

JOINT SEPARATE OPINION OF JUDGES MENSAH AND WOLFRUM

1. The central argument advanced by the Respondent is that the property in the vessel *Juno Trader* “reverted to” the State of Guinea-Bissau as of 5 November 2004 as a result of the failure of the owner to pay the fines imposed by the decision of the Inter-ministerial Commission on Maritime Surveillance (Inter-ministerial Commission). On that basis the Respondent contends that the Tribunal lacks jurisdiction to adjudicate on the case; that the Application is inadmissible; and that the allegation of non-compliance with article 73 of the Convention is not well founded. We appreciate why the Tribunal had to deal only briefly with this argument. We endorse the respective findings of the Judgment (in paragraphs 63, 68). However, in view of the prominence that the Respondent appears to attach to this argument, we consider it appropriate to give a more detailed consideration to it in a Separate Opinion.

2. Two issues need to be discussed with regard to the alleged change of ownership of the *Juno Trader*. These are, first, the process by which the change of ownership occurred, as outlined by the Respondent during the hearing and, secondly, the relevance, if any, of the alleged change of ownership to the nationality of the ship.

3. We wish to stress at the outset that we do not question the right of a coastal state to provide in its laws that fishing vessels, including their fishing gear and cargo, may be confiscated if it is proved that they have engaged in illegal fishing within the jurisdiction of the state. There are provisions to this effect in the laws of many coastal states, and, as a report from FAO indicates, different procedures are adopted for implementing these laws. However, this right of the coastal state must be exercised within the limits of the United Nations Convention on the Law of the Sea (the Convention) and other relevant rules of international, including in particular relevant provisions contained in international instruments on the protection of human rights, such as those providing for the protection of fair trial and due process.

4. We fully recognize and accept that it is not for the Tribunal, in the context of an Application for prompt release under article 292 of the Convention, to deal with

the question of the legality or illegality of the actions taken by a coastal state against a ship found or suspected to have engaged in illegal fishing activities. Pursuant to article 292, paragraph 3, of the Convention, decisions taken by the Tribunal in a prompt release case must not prejudice the merits of any case before the appropriate domestic forum of the detaining state against the vessel, its owner or its crew. Equally, a judgment of the Tribunal under article 292 of the Convention should not in any way appear to prejudice the merits of any case that may be brought before an international court or tribunal concerning the compatibility with international law of any national laws or of measures taken by national authorities on the basis of such laws against a ship, its cargo or fishing gear, including arrest, detention or judicial proceedings. This does not mean that the procedure applied by the coastal state in taking enforcement measures against a fishing vessel is of no relevance to the Tribunal in a prompt release procedure under article 292 of the Convention. In the contrary, as can be seen in this case, it may be of relevance for the establishment of jurisdiction and admissibility. For that reason we endorse paragraph 77 of the Judgment which states that the obligation of prompt release includes elementary considerations of humanity and due process of law.

5. We turn now to the procedures which, according to the Respondent, led to the confiscation of the *Juno Trader*. In its presentation on the first day of the hearing, the Respondent appeared to be maintaining that, pursuant to the provisions of article 60 of the Decree-Law No.6-A/2000 (Fisheries Act of Guinea-Bissau), the property of an alien ship-owner automatically (“by operation of law”) reverts to the State of Guinea-Bissau when the owner fails to pay the fines imposed by the Inter-ministerial Commission within a period of 15 days, or after such extension of time as may be granted by the Inter-ministerial Commission. It further appeared from that statement that the ship-owner does not have any legal recourse (administrative or judicial) for challenging the legal or factual basis of the administrative decision of the Inter-ministerial Commission. From the responses of the Respondent to the questions posed by the Tribunal (as given in the oral presentations of the Respondent on the second day of the hearing and in the written documents submitted subsequently) it seems that the Respondent had modified its views regarding the effect of the non-payment of the fines imposed by Minute 14 of the Inter-ministerial Commission. In particular, the response of the Respondent seems to suggest that the “reversion of

ownership” in the *Juno Trader* to the State of Guinea-Bissau is not legally irreversible. Furthermore, the Respondent appears to accept that the decision of the Regional Court of Bissau suspending the implementation of Minute 14 of the Inter-ministerial Commission remains in force unless and until it is invalidated by a superior court in Guinea-Bissau.

