

DISSENTING OPINION OF JUDGE LUCKY

A. Introduction

1. I have found it difficult to concur with all of the findings in the Judgment of the majority of the Tribunal. Consequently, I have felt obliged to cast a negative vote on the main operative paragraph of the Judgment. In my opinion, this case hinges on the question of jurisdiction and is more complex than it appears because of the interpretation, construction and application of articles 283, 288, paragraph 1, 283 and 300 of the United Nations Convention on the Law of the Sea (the Convention).
2. The procedural history and factual background of the case are set out in the introduction to the Judgment and I shall not repeat them.
3. I do not agree with the decision of the majority that the Tribunal does not have jurisdiction. I find that article 300 of the Convention in conjunction with article 2, paragraph 3, of the Convention satisfies the requirement for jurisdiction. Further, as I will show later in this Opinion, Saint Vincent and the Grenadines has complied with article 283, if there was, *de facto* and *de jure*, the need for an exchange of views. Prior to filing this case, the Parties exchanged views orally before the Application for provisional measures was submitted. Consequently, I find it necessary to elaborate on the reasons why I do not agree with the operative provision 1.
4. This case is complex because several important issues have to be addressed. The Tribunal stated in paragraph 80 of its Order on the initial Application for provisional measures:

80. Considering that the present Order in no way prejudices 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 (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, p. 139, at p. 155, para. 74).

5. In this case, the Parties submitted arguments in accordance with the above paragraph and led evidence in support of their contentions, so that the Tribunal could determine whether it had jurisdiction and whether the claim was admissible before dealing with the merits.

6. In addition the operative order in that Application reads:

1. by 17 votes to 4,

Finds that the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its powers to prescribe provisional measures under article 290, paragraph 1, of the Convention.

7. In light of paragraph 80, set out above, I find it obligatory to consider the evidence invoked by the Parties in order to determine whether Spain violated any of the articles cited by Saint Vincent and the Grenadines.

8. My approach is different from that in the Judgment because I find it necessary to consider: whether there is a dispute; the question of admissibility; the evidence led by both sides in support of their contentions; and the construction, interpretation and applicability of articles 283, 288, paragraph 1, and 300 of the Convention.

9. I think it is fair, just and equitable to consider all these issues in a judgment.

B. Is there a dispute?

10. Article 288, paragraph 1, of the Convention provides that:

A court or tribunal referred to in article 287 shall have jurisdiction over any *dispute* concerning the interpretation or application of the Convention that is submitted to it in accordance with this Part. (My emphasis.)

11. The first question to consider is whether there is a dispute.

12. The Memorial and Counter-Memorial disclose that there is a disagreement with respect to the application of the relevant articles 73, 87, 226, 245 and 303 (corrected to read 304) of the Convention.

13. The Parties are at variance because of the complex issues set out in the pleadings, documentary and oral evidence, which indicate diverse views and opinions.

14. It is clear to me that there is a dispute, because the Parties have disagreed in the memorials and oral submissions with respect to the applicability of the relevant articles of the Convention. I therefore disagree with paragraph 151 of the Judgment, which specifies that there is no dispute and therefore the Tribunal does not have jurisdiction *ratione materiae* to entertain the case before it. It is my opinion that the Tribunal has jurisdiction.

C. Article 283 of the Convention

15. Article 283 provides for an exchange of views regarding *settlement* by negotiation or other peaceful means. Article 283 of the Convention also provides for an obligation to “exchange views”.

Obligation to exchange views

1. When a dispute arises between States Parties concerning the Interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

16. I find that there was a dispute, in accordance with the meaning ascribed to the word “dispute” in the jurisprudence of international law and in light of the divergence in the views of the Parties, prior to the filing of the Applications for provisional measures and for the main case. Representatives of Sage Maritime Scientific Research, Inc. (Sage) began negotiations with the Spanish authorities for the release of the vessels and the arrested crew members. At the initial stage, Saint Vincent and the Grenadines was not part of the negotiations. Sage continued to negotiate even after Saint Vincent and the Grenadines filed its Application for provisional measures and later the Memorial on its claim. Nevertheless, even though the meetings involving the owner of Sage and its legal representatives

did not strictly fulfil the requirements of article 283, the request for provisional measures appears to have been a last resort for settlement in these rather special circumstances.

17. Construed as a whole, article 283 provides for and sets out a means of settling disputes. It appears to me in the light of correspondence between, on the one hand, Sage, and later on the Applicant, and, on the other, the Spanish authorities, that there was no possibility of a settlement. In fact, the tenor and purport of Part XV, Section 1, and articles 279-285 is to provide means of settlement. Section 283 provides for an exchange of views regarding settlement. This cannot mean that the case will be dismissed if the parties do not exchange views.

18. I note that there is a view that an action filed will fail if the parties do not exchange views regarding a settlement by negotiation or other peaceful means. This cannot be the intent of the article. This will occur if the literal rule of statutory interpretation is applied. If this is the case, where parties do not or cannot submit their views to each other any action filed by one or the other will be dismissed. The article is primarily concerned with settlement by negotiation and does not seem to envisage settlement by a third party. I have to pose a rhetorical question: Are parties being forced to or compelled to negotiate among themselves, and if they do not comply, then will any subsequent court action fail? In these circumstances, the article could only make practical sense if “shall” is read as “may”.

