

## SEPARATE OPINION OF JUDGE NDIAYE

1. I would like to add a few brief remarks about the exercise of the Tribunal's jurisdiction in these proceedings concerning the prompt release of the arrested vessel and its crew brought by Saint Vincent and the Grenadines (the Applicant) against the Government of Guinea-Bissau (the Respondent), after setting out the facts.

2. In accordance with its owner/operator's instructions, the *Juno Trader* lay off Nouadhibou, Mauritania, on 18 September 2004 at 10 p.m. for the purpose of transferring a cargo of fish caught within the Exclusive Economic Zone of Mauritania by the fishing vessel *Juno Warrior*, which was duly licensed to fish by the Government of Mauritania.

3. Transfer of the cargo, 1,183.83 tonnes of several species of fresh frozen fish, from the *Juno Warrior* to the *Juno Trader* (a "reefer") began on 19 September 2004 at 10.40 p.m. The fish were packed in 39,461 boxes, each weighing 30 kilos. This operation was completed on 22 September 2004 at 6 p.m, and was followed by a second transfer; this time of 2,800 bags of fishmeal, each weighing 40 kilos. This operation began on 22 September 2004 at 7 p.m. and was completed the next day, 23 September 2004, at 3.30 a.m.

4. Loaded with frozen fish and fishmeal and after taking on fuel from the supply ship *Amursk* (operation completed on 24 September 2004 around 8 p.m.), the *Juno Trader* left the territorial waters of Mauritania for Ghana to off-load its cargo for Unique Concerns Limited, which in the meantime had become the owner of the cargo on the basis of several bills of lading dated 23 September 2004. It was when the *Juno Trader* passed through the Exclusive Economic Zone of Guinea-Bissau that the events leading up to this case occurred. Boarded on 26 September 2004 around 5 p.m. by members of the Guinea-Bissau navy, the *Juno Trader* was escorted into the port of Bissau the following day, 27 September 2004, around 4 p.m. and placed under the control of the Government of Guinea-Bissau. The official documents regarding the reasons for detaining the vessel and its crew were served later.

5. On 18 October 2004, the Interministerial Maritime Control Commission made the following observations:

1. On 26 September 2004, inspectors from the Fisheries Inspection Service on board the vessel *Cacine* came across the vessel *Juno Trader* anchored in the fishing zone of Guinea-Bissau at the position of 11° 42' and 017° 09', alongside the vessel *Flipper 1*.
2. As the vessel *Juno Trader* noticed the approach of the inspection vessel, it weighed anchor and fled and was arrested at the position of 11° 29' and 017° 13', after 2 hours and 30 minutes of hot pursuit.

[...]

5. According to the report on the inspection of the catch found on board, prepared by the CIPA technicians at the request of FISCAP, the species identified (*sardinela, sareia, carapau, bonito, cavala and dentão*) are similar to those existing in our waters. (Minute No. 12/CIFM/04 of 18 October 2004)

6. On 19 October 2004, the Interministerial Maritime Control Commission decided the following:

1. To impose a fine of 175,398 (one hundred and seventy five thousand, three hundred and ninety eight) euros on the said vessel which was seized on the 26 September 2004 within the maritime waters of Guinea-Bissau for infractions to our fishing legislation;
2. To impose a fine of 8,770 (eight thousand, seven hundred and seventy) euros on the captain of the *Juno Trader* in accordance with Article 58 of the General Law on Fisheries for lack of cooperation with the inspectors as evidenced by the attempt of the vessel to flee;
3. To declare as reverted to the State of Guinea-Bissau all the catch found on board the arrested vessel, considering it to have been caught and transhipped in the maritime waters of Guinea-Bissau, without proper authorization;
4. To order that the total amount of the fine (184,168 euros) be deposited in the account no. 305.1000.5001.S00 of the Public Treasury of Guinea-Bissau at the main office of the BCEAO in Bissau, within fifteen (15) days counted from the notification of the present deliberation. (Minute No. 14/CIFM/04 of 19 October 2004)

7. On 3 November 2004, the fine of 8,770 euros levied on the captain was paid by the shipowner.

8. On 5 November 2004, the *Juno Trader*, its gear and cargo automatically reverted to the State of Guinea-Bissau because of non-payment of the fine.

9. On 18 November 2004, 50,000 euros were deposited on behalf of the shipowner with the competent authorities of Guinea-Bissau.

