

# Separate Opinion of Judge Lucky

## I Introduction

1. I did not vote in favour of all the operative paragraphs of the Judgment for reasons that may differ substantially from those in the Judgment. However, I find it difficult to concur with some of the findings, specifically in relation to the operative paragraphs with respect to authorization, imprisonment and loss of profit. Therefore, I feel obliged to cast a negative vote on the said paragraphs. This separate opinion sets out the reasons for my disagreement. In the light of my findings, I will deal with the evidence, documentary and oral, and the admissibility of such evidence as it applies to this case.

2. This case is complex because, among other things, of the voluminous documents and oral evidence submitted for consideration. Therefore, opposing views and conflicting evidence have to be assessed and evaluated.

3. That this case would result in one or more dissenting or separate opinions should come as no surprise or be the cause of any discomfort. In my view, the ventilation of interpretation of the relevant law and findings of fact will be the subject of the highest international scrutiny and will augur well for the development of the jurisprudence of this specialized court. This is a case where the judge has to make findings of fact having predominantly in focus the determination of the truth.

4. My concern is primarily with the evidence in respect of authorization, and whether the crew was imprisoned contrary to article 73, paragraph 3, of the Convention. In this regard, the evidence is paramount and due consideration must be given to the admissibility of the documentary evidence having regard to the oral evidence and the submissions of counsel.

## II The issues

5. It seems to me that the case revolves around whether or not the *M/V Virginia G* was authorized to bunker/supply gas oil to the named fishing vessels in the exclusive economic zone ("EEZ") of Guinea-Bissau. If after a thorough examination, the evidence discloses that the *Virginia G* was not authorized and thereby acted in contravention of the laws of Guinea-Bissau, then that is a virtual end of the claims of Panama. All that follows will be of little or no consequence. If however, the facts found disclose that the *M/V Virginia G* was authorized to bunker, then the whole complexion of the case changes. Consequently, it is crucial to carefully consider and assess the evidence.

6. If the vessel had authorization to bunker then the following becomes relevant. Was the arrest lawful? Was the confiscation lawful? Was the crew imprisoned or unlawfully detained? Is the owner entitled to damages for repair of the vessel and for the unlawfully seized gas oil? Is Panama entitled to reparation for loss of earnings? In addition, was there an abuse of rights of the crew under article 73, paragraph 3, as such action relates to and falls under the ambit of article 300 of the Convention?

7. In order to answer the above questions, it is necessary to consider the evidence in detail and arrive at specific findings of fact.

## III The statement of the captain of the *M/V Virginia G*

8. Before the admissibility and evidential value of the Statement of the Captain of the *M/V Virginia G*, Mr Eduardo Blanco Guerrero, will be considered, several questions arise. When was the statement prepared and signed (it does not bear a date, however it can be presumed it was prepared and signed before the Memorial was filed at the Tribunal and sometime before the Captain's death)? Was the signature witnessed? It was not. Nevertheless, this statement sets out a comprehensive and detailed account of the events that evening. He mentions the supplying of fuel to the fishing vessels, the boarding, arrest and detention of the crew, the sailing to the port at Bissau, the taking of the passports of the

crew and the detention (imprisonment) of the captain and crew on the *M/V Virginia G*. The captain also stated that he signed the notice admitting that the ship was not authorized to supply fuel (bunker) and he did so because he was threatened at gunpoint. Further, he did not fully comprehend what he was signing because it was written in Portuguese, not in Spanish, his native tongue.

9. I find some guidance in the Separate Opinion of Judge Wolfrum in the *M/V "SAIGA" (No. 2) Case (ITLOS Reports 1999, p. 10, at p. 92, para. 4)*.

International jurisprudence does not provide for extended guidance in respect of the appreciation of evidence. Contrary to municipal law, international law, in general, and the rules of international courts and tribunals, in particular, has only developed regulations on procedural aspects concerning the submission of evidence by the parties but not on the appreciation of evidence in general. This is also true for the Rules of the Tribunal, which in several provisions refer to the submission of evidence by the parties, and the authority of the Tribunal to call upon the parties to produce such evidence the Tribunal considers necessary. **Nevertheless, the Tribunal is not very free in deciding on the mode of appreciation of evidence. It is guided in this respect by the principles of impartiality and fair trial and its duty to arrive at a decision** (my emphasis).

10. I think the final sentences are relevant in all cases where the appreciation and admissibility of evidence are crucial to the final decision.

