## SEPARATE OPINION OF JUDGE BOUGUETAIA

(*Translation by the Registry*)

1. In drafting these few lines it is certainly not my intention to distance myself from the Judgment delivered by the Tribunal or to call into question my decision to vote in favour of its final decision.

2. It is clear that it was difficult for the Tribunal to achieve unanimity on its decision in this case; this is best shown by the number of dissenting or separate opinions expressed by the Judges.

3. My separate opinion will primarily concern the content of paragraph 154 of the Judgment and its relationship with article 300 of the Convention.

4. I find it difficult to follow the logic of paragraph 154 of the Judgment, which appears immediately after paragraphs 151 and 153. However, before these substantive issues are addressed, it seems that a brief overview of the procedure will enable the reader to gain a better understanding of my remarks.

5. The *M/V "Louisa" Case* (Case No. 18) between Saint Vincent and the Grenadines and the Kingdom of Spain has been examined twice by the International Tribunal for the Law of the Sea.

6. First, the Tribunal was required to rule on a request for provisional measures submitted by Saint Vincent and the Grenadines, at the end of the examination of which it adopted the Order of 23 December 2010 (*ITLOS Reports 2008-2010*, p. 69, para. 69). The Tribunal found "*prima facie*" jurisdiction, pointing out that "before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded". In finding *prima facie* jurisdiction, in its Order the Tribunal stated that it considered

> that the present Order in no way prejudges the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and

> leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions
> (*Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 70, para. 80).

In doing so, the Tribunal confirmed the approach which it had already taken in the *M/V "SAIGA" (No. 2) Case* (*Order of 11 March 1998, ITLOS Reports 1998*, p. 39, para. 45).

7. After considering the written and oral statements of the Parties, at the end of its examination of the merits of the case, the Tribunal has concluded 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 present case* (emphasis added) (Judgment of 28 May 2013, para. 151).

8. The Tribunal adds: "since it has no jurisdiction to entertain the Application, the Tribunal *is not required to consider any of the other objections raised to its jurisdiction or against the admissibility of the claims of Saint Vincent and the Grenadines*" (emphasis added) (Judgment of 28 May 2013, para. 153).

9. However, in the following paragraph (paragraph 154 of the Judgment), the Tribunal states:

> [w]hile the Tribunal has concluded that it has no jurisdiction in the present case, it cannot but take note of the issues of human rights as described in paragraphs 59, 60, 61 and 62.

Paragraphs 59, 60 and 62 relate specifically to the way in which the Spanish authorities exercised their criminal jurisdiction vis-à-vis the individuals concerned, in particular with regard to the conditions under which they were detained, their treatment after their release and the undue delay in bringing formal charges against some of them.

10. I take the view that because the Tribunal has declared its lack of jurisdiction to entertain the case, there is no cause to examine the other pleas raised by the Parties.

11. As the Tribunal itself states in paragraph 153 of the Judgment, "[s]ince it has no jurisdiction to entertain the Application, the Tribunal *is not required to consider any of the other objections raised to its jurisdiction or against the admissibility of the claims of Saint Vincent and the Grenadines*" (emphasis added).

12. In the following paragraph (154), the Tribunal considers it necessary to "take note of the issues of human rights as described in paragraphs 59, 60, 61 and 62", thus referring to what Saint Vincent and the Grenadines alleges to be a violation of human rights, basic principles of humanity and the principles of due process. However, once the Tribunal has ruled on its jurisdiction, the procedure is terminated and the "door is closed" to any other claim. That is the rule to be applied. I have great difficulty accepting paragraph 154 even though I share deeply in the Tribunal's indignation, which I nevertheless consider to be futile in the circumstances.

13. I believe that in paragraph 154 the Tribunal errs in two respects:

(a) The Tribunal judges the way in which the Spanish authorities exercised their criminal jurisdiction, thereby criticising the exercise by Spain of competences laid down by its domestic law; this is not what it has been called upon to do.

(b) The Tribunal presents that indignation ["cannot but take note of the issues . . ."] as an *obiter dictum* which will not change its decision in any way. Even more seriously, the relegation of a violation of human rights to an *obiter dictum* section (an idea put forward by certain Judges in order to maintain the wording of paragraph 154) would seem to run counter to recent, progressive developments in human rights issues.

14. At a time when the International Court of Justice has achieved a remarkable normative breakthrough in the protection of human rights by regarding respect for them as an obligation *erga omnes*, in my humble opinion the Tribunal should have gone beyond a simple "*obiter dictum*" statement and mentioned it more than "in passing". The basic principles concerning the human person have now joined the corpus of legal norms which are binding on all States. Respect for such human rights has become an obligation *erga omnes* (see ICJ, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32).

15. There has undoubtedly been a violation of the human rights of the individuals arrested and mistreated by the Spanish justice system, who at the very least suffered mental torture, and even physical torture in view of the conditions of their detention.

16. The Tribunal recognizes this implicitly where it "cannot but take note of the issues" (paragraph 151 of the Judgment), but above all where it

> holds the view that States are required 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 (emphasis added) (Judgment of 28 May 2013, para. 155).

