DECLARATION OF JUDGE MENSAH

I agree with the conclusions and decisions of the Tribunal. However, I am troubled by some statements in the Judgment which, in my view, are neither necessary for the decisions nor, indeed, warranted in the context of proceedings for prompt release under article 292 of the Convention. I am particularly concerned because some of the statements come perilously close to an attempt by the Tribunal to enter into the merits of the case pending before the domestic forum in France.

In paragraph 88 of the Judgment, the Tribunal states:

> The Tribunal is aware that the expert opinion of the scientist referred to in paragraph 54 suggests that not all the fish on board could have been fished outside the exclusive economic zone of the Kerguelen Islands. The Tribunal does not, however, consider the assumption of the court of first instance at Saint-Paul as being entirely consistent with the information before this Tribunal. Such information does not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands; nor does it provide indication as to the period of time the vessel was in the exclusive economic zone before its interception.

In this statement the Tribunal appears to be criticising the basis on which the court of first instance at Saint-Paul determined the part of the fish on board the vessel that it took into account in fixing the bond to be posted for the release of the vessel and its Master. I consider that this criticism is both unjustified and inappropriate in the circumstances. The Tribunal rightly notes the statement of the court in Saint-Paul to the effect that the failure of the Master to give prior notification of entry into the exclusive economic zone of the Kerguelen Islands or to declare the quantity of fish on board raised a presumption that all the fish found on board had been caught illegally in the exclusive zone. Incidentally, the Respondent had, during the oral proceedings, taken great pains to explain, satisfactorily in my opinion, that this was not a "legal presumption" but rather a presumption of fact on which the French judge (in the pending case against the Master in the

domestic forum) would decide "according to his intimate conviction" i.e. "[h]e has to consider the material produced by each party and form an opinion as to whether the *alleged facts* are correct" (ITLOS/PV.00/8, page 11, lines 15–17; emphasis supplied). In any case, it is worth noting that, in spite of the stated presumption that all the fish was caught illegally, the court did not take the full quantity of fish on board into account in fixing the bond to be posted. The amount taken into account by the court was no more than half the 158 tons of fish found on board. The court presumably operated on the basis that, regardless of its own "presumption" that all the fish was caught illegally, it was possible for the judge in the forthcoming trial to come to a different conclusion, on the basis of the evidence to be produced before it by the parties.

The Tribunal is, of course, entitled to disagree with the actual figure chosen by the court of first instance. This is because there is no single correct figure in the circumstances of the case. The possible finding of the judge in the forthcoming trial in France regarding the quantity of fish that was caught illegally could range between the entire 158 tons to none at all. But that does not mean that the basis of computation adopted by the court of first instance is "inconsistent" with the facts. In any event, the basis chosen by the court of first instance at Saint-Paul is no more "inconsistent with the facts" than whatever was the Tribunal's own basis for determining the amount of fish that the *Monte Confurco* could reasonably have fished in the exclusive economic zone of the Kerguelen Islands. Like the court at Saint-Paul, the Tribunal could only base its computation on a figure ranging between the maximum of 158 tons that the French authorities allege was caught illegally and the minimum of no illegal catch as maintained by the Applicant. Neither figure can be supported or invalidated by the "facts", simply because at this stage there are no facts, but rather claims and counter-claims from the parties. As the Respondent put it: "[a]s regards the facts, of course there are disagreements. That is perfectly normal. The examination of the facts will occur on 8 January next by a French court which will then make a judgement and will either condemn or release" (ITLOS/PV.00/8, page 7, lines 17–19). The Tribunal may be right when it says that these conflicting claims do not give an adequate basis to assume that the entire catch on board, or a substantial part of it, was taken in the exclusive economic zone of the Kerguelen Islands". (In fact they do not provide a basis for assuming

that *any of the catch* was taken in the exclusive economic zone.) The Tribunal is also correct to say that the conflicting contentions of the parties "do not provide a clear indication as to the period of time the vessel was in the exclusive economic zone before its interception". However, the pertinent question in this regard is: if these "facts" (disagreements) do not provide an adequate basis for the French court to determine the proportion of the catch to be taken into account in determining a "reasonable bond" under French law, how and why do they provide a basis for the Tribunal in undertaking the same exercise under article 292 of the Convention?

In my view, the answer to the question is that the "information" referred to by the Tribunal does not provide a basis for any conclusion regarding the amount of fish that was caught illegally by the *Monte Confurco* in the exclusive economic zone of France. But this is neither surprising nor even pertinent to fixing a reasonable bond in the present case. For the Tribunal is not required to make a determination of any kind on the quantity of fish that was caught illegally or the time spent by the vessel in the exclusive economic zone of the Kerguelen Islands. Indeed it would not be appropriate for it to attempt to do so. Herein lies my concern. The statement of the Tribunal that the information before it does not provide an adequate basis for reaching conclusions on these matters could create the impression that the Tribunal, somehow, considers that it is necessary or appropriate for it to receive evidence and make determinations on these issues in the context of proceedings on an application for prompt release of a ship on its crew pursuant to article 292 of the Convention. The risk that this impression might be created is real, as evidenced by the repeated assertions of the Respondent, during the oral proceedings, that the Tribunal is not competent to deal with the merits of the case, and should not attempt to do so. At one point the Respondent stated: "I recall the texts [of the Rules of the Tribunal] and it seems to be necessary to respect them because certain aspects of the hearing ... were of a somewhat strange character ... . One might have thought that one had been transported at some time before the competent French court dealing with the merits of this case ... . The body of judges forming the International Tribunal for the Law of the Sea was, as it were, likened to a popular jury" (ITLOS/PV.00/8, page 13, lines 24–30).

I know that the Tribunal has emphasised that, in proceedings for prompt release under article 292 of the Convention, it "can 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" (Judgment, paragraph 74). In this regard I agree with the Tribunal that it may be appropriate for the Tribunal to examine "the facts and circumstance of the case to the extent necessary for a proper appreciation of the reasonableness of the bond" (*ibid.*). I believe, however, that any "examination" of the facts must be limited to what is strictly necessary for an appreciation of the reasonableness or otherwise of the measures taken by the authorities of the arresting State. Similarly, the Tribunal should exercise utmost restraint in making statements that might plausibly imply criticism of the procedures and decisions of the domestic courts. This is especially so where, as in the present case, such criticism is not necessary for the decisions of the Tribunal on the issue of the release of a ship or its crew upon the posting of a reasonable bond. In my opinion, the statements in paragraph 88 of the Judgment come uncomfortably close to exceeding what is necessary and appropriate.

(*Signed*) Thomas A. Mensah