11. "The Rules of Procedure of Tribunals do not deal with the authenticity of documents. Clearly, though a tribunal has the power to exclude documents where the issue of their authenticity is raised." (See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 46, paras. 15 ff). An issue relating to the authenticity of documents was raised in the *M/V "SAIGA" (No. 2) Case* cited above, while in the *Qatar v Bahrain Case* the documents were challenged by the Respondent State as not being authentic and were excluded. Documentary evidence seems

to be the most common type of evidence before the Tribunal; in the *M/V "SAIGA" (No. 2) Case*, the entries were not contested. The Tribunal adverted to this fact and did not enquire into the authenticity of the entries in the documents. In that case, the Tribunal did not have to take a decision on the issue (See C. F. Amerasinghe *Evidence in International Litigation*, p. 183).

12. In the instant case, the authenticity of the statement was not challenged. Counsel did not object or challenge the authenticity of the statement, neither did he object to its admissibility. However, by implication Counsel suggested that the contents were not true and led evidence to contradict what is set out therein.

13. In a trial in open court, issues are determined by reviewing documentary and oral evidence. The trial incorporates both written and oral evidence of witnesses and submissions of learned counsel. Consequently, the principle of "equal arms" (*égalité des armes*) is open to both sides. For the avoidance of doubt with regard to the foregoing, I have to add that if a tribunal strictly adheres to written proceedings and does not take cognisance of all the evidence, inclusive of testimony of witnesses, their answers on cross examination and their demeanour and conduct in court, then cases will be determined on documentary evidence. I do not think this can be acceptable, especially in cases such as the instant case where the oral evidence is also crucial in arriving at the truth.

#### IV Assessment of evidence (Findings)

14. The issue to be determined is how does a judge, sitting in an international court, assess evidence and determine the facts. There is no general rule in international law. In fact, the Rules of the Tribunal are silent. Rules cannot set out how a judge should consider and find facts from the evidence. It is solely the function of the judge who is the fact finder. This is a case abounding with evidence, both oral and documentary. It includes a statement/declaration of a witness who has since died. With respect to the statement, it is not dated. Further it was not witnessed and definitely is not an affidavit. Therefore, how can it be assessed? Guinea-Bissau did not object to the admission in evidence

of the statement. Certainly, in a national court counsel would have objected and asked the court to pay little or no regard to the allegations therein. However it seems to me that the rules of evidence in international courts and tribunals are not as strict as in municipal courts, where counsel usually object to any deviation from the strict rules of procedure in the evidence Acts of the country. It appears that judges are correctly cautious and do not intervene lest they be accused of entering into the arena of counsel. States are represented by learned counsel who have sole conduct of the presentation of their case and it is their responsibility to ensure that the rules of evidence are observed. Therefore, it is incumbent on the judge to apply his knowledge in these circumstances to ensure that the rule of law is observed and that justice is not only done but appears manifestly to be done. Since the statement is part of the evidence, I think it has to be assessed in the light of evidence led by both parties.

15. The statement of the captain reads:

**Eduardo Blanco Guerrero**, the captain of the Virginia G states

*On 19th August 2009 I received the order to proceed to the Guinea Bissau EEZ to supply the AMABAL I, AMABAL II and RIMBAL II*

*On 20 August 2009, I received the order for the quantities for each of the vessels:*

1. *AMABAL I 96 Tons (11.11m)*
2. *AMABAL II 113 Tons (130.79m)*
3. *RIMBAL I 81 Tons (93.75m )*
4. *RIMBAL II 115 Tons (113.10m)*

*On the same day, I communicated with the RIMBAL vessels, which confirmed to me that they had confirmation from the Agent that the authorisation had been issued for the bunker operations, as confirmed by the representative on board. I informed the fishing vessels about the quantities that were to be supplied.*

16. The captain went on to say that he supplied the RIMBAL II with gas oil. After supplying the vessel, he realized he had not heard from the AMABAL fishing vessel; he heard from the captains of the RIMBAL vessels that the AMABAL vessels had been arrested in the Port of Bissau and there was no communication with them.

At 2300 hours on 20 August, the *AMABAL II* called me and I was informed that they had been released, and that they had confirmation from their AGENT that the authorisation to bunker had been issued. I inform them about the quantities that we would provide the waypoint and the estimated (ETA) for supply.

On 21 August 2009 the *AMABAL II* was supplied with 113 Tons (130.78 m) of gas oil.

