

DECLARATION OF JUDGE MENSAH

1. I agree with the Tribunal's decision that it has jurisdiction over the dispute giving rise to the Application and the finding that the Application submitted by Panama is admissible, as reflected in paragraphs 1 and 2, respectively, of the *dispositif*. I also support the statement in paragraph 61 of the Judgment that “[f]or the application for release to succeed, the allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel ... upon the posting of a reasonable bond should be well-founded”. I further agree with the finding of the Tribunal, in paragraph 72, that “the allegation made by the Applicant is well-founded for the purposes of these proceedings”.

2. Having decided formally to record its findings in respect of jurisdiction and admissibility in the operative parts of the Judgment, the Tribunal should, in my view, have followed the logic of that decision by also recording its conclusion that the allegation of Panama that France has failed to comply with the provisions of article 73, paragraph 2, of the Convention requiring release of the ship and its Master upon the posting of a reasonable bond is well-founded.

3. In this connection, I wish to reiterate my endorsement of the view of the Tribunal that an application under article 292 of the Convention for the release of a detained ship or crew will only succeed if it is satisfied that the allegation of non-compliance with a provision of the Convention for the prompt release of the ship or crew upon the posting of a reasonable bond or other financial security is well-founded. That statement corresponds to the provisions of article 113, paragraphs 1 and 2, of the Rules of the Tribunal. These provisions reflect the well-considered understanding of the Tribunal regarding what is expected of it when dealing with disputes regarding the interpretation or application of article 292 of the Convention. Article 113 of the Rules is one of the “rules for carrying out its functions”, and it has been formally adopted by the Tribunal in accordance with article 16 of its Statute. As such, it is binding on the Tribunal and on parties that appear before it, except and to the extent that it is shown to be contrary to any provisions of the Convention – whether expressly or by necessary implication.

4. No suggestion has been made that article 113 of the Rules remotely contradicts the letter or spirit of any provision of the Convention. The only question raised concerning it is that the requirement that an allegation should be "well founded" is not expressly provided for in article 292. But the absence, in express terms, of this requirement in the article of the Convention cannot suffice to invalidate article 113 of the Rules. The Tribunal (as also the other courts and tribunals designated in article 287 of the Convention) is required to perform a judicial function when it deals with a dispute concerning the interpretation or application of the Convention. In the discharge of that mandate, it is neither reasonable nor possible for the Tribunal to confine itself in every case to the bare language of the Convention's provisions. It is permitted, indeed required, to "flesh out" the bones of the provisions to the extent necessary in the circumstances of a particular case in order to attain the objects and purposes of the provisions in question. This "fleshing out" can be done in the context of a particular dispute; but it can also be done, as in article 113 of the Rules, by way of a general statement of the approach the Tribunal considers necessary for dealing with any specific provision or provisions. There is, however, a limit to the freedom of the Tribunal in this regard: a statement or approach adopted by it must not be incompatible with any provisions of the Convention.

5. In my view article 113 of the Rules is not incompatible with article 292 of the Convention or any other provision of the Convention, for that matter. It is no more than a statement of what is expected of a court or judicial body when it is invited to deal with a dispute arising under that article. Like other disputes under the Convention, as enumerated in article 297, a dispute under article 292 involves an "allegation" that there has been non-compliance with a provision or provisions of the Convention; and a court or tribunal to which such a dispute is submitted for settlement cannot avoid dealing with the question whether or not there is substance in the "allegation". In other words, the court or tribunal must satisfy itself that the allegation against the Respondent has been "substantiated", ("proved", "shown to be grounded", "made out" etc.). There may be different "standards of proof" (standards of appreciation) for determining whether or not allegations have been made out in particular cases, but there is always the need to determine that the applicable standard of proof has been met. A court or tribunal dealing with a dispute cannot find for an applicant if it is not satisfied that the allegation on which the applicant bases its claim or request has been substantiated. Article 113 of the Convention merely articulates this

principle in relation to disputes under article 292 of the Convention. It is worth noting, in this regard, that article 294 of the Convention applies the same principle to applications made in respect of a dispute referred to in article 297 of the Convention. Paragraph 1 of article 294 provides that the court or tribunal dealing with the case "shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is *prima facie* unfounded, it shall take no further action in the case".

6. In providing that the Tribunal shall apply to allegations under article 292 of the Convention the principle laid down in article 294, article 113 of the Rules does not run counter to anything in the Convention. On the contrary, it represents an accurate and necessary statement of what the Tribunal needs to do to discharge the function assigned to it under this important and innovative provision of the Convention. Accordingly, the Tribunal should not hesitate to base itself on article 113 of the Rules when it is relevant in a dispute before it.

7. I regret that the clear finding of the Tribunal that "the allegation of non-compliance with article 73, paragraph 2, of the Convention is well-founded" is not formally recorded in the *dispositif* of the Judgment. Nevertheless, I have voted in favour of the Judgment because it includes a statement to that effect in paragraph 72; and, particularly, because it clearly states that an application for release can only succeed if the Tribunal finds that the allegation that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel upon the posting of a reasonable bond is well-founded (paragraph 61).

(Signed) Thomas A. Mensah