SEPARATE OPINION OF JUDGE KATEKA

1. I have voted in favour of the Tribunal's finding that it has no jurisdiction to entertain the Application filed by Saint Vincent and the Grenadines. Nevertheless, I do not share the reasoning of the Tribunal, in particular concerning its consideration of article 300 of the Convention.

General remarks

2. The Tribunal as a court of law has the duty of dispensing justice to the litigants in accordance with the Convention, the Tribunal's Statute and the Rules of Procedure. This mandate cannot be abdicated by the Tribunal using technicalities to avoid pronouncing itself on important issues concerning the interpretation of the Convention, including article 300. In this regard, it is recalled that in the first case on the merits before the Tribunal, namely, the *M/V "Saiga" (No. 2) Case*, technical difficulties did not prevent the Tribunal from administering justice. In spite of some doubts about the registration of the Saiga at the time of its arrest, the Tribunal went ahead and dealt with the merits of the case in order to avoid far-reaching consequences for persons who had suffered loss as a result of the measures taken by the respondent State. The Tribunal concluded: "in the particular circumstances of this case, it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute" (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 39, para. 73, sub-para. (d)).

3. The Tribunal should have been consistent with this jurisprudence including that of another of its cases where it stated that "[t]he Tribunal possesses the right to deal with all aspects of the question of jurisdiction, *whether or not they have been expressly raised by the parties*" (emphasis added) ("*Grand Prince*" (*Belize v. France*), *Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, at p. 41, para. 79). Furthermore, article 288, paragraph 4, of the Convention provides for inherent power for the Tribunal: "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". Thus in not following its jurisprudence and the relevant Convention provisions, the Tribunal has exercised too much caution. I regret that the Tribunal has chosen to ignore its case law and the Convention in the present case.

4. I am in agreement with the Tribunal's procedural approach to the consideration of the present case under two aspects. The first aspect relates to the claim by Saint Vincent and the Grenadines on the basis of articles 73, 87, 226, 227 and 303 of the Convention. In my view, the Applicant has failed to establish its claims based on the articles invoked. On the other hand, the Respondent has argued its case convincingly to show that there is no dispute on the basis of these articles.

5. The Tribunal, after discussing each of the above articles, concludes that none can serve as a basis for the claims of the Applicant in respect of the detention of the M/V "Louisa" and its crew. The Tribunal also considered articles 245 and 304 of the Convention, although these articles were not included in the final submissions of the Applicant. Here too the Tribunal concludes that article 245 cannot serve as a basis of the Applicant's claims and that article 304 would arise only if the Tribunal were to hold that it had jurisdiction to deal with the merits of the case. I concur with the Tribunal's reasoning on these articles. I agree with the Tribunal that on the basis of the above articles the Applicant has not established any link of the articles with the facts of its claim.

6. Nonetheless, I believe that as this is the first time that the Tribunal has to pronounce itself on the question of the existence of a dispute in a merits case, it would have been helpful and logical for the Tribunal to spell out clearly its position at the outset. It should not have waited until the second stage when considering article 300. The question should have been considered fully in the first aspect of the case so that this analysis of the issue of the existence of the dispute applies to both aspects of the case. For example, the Tribunal should have dealt with the issue of the existence of a dispute at the date of the Application – should this be on the exact date of the submission of the dispute or around that date? Should the subject matter of the dispute on the interpretation or application of the Convention be determinative of the question rather than the date? What are the documents to be relied upon by the Tribunal concerning the evidence of the existence of a dispute?

7. As the Tribunal relies on the jurisprudence of the International Court of Justice (the ICJ) on its treatment of the subject and existence of the dispute, it may be pertinent to draw attention to the case *Concerning application of the International Convention on the Elimination of all forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment of 1 April 2011*. The joint dissenting opinion of five judges criticised certain aspects of the ICJ's findings

as being "at variance with the Court's most recent jurisprudence" (para. 16). Given this scenario of some inconsistency in the jurisprudence on the matter, the Tribunal would have helped to clarify matters by mapping out its position concretely in order to develop a consistent jurisprudence of its own.