At 1900 hours on 21 August 2009, being in position latitude 11 degrees 48 N and longitude 017 degrees 31.6 W, (location 60 miles of the Guinea Bissau Coast and outside the territorial sea and contiguous zone of Guinea-Bissau), when about to start bunkering operations with the *AMABAL I*, the ship, under my command, the *Virginia G*, was boarded violently and in an assault-like manner, by six persons who were on board an unidentified speedboat. Three of them were carrying weapons (AK). I received no notice of the visit. . . . the *Virginia G* was clearly flying the flag of Panama and it was possible to identify by the IMO number painted on the front of the bridge and by the name on the bow on the stern. . . . we were known to the Authorities in the area as was informed by both fishing vessels, and the Company never performed a supply operation without confirmation (by telephone) that the fishing vessels had obtained the appropriate authorisations from local authorities.

The captain continued: the crew was confined to the accommodation quarters, unable to get out, and kept at gunpoint. The same happened to officers on the bridge—we were kept there at gunpoint and we could not leave the bridge.

On 22 August 2009, we arrived at the bay of Bissau and anchored in the bay. The authorities took the crew's passports and the vessel documentation. In effect, we were deprived of our liberty, but we were told that it should not take more than a couple of days to solve the matter.

From the 12 to the 19th November we remained anchored and guarded by armed soldiers.

17. With respect to the signing of a document in which the captain allegedly admitted that he was bunkering without written authorization, he said:

During the voyage to the port, the assailants forced me to sign, under threat and pointed with a gun, a document, written in Portuguese, which I do not understand well. I could not understand the contents and they did not give me a copy of the document. I agreed to sign this document because I felt threat, even though I did not understand the content-but due to my state of fear and stress and to avoid the assailant's use of force against us, I signed.

## V Evidential value of the statement

18. As I said earlier, the rules pertaining to oral evidence and evidence in general in international courts and tribunals are not as strict as in municipal courts, where in most instances legislation is in force regarding evidence and procedure, e.g. the Evidence Act of Trinidad and Tobago and the Civil Procedure and Criminal Procedure Rules. The Rules governing the admissibility of evidence in international courts and tribunals differ in many respects from the rules in municipal or national law. Even though there were no challenges or objections by the Respondent, I do not think the statement can be evaluated without examining it in the light of the evidence as a whole. It is only then that the weight of evidence contained therein can be accepted. It is important to note that the captain was not available for cross-examination and therefore his testimony could not be tested, so that the court could determine whether what is said therein was the truth. Therefore, I decided to examine this evidence to determine whether other evidence corroborates its contents. In this regard, I have to weigh the evidence of Mr Cisneros and the relevant documents, as well as that of Mr Nunes and Mr Vieira among others.

19. Nevertheless, I find it necessary to consider the evidential value of this unsworn statement especially in the light of the evidence led by Guinea-Bissau. The first mate of the *Virginia G*, Mr Cisneros, testified and was cross-examined. He impressed me as a witness of truth. The oral evidence of the first mate Mr Cisneros corroborates what is set out in the statement. For example, he said:

when I managed to get to the bridge I found the captain was being threatened with a gun by one of the armed military people. He was under stress and powerless.

20. The following excerpts from Mr Cisneros' testimony are helpful:

The vessel is not prepared to carry or to maintain or to supply other types of products, only gas oil. The vessel was in the exclusive economic zone of Guinea Bissau territory.

When we communicated with the captains of those fishing vessels we always ask them whether there are observers on board and whether those observers are authorised to be there, being an authorisation for fishing and bunkering activities.

We had no warning before they came on board. We only realised when they were already in the process of boarding the vessel (The witnesses for Guinea Bissau admitted that they boarded without the accepted form of warning.)

They looked as if they were pirates . . . some of them were wearing military uniform and they were armed, while others were wearing plain clothes with no identification at all. They had AKM combat rifles (Guinea Bissau led evidence that the men carried rifles because of previous incidents with other vessels and for their protection).

21. However the question must be posed: Was the vessel known to the FISCAP officers, who admitted that the vessel was flying the Panama flag and the name was identifiable? "They withdrew the vessel's documents and took all our crew passports."

22. Mr Cisneros was cross-examined by Counsel for Guinea-Bissau. He said in part:

When the boat is loaded, the height is 1.5 meters from the water to the deck and you can jump on board; you do not need any ropes or anything. You can jump easily. They came on board. They acted violently.



