SEPARATE OPINION OF JUDGE LUCKY

1. I support the decision of the Tribunal. However, I would like to make some additional comments regarding these proceedings.

2. The facts are set forth in the introduction to the judgment and I shall not repeat them. It is necessary, however, to refer to the principal arguments of the parties as an introduction to my comments.

3. The Applicant alleges that on 26 September 2004, the *Juno Trader*, a reefer vessel, was passing through the exclusive economic zone of the detaining State, Guinea-Bissau (the Respondent), with a cargo of frozen fish and fish meal, when it was boarded and escorted to the port of Bissau where it is presently detained with its crew, whose passports have been seized. Since 27 September, the ship, cargo and crew have been detained in Bissau. On 18 November, proceedings for the prompt release of the ship, crew and cargo were filed in accordance with article 292 of the United Nations Convention on the Law of the Sea ("the Convention"). The Applicant contends that the vessel was arrested without justification.

4. The Respondent did not file a statement in response but at the oral hearings raised several issues, arguing:

(a) that the allegations in the Application were inaccurate and irrelevant in proceedings for prompt release because they relate to the merits of the case and go beyond the ambit of article 292 of the Convention. Based on what is set out in the Application, the Tribunal could not consider the merits of the case against the vessel since that was a matter for the domestic forum (article 292, paragraph 3, of the Convention);

(b) that the Tribunal could determine only whether the Respondent was in breach of the Convention for the prompt release of a vessel (article 73, paragraph 2, of the Convention);

(c) that the Tribunal could not determine whether the arrest of the vessel was legitimate;

(d) that the Tribunal could not interfere with or impede the ability of the detaining State to deal with the case in accordance with its national law; and

(e) that the Tribunal is limited in its ability to determine matters of fact.

5. The Respondent also argues that the Tribunal does not have the jurisdiction to deal with the matter; that the case is therefore inadmissible and the Application is *prima facie* unfounded.

6. The platform from which counsel for the Respondent launched its arguments was on the premise that the Application was moot or flawed because the vessel had been confiscated for non-payment of a fine and, since 5 November, the *Juno Trader* and its cargo had been the property of the State of Guinea-Bissau. How then, he asked, could the Tribunal order the release of a ship and cargo which were the property of the Respondent? It follows, he submitted, that the Tribunal has no jurisdiction to deal with the matter, on grounds of inadmissibility, and that in the light of the foregoing the Application was not well founded.

Jurisdiction

7. As I mentioned in paragraphs 4, 5 and 6 above, the central point from which counsel's arguments developed was the question of jurisdiction, the basis being that the subject matter of the Application – the vessel and cargo – had been confiscated by the State and, in accordance with the fisheries legislation of Guinea-Bissau, was now the property of that State.

8. It is my opinion that such actions by the relevant authority of a State are administrative actions and are therefore subject to judicial review. After hearing an application by the shipowner and reviewing the documentary evidence, a judge in a domestic court made the following order:

> (a) for the reasons given above, the proceedings being held as admissible and approved, consequently, the immediate suspension of enforcement of decision No. 14/CIFM/04 by the Interministerial Maritime Inspection Commission (the defendant) of the

Government of Guinea-Bissau is ordered, pending a final decision in the present case, with all the following consequences, namely:

1. the immediate cancellation or annulment of any arrangements for the sale of the fish and fish meal on board the ship, Juno Trader;
2. the immediate lifting of the prohibition of the crew of the said ship from leaving the port of Bissau, and immediate return of their passports;
3. the immediate suspension of the payment of the fines imposed on the Master of the said ship and non-invocation of the bank guarantee already provided for that purpose pending a final decision in the case.

Costs to be borne by the appellant subject to repayment."

9. This was drawn to the Tribunal's attention only after the Application had been filed and after the time limit for the submission of a statement in response had been fixed.

10. The Order is self-explanatory and in my view negates the submission of counsel that the decision of the Interministerial Maritime Inspection Commission is still valid. As I understand it, in the domestic court the Applicant sought judicial review of an administrative action, which it was entitled to do, thereby causing the ship, crew and cargo to revert to their original status, *pending a final decision in the case*. The ship, cargo and crew therefore can be and are subject to an Application for prompt release under article 292 of the Convention. I agree with the reasons set forth in the judgement of the Tribunal and have nothing further to add on that issue.

