

SEPARATE OPINION OF VICE-PRESIDENT WOLFRUM

1. I have voted for operative paragraphs 3 and 5 of the Judgment for reasons which, in some places, differ substantially from those the Judgment is primarily based upon. The separate opinion sets out the grounds for my disagreement and provides for alternative reasons for the holdings of the Judgment; in particular it will concentrate on the following issues: the mode concerning the appreciation of evidence as developed and applied in the Judgment; the reasoning concerning registration and nationality of the M/V Saiga; interpretation and application of the principle of the exhaustion of local remedies; relationship between the Convention on the Law of the Sea and national law as well as the competences of the Tribunal to establish violations of national law.

Appreciation of evidence

The Judgment refers to principles on the appreciation of evidence to be applied in this case in several places (paragraphs 66 to 70, 72 to 74, 122, 135, 148, and 175). These paragraphs do not really reveal which mode concerning the appreciation of evidence the Tribunal considers to be appropriate although it is evident that the appreciation of evidence occupies a decisive role in the reasoning of the Judgment. As a matter of transparency of the Judgment, the system on the appreciation of evidence should be clearly identified and fully reasoned. One may even consider this to be a mandatory conclusion to be drawn from the principle of fair trial, an established principle of international law.

3. Before dealing specifically with the mode of appreciation of evidence used in the Judgment some brief general remarks are called for.

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, have 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.

5. Nevertheless, the Tribunal is not totally 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.

6. Rules concerning the appreciation of evidence in all legal systems generally identify two issues to be considered, namely which of the parties has the burden of proof and what is the standard of appreciation to be used in assessing the evidence produced. Both issues are linked. The notion of the burden of proof embraces two aspects: a procedural one, namely who has the duty to present pleadings and evidence, as well as a substantive one, namely which party bears the negative consequences if the alleged facts have not been proven satisfactorily. Whether a fact has been proven satisfactorily is where the standard of proof becomes relevant.

7. It is the prevailing principle governing the appreciation of evidence by adjudicating bodies in all main legal systems that the burden of proof lies on the party who asserts them (*actori incumbit probatio*). It has been argued occasionally that international tribunals are not tied by such firm rules as developed in all national legal systems since they were not appropriate to litigation between Governments. I have doubts whether this approach is still fully adequate. The principle *actori incumbit probatio* is recognized in all legal systems. While the particularities of each legal system may result in modifications concerning the implementation of this principle its essence is uncontested, namely that the party which asserts a fact, whether the claimant or the respondent, bears the negative consequences if the respective facts are not proven. This rule was reaffirmed by the International Court of Justice in several cases (*Nicaragua case, I.C.J. Reports 1984, p. 437, paragraph 101; Frontier Dispute case, I.C.J. Reports 1986, pp. 587–588; Temple of Preah Vihear case, I.C.J. Reports 1962, pp. 15–16*); it has also been upheld by the Permanent Court of International Justice, conciliation commissions, mixed claims commissions and, in particular, The Iran-United States Claims Tribunal.

8. The Judgment does not refer to the burden of proof of either party explicitly although the principle has been invoked in several places. It proceeds implicitly from the premise that it is for Saint Vincent and the

Grenadines to establish that the *Saiga* had, at the time of its arrest, the nationality of Saint Vincent and the Grenadines (paragraph 72). To this I agree since it is Saint Vincent and the Grenadines which is the claimant and the nationality of the *Saiga* is a constituent element for the claim advanced by Saint Vincent and the Grenadines. However, the Judgment does not implement this approach consistently. Paragraph 72, in fact, by referring to "the initial burden" of proof makes an unjustified and unjustifiable attempt to ameliorate the consequences for Saint Vincent and the Grenadines of a full implementation of the principle of burden of proof. For similar reasons I disagree with the way of reasoning in paragraph 148 of the Judgment. The Judgment should have elucidated why the burden of proof that visual or auditory signals to stop were given remained with Guinea.

9. I will now turn to the second element of the appreciation of evidence namely the standard of proof.

10. International tribunals enjoy some discretion concerning the standard of proof they apply, namely whether they consider a fact to be proven. Nevertheless, in spite of that discretion there must be a criterion against which the value of each piece of evidence as well as the overall value of evidence in a given case is to be weighed and determined. It is a matter of justice that this criterion or standard is spelled out clearly, applied equally and that deviations therefrom are justified.

11. The Judgment does not establish, however, the general standards of proof it applies. In this respect reference should have been made to article 28 of the Statute of the Tribunal which provides, *inter alia*, that in cases where one of the parties does not appear before the Tribunal, the Tribunal "must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law." This provision of the Statute, although applicable to cases where one of the parties is absent, implies that this is the standard of proof to be applied by the Tribunal in general.

