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PROTECTION OF THE RIGHTS OF SEAMEN UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The United Nations Convention on the Law of the Sea ("LOSC" or "Convention) [1, p. 1261-1354] has often been referred to as the "constitution for the oceans". Rightly so, it regulates most of the activities connected with the ocean spaces and their use. However, despite of this apparent comprehensiveness of its scope of application, the Convention does not speak in many terms about the seamen and their rights. It contains a minimal number of provisions, which are directly related to the persons serving onboard the vessels. One of them is that related to the detention of vessels and their crews and the ensuing release of them provided for in Art.292 LOSC. The purpose of this article is, accordingly, the examination of this provision from the perspective of the rights of the seamen. The below discussion has a direct academic and practical significance, since the issue has not been well examined in the literature, whereas the examined provisions create a number of practical problems connected with their implementation by the States-Parties to the Convention, as witnessed by the international jurisprudence.

The main provision dealing with the release of crew members from the detention is Art.292 LOSC, according to which where one State-Party to the Convention has 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 the 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 Art. 287 or to the International Tribunal for the Law of the Sea ("ITLOS" or "Tribunal"), unless the parties otherwise agree.

The only provision of the Convention envisaging the release of detained crews (as well as of vessels) against the bond is Art. 73(2), whereas Arts.220(7) and 226(1)(b) provide only for the release of vessels against the bond and say nothing about the release of crews. According to Art.73(2), "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security". It should be pointed out that there have been a number of publications connected with Art.292 prompt release procedure [2], whereas there has not been any significant research, either by the Ukrainian or foreign academia, focusing exclusively on the release of the seafarers. The main task of this article is, accordingly, to fill the emerged academic gap.

In theory, detention of a physical person is explained as an "act or fact of holding a person in custody by reason of a legal proceeding or as the result of court proceedings" [3, p. 662]. Thus, the detention should cover any restriction of a freedom to leave the territory of the detaining State. Although Art.73(3) prohibits imposition of

imprisonment of the crew members for the violations of fisheries laws and regulations in the absence of agreement by the States concerned, in practice a number of coastal States have found many ways to deprive the seamen of their mobility. Recently, there have been many occasions where the masters and the crew were imprisoned or detained without a trial (as was the case with Tasman Spirit where the crew was detained for several years), since in many cases they have been the only locally identifiable individuals with responsibility for the operation of the vessel in question and the only representatives against whom action could readily be taken under the national law as opposed to international law. For example, in the Camouco Case considered by ITLOS the master of the vessel was put under the judicial supervision and the respondent alleged that it was not a detention for the purposes of Art.292. The Tribunal did not share this opinion. Admitting that the master was under the court supervision, ITLOS held that "his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Rйunion". The Tribunal, therefore, considered that, in the circumstances of that case, the court supervision amounted to the detention and it was appropriate, therefore, to order the release of the master of "Camouco" in accordance with Art.292(1) [4, p. 666-703, para. 71]. The same "court supervision" was executed in the Monte Confurco and ITLOS again ordered the release of the master [5, para. 90].

In the Juno Trader all the crew members save one were detained and kept on board the vessel under the surveillance of the armed personnel of the Respondent and their passports were taken away. The Respondent (Guinea-Bissau) then claimed that the passports of some crew members had already been returned, while other seafarers had been replaced in order to maintain the crew of the vessel, and that in any occasion the passports were returned when so requested. Later on, the Applicant announced that six passports had yet to be returned, despite of the Respondent's declaration that there was no restriction to the freedom of movement of the crew. The Tribunal found that "the members of the crew are still in Guinea-Bissau and subject to its jurisdiction" and, therefore, ordered that "all members of the crew should be free to leave Guinea-Bissau without any conditions" [6]. In the same case, the Tribunal observed that Art.73(2) LOSC must be read in the context of Art.73 as a whole and that the obligation of prompt release of vessels and crews "includes elementary considerations of humanity and due process of law" [6]. For these humanitarian considerations and ensuring that the dispute over the arrest of a vessel does not escalate, the prompt release procedures are described as "circuit breaker" [7].

In the Volga Case three detained crew members were admitted by the Respondent (Australia) to bail on the condition that they each deposit AU$ 75,000 cash, surrender their passports and not leave the port where they were kept in detention. Later on, they were allowed to return to Spain under the condition that upon their arrival they surrender their passports and seaman's papers to the Embassy of Australia in Madrid and report to that embassy on a monthly basis, lest the bail deposit be forfeited. The Applicant stated that such conditions are not provided by Art.73(2) and, therefore, are impermissible. The Tribunal "did not consider it necessary" to pronounce whether Art.73(2) allows the detaining State to impose the conditions on the crew outside of

its jurisdiction [8]. This was perhaps due to the fact that when the Tribunal gave its judgment, the bail money was already paid and the crew already left Australia. For this reason, only the question of release of the vessel was considered by the Tribunal.

Overall, it must be recognized that the Tribunal, guided by the humanitarian considerations, has further contributed to the orthodox meaning of "detention" by adding to it the removal of passports and subjection to the court supervision. It appears, therefore, that the release of crew from detention should be ordered by the Tribunal whenever the crew is not in a legal or practical position to leave the detaining State or has not yet left it on the day of the prompt release judgment.

