Release, Judgment of 6 August 2007), *ITLOS Reports* 2007, paras. 59–81. On 28 December 2006, Petropavlovsk-Kamchatskii City Court delivered its judgment in the proceedings instituted against the owner of the *Tomimaru* and imposed, *inter alia*, the confiscation of the vessel. The Kamchatka District Court confirmed this judgment in appeal on 24 January 2007. When Japan filed its application against the Russian Federation on 6 July 2007, the question was pending in front of the Supreme Court of the Russian Federation. The Supreme Court then dismissed the complaint on 26 July 2007, after the closure of the hearings. *Ibid.*, para. 66. ITLOS considered that the decision by the Supreme Court put an end to procedures before the domestic courts and consequently dismissed the application. *Ibid.*, paras. 79–81.
8. “Article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.” *The “Camouco” Case* (Panama v. France) (Application for Prompt Release, Judgment of 7 February 2000), *ITLOS Reports* 2000, para. 57.
9. *Tomimaru Case*, *supra* note 7, paras. 79–81.
10. See A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), 31.
11. *Ibid.*, 34.
12. *Ibid.*
13. See J.-P. Quéneudec, “A propos de la procédure de prompt mainlevée devant le Tribunal international du droit de la mer,” (2000) VII *Annuaire du droit de la mer*, 79, 88, and S. Trevisanut, “The Exercise of Administrative Functions by ITLOS: A Comment on Prompt Release Case-Law,” in N. Boschiero et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Professor Tullio R. Treves* (The Hague: T.M.C. Asser Press, 2013), 309.
14. J. Akl, “La procédure de prompt mainlevée du navire ou prompt libération de son équipage devant le Tribunal international du droit de la mer,” (2001) VI *Annuaire du droit de la mer*, 219, 220–221; D. H. Anderson, “Prompt Release of Vessels and Crews,” *Max Planck Encyclopedia of Public International Law* 2008, para. 3; and R. R. Churchill, “Trends in Dispute Settlement in the Law of the Sea: Towards the Increasing Availability of Compulsory Means,” in D. French et al. (eds.), *International Law and Dispute Settlement: New Problems and Techniques* (Oxford: Hart, 2010), 143, 153. The procedure of prompt release is one of the “substantive limits” to the sovereign rights of coastal states in their EEZ. See B. H. Oxman, “The Territorial Temptation: A Siren Song at Sea,” (2006) 100 *American Journal of International Law* 830, 839.
15. *Volga Case*, *supra* note 6, para. 75.
16. *Ibid.*, para. 67.
17. *Ibid.*, para. 77.
18. *Volga Case*, *supra* note 6, Separate Opinion of Judge Cot, para. 12. See also *Camouco Case*, *supra* note 8, Dissenting Opinion of Judge Wolfrum, para. 12. For a comment, see J.-P. Cot, “The Law

of the Sea and the Margin of Appreciation,” in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Leiden: Martinus Nijhoff, 2007) 389, 398–403.

19. *Ibid.*, para. 27.
20. *Volga Case*, supra note 6, Dissenting Opinion of Judge ad hoc Shearer, para. 19, emphasized that “A new ‘balance’ has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.” See also C. Brown, “‘Reasonableness’ in the Law of the Sea: The Prompt Release of the *Volga*,” (2003) 16 *Leiden Journal of International Law* 621, 628–630 and Quéneudec, supra note 13, 92. In particular, Brown, at 630, suggests that in a case such as the *Volga*, the precautionary principle might have been applied and used in order to assess the reasonableness of the bond.
21. *Volga Case*, supra note 6, paras. 67–69. Y. Shany, “No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary,” (2009), 20 *European Journal of International Law* 73, at 88, noted that: “judicial settlement (being law-based) tends to be binary in nature and may run counter to important interests of some of the conflicting parties [such as the protection of the marine environment or the fight against illegal fishing]. In other words, as a problem-solving tool law has its limits”.
22. In the specific case of the *Volga*, the Australian request might seem excessive as it entailed the payment by the owner of the ship of 1 million Australian dollars to guarantee the carriage of the vessel by VMS. These requirements consisted of a “good behaviour bond” in order to prevent the arrested vessel from committing future violations. The ITLOS concluded that such a “good behaviour bond” is not consistent with LOSC Article 73(2) when read in conjunction with Article 292(1). *Volga Case*, supra note 6, paras. 79–80. See Y. Tanaka, “Prompt Release in the United Nations Convention on the Law of the Sea: Some Reflections on the ITLOS Jurisprudence,” (2004) 51 *Netherlands International Law Review* 237, 269–270.
23. *Volga case*, supra note 6.
24. *The “Hoshinmaru” Case* (Japan v Russian Federation) (Prompt Release, Judgment of 6 August 2007), *ITLOS Reports* 2007.
25. *Tomimaru Case*, supra note 7.
26. *The “Grand Prince” Case* (Belize v France) (Prompt Release Judgment of 20 April 2011), Separate Opinion of Judge Treves, *ITLOS Reports* 2001, paras. 66, 77–94. The ITLOS supports the recognition of the right of a flag State to seek redress for non-national crew members. See *M/V “Saiga” (No. 2)* (Saint Vincent and the Grenadines v. Guinea) (Provisional Measures Order of 11 March 1998), *ITLOS Reports* 1998.
27. Flag states with an open registry, the so-called flag of convenience states, do not have a strong genuine link (see LOSC, supra note 1, Article 91) with their vessels, which are left with very little official protection.
28. ITLOS Rules of Procedure, supra note 1, Article 110.
29. J.-P. Cot, “Appearing ‘for’ or ‘on behalf’ of a State: The Role of Private Counsel Before International Tribunals,” in N. Ando, E. McWhinney, and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, Vol. 2, 2002), 835, at 843:

