

Declaration of Judge Warioba

I have voted for the provisional measure in paragraph 52, subparagraph 1, with some hesitation because it is unnecessarily wide and goes beyond the circumstances and requirement of the Request of the Applicant. As stated in paragraph 47 of the Order the Tribunal has used its discretion in article 89, paragraph 5, to prescribe the provisional measure. That article states:

“5. When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or comply with each measure.”

In this case Guinea, the Respondent, is the party which is required to comply with the measure. The Tribunal has rationalised its decision in paragraph 41 of the Order by saying “that the rights of the Applicant would not be fully preserved if ... the vessel, its Master and ... crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master”. In its final submissions the Applicant had requested that Guinea:

- “(1) release the m/v Saiga and her crew;
- (2) suspend the application and effect of the judgement of 17 December 1997 of the Tribunal de Première Instance of Conakry and/or the judgement of 3 February 1998 of the Cour d’Appel of Conakry;
- (3) cease and desist from enforcing, directly or indirectly, the judgement of 17 December 1997 and/or 3 February 1998 against any person or governmental authority;
...”

For understandable reasons the Tribunal has declined to prescribe a provisional measure on the request for the release of the vessel. But it has gone ahead and prescribed a measure on the other two far beyond the request of the Applicant without giving sufficient reasons for doing so.

The Judgments of the courts of Guinea were submitted to the Tribunal in the proceedings. It is clear from these Judgments that the only person prosecuted was the Master of the vessel. He was convicted and sentenced to imprisonment for a term of six months which was immediately suspended. He was also fined some US\$ 15 million and the vessel and its load were confiscated. No other person, crew, owner, or operator was subject of the prosecution.

Subsequently the vessel and the Master have been released unconditionally in accordance with the Judgment of the Tribunal (the crew had already been released). In the proceedings the Respondent stated that no further action would be taken against the Master in relation to the fine because he could not pay. The vessel and the crew have already left Guinea and are completely free. These developments make the application or effect of the Judgment of the courts of Guinea moot in the context of the incidents of October 1997.

The provisional measure, however, requires Guinea to:

“refrain from taking or enforcing any judicial or administrative measure against the M/V Saiga, its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master.”

The measure is very broad in the type of action Guinea is required to refrain from and the category of people who are protected. The vessel and its crew have been released in the implementation of the Judgment of this Tribunal in the prompt release case (M/V “Saiga”, Prompt Release) and they are free and away from Guinea. Guinea has complied fully with the decision of this Tribunal. With regard to the owners and operators there is absolutely no evidence on record that at any time action by Guinea, actual, threatened or otherwise, was taken against them. One fails to see what action Guinea is required to refrain from in respect of the owners and operators. It is also not clear what type of reports Guinea is supposed to submit. That, however, does not disturb so much in the prevailing circumstances, especially taking into account paragraph 52, subparagraph 2, of the Order which recommends to the parties to desist from action that could aggravate or extend the dispute. One hopes the Tribunal will use its discretion to request information under article 95, paragraph 2, with circumspection lest it unwittingly contribute to aggravation or extension of the dispute.

What really disturbs is the way the Tribunal has used its discretion under article 89, paragraph 5, to prescribe measures different in whole or in part from those requested. This discretion is properly conferred on the Tribunal and it is not a discretion which should be used simply because it is there. It is not a discretion which should be used at a whim but one which should be exercised when there are compelling reasons borne out by facts. The circumstances of this case lack that criterion. Hence my hesitation.

(Signed)

Joseph S. Warioba