19. Article 283 came into force some 30 years ago. The question is what is the true purport or purpose of this article? The true purpose of the article is to encourage States to settle their disputes by an exchange of views and to settle their differences by negotiation. If negotiation fails then the issue must be settled by peaceful means, alternatively, by consultation. There is no mention of settlement by a third party or in an international court or tribunal. I find the following passage from Bennion on *Statutory Interpretation*, 5th edition 2008, p. 887, useful:

In construing an ongoing Act the interpreter is to presume that Parliament intended the act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act’s passing, in law, social conditions, technology, the meaning of the words and other matters. An enactment of former days is thus to be read today in the light of dynamic processing received over the years, with such modification of the

current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out; it also comprises processing by executive officials.

20. Since the Convention came into force, there has been a proliferation of international courts and tribunals. As article 283 is still in force, it must now be construed and applied in a pragmatic sense and allow parties to disputes to approach a court or tribunal directly where one or the other is of the view that settlement by negotiation will not be successful.

21. I find that the provisions of article 283, if applicable, are satisfied. I therefore disagree with the view set out in paragraph 151 of the Judgment.

D. The relevant articles

22. Saint Vincent and the Grenadines submits and claims that Spain has violated its rights under articles 73, 87, 226, 227, 245 and 304 of the Convention. During the oral submissions, Counsel for Saint Vincent and the Grenadines argued that article 300 of the Convention was applicable and gave the Tribunal jurisdiction to hear and determine the case on the merits. In its Memorial, Saint Vincent and the Grenadines did not specifically mention “abuse of right” as set out in article 300 of the Convention; nevertheless, without specifically referring in its Memorial to the abuse of right cited in article 300 of the Convention, there is a subtle/cursory reference therein. Further, Spain expressly cited article 300 in paragraph 75 of its Response to the Request of Saint Vincent and the Grenadines for Provisional Measures in the context of the abuse of legal process referred to in article 294 of the Convention, as stated in paragraphs 186 to 290 of its Counter-Memorial. Therefore, I find it difficult to accept the argument that article 300 was not mentioned and Spain was not aware of any claim under article 300. The said article is relevant to the claims in the case. Therefore, it is necessary to give reasons to support a decision whether Spain violated the said articles and whether they are relevant to the claim.

23. Emphasis is necessary, where applicable, to show that the Spanish authorities arrested the “Louisa”, in the internal waters of Spain, for offences allegedly committed in the territorial sea of Spain, specifically in the Bay of Cadiz. The “Louisa” is an exhibit in criminal proceedings before the court in Spain. I agree that the

Tribunal should not interfere in domestic criminal proceedings for offences against the relevant laws of Spain. However, where international law is also applicable, an international court can arrive at a finding and/or comment on the issue. Spain is a party to the Convention, therefore, if there is an infringement a court can examine the evidence and arrive at a decision. Counsel for Saint Vincent and the Grenadines contends that the inordinate delay in the determination of the criminal proceedings infringes the rights of, not only the “Louisa”, but also the owner and crewmembers of the vessel who are still awaiting trial.

24. Both sides provided evidence, both documentary and oral, in support of their case. The question of jurisdiction is relevant and determines whether the application is admissible and whether the Tribunal can consider the merits of the case.

25. It is my view that the Judgment should reflect that the evidence has been considered and assessed before making a finding. The Judgment, however, does not consider and assess the evidence on the merits because of the finding that the Tribunal does not have jurisdiction; consequently, the Tribunal concludes that the claim is not admissible. I disagree with this approach for the reasons to follow.

26. Counsel for Spain submits that the delay in concluding the criminal proceedings is not the fault of the Spanish authorities. This is because the primary offenders were not cooperating with the investigating judicial officer and were using various means to delay the investigation. The foregoing are matters that most probably will be determined at the trial in the national court. In my view, the question is whether the inordinate delay before trial is an abuse of process and contrary to the Rule of Law.

27. I think that the evidence of the witnesses, who testified in support of the case for each party, is important, because their evidence is helpful in arriving at findings in the case.

28. It seems to me that the construction and interpretation of article 300 of the Convention is crucial because Saint Vincent and the Grenadines has always claimed that its rights, specifically, those of Mario Avella and his daughter as well as members of the crew, have been infringed. Mario was arrested and was held and imprisoned for over a year without being indicted. It must be emphasised in this context that it was only during the hearing on provisional measures in October 2010, and more specifically upon the insistence of Counsel for Saint Vincent and the Grenadines and in response to the request of the President of the Tribunal,

that Spain produced a copy of the indictment. It must be noted that during the oral hearing of the Application for Provisional Measures that Counsel for Saint Vincent and the Grenadines questioned the authenticity of the copy of the indictment. The question remains unanswered: Why was the copy of the indictment produced at such a late juncture in those proceedings?