The development of flags of convenience, with their minimal ‘genuine link’, leaves shipowners with little official protection. ... The ‘on behalf’ clause was drafted to overcome this difficulty and to give shipowners a fast-track procedure, cutting through red tape and gaining a form of direct access to the Tribunal while preserving the intergovernmental nature of the dispute and the litigation.

30. In his dissenting opinion in the *Volga Case*, supra note 20, para. 19, Judge ad hoc Shearer highlighted the fact that

Fishing companies are highly capitalised and efficient, and some of them are unscrupulous. The flag State is bound to exercise effective control of its vessels, but this is often made difficult by frequent changes of name and flag by those vessels. It is notable that in recent cases before the Tribunal, including the present case, although the flag State has been represented by a State

agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel's owners.

31. See Nollkaemper, *supra* note 10, 251: "It has often been said that, in the case of diplomatic protection, once a state has assumed a claim and asserted it in an interstate procedure, that claim belongs to nobody other than the state itself. However, that fails to distinguish between the material right and the procedures for their vindication."
32. *Grand Prince Case*, *supra* note 26, paras. 76–77.
33. *Camouco Case*, *supra* note 8, para. 58.
34. *Tomimaru Case*, *supra* note 7, para. 80.
35. Separate opinion of Judge Cot, *Volga Case*, *supra* note 18, para. 22.
36. See Quéneudec, *supra* note 13, 88: "Le tribunal est amené à contrôler l'exercice du pouvoir discrétionnaire de l'Etat côtier en la matière."
37. Nollkaemper, *supra* note 10, 254, distinguishes between "cases where international courts have to review decisions by national courts on abstract questions of international law, such as may be the case in *Jurisdictional Immunities of the State (Germany v Italy)*, and cases where they have to review the application of international law to facts."
38. Cot, *supra* note 18, para. 387.
39. Dissenting opinion of Judge Wolfrum, *Camouco Case*, *supra* note 18, para. 11: "These discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question." See also the dissenting opinion of Judge Anderson, *ibid.*
40. As rightly pointed out by Judge Cot, *supra* note 18, para. 401, the LOSC "does not put a limit upon the amount of fines against violators a coastal state may consider appropriate." The LOSC Article 73(3), however, prohibits imprisonment or other kinds of corporal punishment for fisheries violations.
41. Dissenting opinion of Judge Wolfrum, *Camouco Case*, *supra* note 18, para. 12.
42. *Volga Case*, *supra* note 6, para. 83.
43. The "*Juno Trader*" Case (Saint Vincent and the Grenadines v Guinea-Bissau) (Prompt Release Judgment of 18 December 2004), *ITLOS Reports 2004*, para. 77. The Tribunal also invoked the application of "international standards of due process of law" in the *Tomimaru Case*, *supra* note 7, para. 76, in relation to the confiscation decision adopted by the domestic authorities, which may have had the consequence of eliminating "the provisional character of the detention of the vessel rendering the procedure for its prompt release without object."
44. *Ibid.*, separate opinion of Judge Treves, para. 6.
45. T. Treves, "Human Rights and the Law of the Sea," (2010) 28 *Berkeley Journal of International Law* 1, 5.
46. B. H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea," (1997) 36 *Columbia Journal of Transnational Law* 399, 422.
47. *Ibid.*
48. See *Juno Trader Case*, *supra* note 43, para. 63 and Separate Opinions of Judge Mensah and Judge Wolfrum. See also V. Cogliati-Bantz, "International Tribunal for the Law of the Sea, *Hoshinmaru (Japan v. Russian Federation)* and *Tomimaru (Japan v. Russian Federation)* Prompt Release Judgments of 6 August 2007," (2009) 58 *International and Comparative Law Quarterly* 241, 255–257.
49. *Tomimaru Case*, *supra* note 8, para. 75.
50. *Ibid.*, para. 76.
51. The ITLOS has dealt with the reasonableness of a bond in six cases: *The M/V "Saiga" Case (No. 1)* (Saint Vincent and the Grenadines v Guinea) (Judgment of 4 December 1997), *ITLOS Report 1997*; *Camouco Case*, *supra* note 8; *The "Monte Confurco" Case* (Seychelles v France) (Prompt Release Judgment of 18 December 2000), *ITLOS Reports 2000*; *Volga Case*, *supra* note 6; *Juno Trader Case*, *supra* note 43; and *Hoshinmaru Case*, *supra* note 24.