The witnesses for Guinea-Bissau said the boarding was without incident. They said the captain was cooperative; he let down the ropes for us to board the vessel. This is a totally different version to that of the witnesses for Panama. The question is: Whom does the judge believe?

23. In answer to the question "Why did the captain accept to sign something like that ("an infringement notice") if it was not true?" Mr Cisneros replied:

I doubt that the captain signed that if he was in full possession of his senses. Maybe stress, fear, led him to sign his death certificate or sentence had he been stressed – but I do not think he would have accepted that.

When asked about the taking of the passports he said: "For two months, I was trying to get my passport back".

24. Counsel for the Respondent asked: "You felt arrested, but could you not go out to the shops to buy provisions?" Answer: "the first few days no, we were not, it was forbidden. The soldiers, the military FISCAP, did not let us".

25. The witness was cross-examined. He was not shaken by cross-examination. I was impressed by his demeanour and conduct in court. I am satisfied that he was speaking the truth.

## VI Authorization

26. The first question is whether the Convention provides for "bunkering". The Convention is silent on the question of bunkering. It does not specify whether bunkering is permitted or not permitted in the EEZ of a State. It is argued that if given a wide and generous interpretation, articles 53, 58, 61 and 62, read together, seem to allow a State to pass legislation with respect to bunkering. I find it difficult to agree with this interpretation and the finding in the judgment that Guinea-Bissau has jurisdiction to legislate and regulate bunkering in its EEZ as set out in Decree-Law 6-A/2000. Noting, but not admitting, that the said regulations may not be contrary to the provisions of the Convention, if

the said Decree applies to vessels that are fishing or carrying out fishing-related activities in the EEZ of Guinea Bissau, Panama contends, and I agree, that the *M/V Virginia G* was authorized to provide bunkering services to the said fishing vessels.

27. It is the duty of a judge to interpret the law not to make law. There seems to be a lacuna in the Convention on the question of bunkering. The Convention is silent on the matter. However, it is argued that although articles 56 and 58 of the Convention are silent on bunkering, article 56, paragraph 1, read with article 62, places bunkering within the jurisdiction of the coastal State. Therefore, if the legislation of the coastal State specifies that a vessel has to have authorization to bunker fishing vessels, such is permissible under the Convention and in conformity with the Convention. I think that by combining the two articles and giving the relevant clauses a wide and very generous meaning, an attempt is being made to "make law" to prescribe "judge-made law". I think that by combining the two articles and giving the said clauses a wide and generous meaning, an attempt is being made to legislate and read into the Convention a term that is not specified or defined. Judges interpret the law, they do not make law. It is not the function of a judge to include a definition or terms where there is none in the Statute, Convention or Treaty.

28. The contentions and submissions of Panama and Guinea-Bissau are set out in paragraphs 248 to 257 of the Judgment. Therefore, there is no need to rehearse them here, except to mention briefly that Panama argues that the accepted procedure for authorization was adhered to in this instance, i.e. a few days in advance arrangements are concluded onshore between the owners of the *M/V Virginia G* and the customers. Instructions are then forwarded to the captain by radio and/or telephone including the fact that the vessel is authorized to supply fuel to the named vessels at specified co-ordinates. The applicant, through the agent, informs the authority, FISCAP. FISCAP may then issue the authorization. The question is: if the procedural requirements have been followed and acknowledged, does that mean that there is a form of authorization?

29. I consider the following important:

1. A letter from FISCAP to the Management of the Bijagos Agency Lda Bissau, the Agent of the Owner of the *Virginia G*, reads:

Bissau, 14th August 2009

**N/REF: No. 180/GCFISCAP/09**

Subject: Authorisation for the supply of fuel

*The Surveillance and Control of Fishing Activities, FISCAP, presents its best wishes and hereby acknowledges receipt of your correspondence S/Ref dated 14th August of the current year.*

*The content of your letter has been analysed and in conclusion FISCAP authorises the supply of fuel to the respective vessels under the following conditions:*

1. *To indicate before the operation;*
  - a. *The coordinates of the operation of the supply of fuel:*
  - b. *Date, time and name of the ship with which the vessels AMABAL I AMABAL II, RIMBAL I AND RIMBAL II will perform the operation.*

Without any further issue, (emphasis mine) our best wishes

Hugo Nosoliny Vieira  
Coordinator

2. In response, Bijagos wrote:

*Subject Information*

Our best wishes.