10. On 23 November 2004, the Regional Court of Bissau called for the following measures at the request of the Applicant, while awaiting a decision on the case:

(a) For the above-mentioned reasons, I find the present procedure well-founded and consequently I order the immediate suspension of the execution of Minute No. 14/CIFM/04 of the Inter-Ministerial Commission on Maritime Inspections (defendant) of the Government of Guinea-Bissau, pending a definitive settlement of the present case, with all legal consequences, including:

1. The immediate cancellation or annulment of any procedure aimed at selling the fish and fishmeal which are found on board the vessel of the plaintiff, *Juno Trader*;

2. The immediate lifting of the prohibition imposed on the members of the crew of the said vessel from leaving the Port of Bissau, and the immediate return of their passports;

3. The immediate suspension of the payment of the fine imposed on the captain of the said vessel and the non-invocation of the bank guarantee posted to that effect, pending the definitive settlement of the said case.

11. The International Tribunal for the Law of the Sea confirmed that it is competent to hear the application and that the application is admissible. Article 292 of the Convention lays out the conditions required for the Tribunal to be competent to hear an application for prompt release. It stipulates the following:

## Article 292

## Prompt release of vessels and crews

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. The application for release may be made only by or on behalf of the flag State of the vessel.

3. The court or 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 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.

4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

12. The two States in this case are parties to the United Nations Convention on the Law of the Sea, which was ratified by Saint Vincent and the Grenadines on 1 October 1993 and by Guinea-Bissau on 25 August 1986. The Convention entered into force for the two countries on 16 November 1994. It is to be noted that no agreement had been reached between the parties concerning recourse to another tribunal within ten days from the date of the arrest of the *Juno Trader*.

13. The problem facing the Tribunal concerns the status of Saint Vincent and the Grenadines as the country of registry of the *Juno Trader*. The Respondent has asserted that the *Juno Trader* reverted to the Government of Guinea-Bissau since 5 November 2004 the *Juno Trader* has been the property of the State of Guinea-Bissau, that title having been transferred to the state by operation of a municipal law of Guinea-Bissau at a time while the vessel was physically situated within the

territory of that state (ITLOS/04/03, p. 45, lines 11 to 14). The Respondent maintains that a confiscated ship ceases to fly any flag at all. The Applicant did not discharge its obligation to prove that it was the country of registry of the *Juno Trader* at the time of submission of its request in this case (ITLOS/PV.04/03, p. 47, lines 16 to 20).

14. It must be recalled that the first paragraph of article 73 of the United Nations Convention of the Law of the Sea refers to "Enforcement of laws and regulations of the coastal State" and provides that:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

15. National legislatures have the prerogative of establishing fishing rights in the form of laws and regulations. Very detailed legislation can be found on fishing violations and systems of applicable sanctions. A national judge applies regulations on the basis of evidence submitted while hearing a specific case.

16. Thus, whenever a vessel is boarded, the administrative authority in charge of maritime affairs orders the seizure or conservatory arrest of a vessel, which will in all probability be confirmed by an order of the tribunal hearing that question and which must also determine the amount of the security to post for the vessel's release (*The M/V "SAIGA" Case*, Judgment of 4 December 1997; *The "Camouco" Case*, Judgment of 7 February 2000; and *The "Monte Confurco" Case*, Judgment of 18 December 2000; all heard before the International Tribunal for the Law of the Sea).

17. In the case of Guinea-Bissau, the situation is slightly different. Article 46, paragraph 3, of Decree-Law No. 6 A/2000 of 22 August 2000 indicates that:

In all cases, the Ministry responsible for Fisheries must submit the report of the boarding within 24 hours to the Attorney General or to the representative of the Public Prosecutor attached to the court with territorial jurisdiction or decide, if appropriate, to impose the fine provided for in article 53 of this Decree-Law.

18. It seems, therefore, that recourse to the Attorney General is in no way an obligation because an alternative is provided for: the fisheries administration can itself levy the fine provided for in article 53. That is what the Interministerial Maritime Control Commission did (see Minute 14/CTFM/04 of 19 October 2004). And that is why no legal proceedings were initiated and no action was brought by the administration against the owners of the *Juno Trader* and its crew. Likewise, the Respondent did not set a bond for the release of the *Juno Trader* and did not express an opinion whether the security posted by the shipowner's representative was reasonable or not.

19. Curiously, the judgment says absolutely nothing about the basic legislative provisions which throw light on the implementation of the laws and regulations of the respondent State.

20. It should be recalled that article 60 of that Decree-Law provides that:

1. Fines for infractions of the present [Decree-Law] shall be paid within 15 days from the date upon which no further appeal can be made against the sentence or from the date of its application by the Interministerial Fisheries Commission, as the case may be.
2. The period referred to in the preceding paragraph may be extended for the same period at the request of the shipowner or his representative.
3. In the event of non-payment of all or part of the fine within the period of extension referred to in the preceding paragraph, any assets which may have been apprehended shall revert to the State.