It discussed the reasonableness of the bond set by the detaining state in four of these cases (*Camouco*, *Monte Confurco*, *Volga*, *Hoshinmaru*), and in all four it declared the bond to be unreasonable within the meaning of LOSC Article 292.

See J. Gao, "Reasonableness of the Bond under Article 292 of the LOS Convention: Practice of the ITLOS," (2008) 7 *Chinese Journal of International Law* 115, 126.

52. This statement is confirmed in the ITLOS Rules of Procedure, supra note 1, Article 114(2): "The Registrar shall endorse or transmit the bond or other financial security to the detaining State to the extent that it is required to *satisfy the final judgment*, award or decision of the competent authority of the detaining State" (emphasis added).
53. *Monte Confurco Case*, supra note 51, para. 71, and see Gao, supra note 51, 131.
54. According to the Rules of Procedure, supra note 1, Article 113(2), ITLOS "shall determine the amount, nature and form of the bond or financial security to be posted." In the *Saiga Case*, supra note 51, para. 82, the Tribunal affirmed that "The overall balance of the amount, form and nature of the bond or financial security must be reasonable."
55. *Camouco Case*, supra note 8, para. 67.
56. *Volga Case*, supra note 6, para. 69.
57. *Monte Confurco Case*, supra note 51, para. 72.
58. *Ibid.*
59. See Cogliati-Bantz, supra note 48, 251–252.
60. Nollkaemper, supra note 10, 253. Gao, supra note 51, 159, noted that "sometimes the ITLOS seemed to determine the amount of the reasonable bond by eliminating the unreasonable components from the bond requested by the detaining state."
61. I. Gallala, "La notion de caution raisonnable dans la jurisprudence du Tribunal international du droit de la mer," (2001) 105 *Revue générale de droit international public* 931, 945.
62. M. Cabrera Mirassou, "ARA Libertad," *Max Planck Encyclopedia of Public International Law* (2014), para. 23. <http://opil.ouplaw.com/home/EPIL>
63. LOSC, supra note 1, Article 290(6).
64. *The "ARA Libertad" Case* (Argentina v. Ghana) (Request for Provisional Measures Order 15 December 2012), *ITLOS Reports* 2012.
65. *The "Arctic Sunrise" Case* (Kingdom of the Netherlands v. Russian Federation) (Request for Provisional Measures Order, 22 November 2013), *ITLOS Reports* 2013.
66. *ARA Libertad Case*, supra note 64, para. 27.
67. For more details on the case, see, inter alia, Mirassou, supra note 62, and N. Peiris, "Provisional Measures in ARA Libertad: On the Margins of Jurisdictional Discourse," (2014) 28 *Ocean Yearbook* 134.
68. These articles refer to, respectively, the right of leaving a port in the exercise of the right of innocent passage, immunities of warships, freedom of navigation, and right of navigation.
69. *Ara Libertad Case*, supra note 64, para. 100.
70. *Ibid.*, para. 108.
71. ITLOS deduced the gravity and urgency of the situation from the fact that the detained vessel was a warship and the Tribunal affirmed that "any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States." *Ibid.*, para. 97 and see also para. 99.
72. See, generally, R. Caddell, "Platforms, Protestors and Provisional Measures: The 'Arctic Sunrise' Dispute and Environmental Activism at Sea," (2014) 45 *Netherlands Yearbook of International Law* 359; D. Guilfoyle and C. A. Miles, "Provisional Measures and the MV Arctic Sunrise," (2014) 108 *American Journal of International Law* 271; and N. Peiris, "'Arctic Sunrise' from ITLOS: The Arctic Surprise and in Search of a Balanced Order," (2015) 29 *Ocean Yearbook* 44.
73. *Arctic Sunrise Case*, supra note 65, para. 96: "The bond or other financial security should be in the amount of 3,600,000 euros, ... [and] the bond or other financial security should be in the form of a bank guarantee."
74. *Ibid.*, separate opinion of Judge Jesus, para. 7(b).
75. *Ibid.*, para. 11.
76. Separate opinion of Judge Kulyk, para. 12.

77. Separate opinion of Judge Jesus, supra note 74, para. 11.
78. Shany, supra note 21, 81.
79. See A. von Bogdandy and I. Venzke, “In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification,” (2012) 23 *European Journal of International Law* 7, 8.
80. Gallala, supra note 61, 945.
81. *Arctic Sunrise Case*, supra note 65, dissenting opinion of Judge Golitsyn, para. 47, highlights how “the Tribunal cannot claim under the circumstances that it preserves the rights of the Russian Federation by prescribing the release of the ship and its crew upon the posting of a bond or other financial security.”
82. Shany, supra note 21, 81.