6. According to the jurisprudence of the Tribunal, the content and consequences of the law of a State applicable in proceedings before the Tribunal is a question of fact. Given the difference between the statements concerning the law of Guinea-Bissau, as given by Respondent before the Tribunal, and the view of the law as it emerges from the decision of the Regional Court of Bissau, it is necessary for the Tribunal to make a choice as to which of these views it should base itself on in considering the status of the vessel. In making such a choice the Tribunal must operate on the basis that the obligation of States, including the State of Guinea-Bissau, under the Convention and under general international law, includes the obligation not to deny justice or due process of law, especially in respect of legal and judicial procedures that involve interference with the property rights of aliens. This general approach has been confirmed in the jurisprudence of the Tribunal. In the Judgment in the *Saiga* case (No. 1), the Tribunal stated that: “It is the opinion of the Tribunal that given the choice between a classification that implies a violation of international law and one that avoids such implication it must opt for the latter” (paragraph 72). We believe that this general principle is applicable in the present case. This means that the Tribunal must base itself on the view of the law as given in the Order of the Regional Court of Bissau. As a consequence of that Order, the confiscation of the *Juno Trader*, or to use the terminology of article 60 Decree-Law No. 6 A of Guinea-Bissau the reversal of property to the government of Guinea-Bissau, cannot be considered as final and legally irreversible, as the Respondent appeared at one time to be contending. This conclusion is fully in accord with the Order of the Regional Court of Bissau. That Order clearly implies that the decision of the Inter-ministerial Commission is subject to judicial review, and that this judicial review has effectively been exercised through the Order of the Regional Court which suspended the implementation of Minute 14 of the Inter-ministerial Commission and all consequences flowing from that Minute until a final award on the merits of the case. In this regard, we are concerned to note that this decision of the court

appeared to be the subject of some criticism by counsel for the Respondent on the first day of the hearing. If the Tribunal has to choose between, on the one hand, the characterization of the law of Guinea-Bissau as given by the Respondent in its pleadings and, on the other, the meaning and effects of the law as given in the judgment of the Regional Court of Bissau, the Tribunal must choose the view of the law as indicated in the Judgment of the Regional Court. It appears axiomatic that the Tribunal should rely on a formal pronouncement of a competent court of a state regarding the meaning and effects of a law of the state rather than on a statement made by counsel in the course of pleading a contentious case. On that basis we concur with the Judgment that the administrative decision on the penalties against the *Juno Trader* and its captain are not yet final under the law of Guinea-Bissau and, as the consequence thereof, that the change of ownership of the vessel by operation of the law cannot be considered as being final.

7. We now turn to the possible impact that the alleged change of ownership would have on the nationality of the *Juno Trader*, leaving aside the question whether that change in ownership can be considered as final. According to article 292, paragraph 2, of the Convention, an Application for prompt release may only be made by or on behalf of the flag State of the ship. In the *Grand Price* case the Tribunal has stated that the Applicant has to be the flag State at the time of the arrest as well as at the time when the application was filed (paras. 77 and 93, see also the declaration of Vice-President Nelson, Judge Wolfrum, Judge *ad hoc* Cot and the Separate Opinion of Judge Treves).

8. The Respondent argues in essence that the alleged change of ownership results in an automatic change in nationality of the ship, or even loss of the nationality altogether. Actually the position of the Respondent on this point is not entirely clear. At one point in his presentation, the Agent of the Respondent stated:

I must confess that I do not myself have an answer to the question of what normally happens in respect of the flag of a vessel when the vessel is confiscated by another State for violations of its fisheries regulations or other laws. My understanding is that it may be the case that it is thereupon regarded as ceasing to fly any flag at all, and to have become an ordinary chattel, until it is sold by the State that confiscated it and is reflagged by the new owner. In any event,

although I cannot provide the Tribunal with a clear answer, the burden is on the Applicant to establish its case. (PV 04/03, p.47)

9. But whatever may be the view of the Respondent on this issue, it is our view that there is no legal basis for asserting that there is an automatic change of the flag of a ship as consequence solely of a change in its ownership. In this context we consider it important to emphasize the special importance of the nationality of a vessel, particularly in regard to the implementation and enforcement of international law rules pertaining to the rights and responsibilities of states in respect of the ship. According to article 91 of the Convention, it is for each State to establish the conditions for the granting of its nationality to ships and for the registration of ships. The term 'nationality', when used in connection with ships, is merely shorthand for the jurisdictional connection between a ship and a State. The State of nationality of the ship is the flag State or the State whose flag the ship is entitled to fly; and the law of the flag State is the law that governs the ship. The jurisdictional connection between a State and a ship that is entitled to fly its flag results in a network of mutual rights and obligations, as indicated in part in article 94 of the Convention. For example, granting the right to a ship to fly its flag imposes on the flag State the obligation to effectively exercise its jurisdiction and control in administrative, technical and social matters. In turn, the ship is obliged to fully implement the relevant national laws of the State whose flag it is entitled to fly. All States which have established ships' registers provide for specific procedural and factual requirements to be met before a ship is entered on their registers or is granted the right to fly the flag of the particular State. Ships receive respective documents to prove that they are entitled to fly a particular flag. Similarly, the laws of these states establish clear procedures to be followed for ships to leave the register, including the conditions under which a ship may lose the right to remain on the register.