Procedure in prompt release cases

11. Articles 110 to 114 of the Rules of the Tribunal ("the Rules") set forth the procedure in prompt release cases.

12. As I understand it, the true purpose of the relevant articles in the Convention and in the Rules of the Tribunal is to ensure that the proceedings before the Tribunal take place and are completed in the relatively short and specified time prescribed in articles 292 and 73 of the Convention.

13. Those provisions of the Rules were adhered to by the Applicant. However, in my view it must be noted also that the Application contained several irrelevant matters regarding the issues and the Applicant appears to make statements of fact and allegations which ought to be addressed at a hearing on the merits of the case.

14. Also, the Applicant submitted its Application almost two months after the ship was detained, albeit because, it is alleged, the Respondent did not comply with the provisions of article 74, paragraph 4, of the Convention in that it did not promptly notify the flag State of the arrest and detention of the vessel and the penalties imposed.

15. The Respondent State did not submit a statement in response under article 111, paragraph 4, of the Rules, which reads:

> A certified copy of the application shall forthwith be transmitted by the Registrar to the detaining State which *may* submit a statement in response with supporting documents annexed, to be filed as soon as possible but not later than 96 hours before the hearing referred to in article 112, paragraph 3 (emphasis added).

16. In previous correspondence, counsel for the Respondent had sought more time to prepare the statement in response, and this was granted in the Tribunal's Order of 1 December 2004, which set forth a schedule for the submission of a statement in response by the Respondent and the dates for the hearing.

17. On 2 December 2004, the agent/counsel of the Respondent wrote to the Registrar stating that he was not in a position to file a statement in response within the stipulated time limit.

18. Counsel for the Respondent then informed the Tribunal that the Respondent was not obliged to submit a statement in response because the article does not make it mandatory to do so. Obviously, counsel for the detaining State gave a literal interpretation to the word "may" in article 111, paragraph 4. Whereas I agree with counsel that the Respondent is not required by the Rules to submit a statement in response, non-submission in the instant case could appear to be a strategy to gain advantage.

19. With due respect to counsel and in the awareness of the difficulties he may have experienced in obtaining instructions and documentary evidence from his client, prime consideration should have been given to the fact that this is an *urgent matter* of prompt release of a vessel, its crew and cargo. This is no doubt the reason for the requirement that a suitable and reasonable bond must be posted if vessels are to be released. If the bond that is posted is not accepted by the detaining State, then the flag State may institute proceedings under article 292 of the Convention for the prompt release of the vessel. Time is of the essence in these matters, as in this case, where the vessel, crew and cargo have been detained since 26 September 2004 until the time of writing, in December 2004.

20. Considering the manner in which the Respondent managed its presentation of its case, I feel compelled to make the following comments.

21. The fact that counsel exercised the right not to submit a statement in response placed the Tribunal in the invidious position of having to conform to the provisions of article 68 of the Rules, which requires the judges to exchange views concerning the written pleadings, in the absence of a statement in response from Guinea-Bissau. Article 68 reads as follows:

> After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal shall meet in private to enable judges to exchange views concerning the written pleadings and the conduct of the case.

22. Article 112, paragraph 3, of the Rules provides as follows: "… each of the parties shall be accorded, unless otherwise decided, one day to present its evidence and arguments". Since in the present proceedings one party was not bound by written pleadings, it could still produce oral and documentary evidence at the hearing because the word "evidence" in article 112, paragraph 3, of the Rules is in my opinion all-encompassing.

23. The Tribunal has not been asked to express an opinion on whether respondents should be obliged to submit statements in response, but I think that to

ensure the smooth and effective conduct of such matters parties should be so obliged. While it may be argued that there are many difficulties in preparing a statement in response, these are urgent matters and, if given an extension of time, as in the instant case, the detaining State should submit a statement in response even if that statement is confined to matters relating to whether or not the ship should be released on the posting of a bond or other financial security.

