SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO

1. I have voted in favour of the Judgment. Nevertheless, certain procedural aspects of this case have prompted me to append this separate opinion to the Judgment.

Equality of opportunity

2. It is an elementary principle of judicial administration, whether national or international, that the parties to a dispute are given equal opportunities to present their respective cases in a court of law. It follows from this principle that the procedural rules of a court may not be designed to serve, or be allowed to serve, as an instrument to confer undue advantage in favour of one party *vis-à-vis* another party, lest the impartiality of the judicial mind be called into question. Has there been an erosion of the principle of equality of opportunity in the present case? Saint Vincent and the Grenadines, the Applicant, has put on record that it is an aggrieved party in this regard and has invited the Tribunal to review the Rules of the Tribunal (hereinafter "the Rules").[1] How has this come about?

3. Proceedings under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") for *prompt* release of vessels and crews are special. While preparing the Rules of the Tribunal for carrying out its functions under article 292 of the Convention, the Tribunal had no precedents to rely upon in comparable situations, if any, in the jurisprudence of other courts.

4. Nevertheless, the Convention gives sufficient guidelines about the philosophy underlying article 292 of the Convention. Article 292 is designed to free ships and their crews from prolonged detention resulting from the imposition of unreasonable bonds in municipal jurisdictions which inflict deleterious effects on the owner of the vessel and also on international commercial transactions. The article therefore requires that, once a reasonable bond or other security has been assured to the detaining State, prompt release of the vessel and its crew should ensue. Consistent with this, the basic principle enshrined in the Rules is that applications for release must be dealt with "without delay".[2] The

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[1] See ITLOS/PV.04/04, p. 14.
[2] See article 112, paragraph 1, of the Rules.

Resolution on the Internal Judicial Practice of the Tribunal (hereinafter "the Resolution") also requires deliberations of the Tribunal concerning prompt-release applications to be conducted in accordance with the principles and procedures set forth therein, taking into account "the nature and urgency of the case".[3] The emphasis on the "without delay" and "urgency" requirements in that regard are the inevitable corollary of the concept of *prompt* release enshrined in article 292 of the Convention. How do the Rules go about giving effect to those requirements?

5. Article 292 does not require the flag State to file a prompt-release application within any time limit after the detention of a vessel or its crew.[4] However, once an application has been filed, the Rules bring into force a time limit for the submission of a statement in response, and also for the dates for hearings, for adoption of the judgment and notification of the date on which it will be read.[5] Articles 111 and 112 of the Rules – the applicable provisions in this respect – were amended on 15 March 2002. Before they were amended, the Rules called upon the Tribunal (or the President, if the Tribunal is not sitting) to fix the earliest possible time, but not exceeding ten days from the date of receipt of the application, for a hearing.[6] They provided that the detaining State "may submit a statement in response with supporting documents annexed, to be filed no later than 24 hours before the hearing".[7] They also provided that the judgment should be read "not later than 10 days after the closure of the hearing".[8]

6. Articles 111 and 112 were amended in the light of the experience gained in the cases submitted to the Tribunal. The hearing is now required to take place within a period of 15 days commencing with the first working day following the date on which the application is received; the statement in response, if any, must be submitted not later than 96 hours before the commencement of the hearing; and the Tribunal is given a maximum of 14 days after the closure of the hearing to deliver its judgment. The amended provisions thus give more time to the Respondent to prepare its statement in response and to the Applicant to examine the statement in response before commencing its arguments in the oral proceedings. These provisions have worked satisfactorily so far and have given no room for complaint. There has been no prompt-release case so far in which the Respondent failed to submit its statement in response.

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[3] See article 11, paragraph 2, of the Resolution.

[4] See *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, pp. 10, 28. See also P. Chandrasekhara Rao, "ITLOS: The First Six Years", *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 183, 230–231.

[5] See articles 111 and 112 of the Rules.

[6] Article 112, paragraph 3, of the Rules.

[7] Article 111, paragraph 4, of the Rules. Emphasis supplied.

[8] Article 112, paragraph 4, of the Rules.