The BIJAGOS AGENCY management, in response to your letter N180/GCFISCAP/09 of 14/08/09, hereby informs the following:

- 1- The coordinates of fuel supply operations are 17, 35 and 12, 00
- 2- This operation should be realised at 16:00 hours on 21 August 2009.

The tanker's name is VIRGINIA G.

BISSAU, AUGUST 20th 2009

Respectfully,  
The management  
[STAMP and SIGNATURE (BIJAGOS)]

FISCAP STAMP  
RECEIVED No. 1106/2009  
Secretary [signature]

30. In my opinion this appears to be a clear indication that authorization was not only in progress but was approved. FISCAP requested the coordinates and names of the vessel and this was submitted and acknowledged. How then can FISCAP argue that permission was not granted and depend solely upon the fact that the written authorization was not on board the *M/V Virginia G* and profess that this is a requirement of the law? Further, the additional note reproduced in bold letters in paragraph 60 of the Judgment can be misleading. Its evidential value has not been satisfactorily explained in the Judgment because, no doubt, when examined in the light of the evidence, it is an addition, as I shall explain later.

31. Do the words "authorises the supply of fuel to the respective vessels" and "without further issue" convey to the recipient that authorization is approved? I think so because the words are clear. The reply specifying the information was sent to FISCAP. FISCAP said it did not receive the letter with the information, therefore Guinea-Bissau contends that there was no written authorization. In the light of the evidence both documentary and oral, this contention is preposterous. In other words, these witnesses are economical with the truth. However, in my opinion the letter of 20 August along with the letter in response could only mean that the vessel was authorized to bunker the named vessels. When this evidence is assessed with that submitted by the Agents of Guinea-Bissau, the preponderance of evidence is in favour of Panama and that of Guinea-Bissau is highly questionable. Further, a review of the oral evidence of Mr Nunes and Mr Vieira in comparison with the statement of the captain, the witnesses and the documentary evidence, specifically the letters, weighs heavily in favour of Panama. The written and oral evidence of Mr Cisneros will be helpful in arriving at a finding of facts and the truth.

32. I find it convenient to set out here the pertinent questions and answers of Mr Vieira during examination in chief by Counsel for Guinea-Bissau. Counsel referred to a letter also dated 20 August that Panama contends Counsel never saw until the Counter-Memorial and counter-claim were filed. That letter reflects the following words set out in bold:

I have read the contents and would like to know whether or not the ship in question has authorisation for a related operation to sell fuel in the EEZ of Guinea Bissau.

It is alleged that these were instructions to Mr Vieira, who, I have found, had already signed and sent the letter mentioned and set out above. If this is correct, it seems to me that the author of the note, having seen the original letter, was asking whether the ship was authorized.

Question: You received this letter, as I understand – it was produced by Panama – that asks you for an authorisation from the *Amabals* to supply oil to the vessels *Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal II*. Do you confirm having received this letter? I am talking about the request. You received a communication from the agency of the *Amabals* and they asked for permission to do an operation of supplying fuel. This is a letter you sent on 14 August. What did you ask for the operation?

Mr Vieira: The answer was signed by me in the correspondence that we had with the Bijagós agency. They asked to receive fuel and we, as usual, as it has to be done in the presence of inspectors, asked about the date, the place and time that they were going to take on the fuel.

Question: You received a letter from the Bijagós agency. Can you read what the agency answered to you, please?

Mr Vieira reads: "The management of the agency in reply to your correspondence N180/GCFISCAP/09 of 14 August would like to inform you that the coordinates for fuelling operations are 17,35 and 12,00. This operation will be done at 1600 hours on 21 August 2009. The tanker is called the Virginia G."

Question: Could you also read the note you wrote in this letter?

Mr Vieira reads: "I have read the contents and I would like to know whether or not the ship in question has authorization for a related operation to sell fuel in the EEZ of Guinea-Bissau."

33. Having regard to the earlier letters and responses set out above, one can only surmise that this so-called note is an afterthought, was not communicated to the Agent of the *Virginia G* and cannot be used to rebut clear, concrete and convincing evidence.

34. In my opinion this appears to be a clear indication that authorization was not in progress but was approved. FISCAP requested the coordinates and names of the vessels. This was submitted and acknowledged. How then can FISCAP argue that permission was not granted and depend solely upon the fact that the written authorization was not on board the *M/V Virginia G* and profess that this is a requirement of the law. I have read Decree 6-A/2000. Nowhere is it stated that a bunkering vessel must have on board a written authorization.