12. Traditionally, in international adjudication, apart from *prima facie* evidence which is reserved for preliminary proceedings, two standards of proof are applied, proof beyond reasonable doubt, which requires a high degree of cogency, and preponderance of evidence. The latter means that the appreciation of evidence points into a particular direction although there remains reasonable or even more than reasonable doubt. International courts or tribunals have not confined themselves strictly to these standards

but have combined or modified them where justifiable under the circumstances of the respective case. "[W]ell founded in fact and law" as referred to in article 28 of the Statute is not a standard of proof in the sense of "preponderance of evidence", it is rather comparable to the standard of proof in the sense of "proof beyond reasonable doubt" as applied in many national legal systems (see Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 1996, at p. 324).

13. The Judgment uses different formulas to describe the standard of proof it applies. For example in paragraphs 72 and 73(a) it is stated that it "... has not been established that the Vincentian registration or nationality of the *Saiga* was extinguished ...". In paragraph 148 it is said that "... the evidence adduced by the Respondent does not support its claim that the necessary visual or auditory signals to stop were given ...". The two standards of proof applied seem to differ.

14. More importantly, however, the Judgment does not give any indication which degree of cogency it felt was necessary to accept that the *Saiga* was a ship of Vincentian nationality; obviously it was a low one. The Judgment does not consider it necessary to be satisfied of the Vincentian nationality of the *Saiga* but rather accepts the lack of proof for the contrary to be sufficient. This is irreconcilable with the standard of proof to be applied according to the Statute. There is no sustainable justification for departing from the standard of proof in respect of the registration of the *Saiga*, namely that the Tribunal must be positively satisfied that the claim is well founded in fact and law. Since the nationality of the *Saiga* is a constituent element for the claims of Saint Vincent and the Grenadines as qualified by the Judgment, this standard of proof is not met by the statement that Guinea was not able to prove the contrary, which it actually did. When dealing with the nationality of the *Saiga* I will establish that on the basis of the evidence before the Tribunal one cannot come but to the conclusion that the *Saiga* was not registered in the Register of Ships of Saint Vincent and the Grenadines at the time of its arrest and thus did not have the nationality of Saint Vincent and the Grenadines.

Registration

15. I disagree with the statements made in paragraphs 72 and 73(a) and (b), namely that "... it has not been established that the Vincentian registration or nationality of the *Saiga* was extinguished ..." and that "... the consistent conduct of Saint Vincent and the Grenadines provides sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute". I support, however, the statements made in paragraph 73(c) and (d) and it was only for that reason that I was able to vote for operative paragraph 3.

16. My disagreement with the statements in paragraphs 72 and 73(a) and (b) is based on two grounds. The statements and the respective reasoning do not adequately reflect the role of flag States concerning registration of ships and the significance the Convention on the Law of the Sea attaches to proper documentation of registration. Additionally, these paragraphs are based upon an assessment of facts which I do not share. The evidence before the Tribunal clearly leads to the conclusion that the *Saiga* was not registered with Saint Vincent and the Grenadines at the time of its arrest.

17. Registration of ships has to be seen in close connection with jurisdictional powers flag States have over ships flying their flag and their obligation concerning the implementation of rules of international law in respect to these ships. It is one of the established principles of the international law of the sea that, except under particular circumstances, on the high seas ships are under the jurisdiction and control only of their flag States, e.g. States whose flag they are entitled to fly. But the high seas are subject to international law which governs their utilization. This subjection of the high seas to the rule of international law is organized and implemented by means of a permanent legal relation between ships flying a particular flag and the State whose flag they fly. This link enables and, in fact, obliges States to implement and enforce international as well as their national law governing the utilization of the high seas. The Convention upholds this principle. It further establishes a legal regime balancing the jurisdictional powers of the flag State and the powers and competences of coastal States or port States concerning foreign ships whenever they enter maritime areas under the jurisdiction of the latter or enter respective ports.

Since the juridical order of the maritime spaces is based upon the institution of the nationality of ships, it is necessary that this nationality be easily identifiable, that, in case of disputing claims or situations requiring the identification of the ship, its nationality may be established on the basis of verifiable objective data. These essential principles are not reflected adequately in the Judgment when it considers some signs of Vincentian nationality, e.g. some documents, including the ship's seal (see paragraph 67), produced by the charterer or owner, on board of the ship and, in particular, the subsequent conduct of Saint Vincent and the Grenadines (see paragraph 68) as sufficient to prove it to have had the nationality of Saint Vincent and the Grenadines at the time of the arrest.

18. Traditionally the nationality of ships has been established and implemented by linking national rules on the nationality of ships with international ones and in particular by obliging States to mutually respect the national rules on the nationality of ships. It is the traditional rule of international law, frequently confirmed in international and national adjudication, that the national law of each particular country determines which ship should be eligible for receiving the nationality of the particular State. It has been equally recognized that each State may decide upon the criteria of eligibility which must be recognized by other States. Article 91, paragraph 1, first sentence, of the Convention has codified this rule of international customary law.