7. In the instant case, the prompt-release application was filed on behalf of the Applicant on 18 November 2004. Pursuant to article 112, paragraph 3, of the Rules, by Order of 19 November 2004 the President of the Tribunal fixed 1 and 2 December 2004 as the dates for the hearing. Under article 111, paragraph 4, the Republic of Guinea-Bissau, the Respondent, was to give its statement in response, if any, not later than 96 hours before the hearing.

8. On 26 November 2004, the Registrar of the Tribunal was informed that the Government of Guinea-Bissau was not able to prepare sufficiently for the hearing before the Tribunal in the available time. The Respondent requested the postponement of the hearing by one week and a corresponding postponement of the time limit for filing the statement in response.

9. It may at once be noted that no valid justification was given for failure to comply with the President's Order. The argument that the time allowed under article 112 of the Rules was not sufficient to prepare for the hearing exposes the Rule itself to a charge of arbitrariness. In any event, the case in question involves prompt-release proceedings and undue delay in the disposal of such proceedings could undermine the object of the proceedings, resulting in heavy financial losses to the shipowner from the detention of the vessel and continued deprivation of freedom for the crew members. It may not be out of context to recall here that the Regional Court of Bissau (Civil Division) thought it appropriate to order the prompt stay of execution of Minute No. 14/CIFM/04 of the Interministerial Maritime Control Commission of the Government of Guinea-Bissau, without even putting the Government on notice, in view of the urgent nature of the case. In a letter dated 29 November 2004, the Applicant conveyed its opposition to the Tribunal's granting the Respondent's request for postponement.

10. With a view to avoiding any departure from the Rules, the Tribunal held a hearing on 1 December 2004[9] and decided to postpone the continuation of the hearing to 6 December 2004 and to extend to 2 December 2004 at 1000 hours the time limit for the Respondent to file a statement. Also, the time limit for filing any additional documents was also extended to 6 December 2004 at 1000 hours.

11. Although the Tribunal would have been well within its competence to turn down the Respondent's request, it made every effort to take it on board lest the Respondent's case go unrepresented. The applicable provisions on time

[9] This was the first sitting in the cases heard by the Tribunal so far at which neither party was present.

limits have been stretched by using the concept of postponement of the continuation of the hearing.[10] In short, whereas in the normal course of events the hearings would have been completed by 2 December 2004, they were instead completed on 7 December 2004. But for the extension, the Tribunal would have delivered the judgment a couple of days before 18 December 2004, the date on which the judgment is now scheduled to be delivered.

12. Notwithstanding the extension given, in a letter dated 1 December 2004 the Respondent stated that it would not be possible for its representative to attend the public sitting scheduled for that date, that its inability to attend was attributable to resource considerations and that no disrespect to the Tribunal was in any way intended. In a further letter, dated 2 December 2004, the Respondent stated that it was not in a position to file a statement in response even within the extended time limit and added that, under article 111, paragraph 4, of the Rules of the Tribunal, the filing of a statement in response was *not mandatory*. The Respondent added that it nevertheless considered a statement in response to be *desirable, including in order to give notice to the Applicant of the nature of the case to be presented by Guinea-Bissau*, and requested an extension of the time limit for filing its statements in response.

13. Although no further extension could be given for filing a statement in response, following consultations with the parties, there were indications that the Respondent might wish to submit a short statement sometime before the commencement of the hearing on 6 December 2004 and that the Applicant would not object to the submission of such a statement. However, the public sittings had to be held without any statement from the Respondent and the Applicant had to open its case without knowing the nature of the Respondent's case.

14. The Respondent disclosed its case for the first time in the statement that it made following the opening statement of the Applicant on 6 December 2004. The Respondent took the whole of the afternoon of 6 December and a part of the morning on 7 December 2004 to complete its statement. Following a 40-minute break, the Applicant began its reply, wherein it stated:

> One thing I have observed since yesterday which I had not expected. As the Tribunal will know, the Republic of Guinea-Bissau, the Respondent State, did not submit a counter-memorial to our Application for prompt release. That is their right according to the Statute and Rules of the Tribunal. However, I have noted the following, which is

[10] See article 69, paragraph 1, of the Rules.

