

SEPARATE OPINION OF JUDGE TREVES

While I share the conclusions reached in the Judgment, I would like to add some observations concerning two aspects of the reasoning of the Tribunal.

1. The first such aspect concerns the relevant time for the status of the applicant State as the flag State of the vessel. The Judgment does not explicitly take a position on this question. In the "*Camouco*" (paragraph 46) and "*Monte Confurco*" (paragraph 58) Judgments the Tribunal has said that the status of the applicant State as the flag State was not disputed "both at the time of the incident in question and now" (the time of the Judgment). These are, however, in my view, mere statements of fact which cannot be read as expressions of the position of the Tribunal on the legal question of the relevant time (nor on whether the Tribunal can question the nationality of the ship when it has not been challenged by a party).

In my view, the question of the relevant time for the status of the applicant State as the flag State of the vessel must be considered in light of article 292 as a whole.

Article 292 of the Convention establishes, for limited purposes, a form of diplomatic protection. In submitting an application for release, the flag State espouses a private claim of persons linked to it by the nationality of the ship. This becomes even clearer considering that the application may also be submitted directly by the interested private persons "on behalf" of the flag State.

In cases of diplomatic protection, the nationality requirement must be satisfied at least at the time of the submission of the claim and at the time of the commission of the wrongful act. The time of the submission of the application does not raise major difficulties in general as well as in prompt release proceedings. The Judgment, in paragraph 66, by referring to paragraph 2 of article 292, seems to assume that the relevant time is indeed that of submission of the application.

As regards the time of the commission of the wrongful act, it must be noted that, in the Judgment in the *M/V "SAIGA" (No. 2) Case*, the Tribunal considered the nationality of the *Saiga* at the moment of the arrest of the vessel. In fact, this was the moment of the alleged wrongful act, as Saint Vincent and the Grenadines claimed that the arrest had been effected in violation of the Convention.

In a case submitted to the Tribunal for the prompt release of a vessel, the claimed wrongful act is not, however, the arrest of the vessel. It is rather the non-compliance with a provision of the Convention for the prompt release of the detained vessel upon the posting of a reasonable bond or other financial security. Consequently, the relevant time is that at which it can be alleged that such breach of the Convention has occurred. This time comes on a date subsequent to the date on which the vessel was arrested. Such may be the date on which the detaining State has refused to release the vessel notwithstanding the posting of a reasonable bond, the date on which the offer of such bond has been refused, the date on which it can be claimed that release is not being done promptly, the date on which a bond is fixed and is deemed to be unreasonable and the dates on which other conceivable violations of rules such as article 73, paragraph 2, can be alleged to have occurred.

In the present case, this date seems to be not earlier than 12 January 2001, when the *tribunal d'instance* fixed a guarantee, of a given form and amount, for the release of the

vessel, or, perhaps, as late as 22 February 2001, when payment of the guarantee was refused by the Order of the Judge of the *tribunal d'instance*.

2. The second aspect of the reasoning of the Tribunal on which I would like to make some observations concerns the crucial question of whether in fact Belize was the flag State at the relevant time. The analysis of the documents available to the Tribunal, as set out in the Judgment, seems adequate to satisfy me that, on the relevant dates, Belize was not the flag State of the *Grand Prince*. More than the arguments based on the different hierarchical positions in the Belizean Government of the authorities who signed the communications considered by the Tribunal, or on the burden of proof, which does not seem relevant in a situation in which the Tribunal is acting *proprio motu*, I find important the remark made in the Judgment that the two documents of the 26 and 30 of March "on their face were intended to serve the purpose of authorizing the shipowners to make an 'appeal' to the Tribunal" (paragraph 84).

These and other available documents show no trace of action taken by the shipowner to prevent or remedy the lapse of registration set for 29 December 2000 in the provisional patent of navigation, or to react to the sanction of de-registration mentioned in the Foreign Ministry's note verbale of 4 January 2001. The impression one gathers is that the only concern of the shipowner was to be authorized to submit to the Tribunal an application on behalf of Belize, while its mind was already set on registering the vessel in Brazil.

The shipowner, through its lawyer, was in fact authorized to act on behalf of Belize by the letter of the Attorney General of 15 March 2001. Neither this letter, nor the mention it contains that the *Grand Prince* was registered in Belize, eliminate, however, the fact that, more than two months before the letter was sent, the date for the lapse of registration had been reached and the Belizean Foreign Ministry had sent a communication to the effect that registration had either been deleted or was in the process of being deleted with immediate effect as a sanction provided for in the Belizean law. The conclusion that can reasonably be drawn is that the registration of the *Grand Prince*, if indeed it remained in existence at the relevant date, was solely for the purpose of submitting an application under article 292.

It was an artificial creation, a fiction, as also noted in the Judgment in commenting on the Belizean assertion that the ship was "still considered" as registered in Belize (paragraph 85). Neither the attitude of the shipowner nor, what is more important, that of Belize as they emerge from the documents, show that "registration" was seen as entailing the normal consequences of registration, namely, the right to navigate under the flag of the registering State, and all the obligations concerning administrative, technical and social matters set out in article 94 of the Convention. Compliance with these obligations, as indicated by the Tribunal in the *M/V "Saiga" (No. 2)* Judgment of 1 July 1999, "secure more effective implementation of the duties of the flag State" by establishing a genuine link with the ship (paragraph 83). A "registration" of such an artificial character as that which might have existed for the *Grand Prince*, whatever the name it receives, cannot be considered as "registration" within the meaning of article 91 of the Convention. And it is only this kind of registration that makes a State a flag State for the purposes of article 292 of the Convention.

(Signed) Tullio Treves