10. In view of the important functions of the flag State as referred to in article 94 of the Convention and also the pivotal role of the flag State in the initiation of the procedure for the prompt release of a ship under article 292 of the Convention, a procedure which may be compared to diplomatic protection of persons, it cannot easily be assumed that a change in ownership automatically leads to a change of the flag. The obligations and rights of the flag State in respect of the ship cannot be

transferred automatically, particularly since the flag State has obligations and enjoys corresponding rights *vis-à-vis* other States. For this reason it is both necessary and appropriate that a change in flag should be in accordance with procedures established by the flag State for that purpose and it is also necessary that these procedures are consistent with the fundamental objectives of international law relating to the nationality of ships. In the present case, there is no evidence that the alleged loss of the flag of the *Juno Trader* had any basis in the law of the flag State or the relevant provisions of the Convention.

11. Equally, it is not tenable to argue that the *Juno Trader* has lost its flag in consequence of its alleged confiscation. Vessels without flags are the exception and, therefore, loss of flag of a ship cannot be assumed lightly. Further, and more importantly, a vessel that loses its flag also loses the protection of the flag State. In the context of the regime of prompt release of ships under article 292 of the Convention, ships are particularly dependent upon the protection of the flag State. A procedure that purports to result in the loss of flag of ships with little or no legal process would result in the absence of any effective protection for ships detained in foreign ports. This would undermine the delicate balance between the interests of the coastal state and the interests of the flag state that was intended to be established by the provisions of articles 73 and 292 of the Convention.

12. Finally, we consider as wholly untenable the argument of the Respondent that the case is moot because, following its confiscation by the State of Guinea-Bissau, the *Juno Trader* cannot any longer be considered as detained. In our view, the objective of the prompt release procedure under article 292 of the Convention is to provide for the release of a vessel pending the final conclusion of the legal proceedings in the domestic fora of the coastal State. We accept that when these national legal proceedings have been completed, the prompt release procedure does not serve any further purpose. However, this cannot mean that the application of the article 292 procedure can be set aside by mere administrative action, particular when, as in the present case, judicial procedures available under the laws of the state are still in progress. Such a proposition would deprive the prompt release procedure under article 292 of the Convention of all its meaning. In our view, a vessel continues to be a detained ship, within the meaning of article 292 of the

Convention, until after the completion of national procedures that meet the standard of due process as developed in international law.

13. We also note that there are a number of factors that undermine the contention of the Respondent that there has been a change in the flag of the *Juno Trader* in consequence of the alleged change in ownership. The Respondent has given no evidence that it made any attempt to register the vessel on the ships register of Guinea-Bissau or on the register of another State. On the contrary, during the hearing of December 7, 2004, the Respondent referred to a letter of the Government of Guinea-Bissau to the Commissioner of Marine Affairs of Saint Vincent and the Grenadines informing the Commissioner of the alleged change in ownership. No reference was made to a possible change or loss of the flag of the *Juno Trader*. It would have been more pertinent in this context for the Commissioner of Marine Affairs, the competent agency of the flag State, to be informed of the very significant event of the change or loss of nationality of the *Juno Trader*, rather than the mere change of ownership. Indeed, the fact that a communication on the change of ownership was addressed to the Commissioner of Marine Affairs of Saint Vincent and the Grenadines, instead of the Agent of the owner, would suggest that the authorities of Guinea-Bissau considered that Saint Vincent and the Grenadines still had competence in respect of the ship on the date of the communication.

14. In this regard, we consider it appropriate to emphasize that there is also a duty on flag States and ship-owners to act promptly. In our view, the prompt release procedure under article 292 of the Convention is designed as an expeditious procedure whose sole objective is to ensure that an arrested vessel is not tied up in port for a long period while awaiting the finalisation of the national administrative or criminal procedures. This objective can only be achieved if the ship-owner and the flag State take speedy action either to exhaust the possibilities provided under the national judicial system of the detaining State or to initiate the prompt release procedure under article 292 of the Convention sufficiently in time before the criminal or administrative procedures against the vessel in the domestic forum are completed. The procedure under article 292 of the Convention cannot be used either as an appellate procedure against decisions of the competent domestic fora or as a remedy against a procedural default in domestic judicial procedures on the merits of

the case against the ship, its owner or crew. Where a ship-owner of flag State waits until the completion of the domestic procedures, the Tribunal will have neither the competence nor possibility to apply the prompt release procedure of article 292 of the Convention. In the present case, the Tribunal has concluded that this is not the case, and that the proceedings in the domestic forum have not been completed to displace its jurisdiction. We fully agree with that conclusion.

(Signed)

Thomas A. Mensah

(Signed)

Rüdiger Wolfrum