

DECLARATION OF JUDGE NDIAYE

[Translation]

Reasonableness is determined essentially in terms of the factual and relevant circumstances of the case. The aim is to strike a balance in a given context between the obligation of release under the Convention and the right to prosecute and punish those who contravene the laws and regulations of a given State. Reasonableness may be observed from the outcome or be ascertained.

It must be noted that in release proceedings there is invariably a tendency for applicants to argue that the bond or financial security set by the State that has detained the vessel is exorbitant. They find this to be a convenient means of bringing that State before the international court without even seeking to enter into an agreement within the ten (10) days. The detaining State, for its part, must take care to set a bond or other financial security that is proportionate to the offence, because the bond is always an extremely important relevant fact before the International Tribunal.

The provisions concerning this are rather measured. They refer to “reasonable bond or other security” (article 73, paragraph 2), to “bonding or other appropriate financial security” (article 220, paragraph 7) or to “reasonable procedures such as bonding or other appropriate financial security” (article 226, paragraph 1(b)). This means that the bond must be proportionate to the offence and should not take on a punitive or deterrent character. Otherwise, the challenging of the amount of the bond would turn the Tribunal into a forum for appealing against the decisions of national authorities, which it is not. Rather, the Tribunal applies the provisions of the Convention and other rules of international law that are not incompatible with it (article 293).

(Signed) Tafsir Malick Ndiaye