21. The Respondent claims that title was transferred by implementation of the applicable provisions of domestic law referred to above because the shipowner's request that the timelimit for payment of the fine be extended by 15 days was not accepted and the fine was not paid.

22. On 23 November 2004, the Regional Court of Bissau ordered interim measures, "pending a definitive settlement of the present case", which are basically tantamount to suspending execution of the decision of the Interministerial Maritime

Control Commission. The problem is that this conservatory injunction which hardly carries the authority of a judicial decision and which was made while awaiting a final decision in the case, **is voided by application of the legislative provisions in force**. These legislative provisions apply *ope legis* as a direct result of the law without taking into account any administrative or judicial decision. In addition, those provisions became effective on 5 November 2004, before deposit of the document instituting the proceedings, which occurred on 18 November 2004.

23. Moreover, the Applicant is well aware of this when it declares:

In a document signed by Mr Malal Sane, coordinator of FISCAP, but undated, the author recognizes that the representative of the shipowner requested an extension of the timelimit of 15 days for payment of the fine, adding that this extension was not granted. The administration of Guinea-Bissau is free, under the provisions of that statute, if I understand correctly, to grant or not this extension. The most basic concepts of fairness and integrity require that the administration take the trouble of replying to the shipowner, who was waiting for this reply to his request for extension; if only because it involves a sanction that threatens the shipowner with nothing less than seizure of the vessel. No step was taken by the Guinea-Bissau fisheries administration to inform any one. Confiscation and change of ownership were supposed to have occurred on 5 November (ITLOS/PV.04/04, p. 22, lines 23-34 [retranslation on the basis of the interpretation]).

24. In the circumstances, the final decision in this case was actually that of the Interministerial Commission that led to confiscation by law. The question that then arises is whether the appeal against the act of the Interministerial Commission, sought by the Applicant, can suspend the act's effects. What is certain is that whatever the recourse open to the owners of the *Juno Trader* in appealing the decision of the Interministerial Commission in Guinea-Bissau, the Applicant cannot easily advance its claim on the basis of article 292.

25. Domestic legal proceedings handed down a verdict of legal seizure of the vessel, on the grounds that the shipowner did not discharge the penalties imposed on it within 15 days as required by the Guinea-Bissau fisheries law. That means that recourse to the procedure of prompt release becomes meaningless, because confiscation definitively transfers the *Juno Trader* to the Government of Guinea-

Bissau. The specific nature of the procedure in no way allows the Tribunal to judge the actions of a coastal State in the exercise of its sovereign rights. Paragraph 3 of article 292 leaves no doubt about this. The procedure of prompt release is aimed – very modestly – at ensuring the prompt release of a vessel as soon as a bond is posted while awaiting conclusion of domestic procedures, whether judicial or administrative.

26. Hence, it is not for the Tribunal to judge the validity of the acts of the public authority of the coastal State, not really having solid criteria for this and being limited by this specific procedure. The Tribunal must accept the public acts of the coastal State without going into their merits.

27. After studying the question of its competence to hear the Application, the Tribunal arrived at the following conclusion (Judgment, paras. 63 and 64):

In any case, whatever may be the effect of a definitive change in the ownership of a vessel upon its nationality, the Tribunal considers that there is no legal basis in the particular circumstances of this case for holding that there has been a definitive change in the nationality of the *Juno Trader*.

Accordingly, the Tribunal finds that there is no legal basis for the Respondent's claim that Saint Vincent and the Grenadines was not the flag State of the vessel on 18 November 2004, the date on which the Application for prompt release was submitted.

28. If the Tribunal has found itself competent in this case it is simply on the basis of formal, even formalistic, criteria, making the subtle and slightly artificial distinction between title of ownership and flag. Transfer of ownership does not automatically lead to transfer of flag. There are formalities to be completed that clearly were not carried out at the time of submission of the document instituting proceedings.

29. Thus, the Respondent did not show the Tribunal any measure that it has taken that would prove that it had decommissioned the *Juno Trader*, that it exercises its jurisdiction – in accordance with its domestic law – over the vessel, the captain, the officers and the crew for administrative, technical and social reasons. The Respondent has also failed to provide evidence of any measures taken to register

the vessel in the ship registry of Guinea-Bissau or even of an offer of sale. The only formality carried out by the Respondent has been to notify the Applicant about the confiscation with the decision dated 3 December 2004.

30. Clearly, with this type of solution there is great risk of ending up with a phantom flag.

*(Signed)*  
Tafsir Malick Ndiaye