35. Guinea-Bissau appended a letter in its counter-claim with a handwritten note and the following set out in bold; Panama claims that this was not part of the original letter produced by Panama in its Memorial or Counter-Memorial. This letter was purportedly signed on 20 August 2009, incidentally, the same date as that of the letter sent by the same Mr Vieira. It contains an additional sentence that reads:

The content of your correspondence was analysed, similar words to the letter signed by Mr Vieira and set out above with the following added **although it has received the information requested, further proposes that your agency certify whether the vessel supplying the fuel is duly authorised for this operation in the EEZ of Guinea Bissau.**

36. It is not clear whether: Mr Vieira signed two letters on the same day, apparently disregarding what he had written in the first; or he is trying to mislead a superior authority; or this letter was prepared after the event. It seems to me that whoever is responsible is very economical with the truth. In other words, Mr Vieira is not telling the truth. This is curiously strange and is unacceptable.

37. Counsel for Guinea-Bissau would like the court to accept a contradiction in the terms and to accept the later letter. Furthermore, it would have been acceptable if the second letter had referred to the first and specifically said that authorization had not been granted. The evidence is weak, moreso when compared with that of Panama.

38. The agent advised the captain that authorization had been obtained and granted by FISCAP. FISCAP as an arm of the State is in a fiduciary position and its decisions bind the State.

39. There are parts of the oral evidence of Mr Nunes that are of assistance in determining whether the document, an admission by the captain that he was not authorized to bunker, is helpful in arriving at the truth. As alluded to above, the captain said in his statement that he signed because he was being threatened and that a gun was pointed at him. Nevertheless, the FISCAP officers may not have been aware at the time of the signing of the "confession" of the procedure for taking such a statement. It is not disputed that it is an offence to bunker without authorization in the EEZ of Guinea-Bissau. In other words, an offender can be arrested and charged for a criminal offence. Let me say at the outset that the officers did not comply with due process and the rules of evidence in taking and executing such a statement. The captain was not warned of intended prosecution; the statement was not fully explained to him. It was not in his native language; it was in Portuguese. A member of the crew or an independent person did not witness it. This is an excerpt of what Mr Nunes said:

When we arrived on the ship, I asked the captain whether he was doing a fishing related operation by bunkering: Do you have authorisation? He said he did not. After I asked him if he had authorisation to refuel the fishing boat I decided to tell him "as the ship does not have authorisation issued by the competent authority, then I have to arrest this ship or arrest this ship right now.

40. Two questions arise: Did he speak to the captain in Portuguese or Spanish? Secondly, it is curious to note the technical language "whether he was doing a fishing-related operation by bunkering". This is a matter of legal interpretation.

41. He agreed that he was able to read the name of the ship with the IMO number and that he verified the name of the vessel. In terms of the documentation his testimony in chief ended when he said "it is a severe fishing offence

under current legislation". This is interesting in the light of the following answers during cross-examination. He went on to say that when they boarded the *M/V Virginia G* the *Amabal* was receiving fuel during the inspection of the vessel:

The captain asked us if he should stop the operation, to which we answered that he could continue until it ended. And that is what he did supplying the *Amabal II* with 110 tons of diesel oil.

42. When asked if it is the common practice of Guinea-Bissau officials to authorize continuation of what is qualified by them as a grave fishing infringement, he answered: "Yes, it is our common practice".

43. This is very strange, I cannot accept that where there is an instance of a person committing, as the witness says, "a serious offence", he is permitted to continue committing the offence. In other words, if what Mr Vieira says is true, then he would be an accessory to the offence. Further, it appears to me that he was an *agent provocateur*. He allowed the captain to continue supplying the fuel and then ordered the arrest of the ship and crew.

44. The fishing vessels had licences and authorization to receive fuel. How then can the *M/V Virginia G* be at fault? The captain was advised that the *M/V Virginia G* was authorized and the exhibits corroborate this fact. Further, there are documents from FISCAP signed by Mr Vieira. With respect to the notice of admission of the offence, he said:

The notice is in Portuguese. I am not allowed to arrest anyone. I gave the notice to the captain and he read it .It was written in Spanish. It is in Portuguese but when the captain was reading it, he used Spanish pronunciation. He read it with a Spanish Accent. There is a difference in the languages he read what we had written and he understood it very well and signed it.

