

SEPARATE OPINION OF JUDGE JESUS

1. Although I voted in favour of the Judgment of the Tribunal, I feel compelled, nonetheless, to file this separate opinion to highlight my understanding of the issue of confiscation of fishing vessels by the detaining State for violation of fishing laws and regulations, since I do not share some of the tenets of the doctrinal construction built into the decision of the Tribunal on this case. The intention is not to deal with the legitimacy of the confiscation of vessels for fisheries-related violations *per se*, but only to underline certain aspects of it that may have a bearing on the outcome of prompt release cases.

2. Faced with an increase in illegal, unreported and unregulated fishing in their waters, coastal States have been resorting to harsh measures, in order to better protect their resources from being plundered and to avoid over-exploitation. In many cases, it is believed that fines imposed have not acted as a significant deterrent, as might have been expected, for effectively controlling and preventing illegal fishing.

3. As a result, one of the measures taken, not so infrequently, by a vast number of coastal States is confiscation of the fishing vessel because of illegal fishing. Confiscation is generally treated by the fisheries laws and regulations of the detaining State as a penalty or as a result of failure to pay fines imposed within the due time.

4. Article 73 of the Convention seems to give clear a direction as to the nature of the measures the coastal State may take to protect its sovereign rights over living resources in its exclusive economic zone (EEZ). Indeed, paragraph 1 of that article states that

in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, [the coastal State may] take such measures [...] as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention.

5. It would appear, from a careful reading of the provision of article 73 quoted above, that, whatever measure the coastal State takes to protect the living resources in its EEZ, it is a measure that the coastal State is entitled to take in exercising its sovereign rights over such resources, in order to secure the most effective protection of them from those who are plundering them, and prevent their depletion.

6. The penalty of confiscation of fishing vessels, in this regard, appears to be consistent with the provision of article 73, paragraph 1, of the Convention, for there is nothing in the Convention that would exclude the penalty of confiscation from those measures that, in accordance with this article, the coastal State is entitled to take against a vessel engaged in illegal fishing in its EEZ. This understanding seems to be supported by undisputed State practice.

7. Measures of the coastal States that would not be in conformity with the Convention are, for example, those referred to in paragraph 3 of article 73, that is to say, the imposition of the penalty of imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment, for fisheries violations committed in the EEZ. If such measures were to be taken by a detaining State, they would be considered, as referred to in paragraph 1 of article 73 of the Convention, as not being in conformity with the Convention. By the same token, if the intention of the Convention was to exclude confiscation of fishing vessels for violations of fisheries laws and regulations from the panoply of measures that the coastal State may take to protect its marine living resources, then the provision of paragraph 3 of article 73 would have said so, explicitly, as it did in relation to imprisonment and other forms of corporal punishment.

8. While not questioning the right of the coastal State to confiscate fishing vessels, this decision of the Tribunal includes a certain amount of elaboration which may imply that coastal States should not confiscate a fishing vessel immediately after its arrest or detention, so as to give time for the flag State to apply for its release upon the posting of a bond. This view seems to have found support in paragraph 76 of the decision of the Tribunal, *in fine*. In assessing the balance that should exist between the interests of the detaining State and of the flag State on the issue of prompt release, that paragraph declares that "[i]n particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention".

9. I do not share this view, for the following reasons:

(a) Firstly, confiscation of fishing vessels on account of illegal fishing is imposed as a penalty and, as such, confiscation is a matter to be considered part and parcel of the merits of a case, which is excluded from the jurisdiction of the Tribunal when seized of an application for the prompt release of fishing vessels, as set out in article 292, paragraph 3, of the Convention. Indeed, this article and paragraph, as mentioned before, make it clear that the prompt release procedure "is without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew".

(b) Secondly, the Tribunal has held, and rightly so, that laws and judicial decisions of States are to be considered by it as facts. Therefore national legislation and decisions should not be the object of a value judgment or qualification in a prompt release case.

(c) Thirdly, the prompt release procedure does not seem to prevent the detaining State from confiscating a vessel at any stage of its detention. The timing of the adoption of the measure of confiscation of a fishing vessel is an issue germane only to the consideration of the merits of the case. Whether the coastal State confiscates the vessel immediately after its detention or at a later stage, confiscation of detained fishing vessels is a matter that falls totally within the competence of the appropriate forum of the coastal State and should not, therefore, be a consideration of the Tribunal when it is dealing with a case concerning the prompt release of a fishing vessel. If the process leading to confiscation is tainted by irregularities or illegalities, the proper forum for seeking redress for such irregularities and illegalities is to be found in the local remedies available and not in the Tribunal, since it should consider only the application for release. It is to be noted in this regard that the imposition of penalties involving the confiscation of the vessel, lies at the very core of any merits case, since the very purpose of such a case is to decide whether or not penalties of one sort or another should be imposed. Therefore, the Tribunal, while seized of a prompt release case, is not called upon, for lack of competence, to make inroads into what is or is not confiscation properly exercised, whether or not it be exercised in a justifiably or unjustifiably hasty manner. Since confiscation, as stated before, is an issue that is relevant to the merits of the case, issues pertaining to the inappropriateness of confiscation, the justification or non-justification of the hasty manner in which it is carried out by the detaining State, and the absence of procedures that guarantee the

due process of the law, among others, are issues whose relevance may be pursued in the appropriate domestic forum, but certainly not by the Tribunal in the context of a prompt release procedure.

(d) Fourthly, as conceived and translated into article 292 of the Convention, the prompt release procedure is rather a means of avoiding a fishing vessel that is detained on account of violations of fisheries laws and regulations being left unnecessarily immobilized, pending the decision of the domestic forum on the merits. Its prompt release, therefore, presupposes that the vessel is still detained. Indeed, article 292, paragraph 1, states that "the question of release *from detention* may be submitted to any court or tribunal" (emphasis added). If, as a result of the automatic operation of the law or a domestic judicial decision or a decision of any other competent authority of the arresting State, the vessel has been the object of an irrevocable decision of confiscation by the arresting State, then the vessel is no longer detained within the meaning of article 292 of the Convention. Therefore the issue of prompt release becomes moot. This is, after all, the conclusion of paragraph 76 of the Judgment of the Tribunal in the present case, when it states that "A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object".

(e) Lastly, if the flag State wants its vessel released promptly from detention, then in order to avoid early confiscation of the fishing vessel, the flag State may, after satisfying the requirements of paragraph 1 of article 292 of the Convention, apply to the Tribunal for prompt release immediately after the 10 days from the time of the vessel's detention have elapsed.

(signed) J.L. Jesus