19. This rule constitutes as much a right as an obligation of States. The provision embraces the prescriptive jurisdiction of every State to establish the respective conditions ships have to meet for being granted the right to fly the flag of that particular State. The wording of the provision further clearly indicates that States are under an obligation to enact respective national regulations.

20. Article 91, paragraph 1, of the Convention refers to nationality as well as registration without clarifying the relationship between the two concepts. This again is an area where States have considerable discretion. Different systems are applied in municipal law; however, it is common to all of them that the attribution of nationality for merchant ships requires a constitutive act from the side of the responsible authorities of the given State. It is the prevailing practice that – except for warships and sometimes smaller vessels – such constitutive act rests in the registration e.g. that nationality is granted through registration.

21. The obligation to enter ships into a register of ships has developed in national law; most States in that respect followed the example of the Navigation Act of the United Kingdom of 1651 as amended in 1660. This equally holds true for Saint Vincent and the Grenadines. According to section 2(c) of the Merchant Shipping Act of Saint Vincent and the Grenadines a "Saint Vincent and the Grenadines ship" means a ship registered under this Act and includes any ship that is deemed to be registered under this Act," the latter part of the provision referring to ships registered immediately before the 22 October 1985 under the Merchant Shipping Act of 1894 of the United Kingdom. Although the Judgment acknowledges that under the law of Saint Vincent and the Grenadines a ship acquires nationality through registration it does not clearly distinguish between the two; it indiscriminately refers to one or the other or both (see paragraphs 67 and 68, paragraph 69 and operative paragraph 3 which only refers to registration).

22. To attribute effectively the right to fly its flag to a ship and to be certain that this will be respected a State must take further steps with the view to make other States cognizant of this fact. The mode most traditionally upheld to prove the registration and/or nationality of a particular ship is in making such formal attribution through appropriate documentation. This has been confirmed in hundreds of treaties of friendship, commerce, and navigation. Although different clauses are used they all confirm that the nationality of vessels shall be reciprocally recognized on the basis of documents and certificates on board the vessel issued by the proper authorities of either of the contracting Parties.

23. The Convention follows this approach in its article 91, paragraph 2. The wording of this provision indicates that certificates of registration or equivalent documents issued by the respective national authorities constitute the proof for a particular ship to have the right to fly the flag of that State. The authorities of other States or international authorities, as the case may be, are under an obligation to respect these documents as being accurate and valid, in particular, they must not – except under special circumstances – challenge the validity or accuracy of such documents on the ground that they do not correspond to the national law of the State having issued the documents. Only such understanding of the objective of the documents referred to in article 91, paragraph 2, of the Convention corresponds to the content of the general rule enshrined in article 91, paragraph 1, first sentence, of the Convention. To consider documents as referred to in article 91, paragraph 2, of the Convention as being the

authoritative statement of the responsible State on the status of a given ship thus is the necessary mechanism to protect the right of every State to establish its own regime on registration and nationality of ships and to apply it according to its national law.

24. The Tribunal has received as documentary evidence concerning the nationality of the *Saiga* the Certificate of its provisional registration issued 14 April 1997, the entries in the Register of Ships (p.7306/1G, printed out 15 April 1997), the Certificate of the permanent registration of the *Saiga* of 28 November 1997, the respective entry in the Register of Ships and statements of the Commissioner as well as the Deputy Commissioner of Maritime Affairs concerning registration in general and of the *Saiga* in particular. Additionally thereto the registration of the *Saiga* at the time of its arrest was intensively addressed in the hearings by both parties.

25. When establishing whether the *Saiga* was registered under the flag of Saint Vincent and the Grenadines the Tribunal does not utilize these documents, in particular it disregards the content of the Provisional Certificate of Registration and of the Register of Ships. Instead, as already indicated, the Judgment relies as evidence on "several indications of Vincentian nationality on the ship or carried on board" (paragraph 67), the conduct of Saint Vincent and the Grenadines after the arrest of the *Saiga* (paragraph 68) and on the failure of Guinea to challenge the registration or nationality of the *Saiga* (paragraphs 69 and 72(a)). The disregard of the wording of the Provisional Certificate of the *Saiga* and of the entry in the Register of Ships, as printed out 15 April 1997, is at the root of my disagreement with the reasoning of the Judgment on the issue of registration/nationality of the *Saiga*.