8. Before dealing with the second aspect of the case, let me state that the consideration of the case under two aspects creates a dilemma for me. While I agree with the Judgment on the first aspect of the case, I do not agree with the second aspect, as will be shown below. Since the *dispositif* combines both aspects of the case, it was difficult for me to take a position on the matter.

Article 300

9. The second aspect of the case concerns "the applicability of article 300 of the Convention to the facts and circumstances of this case" (Judgment, para. 126). It is on this article that I differ with the Tribunal's approach and reasoning. In this regard, what the Tribunal says about article 300 is as interesting as for what it remains silent about.

10. The Tribunal cites extensively the arguments of the parties on article 300 (Judgment, para. 127ff). After citing a dozen paragraphs, the Tribunal changes track when it states that "[b]efore examining whether article 300 of the Convention applies to the facts of this case, the Tribunal wishes to examine the argument advanced by Spain that Saint Vincent and the Grenadines is trying to change the nature of the dispute into one quite different from that set out in its Application" (Judgment, para. 138).

11. The Tribunal agrees with Spain that reliance on article 300 of the Convention "generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim" (Judgment, para. 142). The Tribunal refers to its own Statute and Rules as well as the case law of the ICJ that a dispute brought by Application cannot be transformed into another dispute which is different in character. The Tribunal then concludes that article 300 of the Convention cannot serve as a basis for the claims of the Applicant and that "no dispute concerning the interpretation or application of the Convention existed between the parties at the time of the filing of the Application and that, therefore, it has no jurisdiction *ratione materiae* to entertain the case before it" (Judgment, para. 151).

12. I do not share the Tribunal's view that the invocation of article 300 of the Convention by the Applicant is tantamount to a new claim. In my view, it is an additional claim. The ICJ's jurisprudence on the matter of a new claim shows that "an additional claim must have been implicit in the application or must arise directly out of the question which is the subject-matter of the Application" (*Phosphate Lands in Nauru* case, para. 67). It may be observed that neither in the Statute nor in the Tribunal's Rules is there a provision which forbids a party to amend its claim up to the stage of its final submissions. If anything, the Rules by inference seem to allow such modification or amendment of the pleadings. Article 62, paragraph 4, can be cited in this connection.

13. The institution of proceedings is governed by procedural rules of the Tribunal. Article 54 paragraph 2 of the Rules states: "[t]he application shall specify as far as possible the legal grounds upon which the jurisdiction of the Tribunal is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based". The expression "as far as possible" implies a less than absolute threshold. It is recalled that the origin of the case lies in the detention of the M/V "Louisa" and its crew. While Spain maintains that the dispute centres on the crime of damaging Spanish historical patrimony, Saint Vincent and the Grenadines contends that the boarding and detention of the M/V "Louisa" was unlawful and that this is the core of the dispute, including the detention of the crew and abuse of their human rights. The theme of the treatment of the crew and abuse of the human rights of Mario and Alba Avella is spelt out by the Applicant from the start of the case i.e. at the submission of the Application. The Tribunal in spite of concluding that it has no jurisdiction in the case, has deemed it important to make an *obiter dictum* on the requirement of "States to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances" (Judgment, para. 155). This strand on the treatment of the crew and the Avellas is the genesis of the reliance on article 300 by the Applicant. It fulfils the requirement of "a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention" (Judgment, para. 99), namely reliance on article 300 in this case. It is thus surprising to see that the Tribunal which went ahead and decided the *M/V "SAIGA" (No. 2) Case* because of concern about the suffering of persons involved has in the present case acted contrary to its own jurisprudence.