24. It is well known that justice must not only be done but must appear manifestly to be done, and that fairness is paramount in every case. In other words, one party must not be placed at a disadvantage in a matter before the court. Because there was no written response from the Respondent State, the Applicant's counsel complained that it was difficult to plead the cause while unaware of what Guinea-Bissau had to say in reply. Also, during his oral submission learned counsel for the Applicant said, "I cannot understand what is claimed of the Juno Trader, is it illegal fishing, transshipping or something else?" Even at that stage of the proceedings counsel for the Applicant was in a quandary.

25. In any proceedings, it is not equitable to fail to disclose one's defence to the other party. It seems to me that the Respondent appeared to respond to the Application on an *ad hoc* basis, providing answers and documentary evidence during the oral proceedings. In prompt release proceedings it would be helpful if agents could make a concerted effort to file documents within the prescribed time, as this would be of assistance both to the parties and to the Tribunal.

26. In the light of the foregoing, it is now necessary and urgent for the Tribunal to amend articles 111, paragraph 4, and 112, paragraph 3, with respect to pleadings and the requirements for filing them so as to specify that in prompt release proceedings a statement in response must be submitted by the Respondent before the prescribed deadline of 96 hours before the hearing.

Evaluation of evidence in prompt-release cases

27. I am aware that the evaluation of evidence is the subject of considerable debate. There are two views: first, that article 292, paragraph 2, of the Convention

must be construed strictly and that the words “without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew” could mean only that the Tribunal may not consider the merits cases, or evaluate evidence; it may decide only whether the bond or financial security is reasonable. In my view, that interpretation is too narrow.

28. The second view is that the Tribunal may evaluate evidence if the circumstances so warrant. I propose that the issue of evaluating evidence in prompt-release cases should be considered in general terms, and, more specifically, in the light of the present Application, in which both written and oral allegations have been made and both documentary and oral evidence have been adduced.

29. The following questions arise: how should the Tribunal determine whether there has been a breach of the provisions of article 73 of the Convention? Is the Tribunal limited in its ability to determine matters of fact? And, in instances where it is alleged that an offence has been committed and a vessel has been detained by a State for allegedly violating its laws, may the Tribunal consider whether an offence has indeed been committed, and whether the offence is so grave that a reasonable bond should be posted?

30. Whereas article 292, paragraph 2, of the Convention may seem to limit the Tribunal’s jurisdiction, I do not think that the article should be construed narrowly, because there may be instances where an evaluation of the evidence may be necessary for the Tribunal to arrive at an equitable decision.

31. Before the gravity of an offence can be determined, the Tribunal must decide whether an offence has in fact been committed; then, the question of the gravity of that offence arises. It is accepted that the Tribunal should not question the action of the detaining State in detaining a vessel and its crew because the actions of a State may not be questioned, the more so when the action is found to be justified by a domestic court.

32. The Interministerial Commission imposed a fine on the Master and on the vessel. Under the fisheries legislation of Guinea-Bissau, the ship was subsequently

confiscated for non-payment of the fine within the prescribed time. On an application by the shipowner, the administrative decision of the Interministerial Maritime Inspection Commission was stayed by a domestic court pending a final resolution of the case by that court.

33. The decisions of domestic courts must be respected, as is apparent in the instant case. Also, the decision of the domestic court is of assistance in determining whether an offence has been committed and whether it was grave enough to allow the State authorities to take the action which they did.

Criteria for determining the reasonableness of a bond

34. Unlike in the *Monte Confurco case*, where a bond had been fixed, in the instant matter a bond was not fixed. The shipowner posted a bond of €50,000 which, by the action of the State, was not accepted, because the ship, crew and cargo are still detained pending a final decision by the domestic court on the administrative decision by the Interministerial Commission.

35. What, then, would be a reasonable bond? In order to arrive at a decision in that regard there are several factors to be considered, bearing in mind what is prescribed in law: articles 292 and 73, paragraph 2, of the Convention and the jurisprudence of the Tribunal in the relevant case law.