26. The Judgment should have proceeded from the documents Saint Vincent and the Grenadines had to issue, according to article 91, paragraph 2, of the Convention, to the *Saiga*, namely the Provisional Certificate of Registration relevant at the time of the arrest of the ship. This Certificate of Registration was marked to be a provisional one and clearly stated that it expired on 12 September 1997. An examination of the Register of Ships (p. 7306/1G, printed out on 15 April 1997, submitted by Saint Vincent and the Grenadines) confirms that the registration of the *Saiga* (*ex Sunflower*) was entered on 12 March 1997 and was valid until 12 September 1997. Apart from confirming that the registration of the *Saiga* ceased to be valid on 12 September 1997, its wording further establishes not that the certificate was provisional but that the registration was a provisional one and thus was valid

only for a period of six months, namely from 12 March to 12 September 1997. Since the permanent registration of the *Saiga* was entered in the Register of Ships of Saint Vincent and the Grenadines only on 28 November 1997 the Judgment should have come to the conclusion that the *Saiga* was, according to the documents referred to in article 91, paragraph 2, of the Convention, not registered at the time of its arrest. The further and only possible conclusion to be drawn is that, according to the Merchant Shipping Act of Saint Vincent and the Grenadines, the *Saiga* at the time of its arrest did not have the nationality of Saint Vincent and the Grenadines.

27. The Judgment gives no reason why these documents do not overrule the evidence the Judgment refers to in paragraph 67. Account should have been taken in this context that it was Saint Vincent and the Grenadines which had issued documents according to which the *Saiga* was not registered at the time of its arrest and that the documents the Judgment seems to rely upon do not have the same status. The Judgment further does not explain why it considers acceptable the arguments advanced by Saint Vincent and the Grenadines based upon an interpretation of its Merchant Shipping Act and its administrative practice (paragraph 67). These arguments are untenable and the Tribunal should have rejected them. The Tribunal has the power to do so. As rightly stated in paragraph 66 of the Judgment the nationality of a ship is a fact to be determined, like other facts in dispute before the Tribunal, on the basis of evidence adduced by the parties. To do so the Tribunal may interpret the national law invoked as stated in respect of the national law of Guinea (see paragraphs 120 and 121). In international litigation a State does not have the exclusive power to interpret its national law to the detriment of the other party.

28. The claim advanced by Saint Vincent and the Grenadines that the *Saiga* had remained registered in spite of the wording of the Provisional Certificate and the entry in the Register of Ships cannot be based upon section 36(2) of the Merchant Shipping Act. According to this provision a provisional certificate shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue. This provision establishes that a provisional certificate of registry has the same effect as a permanent one. It does, however, not say that a provisional certificate of registry has to be valid for 12 months; it further does not say that a provisional certificate whose validity has expired has the same effect as a permanent certificate. Nothing in the Merchant Shipping Act of Saint Vincent and the Grenadines precludes the authorities to issue a provisional certificate being valid only for a shorter period, namely six months. This is confirmed by the brochure on Saint Vincent and the Grenadines Maritime Administration as well as by a letter of the Deputy Commissioner for

Maritime Affairs of 1 March 1999 explaining that it was the practice to issue a provisional certificate of registration for a six-month period only. I agree with the assessments of the Merchant Shipping Act of Saint Vincent and the Grenadines by President Mensah and Judge Rao in their individual Separate Opinions and of Judge Warrioba in his Dissenting Opinion.

29. Equally section 37 of the Merchant Shipping Act does not sustain the claim that the *Saiga* remained validly registered even after the expiry date of the provisional registration. It was argued that only on the basis of this provision a ship could be deleted from the Register of Ships and since there had been no suggestion to do so the *Saiga* had remained on the Register of Ships. Section 37 proves the contrary of what Saint Vincent and the Grenadines means to prove by invoking it. Section 37 does not provide that a ship has to be deleted from the Register of Ships if the validity of its registration lapses. Therefore it is impossible to argue that a ship not deleted from the Register remains registered until deleted. Accepting this argument would mean that even ships whose provisional registration had come to an end after 12 months would remain registered. Actually the Merchant Shipping Act does not provide for the removal of ships from the Register of Ships at all although it foresees several reasons why a certificate may become invalid.

30. The other documents submitted by Saint Vincent and the Grenadines through which it intended to establish that the *Saiga* was registered at the time of its arrest confirm that the *Saiga*'s provisional registration was valid for six months only and was not renewed. This is in particular true for the letter of the Deputy Commissioner for Maritime Affairs 1 March 1999. It stated, amongst others, "... that it is Registry practice for Provisional Certificates of Registry to be issued for six-month periods as was done with the 'SAIGA'. One purpose of this is to encourage owners to comply with the formalities of permanent registration sufficiently in advance of the one-year validity period of the provisional registration period under Section 36 (2) of the Act. Moreover, in my experience it is very common for Owners to allow the validity period of the initial Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate (as was the case here)". Nevertheless, she considered the *Saiga* to have remained validly registered.

31. The Judgment further states that the consistent conduct of Saint Vincent and the Grenadines following the arrest of the *Saiga* supports the contention that the nationality of Saint Vincent and the Grenadines was maintained by the *Saiga* (paragraph 68). I cannot agree with the underlying rationale of this reasoning.