45. This is indeed very strange and in my view contrary to accepted practice and procedure. The contents should have been explained to him. This is the practice and procedure in the criminal justice system. Further, he should have



been warned that he could be prosecuted because, as Mr Vieira said, it is a *grave offence*; therefore, he should have been asked if he understood what he was signing. It is certainly insufficient simply to say he understood it very well; that is a subjective opinion based on his observation. In my opinion, this document has no evidential value. In fact, in a national court an objection would be upheld and the document excluded and expunged from the record. It was a confession and/or admission of guilt. The accepted procedure for taking such a statement was not followed.

## VII Burden of proof

46. Before proceeding further on the topic of evidence, it will be appropriate to consider the standard of proof required in cases before the Tribunal. I think the standard should be considered on a case-by-case basis because of the differences between common law and civil law requirements in this respect.

47. In common law, there are two main standards: one that is applicable in civil cases and the other in criminal cases. The standard adopted in common law jurisdictions in criminal cases is proof beyond a reasonable doubt; in civil cases, the standard is based on the "preponderance of evidence" or "the balance of probabilities". In the civil law system, the concept of the standard of proof is different. It is not "on the balance of probabilities" but it is a matter for the personal appreciation of the judge, or "l'intime conviction du juge". In other words, if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met. I have applied the foregoing when examining the documentary and oral evidence.

48. It having been determined that the *Virginia G* was authorized to bunker and that the FISCAP officials were not telling the truth, the incidents that followed, i.e. the arrest and detention/imprisonment, were not in conformity with the law.

## VIII Imprisonment

49. The evidence of the captain and Mr Cisneros disclose that they were in effect deprived of their liberty and kept under guard on the ship. Panama

submits that they were imprisoned contrary to the provisions of article 73, paragraph 3, of the Convention.

50. The word "imprisonment" is not defined in article 73, paragraph 3, of the Convention. Therefore, a meaning relevant to the circumstances is necessary; the word "imprisonment" in article 73, paragraph 3, must be given a wide and generous meaning. The meaning ascribed ought not to be that the individual must be sent to a prison and confined in cell. The term imprisonment means the restraint of a person contrary to his will; in other words it means a deprivation of one's liberty. As to what will amount to imprisonment, the most obvious modes are confinement in a prison or private house (in this case a ship). In my view the crew were deprived of their right to liberty and freedom.

51. Therefore, a meaning relevant to the circumstances is necessary. As I said, imprisonment may take many forms and gives the right to a claim for false arrest. The members of the crew were not and have not been charged for any offence in Guinea-Bissau and no bail was fixed in the event of a charge; they were simply unlawfully detained without charges being preferred. The authorities took their passports and they had to remain on the ship under guard for a few days. In any event, they could not leave Guinea-Bissau without their passports (a similar situation to the captain in the *M/V "SAIGA" (No. 2) Case*). The law on statutory interpretation will be helpful in construing article 73, paragraph 3, of the Convention.

52. I think it will be useful to consider current definitions in national and international law and apply these to the facts in this case

## IX Imprisonment

53. The act of putting or confining a man in prison; the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. *State v. Shaw*, 73 Vt. 140. 50 Atl. 803; *In re Langs-* low, 107 N. Y. 314, 00 N. E. 500; *In re Langan* (C. C.) 123 Fed. 134; *Steere v. Field*, 22 Fed. Cas.1221. It is not a necessary part of the definition that the confinement should be in a place usually appropriated to

that purpose; it may be in a locality used only for the specific occasion; or it may take place without the actual application of any physical agencies of restraint, (such as locks or bars) but by verbal compulsion and the display of available force. See *Pike v. Hanson*, 9 N. II. 491. Any forcible detention of a man's person, or control over his movements, is imprisonment. *Lauson v. Buzincs*, 3 liar. (Del.) 410. Law Dictionary: (Black's Law Dictionary)

## X Definitions of "Imprisonment" and "Detention"

54. Any form of imprisonment where a person's freedom of liberty is removed can be classed as detention, although the term is often associated with persons who are being held without warrant or charge before any have been raised. Being detained for the purposes of a drugs search is tantamount to a temporary arrest, as it is not yet known whether charges can be brought against an individual, pending the outcome of the search. The term 'detained' often refers to the *immediacy* when someone has his or her liberty deprived, often before an arrest or pre-arrest procedure has yet been followed. For example, a shoplifter being pursued and restrained, but not yet informed he/she is under arrest or read his rights would be classed as 'detained'. (Collins English Dictionary – Complete & Unabridged 10th Edition)
55. In the below mentioned cases, the Tribunal held that the captain was detained, apparently unlawfully, and ordered his release under circumstances, though not quite similar, that will have a bearing on this case.
56. **Case No 5: *The "Camouco" Case***
71. That the *Camouco* has been in detention is not disputed. However, the parties are in disagreement whether the Master of the *Camouco* is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it

is appropriate to order the release of the Master in accordance with article 292, paragraph 1, of the Convention.

