DISSENTING OPINION OF JUDGE ANDERSON

1. I agree fully with operative paragraph 1 on the question of jurisdiction and the reasoning in paragraphs 37 to 44 of the Judgment. To my regret, I have felt obliged to vote against operative paragraph 2 and the consequential paragraphs 3, 4 and 5 of the Judgment for the following reasons.

2. The Applicant has invoked article 73 of the Convention in support of an application for the prompt release of the *Saiga* under article 292. Accordingly, the task of the Tribunal, in accordance with the terms of that article and article 113, paragraph 1, of its Rules, is to "determine whether or not the allegation made by the Applicant that the detaining State has not complied" with, in this case, the provision contained in article 73, paragraph 2, "for the prompt release of the vessel or its crew upon the posting of a reasonable bond ... is well-founded." The issue, in short, is whether or not Saint Vincent's allegation is well-founded, a question of the interpretation and application of article 73, in the context of the Convention as a whole.

The scope of the present proceedings and the standard of appreciation

3. Paragraph 50 of the Judgment notes correctly that the proceedings are "not incidental to proceedings on the merits" and "are separate, independent proceedings". Paragraph 50 goes on, however, to allude to the hypothesis that "the merits of the situation that led to the arrest ... could later be submitted for a decision on the merits ... according to article 287." The scope of the present proceedings is confined to the question of release and the issue of whether or not the allegation is well-founded. Any further proceedings which may be instituted on the merits of issues arising from the facts would amount to a different case, or cases, in my opinion.

4. Paragraph 51 of the Judgment adopts the approach that, because the merits of the case may be submitted to an international court or tribunal, the "standard of appreciation" should be "whether the allegations made are arguable or are of *a sufficiently plausible character*". At this point, in my opinion, the majority fall into error. No authority is cited, but the underlined words were used by the International Court of Justice in the *Ambatielos* case (*I.C.J. Reports 1953*, at p. 18). The Court adopted that standard in the context of defining its own role *vis à vis* that of the Commission of Arbitration. In my opinion, the majority's approach in this case is mistaken

because, on the issues over which the Tribunal has jurisdiction, there exists no equivalent of the Commission of Arbitration. The Tribunal's limited jurisdiction is exclusive and the normal standard of appreciation should apply.

5. It is not a question here of assessing whether the allegations are "arguable" or "plausible," as postulated in paragraph 51 of the Judgment. Article 292, paragraph 4, refers, rather, to "the *decision* of the court or tribunal". ("Decision" is a strong word, of course.) In the same vein, article 113, paragraph 1, of the Rules contemplates a determination (another strong word). This is not a finding which is to be followed by an examination of the merits of the question by another court or tribunal, including this Tribunal, at a later stage. Proceedings under article 292 form a discrete case, not a first phase in a case which proceeds on to the merits. Such proceedings are not preliminary or incidental and they conclude, in accordance with the Rules of the Tribunal, not with an order but with a judgment. They are definitive proceedings in which the court or tribunal decides whether or not the applicant has made out the initial allegation, that is to say, whether it is well-founded or not.

The issue of article 73 of the Convention

6. In my opinion, the charges against the *Saiga* cannot properly be characterised as falling within the ambit of article 73. In the first place, the *Saiga* is a tanker and off-shore support vessel, not a fishing vessel. Secondly, before the Tribunal, the Respondent has explained the arrest in terms of smuggling, contraband and the importance to its national economy of safeguarding customs revenues from petroleum products. Most importantly, the charges set out in the Procès-Verbal issued by the customs authorities have been laid under the following legislation:

- Article 40 of *le Code de la marine marchande*, which establishes and provides for the Exclusive Economic Zone (EEZ) of Guinea in standard terms drawn from article 56 of the Convention, terms which do not appear on their face to create any criminal offences.
- Article 1 of Law L/94/007 which reads:
  "*Sont interdits en République de Guinée l'importation, le transport, le stockage, la distribution du carburant par toute personne physique ou morale non légalement autorisée.*"

Unofficial translation submitted to the Tribunal by the Applicant:

"The import, transport, storage and distribution of fuel by any natural person or corporate body not authorised are prohibited in the Republic of Guinea."