32. It is undisputed that Saint Vincent and the Grenadines acted as the flag State of the ship after its arrest and, in particular, in the proceedings before the Tribunal. The question is whether this is relevant, that is to say whether a State may establish the nationality of its claim by initiating and participating in respective international proceedings or may gain *locus standi* by advancing claims of natural or juridical persons although they do not have its nationality. Such approach does not seem to find support. I have no intention, though, to deal with this important question in depth since in this case there are two reasons why the nationality of the *Saiga* cannot be established retroactively and certainly not through conduct of Saint Vincent and the Grenadines.

33. It is well established in international law that the primary requisite for the making of an international claim is the existence of an interest recognized by law at the time the alleged violation of that interest occurred. This condition is not fulfilled since the *Saiga* did not have the nationality at the time of the arrest and later conduct of Saint Vincent and the Grenadines cannot cure this deficit. Apart from that, the Convention on the Law of the Sea rules out that a State becomes the flag State of a ship retroactively and by mere conduct. According to the Convention, flag States have the duty to "effectively exercise" their jurisdiction and control in several matters over ships flying their flag (article 94 of the Convention); they have further obligations, in particular, in relation to manning, seaworthiness, collision prevention, construction, and crew qualification in conformity with generally accepted international regulations, procedures and practices. Article 94, paragraph 4, of the Convention details some of the measures that a flag State must adopt to ensure regular surveys; appropriate equipment and instruments for the safe navigation of the ship; and appropriate qualifications for the masters, officers, and crew. Further flag State obligations in relation to vessel source pollution are set out in article 211, paragraph 2, of the Convention. In addition, the flag State must comply with applicable international rules and standards established for the prevention of pollution.

The respective link between the flag State and the ships concerned being the necessary precondition for the implementation and enforcement of such international rules is established through the registration of ships and their acquiring the respective nationality. As already indicated, article 91, paragraph 1, of the Convention leaves it to the States to prescribe the national rules which specify the conditions for registration. But the said provision does not allow a State to claim the flag State position in international proceedings although there is no valid registration when the very State considers this to be in its interest and to reject it if its interests so require.

34. Finally, I disagree with the reference to the Judgment of the Tribunal of 4 December 1997 where the *Saiga* was described as "an oil tanker flying the flag of Saint Vincent and the Grenadines". If such a reference was felt to be necessary for factual accuracy, then it should have been equally indicated in the Judgment that this was a reference to the narrative part of the Judgment of 4 December 1997 (paragraph 26) and that this Judgment further stated: "As far as the ownership of the vessel is concerned, the Tribunal notes that this question is not a matter for its deliberation under article 292 of the Convention and that Guinea did not contest that Saint Vincent and the Grenadines is the flag State of the vessel." Nothing, and this is my second argument against the inclusion of paragraph 71 in the Judgment, can be taken as to suggest that a respective finding had already been made by the Tribunal. This would not accurately reflect the content of this Judgment as can already be seen from its paragraph 44. The statement in paragraph 44 of the Judgment of 4 December 1997 should further be seen against the background of the respective submissions. Counsel of Saint Vincent and the Grenadines stated during the oral proceedings on 28 November 1997 in response to a question from the Agent of Guinea about the ownership of the vessel: "We have been able to obtain this morning a provisional certificate of registration from Saint Vincent and the Grenadines which unfortunately, although dated 14 April 1997, is dated to expire on 12 September 1997. Efforts are being made to obtain the no longer provisional but full certificate of registration on behalf of the owners. We hope that we will be able to get this to the Tribunal at the latest during the adjournment" (ITLOS/PV.97/2, p. 5, 15-20). In retrospect the statement of Counsel of Saint Vincent and the Grenadines to which also the Separate Opinion of President Mensah and the Dissenting Opinion of Judge Warioba refer, concealed not only that there was a gap in registration but that the Permanent Certificate of Registration which was promised to be delivered was issued only the very same day.

35. I endorse the statement made in paragraph 73(c) of the Judgment namely that the persistent failure of Guinea to question the assertion of Saint Vincent and the Grenadines that it was the flag State of the *Saiga* when it had every reasonable opportunity to do so precluded Guinea of the opportunity to challenge the nationality of the *Saiga* at this stage. This statement lacks, however, adequate reasoning.

36. International law has developed mechanisms which, in fact, preclude a party from raising particular objections or claims due to the preceding conduct of that party, namely estoppel and acquiescence. The concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity.

37. The rule of estoppel operates so as to preclude a party from denying before a tribunal the truth of a statement or a fact made previously by that party to another whereby the other has acted to his detriment or the party making the statement has secured some benefit. It is the prime objective of the rule of estoppel to preclude a party from benefiting from its own inconsistency to the detriment of another party who has in good faith relied upon a representation of facts made by the former party. The International Court of Justice has phrased the rule of estoppel as follows in its Judgment in the *Temple of Preah Vihear* case:

[T]he principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*I.C.J. Reports 1962*, pp. 143–144)

38. In the *Delimitation of the Maritime Boundary in the Gulf of Maine* case the I.C.J. stated:

The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. (*I.C.J. Reports 1984*, p. 305, para. 130)

39. Two forms of estoppel are recognized in international jurisprudence, namely estoppel by treaties, compromis etc. and estoppel by conduct.