36. Article 292, paragraph 3, provides as follows:

> 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.

37. The wording of the article is that the Tribunal "*shall deal only with the question of release*"; i.e., it has mandatory force. The article then goes on to prescribe that the Tribunal, in carrying out its function, must do so *without prejudice to the merits of any case before the appropriate domestic forum*. Applying the well known rules of

interpretation and construction of statutes, the literal rule and plain-language meaning, that provision does not prevent the Tribunal from considering evidence if it deems it necessary to do so bearing in mind the particular circumstances of the case. In my opinion, if the Tribunal chooses to make a finding on the facts when considering the question of release, that finding will not bind the domestic court. There may be instances where the Tribunal may have to consider evidence in order to determine the value of a bond, and, if so, in my respectful view it may do so, bearing in mind the injunctive effect of article 292 of the Convention.

38. In paragraph 67 of the judgment in the *"Camouco" Case* (Panama *v*. France) (reported in *ITLOS Reports 2000*, vol. 4, p. 10), the Tribunal set forth criteria for determining the reasonableness of a bond or security as follows:

> The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the *gravity of the alleged offences*, the penalties imposed or imposable 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. (Emphasis added.)

39. In paragraph 76 of the *Monte Confurco* Judgment (p. 109 of the aforementioned *Report*), the Tribunal reiterated that paragraph of the Judgment in the *"Camouco" Case* and added:

> … This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them. …

40. It appears to me that in order to consider the gravity of the alleged offence the Tribunal would have to weigh that gravity in the same manner as a national judge determining urgent applications, for example in injunctive proceedings, and find whether a *prima facie* case has been made. In carrying out that exercise, the Tribunal will not be making any finding on the merits *per se* but will be determining whether or not the detaining State violated the provisions of article 73 of the Convention or whether the vessel of the Applicant State violated the fisheries legislation of the detaining State.

41. I am cognizant of the caution set forth in article 292 of the Convention and of the views expressed that the Tribunal may not consider the merits in a case for prompt release, but in the light of a growing and necessary jurisprudence and given that the law is dynamic, there is a school of thought, to which I belong, that courts, by giving a broad interpretation to a statute – or, in this case, an article – can "make" law. Law is dynamic, not static, and, as such, the law or statute should be given a broad interpretation to suit changing circumstances. The law must advance as technology advances. I do not think a court or tribunal should be constrained by "tabulated legalism" and strict and narrow interpretation. Therefore, in my view, article 292 should be given a broad interpretation, the more so in the light of the jurisprudence in previous decisions of the Tribunal.

42. I mention this because, in the instant case, the Applicant led oral evidence of a witness who was cross-examined. It is well known that the purpose of cross-examination is to test the witness's veracity so that a judge or judges can determine whether the witness is a witness of truth or not. Therefore, in my opinion, the Tribunal must consider the testimony of the witness Mr Nikolay Potarykin, and determine whether he is telling the truth. I do not think his testimony can be overlooked or simply noted. No evidence was adduced by the Respondent to contradict the witness, and in such circumstances, the Tribunal must give credence to his testimony.

43. In the instant case, there are allegations and denials. In the light of those allegations and denials, of the submissions, of the oral testimony of the Master of the vessel and of the documentary evidence in support provided by each party, an evaluation of evidence is crucial. For example, was the *Juno Trader* involved in the transshipment of fish from the *Juno Warrior*? Or was it simply passing through the exclusive economic zone of Guinea-Bissau on its way to Ghana? Was the *Juno Trader* at anchor or not? Those questions will be considered at the hearing on the merits in the domestic court.

44. In my opinion, in arriving at a reasonable bond the following factors are relevant:

(a) a bond must not be punitive or convey the idea that the amount of the bond was determined on the basis of any finding of culpability;

(b) the purpose of the bond is to ensure that the Applicant returns to the court in Guinea-Bissau to defend the charge and that the Respondent, if successful, does not lose financially;

(c) the gravity of the offence;

(d) where necessary, an evaluation of evidence.

45. It is my hope that the above comments will provide clarification to certain issues which arose in the instant matter.

(Signed)

Anthony Lucky