17. Rather than accepting the violation of human rights as a possible basis for its jurisdiction, the Tribunal preferred to follow a different logic:

- rejecting article 300, which was invoked by Saint Vincent and the Grenadines as one of the bases for the jurisdiction of the Tribunal;

- taking note "in passing" of that violation of human rights, which is specifically covered by article 300.

In other words, it says one thing and then says the opposite!

"The Tribunal therefore is of the view that article 300 of the Convention cannot serve as a basis for the claims submitted by Saint Vincent and the Grenadines" (Judgment of 28 May 2013, para. 150).

18. It is not the aim of this separate opinion to open a debate on the substance of article 300 (otherwise it would become a dissenting opinion), but to point out, albeit briefly, the way in which article 300 of the Convention on the Law of the Sea is dealt with; this would seem a subject likely to be of interest to the reader.

19. Article 300 reads as follows:

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

20. Without returning to the arguments raised by the Parties in the course of the debate on article 300, I will have regard only to the reasoning of the Tribunal in order to conclude that it could perhaps have opted for a different approach.

21. "The Tribunal notes that the case before it has two aspects: one involving the detention of the vessel and the persons connected therewith and *the other concerning the treatment of these persons* . . . The second aspect was introduced by Saint

Vincent and the Grenadines on the basis of article 300 of the Convention only after the closure of the written proceedings. It was discussed during the oral proceedings and included in the final submissions of Saint Vincent and the Grenadines" (Judgment of 28 May 2013, para. 96).

22. I would not take as categorical a view as the Tribunal in considering that Saint Vincent and the Grenadines invoked article 300 only after the closure of the written proceedings and that it raised it only during the oral proceedings and in its final submissions. While the Applicant did not mention article 300 explicitly in its Memorial, an implicit reference is made where, in paragraph 81, it sets out the reparations it is seeking.

> The reparations which Applicant seeks include the following: . . .
>
> 3. *Reparations for the violation of human rights* of Alba and Mario Avella. (emphasis added) (Memorial of Saint Vincent and the Grenadines, p. 23, para. 81 (3)).

23. The connection between the claim made by Saint Vincent and the Grenadines and article 300 seems to be beyond doubt even though this is not stated expressly by the Applicant. Moreover, the Applicant confirms its intentions when it "requests the Tribunal prescribe the following measures: (c) declare that the detention of any crew member was unlawful." (Memorial of Saint Vincent and the Grenadines, p. 27, para. 86 (d)).

24. These contentions do not seem, for the Tribunal, to be a legitimate ground requiring an examination as it "considers that this 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 of 28 May 2013, para. 142).

25. In my view, the invocation of article 300 by Saint Vincent and the Grenadines undoubtedly added to, or even modified, the legal basis for its claim, but in no way did it change the subject-matter of the dispute; furthermore, the Applicant never abandoned the series of provisions on which it based its claim.

26. Spain cited article 300 many times in the written proceedings, thereby explicitly recognising the Applicant's right to do likewise (ITLOS/PV.12/C18/11, p. 11 *et seq.*).

27. The two Parties consented to make arguments on article 300, which they did at length.

28. There is nothing in the Convention or in the Rules of the Tribunal to prevent a Party from having recourse at the last minute to one or more articles which may consolidate or reinforce the legal basis for its claim.

"The 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 of 28 May 2013, para. 137).

29. The Tribunal thus has taken the view that, although article 300 may be interpreted as a horizontal provision applying to all the articles of the Convention, it remains a "qualifying" provision which cannot be invoked on its own.

30. The Applicant was not able to find a link, or show the link, between article 300 and the other provisions on which its claim was based, which prevented it from arguing this ground before the Tribunal.

31. I personally regret that the Tribunal was not able (for fear of favouring the position of one or other of the Parties) to take that step and join the ICJ in its work in furthering the protection of human rights.

32. It could easily, while still demonstrating caution, have found the link between article 300 and other provisions of the Convention (unfortunately not invoked by the Applicant).

33. Article 2(3) of the Convention could have served perfectly well as an anchoring provision for article 300. It states that "[t]he sovereignty over the territorial sea is exercised *subject to this Convention and to other rules of international law*" (emphasis added) (article 2(3) of the Convention).

34. The objection has been raised that article 2 could not be relied on because the acts attributed to the Spanish authorities took place in a Spanish port, that is to say within the framework of the exercise by Spain of its sovereign rights.

35. I would reply that no right, however sovereign, may be exercised in a manner that results in abuses of rights and arbitrariness.

36. Furthermore, article 2 of the Convention constitutes a general provision in Part II, which, in section 2 "Limits of the territorial sea", governs the rules applicable to ports and to internal waters.

37. Lastly, even though, in the light of all the foregoing considerations, it seems difficult to find the link between article 300 and another provision of the Convention which would have allowed the Tribunal to take a more proactive and perhaps more convincing approach, I remain convinced that the Tribunal could have been guided by the preamble to the Convention, the last paragraph of which states that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law" (preamble to the Convention).

38. The Tribunal would then have made its own concrete contribution to the momentum in protecting human rights.

39. Perhaps we have missed an important rendezvous with a fundamental principle of international law.

(*signed*) Boualem Bouguetaia