40. The Judgment should have considered as to whether the conclusion of the 1998 Agreement estopped Guinea from questioning the registration/nationality of the *Saiga* at the time of arrest since, in theory, such kind of treaties may contain elements relevant thereto, in particular if they affirm facts or assessments which cannot be questioned later on. However, as has been pointed out in the judgment in the *Salem* case (UNRIAA vol. II, at p. 1180), the wording has to be clear in acknowledging the facts in question. The Agreement of 1998 does not refer to Saint Vincent and the Grenadines as the flag State of the *Saiga*; it refers instead to "the dispute between the two States relating to the MV 'Saiga'". This does not amount to a recognition that Saint Vincent and the Grenadines has been accepted as the flag State of the ship at the time of its arrest. Some inspiration may be gained in this respect from the judgment in the *Salem* case. The respective compromis referred to Salem as an American citizen. Nevertheless, the arbitral tribunal allowed Egypt to challenge Salem's American nationality.

41. However, the conduct of Guinea after the arrest of the *Saiga* and in particular in the proceedings in the *M/V "SAIGA"* case (prompt release) points in the direction that it considered Saint Vincent and the Grenadines to be the flag State. For example, Saint Vincent and the Grenadines was referred to in the *cédule de citation* as the flag State and it was not challenged as such in the proceedings of the *M/V "SAIGA"* case (prompt release). Finally, Guinea has entered into negotiations with Saint Vincent and the Grenadines concerning the formulation of the bank guarantee for the release of the ship and has accepted such a guarantee from Saint Vincent and the Grenadines. All these actions or inactions of Guinea could be taken by Saint Vincent and the Grenadines that Guinea would not challenge the status of the latter as a flag State.

42. The Judgment should have further examined whether Guinea had acquiesced in Saint Vincent and the Grenadines as the flag State of the *Saiga*. The conduct of Guinea after the arrest of the ship and, in particular, in the proceedings in the *M/V "SAIGA"* case (prompt release) clearly point in this direction.

43. The doctrine of acquiescence has been applied, either expressly or implicitly, as a principle of substantive law. As the International Court of Justice has stated in the *Gulf of Maine* case the doctrine of acquiescence has, as the doctrine of estoppel, its basis in the concepts of equity and good faith. The case law referred to considers acquiescence to be a type of qualified inaction. There seems to be some uncertainty in international jurisprudence as to what are the prerequisites to establish a binding effect of inaction. It is, however, common ground that the acquiescing State must have remained inactive although a protest or action would have been required (see Judgment of the International Court of Justice in the *Arbitral Award Made by the King of Spain on 23 December 1906 [Honduras v. Nicaragua]*, Judgment, *I.C.J. Reports 1960*, pp. 192–217). That is exactly the case here. Guinea should have raised the lack of registration of the *Saiga* at the outset of the proceedings in the M/V "SAIGA" case (prompt release). By remaining inactive in this respect and by negotiating the conditions of the bank guarantee to be submitted by Saint Vincent and the Grenadines for the release of the ship and by finally accepting the bank guarantee Guinea accepted Saint Vincent and the Grenadines as the flag State. It would be contrary to good faith if Guinea were now allowed to reverse its position; it is barred from invoking the lapse of registration between the expiry of the Provisional Certificate of Registration and the issuing of the Permanent Certificate of Registration.

44. The Judgment states that in the particular circumstances of the case it would be unreasonable and unjust if the Tribunal were not to deal with the merits of the case. Although I agree with this statement in substance it would have been appropriate to deal with this issue in depth. In particular, it was necessary to explain which circumstances led to this conclusion. The Judgment should have referred to the fact that a decision of the Tribunal to dismiss the claims advanced by Saint Vincent and the Grenadines on the ground that the *Saiga* was not registered at the time of its arrest would have been highly detrimental for those who suffered most from the arrest, namely the members of the crew and the owner of the cargo. They, however, had no influence on the management of the ship and, in particular, on its proper registration. The gap in registration was, apart from that, the result of a lax administrative practice on the side of Saint Vincent and the Grenadines and the lack of diligence requested from the shipowner rather than the result of

intent. The willingness of the shipowners to maintain the ship's registration was not contested. Finally, it is to be taken into consideration that otherwise Guinea would have been saved, without any justification, from the consequences of the arrest of the *Saiga* which the Judgment rightly qualified as having been illegal and undertaken with excessive use of force. For these reasons justice required as already indicated to preclude Guinea from raising the lack of registration of the *Saiga* at the time of its arrest. I would like, however, to emphasize that this is possible only since Guinea in the first place did not object to Saint Vincent and the Grenadines as the flag State of the *Saiga*. The statements in paragraph 73(c) and (d) of the Judgment are thus to be considered to form a unit.