> peculiar. The Republic of Guinea-Bissau has had an opportunity to study our arguments in depth from 18 November, the date of submission of our Application, until 6 December, which was yesterday. To study their arguments we had last night. The whole night spent on that had the infelicitous consequence upon yours truly of losing some of my natural freshness. The Tribunal might perhaps want to grasp this opportunity to review the rules of procedure so that greater or more straightforward equity may be established between the parties.

15. I have given a rather detailed account of what has happened in the case in respect of the submission of a statement in response, for it has significant implications for the future conduct of prompt-release cases. The main question is whether the detaining State is obliged to submit a statement in response. The Respondent considered that the filing of a statement was not mandatory,[11] since article 111, paragraph 4, of the Rules uses the expression "may".

16. Of course, there is no doubt that a party cannot be compelled to submit a statement, but the matter cannot be dismissed without saying more. As admitted by the Respondent itself, the need for submission of a statement in response is not an empty formality, and such a statement is required to give notice to the applicant of the nature of the case to be presented by the detaining State. It is for this reason that article 111, paragraph 4, states that, if a statement in response is to be filed, it ought to be filed not later than 96 hours before the hearing. The 96-hour period is considered essential for the applicant to understand the case of the detaining State and to express its considered and final position at the hearing.

17. The Rules do not envisage submission of a statement in response after the commencement of the hearing; nor do they state that, where the detaining State fails to submit a statement in response, it must be denied the opportunity to participate in the oral proceedings. However, it may be relevant to note here that, after the closure of the written proceedings, not even documents may be submitted to the Tribunal by either party except with the consent of the other party, and, in the event of objection, it is left to the Tribunal to decide whether or not to authorize production of the document.[12] Thus, whereas the detaining State is entitled to present its statement and supporting documents prior to the

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[11] See letter dated 2 December 2004 from the Respondent to the Registrar of the Tribunal and Applicant's statement in ITLOS/PV.04/04, p. 14.

[12] See article 71, paragraphs 1 and 2, of the Rules of the Tribunal.

commencement of the hearing, it loses this entitlement thereafter. There is, therefore, a legitimate expectation built into article 111, paragraph 4, of the Rules that the detaining State would not miss the opportunity to present its case with supporting documents as provided for in that article.

18. In any event, it is inherent in the Rules of the Tribunal and the general principles of procedural law that each party must enjoy equal rights for the submission of its case to the Tribunal.[13] Where a party fails to submit a statement in response and where the opposite party does not have sufficient time to respond to the statement made by the former during the oral proceedings, it may be difficult to maintain that the former has not obtained an unfair advantage over the other. The fact that both parties are given equal speaking time does not alter this position. The permissive provision in article 111, paragraph 4, of the Rules must not be used by a party to gain an unfair advantage over the other party.

19. Aggrieved by the disadvantaged position in which it was placed, the Applicant invited the Tribunal to review its Rules so that greater equity may be established between the parties. There is force in this request and the Tribunal should attend to it as soon as possible with a view to ensuring that neither side obtains any unfair advantage over the other. There are several ways whereby the principle of equal opportunities for the parties may be allowed full play, not all of which may entail amendment of the Rules.

20. Before leaving this topic, I wish to state that, having regard to the nature of prompt-release proceedings, the time given by the Rules to the detaining State to submit its statement in response cannot be said to be inadequate or too short. It is worth stating also that prompt-release proceedings are not proceedings on the merits of a case; they are concerned only with the question of the prompt release of a vessel and its crew upon the posting of a reasonable bond or other financial security.[14]

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[13] See also Shabtai Rosenne, *The Law and Practice of the International Court*, 1920–1996, Vol. III, p. 1092.

[14] See article 292, paragraph 3, of the Convention.

21. In the several cases decided by it, the Tribunal has indicated the factors relevant in assessing the reasonableness of bonds or other financial security.[15] Nevertheless, the parties are seen devoting more time to the merits of their cases rather than to the determination of reasonable bond. If the parties were to focus their attention on the question of bond and the evidence bearing on it, the time limits specified by the Rules would prove workable.

(Signed) P. Chandrasekhara Rao

[15] See, for example, *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 31, para. 67.