– Articles 316 and 317 of *le Code des douanes* which prohibit the smuggling of goods into the "*territoire douanier*", defined in article 1 as including:

"*l'ensemble du territoire national, les îles situées le long du littoral et les eaux territoriales guinéennes.*"

Unofficial translation of the first paragraph of article 1 submitted to the Tribunal by the Applicant:

"The customs territory includes the whole of the national territory, the islands located along the coastline and the Guinea territorial waters."

– Article 361 of *le Code pénal*, which reads as follows:

"*Seront punis d'un emprisonnement de 5 à 10 ans et de la confiscation de tous les biens des délinquants, receleurs et complices de toute importation frauduleuse de la monnaie ayant cours en République de Guinée et des produits agricoles et industriels.*"

Unofficial translation submitted to the Tribunal by the Applicant:

"Delinquents, receivers and accomplices will be punished by imprisonment of 5 to 10 years and confiscation of all the property for any fraudulent import of money being legal tender in the Republic of Guinea from agricultural and industrial products."

– Article 363 of *le Code Pénal*, which reads as follows:

"*Il n'y a ni crime, ni délit en cas d'homicide ou de blessures commises par les forces de l'ordre sur les personnes délinquantes qui en flagrant délit fraudent à la frontière et qui n'ont pas obtempéré aux sommations d'usage.*"

Unofficial translation submitted to the Tribunal by the Applicant:

"There is no crime, or offence in the event of murder or wounding committed by the forces of order on trespassers who as a flagrant offence smuggle at the border and who have not complied with the demands of customs."

To sum up, the key provisions of criminal law in this case are those contained in Law L/94/007 and the Customs Code, which refer to the territory of Guinea, its customs territory and its territorial sea (12 nautical miles). Article 40 appears simply to supply the 200 mile limit, whilst the two articles in the Penal Code supply the penalties upon conviction, as well as immunity for the "forces of order" – presumably including those who captured the

Saiga. On its face, article 40 does not appear to create any fisheries offences. Accordingly, the relevant provisions of the legislation can be characterised or classified only as customs or fiscal, not fisheries, legislation. The extended significance given in the Judgment to article 40 cannot be justified. It follows that the offences charged can be classified in these proceedings only as customs or fiscal offences. Any other view is implausible, in my opinion.

7. In the perspective of this legislation, the considerations that the three vessels (according to the Respondent's evidence, two Italian and one Greek) which were admittedly bunkered by the *Saiga* in the EEZ were (1) fishing vessels and (2) engaged in fishing in the EEZ (in at least one instance, according to the Respondent[1], under the Fisheries Cooperation Agreement between Guinea and the European Community) do not appear to have been material factors. Despite what is stated in paragraph 64 of the Judgment, the fact that Law L/94/007 contains article 4 concerning offences by fishing vessels is not a material consideration since no charge has been laid in the Procès-Verbal under that article against the *Saiga*. The actual charges laid in the Procès-Verbal could have been brought, it would appear, even if the *Saiga* had refuelled in the EEZ any merchant vessel afloat today. Moreover, Guinea did not submit to the Tribunal, or rely upon in argument before it, the fisheries legislation mentioned in paragraph 64 of the Judgment.

8. It will, of course, be for the national courts in Guinea to decide upon the merits of the charges. The foregoing analysis of the legislation has been made for the sole purpose of responding to the classification of the charges contained in paragraph 71 of the Judgment.