45. Finally, the Tribunal should have noted in the context of registration that the differences between the parties concerning the nationality of the *Saiga* were the result of unusual features in the legislation of Saint Vincent and the Grenadines, a certain laxity in the administrative practices of the authorities called upon to implement the rules concerning registration and a laxity on the side of the shipowners concerning the proper registration of the *Saiga*. The Merchant Shipping Act of Saint Vincent and the Grenadines opens the possibility of provisional registration for one year, a period which clearly goes beyond that allowed under the national law of other States. The Act further does not provide clear rules for a removal of ships from the Register of Ships and on the effective implementation of such decision or event. The authorities of Saint Vincent and the Grenadines do not seem to intervene in cases where there is, as it was referred to, a lapse of registration. This legislation of Saint Vincent and the Grenadines combined with the administrative practice is likely to weaken the link between it and the ships flying its flag although this link is essential for the implementation of the international rules referred to in article 94 of the Convention. I agree with the assessment of President Mensah in his Separate Opinion in this respect.

Exhaustion of local remedies

46. I agree with the Judgment that Guinea cannot successfully challenge the admissibility of certain claims advanced by the Applicant by invoking that local remedies have not been exhausted for the reasons set out in paragraph 100. However, I disagree with the statement and the supporting arguments advanced in paragraphs 98 and 99 of the Judgment. The subject matter of the case before the Tribunal is not only one which encompasses direct violations of the rights of Saint Vincent and the Grenadines.

In qualifying the claims made and exempting them from the scope of the exhaustion of local remedies rule the Judgment deviates without appropriate reasoning from the jurisprudence of the International Court of Justice.

47. It is well established by customary international law that local remedies have to be exhausted before a State may bring an international claim for injuries to its nationals committed in the territory of another State. In order for a State to espouse such a claim it must establish that the alleged injured person was a national at the time of the injury and continuously thereafter, at least up to the date of the formal presentation of the claim. Furthermore, the person whose claims are espoused is required to have exhausted all remedies reasonably available through the domestic institutions of the State alleged to have caused the injury. There are exceptions to this rule and it may also be waived.

48. It is well accepted that where a State expressly sues in right of diplomatic protection, an examination of the exhaustion of local remedies is mandatory. It is equally accepted that where the claim made by the claimant State is one of direct injury and involves no injury to its nationals as such, the exhaustion of local remedies rule does not apply since the rule does not require a claimant State to have recourse to the domestic remedies available under the legal system of another State. It is therefore crucial to establish whether the injury in question is to be qualified as a direct injury of the claiming State. The Judgment states in this respect: "None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted." According to the dictum of the International Court of Justice in the *ELSI* case (*I.C.J. Reports 1989*, pp. 42–43 and 51) claims to be exempt from the scope of the exhaustion of local remedies rule have to be "– both distinct from, and independent of", the dispute of the alleged violation in respect of the individuals involved. To decide whether this is the case does not depend upon the wording of the claims made, it is rather necessary to determine the nature of the injury and the rights violated.

49. Although the Submissions No. 1, 2, 4, 5, 7 and 8 are phrased in terms of violations of rights of Saint Vincent and the Grenadines it can hardly be denied that the dispute would not have occurred without the arrest of the *Saiga* by the authorities of Guinea. It is further beyond question that the arrest of the *Saiga* had negative implications predominantly for the owner of the ship, its charterer and its crew. This is reflected by the Judgment. It awards compensation mainly to members of the crew, the captain, the owner and the charterer of the vessel (see operative paragraph 3 and Annex), however, no compensation to Saint Vincent and the Grenadines directly.

50. The crucial question to be decided is whether this is a case whose subject matter is the alleged violation of the rights of a State, i.e. Saint Vincent and the Grenadines, or whether its subject matter also covers alleged violations of rights of individuals. To be more concrete it is decisive whether the freedom of navigation and the freedom not to be subjected to illegal hot pursuit invoked by Saint Vincent and the Grenadines is a right of States only or also a right of ships.