Another problem connected with the detention of the crews is the right of their protection in Art.292 procedure. It is granted that no close bonds are usually present between the seafarers aboard the vessels with the flag State of such vessels, because in most cases these seafarers hold the nationalities different from that of the flag State. Admittedly, some flags do establish a close connection with the seafarers serving on board their vessels and exercise proper jurisdiction over them, but the majority do not. Under Art.292 LOSC, it is only the flag State which is entitled to make applications on behalf of detained vessels and crews, whereas no other State including the States of nationality of the detained seafarers is given such right. It was often asserted that the flags of convenience (which normally do not have genuine link with their vessels as required by Art.91(1) LOSC) should not be given a right of diplomatic protection of their vessels and the crews.

Thus, the reality demonstrates that the most vulnerable subjects in detention of the vessels are the crew members, mostly aliens vis-a-vis the flag State. Even if the detained crew members were to persuade the ship-owner to ask the flag State to file a request for their release under Art.292, there is no guarantee whatsoever that the latter will be willing to espouse international claims in respect of the persons not even being its nationals. In all the cases considered thus far by ITLOS under Art.292 LOSC the crew members were released in connection with the release of a vessel and no applications have been filed so far solely to request the release of the detained crew members. This does mean that such detentions are inexistent. Actually, they are dominant compared with the detentions of vessels. Usually, the release of detained crew members is effected by the States of their nationality through the diplomatic channels, and even more often these crew members are left to the justice of the detaining States. Furthermore, since there is discretion for the flag State in exercising the right to make an application under Art.292, there is always a danger of a situation that it does not go to international adjudication if it does not want to. The striking examples are the incidents having occurred with the tankers "Prestige" and "Tasman Spirit", the potential Art.292 cases. All the above earnestly speaks in support of the idea that apart from the flag State, the States of nationalities of the detained crews should have also been provided with a right to make an application under Art.292. This would have given the most vulnerable participants of a maritime enterprise an additional safeguard of their human rights to be defended should the need arise.

Apart from the danger that the flag State may use discretion in whether or not to make the application under Art.292 and to request the release of the alien crews,

even if such request is made, it may be challenged by the respondents. In the Saiga-2 Case considered by ITLOS the Respondent unsuccessfully alleged that certain claims of the Applicant were inadmissible because they related to the violations of the rights of natural persons who were not nationals of the applicant. ITLOS then translated the provisions of the Convention by stating that: "the Convention considers a ship as a unit, as regards ... proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant" [9].

To summarize the foregoing discussion, it must be emphasized that the Convention contains only one provision according to which the detained crew members may be released under Art.292 LOSC. The relevant jurisprudence of ITLOS has interpreted the meaning of "detention" in a broad way and appears, therefore, to be favourable to considerations of humanity. Another right of the crew members – to be diplomatically protected in respect of their release, can be exercised only by the flag State and, most probably, only in respect of a detained vessel. Due to the absence of the relevant case-law, it is not yet clear whether the flag State also has a right of protection of crew members in respect of their release under Art.292 LOSC where the vessel herself was not detained. Likewise, it is not yet clear whether the flag State may exercise a right of protection of crewmembers in case of their detentions not covered by Art.292 LOSC.

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Анотація

Караман І.В. **Захист прав моряків відповідно до Конвенції Організації Об'єднаних Націй з морського права.** – Стаття.

Аналізуються положення Конвенції ООН з морського права 1982 р., пов'язані з правами моряків при їх затриманні, передбаченому ст.73(2), та звільненні, передбаченому спеціальною процедурою згідно ст. 292, що по суті є єдиною нормою Конвенції, що стосується прав людини.

Ключові слова: права моряків, Конвенція ООН з морського права, Міжнародний Трибунал з морського права.

Summary

Igor V. Karaman. **Protection of the Rights of Seamen under the United Nations Convention on the Law of the Sea.** – Article.

The provisions of the 1982 United Nations Convention on the Law of the Sea related to the detention of seamen as provided for in Art.73(2) and their release as provided by the special procedure pursuant to Art.292 being the only human rights provision of the Convention are analyzed.

Key words: Rights of seamen, United Nations Convention on the Law of the Sea, International Tribunal for the Law of the Sea.

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ОСОБЛИВОСТІ ВИЗНАЧЕННЯ ПІДСУДНОСТІ ВИБОРЧИХ СПОРІВ

Аналіз норм Кодексу адміністративного судочинства України (далі – КАСУ) [1], які присвячені особливостям встановлення правил підсудності, показує, що законодавець приділяє особливу увагу правилам підсудності у справах, що виникають із правовідносин, пов'язаних з виборчим процесом. У ст.ст. 172–176 КАСУ містяться дев'ять частин, норми яких повністю присвячуються правилам підсудності. Як встановлюють чч. 3, 4, 5 ст. 172 КАСУ, рішення, дії або бездіяльність Центральної виборчої комісії щодо встановлення нею результатів виборів чи всеукраїнського референдуму оскаржуються до Вищого адміністративного суду України. Усі інші рішення, дії або бездіяльність Центральної виборчої комісії, члена цієї комісії оскаржуються до Київського апеляційного адміністративного суду. Рішення, дії чи бездіяльність виборчої комісії АРК, обласних, районних, міських (у тому числі міст Києва та Севастополя), районних у містах виборчих комісій щодо підготовки та проведення місцевих виборів; територіальних (окружних) виборчих комісій щодо підготовки та проведення виборів Президента України, народних депутатів України; обласних комісій з референдуму і комісії АРК з всеукраїнського референдуму, а також членів зазначених комісій оскаржуються до окружного адміністративного суду за місцезнаходженням відповідної комісії. Рішення, дії чи бездіяльність виборчих комісій, комісій з референдуму, членів цих комісій, за винятком рішень, дій чи бездіяльності, що визначені частинами третьою - четвертою цієї статті, оскаржуються до місцевого