14. It bears emphasizing that I am of the view that invocation of article 300 (good faith and abuse of rights) was implicit in the Application and that it arose in the context of the detention of the *Louisa* and the treatment of the crew. In its statement of facts (chapter 2 of the Applicant's Request for the prescription of provisional measures), it is stated that "[t]his Request for provisional measures is made in conjunction with an Application to determine a dispute on the merits". Hence the details in the Request "are adopted by reference as if fully set forth" in the Application instituting proceedings before the Tribunal (see letter dated 23 November 2010 by the Agent of Saint Vincent and the Grenadines to the Tribunal's Registrar). The Applicant further states that "[t]he Annexes provided with the said Request are respectfully adopted herein and incorporated by reference" (attention is drawn to Annex 8 of the Request). Thus it can be concluded that the Applicant's detailed Request for provisional measures should be read as if it is incorporated into the Application. Indeed it was this Request cum 'incorporated Application' that prompted Spain in its Written Response to the Request to remark that "the principle of good faith plays an important role". In the same document Spain observes that good faith has not governed the attitude of Saint Vincent and the Grenadines (chapter 3 of the Written Response, para. 47). Spain also in paragraph 75 of the same document cites expressly article 300. Thus it can be concluded that article 300 was invoked by inference in the Application and that "the claim is closely related to the matrix of fact and law" (*Phosphate Lands in Nauru* case, para. 63) related to the arrest and detention of the M/V "Louisa".

15. Furthermore, in its written pleadings, Spain accuses Saint Vincent and the Grenadines of "abuse of process" (Counter-Memorial, para. 187); the evidencing by the Applicant in the Application of "an abuse of rights in the sense of article 300" (Counter-Memorial, para. 189); Spain also accuses Saint Vincent and the Grenadines of bad faith by neglecting to exchange views on its claim (Rejoinder, para. 58). All this goes to show that the invocation of article 300 of the Convention by the Applicant during the oral proceedings was not new. In any case, during the oral proceedings, Spain participated fully in the discussion of article 300. In fact Spain stated that it did not object to the application of article 300. Its only reservation was that article 300 did not have a life of its own.

16. In a remarkable way, the Tribunal agrees with the contention of Spain when "[t]he Tribunal finds that it is apparent from the language of article 300

of the Convention that article 300 cannot be invoked on its own" (Judgment, para. 137). The Tribunal then adds that "[i]t becomes relevant only when 'the rights, jurisdiction and freedoms recognised' in the Convention are exercised in an abusive manner" (ibid.). Having avoided pronouncing itself on the applicability of article 300, the Tribunal makes this categorical assertion without any attempt to explain or elaborate on what it means. It is regrettable that the Tribunal has thus missed an opportunity to interpret article 300 of the Convention. I believe that the Tribunal should have analysed article 300 in detail in order to bring clarity to this article which raises cross-cutting issues. It would have helped the parties and the international community if the Tribunal had expanded on its statement that article 300 cannot be invoked on its own. For example, the Tribunal should have examined questions such as whether there is another provision in the Convention that could have been invoked together with article 300 to establish jurisdiction. The Tribunal should also have interpreted the meaning of the phrase "... shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right". This phrase is compact and full of meaning and would have needed elucidation, especially when the examination of the *travaux préparatoires* of article 300 does not shed much light on this matter. The *travaux* in fact shows that there are highly subjective elements in article 300 which are compensated by subjecting the article to the provisions of Part XV for the settlement of disputes.

Other issues

17. The Tribunal, in view of its finding that it has no jurisdiction *ratione materiae* to entertain the case before it, then concludes that it is not required to deal with the question of the obligation under article 283 of the Convention to exchange views. The Tribunal having reached a mistaken finding that there is no dispute between the parties has thus missed an opportunity to consider article 283 of the Convention. The parties in their pleadings referred to this article in great detail, although one party regarded it as a question of admissibility. The Tribunal has dealt with this article in its case law as a question of jurisdiction.

18. My final point is on paragraph 47 of the Judgment where, "[t]he Tribunal notes with regret" that a copy of the Agreement for the Exploration and Study of Marine Geological Formations between Sage Maritime Scientific Research Inc., and Tupet Sociedad de Pesquia Maritima SA was not provided by the Applicant until after a request was made by the Tribunal. On this matter, I am of the view that the extensive quotations in paragraph 47 not only go into the merits but are also out of place.

When dealing with inter-state litigation, a court or tribunal should approach with caution matters that may seem to criticise the parties. The sovereignty of States and equality of treatment of the parties should be respected. The Tribunal should avoid subtle comments which impinge on the sovereignty of States by seeming to censure counsel who act on behalf of the parties. Parties are under obligation to respect and adhere to the Tribunal's procedures and guidelines and they normally do so.

(*signed*) James L. Kateka