51. The wording of the respective provisions of the Convention concerning the freedom of navigation (articles 58 and 87) seem to point into the former direction whereas article 111, paragraph 8, of the Convention points into the latter. Article 87 of the Convention, to which article 58 refers, deals with freedoms of States although such freedoms are exercised, in practice, mostly not directly by States but rather by natural or juridical persons. However, article 111, paragraph 8, of the Convention provides that in the case of illegal hot pursuit – which constitutes an infringement of the freedom of navigation – the illegally arrested ship will be compensated. According to article 110, paragraph 3, of the Convention a ship having been subject to an illegal visit on the high seas equally has the right to claim compensation. Since in international law the right to receive compensation depends upon the pre-existence of an internationally protected right whose violation gives rise to international responsibility, both provisions indicate that the freedom of navigation incorporates a right of natural or juridical persons, too. This is indirectly confirmed by two provisions of the Convention. Article 295 of the Convention provides that local remedies are to be exhausted, where required under international law, before a dispute between States Parties may be submitted to a dispute settlement procedure provided for under the Convention. If, as the Judgment seems to indicate, disputes concerning the interpretation or application are only disputes

between States Parties arising from alleged violations of States' rights, article 295 of the Convention would be meaningless. This, however, would violate one of the most basic rules concerning the interpretation of international treaties, namely that interpretation should not render a provision inoperative. Finally, according to article 292, paragraph 2, of the Convention the application for the prompt release of a vessel may be made by the flag State or on its behalf. The second alternative of that provision opens the possibility for the flag State to entrust the entity whose interests are directly at stake to initiate the respective proceedings. This again recognizes that disputes concerning the exercise of freedom of navigation, in general, involve rights of natural or juridical persons which may prevail over the rights of States. Accordingly, the concept of freedom of navigation has as its addressees States as well as individual or private entities. Every other interpretation would run counter the objective of the Convention on the Law of the Sea. If the freedom of navigation would be interpreted as the freedom of States only it would be limited to the right of States to have ships flying their flag. However, such definition would not take into consideration that the concept of freedom of navigation encompasses, as stated by the Permanent Court of International Justice in the *Oscar Chinn* case:

According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers. (*Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63, p. 83*)

52. Although this definition of the concept cannot be applied without modification to the freedom of navigation at sea it is beyond doubt that this freedom comprises activities undertaken by individuals or private entities rather than by States. Accordingly, it is questionable to qualify claims resulting from infringements upon the right of freedom of navigation as interstate disputes.

53. The provisions of the Convention indicate that concerning freedom of navigation the rights of States and those of individuals are interwoven. It is significant that – in respect of the freedom of fishing – article 116 of the Convention refers to the right of States for their nationals to engage in fishing. A similar wording would have appropriately qualified the freedom of navigation.

54. Applying the test developed by the International Court of Justice in the *ELSI* case (*I.C.J. Reports 1989*, pp. 42–43, paragraph 51) whether local remedies are to be exhausted this means that, to the extent the subject matter of a dispute concerns an alleged violation of the freedom of navigation, it is impossible to find a dispute over alleged violations of the Convention which is both distinct from, and independent of, a dispute over the alleged violation of the rights of the ship involved.

55. Guinea could, however, not successfully invoke the exhaustion of the local remedies rule since this rule is only applicable if a prior voluntary link exists between the individual and the Respondent State (see Ian Brownlie, *The Rule of Law in International Affairs*, 1998 at p.104). In consequence it does not apply, as the Judgment rightly points out (paragraph 100), in cases where the State having taken measures acted outside the scope of its jurisdiction. In particular, when a State had no jurisdiction concerning the measures taken, as it is the case here, the requirement to exhaust local remedies would amount to a recognition of the jurisdiction of that State. This is certainly not the objective of the concept on the exhaustion of local remedies.

Relationship between the Convention and national law

56. In paragraph 121 the Judgment states that the Tribunal is “competent to determine the compatibility of such laws and regulations with the Convention”. This statement should, in spite of the reference to the jurisprudence of the Permanent Court of International Justice, not be construed as to limit the competences of the Tribunal. In fact its competences are, as a result of the progressive development of international law through the Convention, much broader. For example, according to article 58, paragraph 3, of the Convention States shall “comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention”. This means that States are not only bound by the Convention but also by the respective national law enacted by coastal States.

57. National law plays a particular role in respect of the legal regime governing the use and management of the sea. The Convention is to be considered as a framework agreement; it provides for further rules to be enacted by States, in particular coastal States, international organizations or international conferences. Those rules, to the extent they are in accordance with the Convention, supplement the latter and hence they are covered by the jurisdiction of the Tribunal. This is explicitly stated in article 297, paragraph 1(b), of the Convention. According to it the compulsory procedures

for the settlement of disputes provided for in section 2 of Part XV of the Convention cover cases where it has been alleged that a State in exercising, for example, the freedom of navigation has acted in contravention of laws or regulations adopted by the coastal State. On that basis the Tribunal could and should have stated that already the law of Guinea does not provide a basis for the arrest of the *Saiga*.

Costs

58. The Judgment has refrained from awarding costs to the successful party. I agree with this decision for the reason that I consider it inappropriate to take such a decision although the Tribunal was mandated to do so as long as it has not established general rules and criteria concerning the assessment of costs and their distribution. If such rules and criteria had been established previously I would have agreed to award reasonable costs and necessary expenses to the successful party.

(Signed) Rüdiger Wolfrum