

## SEPARATE OPINION OF JUDGE LAING

1. The Tribunal's close examination of jurisdiction and my following discussion of the determination of nationality of vessels are justified by the international consequences which may flow from a judicial decision in a dispute or in an article 292 application involving the issue of nationality and the related interpretation of the Convention, as this Tribunal stated in paragraph 65 of its Judgment in the *M/V "Saiga" (No. 2) Case*.

2. Of vital importance in these questions is article 91, paragraph 1, of the Convention, which provides:

*Article 91*  
*Nationality of ships*

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. ...

Thus, in the ideal situation, up to three elements may be involved in a determination of or as ingredients of the nationality of a vessel – (1) the actual grant of nationality by the flag State, (2) the registration of the vessel and (3) the flying of the flag State's flag as of right. In the composite notion of nationality, these elements roughly consist of, or are comparable to, firstly, a mental element; secondly, a material element; and thirdly, a symbolic element. All of these elements appear to be generally present in the legislation and practice on ship nationality of most States. However, the element that is almost universally provided for in any credible legislative scheme and in practice is the material ingredient of registration following a relatively formal and detailed application therefor.

3. Some confirmation of the importance and salience of registration is furnished by article 94, paragraph 2, of the Convention, which requires the flag State to maintain a register of ships. Confirmation is also supplied by

the fact that registration is normally conclusive evidence of title to the vessel under private law.

4. Notwithstanding the foregoing, in lieu of registration, the important material ingredient of nationality might be supplied by generic "documentation" of nationality, provided for in cases where the flag State makes brief or "provisional" grants of nationality or other longer-term, yet temporary, grants of nationality to foreign vessels registered elsewhere but presently under bareboat charter, subject to the flag State's law. Application for such documentation generally appears to require less formality and detail than is normally required in an application for registration. The grant of nationality through documentation carries with it the right to fly the flag; but the documentary evidence of nationality issued to the ship is not the usual Certificate of Registration.

5. This is the case with the legislation of Belize. Under the Belize Registration of Merchant Ships Act, 1989, both provisional and permanent nationality are referred to as "registration." However, guided by article 91 of the Convention and international practice, it is useful to distinguish between documentation and registration. In Belize, the application for provisional nationality is required to be accompanied by a limited number of supporting papers. Notably, no proof of title is required. The nationality document which is issued is called the provisional patent of navigation. The permanent nationality patent, with accompanying title rights, may only be issued once proof of title is later submitted, subsequent to the grant of provisional nationality, followed by a detailed application accompanied by various technical vessel certificates and other papers.<sup>6</sup>

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6. Notwithstanding any such distinctions, in Belize, and elsewhere, both registration and generic documentation have in common the fact that they are substantive requirements prescribed for in pre-existing legislation. This was not the case with the letter of 26 March 2001 from the Deputy Registrar

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<sup>6</sup>See N. Ready, *Ship Registration*, pp. 1-9, 133-136 (1998), discussing the concepts of registration and documentation, as illustrated by the law and practice of Panama, which closely resemble those of Belize.

of IMMARBE and that functionary’s purely informal and evidently *ad hoc* certification of 30 March 2001 in an unusual document addressed “To Whom It May Concern”. Whatever can be said about what these documents might have signified as far as concerns the mental and symbolic elements, they satisfied no legislative requirement and did not constitute the critical material element of nationality. Their language leads me to the conclusion that they were extra-legal accommodations being afforded, for whatever they were worth, to the shipowner in its effort to obtain relief from confiscation and, seemingly, release from detention of the vessel. In addition, the letter by the Attorney General cannot be treated as anything more than what it apparently was – a verification or authorization of the Agency status for these proceedings. On its face, it incidentally confirmed only a general understanding of the vessel’s flag status and also constituted an accommodation.

7. The accommodatory nature of the communications mentioned in the preceding paragraph is underscored by the fact that, as the Judgment states, the evidence is clear that the provisional patent of navigation expired on 29 December 2001 and/or that the bare penumbra of provisional (or, one might say, probationary) grant of nationality was revoked on 4 January 2001. As to whether the affirmations of such revocation made on that date by the Ministry of Foreign Affairs were accurate, there applies the principle of *omnia praesumitur rite et solemniter esse acta donec probetur in contrarium*: all things are presumed to have been rightly and duly performed until it is proved to the contrary. Especially given the seriousness of the diplomatic commitment, I do not see any evidence that this presumption was dislodged.

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8. Furthermore, informal and *ad hoc* statements by governmental or quasi-governmental functionaries on issues relating to nationality cannot be and are not determinative of the weighty international question of jurisdiction in proceedings under article 292 of the Convention, in light of the law and practice referred to in paragraphs 2-5 and in view of the consequences

which may flow from an international judicial decision involving the question of nationality.<sup>7</sup>

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9. Finally, I feel compelled to express my first thoughts about limited aspects of the issue of confiscation of vessels under foreign flags. This is because such a confiscation often creates the sort of emergency that may justly stimulate judicial speech, as do the humanitarian and economic needs that are part of the *raison d'être* for and the concerns behind the institution of prompt release. However, the following remarks are not to be taken as my decisive views on this aspect of the case.

10. Firstly, as I state in paragraph 8 in relation to certain *ad hoc* statements, I believe that confiscation of a vessel under a foreign flag, even if valid according to national law, cannot, *per se*, be accepted by an international adjudicatory body if, in intent or effect, it would exclude the jurisdiction of that body or extirpate rights or an entire remedial scheme explicitly recognized in an important instrument with such wide participation as the 1982 Convention.

11. Secondly, as I understand it, in cases other than violations of neutrality status during wartime, under international law there is a substantial presumption against the legality of confiscation of vested rights or property owned by foreigners in the circumstances outlined in the preceding paragraph, particularly when such rights or property consist of foreign flag vessels found on the high seas or otherwise outside the territorial jurisdiction and normal prescriptive competence of the confiscator, as here. As I noted about the exclusive

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<sup>7</sup>The findings in this Opinion about proof of nationality are not inconsistent with this Tribunal's finding of the existence of nationality mentioned in paragraphs 67-73 of the *M/V "Saiga" (No. 2) Case* indicating, in effect, that there were clear and multiple evidences of the material and symbolic elements, the flag State had palpably and consistently manifested that it possessed a positive mental element, good faith was implicated and circumstances somewhat in the nature of preclusion were present.

economic zone in the *M/V “Saiga” (No. 2) Case*,<sup>8</sup> article 73 and other provisions of Part V of the Convention do acknowledge the existence of some coastal State jurisdiction and prescriptive competence over vessels concurrent with that of the flag State. Of course, the grant to coastal States of that jurisdiction and competence is limited to aspects of the largely economic sovereignty over natural resources and, at face value, does not specify, require or apparently envisage confiscation – a type of measure which was not tolerated in the high seas by the pre-1982 law. Furthermore, I am unaware of any textual or other credible evidence that Part V of the Convention necessarily implies such a potentially draconian penalty.

12. Thirdly, in view of the foregoing paragraph, it needs to be carefully examined whether such confiscation as described in paragraphs 10 and 11 is a type of measure “adopted by [the coastal State] in conformity with this Convention,” in the terms of article 73, paragraph 1.

13. Finally, such confiscation raises significant questions about due process and the essential humanitarian and economic motivations and concerns to which I have alluded in paragraph 9. Therefore, *prima facie*, its justifiability also needs to be carefully examined.

(Signed) Edward A. Laing

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<sup>8</sup>*M/V “Saiga” (No. 2) Case*, Separate Opinion of Judge Laing, paragraphs 35–54.