57. **Case No 6: *The "Monte Confurco" Case***

90. It is not disputed that the *Monte Confurco* has been in detention. However, the parties are in disagreement whether the Master of the vessel is also in detention. It is admitted that the Master is presently under court supervision, that his passport has also been taken away from him by the French authorities, and that, consequently, he is not in a position to leave Réunion. The Tribunal considers that, in the circumstances of this case, it is appropriate to order the release of the Master in accordance with article 292, paragraph 1, of the Convention.

58. In the above cases, the captain of the vessel was in "detention". The question is whether there is a distinction between detention and imprisonment. While it is accepted that a person can be held in detention or detained without being imprisoned *per se*, I think it is very different when an individual is detained in a specific place and his freedom, his right of free movement, is curtailed, as in the instant case. In the above-mentioned cases the captain could have left the ship but could not leave Reunion. In this case the distinction is that the crew could not leave Guinea-Bissau but were detained in the *M/V Virginia G* under military guard.

59. In my view, the Judgment does not reflect an assessment of the evidence and set out reasons why the evidence led through the witnesses on this issue of imprisonment was not acceptable or believed when compared with that led by Guinea-Bissau.

60. It having been determined that the *M/V Virginia G* was authorized to bunker and that the FISCAP officials were not telling the truth, the incidents that followed, i.e. the arrest and detention/imprisonment, were not in conformity with the law.

61. For the above reasons, I think that, depending on the circumstances, detention and imprisonment can have the same meaning.

## XI Abuse of rights

62. In the *M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain*, para. 137), the Tribunal found as follows:

it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when "the rights, jurisdiction and freedoms recognised" in the Convention are exercised in an abusive manner.

63. I am of the view that the fundamental rights and freedoms of the captain and crewmembers were infringed. They were falsely imprisoned, their freedom of movement was curtailed and there was an abuse of their human rights and dignity. Guinea-Bissau violated the provisions of article 73, paragraph 3, of the Convention and as a result, the provisions of article 300 of the Convention are applicable. Further, the relevant authorities acted in bad faith, as set out in the order of the Regional Court, and in contravention of the said order confiscated the gas oil on board the *M/V Virginia G* and removed it from the ship.

64. Article 300 provides

Article 300  
Good faith and abuse of rights

States parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner, which would not constitute an abuse of right.

65. Article 300 embodies general principles of International Law that emphasize "good faith" and abuse of right. The article must not be construed narrowly but should be given a wide and generous interpretation. It specifies that States shall exercise their rights, jurisdiction and obligations under the Convention in good faith and in a manner which does not infringe a right under the Convention. Counsel for Panama contends that the article is applicable and in these circumstances, I agree.

66. In my view, the captain and crew were unlawfully arrested and detained, the *M/V Virginia G* was unjustly seized and detained in the port, the crew was not treated with the dignity they deserved and their freedom was not recognized. The crew members and by extension Panama are entitled to damages. The award can be based on awards of international Human Rights Courts.

## XII Compensation and loss of profit

67. In paragraph 438 of the Judgment, the Tribunal concludes that

as the available procedures under the laws and regulations of Guinea-Bissau have not been used by the owner of the vessel to secure its release, Panama cannot claim on behalf of the owner of the vessel any loss of profit.

68. The reason advanced is that *the M/V Virginia G* was arrested for violations of the laws and regulations of Guinea-Bissau. As I said at the very beginning of this opinion, the *M/V Virginia G* was authorized to bunker, in accordance with the law. Therefore, all subsequent acts by the authorities of Guinea-Bissau were unlawful. I find that the owner is entitled to compensation and loss of profit.

69. I may add that I have read in draft the Joint Separate Opinion of Judges Cot and Kelly and I agree with the views expressed therein.

(signed) Anthony Amos Lucky