9. There is insufficient justification in this case for changing the Respondent's own description of the charges from smuggling to fisheries offences, for the purposes of this case. The charges in the Procès-Verbal are *facts* before this Tribunal. The choice referred to in paragraph 72 is one which has not been given to the Tribunal, either by the limited jurisdiction in article 292, paragraph 3, or by the Parties in front of the Tribunal. In order to avoid implying a particular violation by the Respondent of international law as laid down in the Convention (a finding which, of course, the Tribunal has no jurisdiction to make in these proceedings under article 292), the majority has chosen instead to find that the Applicant's allegation is well founded (paragraph 73). It follows that Guinea has failed to comply with the obligation contained in article 73, paragraph 2, in not releasing the vessel. In other words, the

[1]Provisional Verbatim Record of the Oral Proceedings, 27 November 1997, page 27 (English version) and page 37 (*version française*).

sense of the Judgment is that Guinea has violated a different part of the Convention, since a failure to comply amounts to a breach: *pacta sunt servanda.*

10. My overall conclusion is that the *Saiga* is not an "arrested vessel" within the meaning of article 73, paragraph 2. No other article is applicable. It follows that the Applicant's allegation is not "well founded" within the meaning of article 113 of the Rules, and that there is insufficient basis in law for "the decision ... concerning the release of the vessel" under article 292, paragraph 4. I have voted against operative paragraph 2 without hesitation. Moreover, this is not a case of "admissibility" as that paragraph suggests. Rather, it is a final decision on the merits of the allegation and not a finding of admissibility in incidental proceedings.

The scope of this dissenting opinion

11. Article 292 represents a self-contained, special procedure, separate from the other provisions for the settlement of disputes contained in Part XV of the Convention. The task of the Tribunal is to "deal only with the question of release without prejudice to the merits ..." (article 292, paragraph 3). Nonetheless, in the proceedings before the Tribunal, both parties have submitted extensive evidence and argument on the merits of several issues arising under article 111 and other provisions of the Convention, thereby going beyond the scope of article 292. My negative votes should not be taken as expressing any opinions whatsoever on the merits of those issues, which may still be the subject of further proceedings before a court or tribunal under Part XV of the Convention.

The issue in paragraph 53

12. I see nothing "strange" in the situation postulated by the Applicant and recorded in paragraph 53 of the Judgment. There is a perfectly valid explanation. It is set out in paragraphs 23 and 24 of the joint dissenting opinion by Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye.

The relevance of imprisonment to prompt release

13. The world is plagued by many types of smuggling, including narcotic drug smuggling. All types of vessels participate in this traffic, including fishing vessels entering the customs territory of a coastal

State from the EEZ. Upon arrest, suspected smugglers are often refused bail for obvious reasons. International standards for the protection of human rights[2] require that they be given a fair trial on criminal charges. Upon conviction by a competent court, smugglers are often sentenced to monetary penalties, confiscation orders *and imprisonment*. Against that background, the Convention obviously does not confine permissible penalties in respect of smuggling offences to fines and confiscation orders (as, generally, in the case of fisheries offences in article 73) or to monetary penalties (as in the case of pollution offences in article 230); imprisonment remains available in regard to smuggling offences. Prompt release orders reduce the penalties available to the appropriate domestic forum and may even prejudice the holding of the trial in the first place. Part XV of the Convention is available to the flag State Party in the event of any abusive use by a coastal State Party of its powers of arrest and prosecution, whether on smuggling or any other criminal charges. In that perspective, article 292 is not the appropriate remedy in such cases. In my opinion, the aspect of imprisonment should not be overlooked.

The other dissenting opinions

14. I should like to associate myself generally with the thrust of the separate opinions of President Mensah, of Vice-President Wolfrum and Judge Yamamoto, and of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye. In particular, I endorse paragraphs 20 to 25 of the opinion by Vice-President Wolfrum and Judge Yamamoto concerning the question of bunkering, which is an internationally lawful use of the sea related to navigation in my opinion.

(*Signed*) David H. Anderson

[2]See Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", 36 *Columbia Journal of Transnational Law* (1997) 339.