29. The M/V “Louisa” sailed into the Port of Cadiz with consent to conduct seismic research in the Bay for oil and gas deposits. It sailed into the Port on 20 August 2004 and soon after began to conduct operations in the territorial sea and internal waters of Spain. The “Louisa” was arrested and detained on 1 February 2006.

30. For purposes of clarification, I refer to the factual background set out in paragraphs 44-69 of the Judgment. The reason is to demonstrate the delay prior to the trial on indictment of those charged. During the oral hearing for provisional measures, Counsel tendered a copy of an indictment, dated 27 October 2010. In addition, I refer to the aforementioned paragraphs to demonstrate that the circumstances are such that “justice delayed is justice denied”. Therefore, the question is whether these actions or inactions amount to an abuse of process and an abuse of right under article 300 (see para. 41*ff*).

31. Charges were never brought against Ms Avella, Mr Sandor and Mr Zsolt in the indictment issued on 27 October 2010 by the Court of Criminal Investigation in Cadiz. Mario Avella and John Foster are charged with “the crime of possession and depositing of weapons of war” and with damaging Spanish historical patrimony.

E. The relevant articles

32. The issue is whether Spain violated articles 73, paragraphs 2 and 4, 87, 226, 227, 300 and 303 of the Convention.

F. Article 73, paragraph 2

33. The article must be construed as a whole and not in part. Article 73, paragraph 1, specifies that a State may exercise its sovereign rights over, and specifies, “living resources in [its] exclusive economic zone”. The “Louisa” was originally in the territorial sea of Spain. It is under the circumstances set out in article 73, paragraph 1,

that a crew shall be promptly released upon posting of a bond. Saint Vincent and the Grenadines did not apply for prompt release of the "Louisa", neither did it ask for the posting of a reasonable bond. In these circumstances, article 73, paragraph 2, has not been violated by Spain.

34. Further, article 73, paragraph 4, is part of article 73, paragraph 1. The "Louisa" was arrested and detained in the internal waters of Spain, albeit for criminal offences committed in the territorial waters of Spain. The question must be: if the alleged offences were committed in the territorial sea of Spain, was the arrest and detention of Mario Avella reasonable. Therefore, should he, in accordance with article 300 of the Convention, be afforded an action and/or is he entitled to claim of abuse of right under article 300? In other words, is there a link between article 73 and article 300? I do not think so, because article 73 provides for the exercise of rights over the living resources in the exclusive economic zone and for the release of arrested vessels and crews upon the posting of a reasonable bond or security. The article provides that penalties for violations of fisheries laws and regulations may not include imprisonment, in the absence of agreements to the contrary by States concerned, or any other form of corporal punishment. The "Louisa" and crew were not engaged in fishing in the exclusive economic zone of Spain but were arrested and detained for alleged violations of another nature.

G. Article 87 of the Convention

35. Saint Vincent and the Grenadines complains that the M/V "Louisa" has been denied its right to freedom of navigation. It sailed into the Port with consent, is detained therein and is not allowed to exercise its right of navigation in the high seas. Counsel for Saint Vincent and the Grenadines advanced a novel argument. He contended that by preventing the M/V "Louisa" from leaving the Port to sail onto the High Seas, Spain has committed an infringement of the right to freedom of navigation. This may be so in a case where a vessel is detained without just cause. However, in the instant case, the vessel is the subject matter of criminal charges and until it is released by the municipal court, it cannot leave the port. In fact, Spain contends, and I agree, that this article is not applicable, because the vessel is subject to and is an exhibit in criminal proceedings, an investigation and charges under Spanish law and, under such law, is not permitted to leave.

36. Further, article 87 applies to the high seas. Therefore, even if given the widest and most generous interpretation, article 87 cannot be deemed to include the territorial sea or internal waters. If that were the case, the article would provide for such circumstances.

37. The sovereignty of a State must be respected and so too the laws of the State.

H. Articles 226, 227 and 228

38. The purpose of article 286 is to provide for the investigation of foreign vessels and deals with the method of investigation as it relates to proper documentation and the physical condition of the vessel. The article does not provide for situations where a vessel is detained because of a criminal investigation and is an integral part of the investigation, and where persons connected with the vessel are being investigated and are facing trial for criminal charges against them. Spain has not violated any of the provisions of the article.

39. The evidence presented shows that there has been no violation of articles 227 and 228 because there was, and is, no discrimination in the proceedings initiated by Spain. Spain does not claim that the vessel is liable to pollute the territorial sea or areas beyond the territorial sea.

I. Jurisdiction

40. Article 288, paragraph 1, of the Convention provides that a tribunal or court shall have jurisdiction over any dispute concerning the interpretation or application of the Convention. I find that there is a dispute and I alluded to this earlier. There being a dispute concerning the interpretation or application of the articles set out above, the Tribunal must construe and interpret the articles to determine whether the Respondent has violated any of the provisions therein. I have already considered the articles with the exception of article 300 of the Convention and I now turn to article 300 of the Convention

J. Article 300

41. The Applicant contends that the Tribunal has jurisdiction on the merits of the case based on its contention that article 300 is applicable. The Applicant claims that Spain has violated article 300, which reads:

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 recognized in this Convention in a manner which would not constitute an abuse of right.

42. Article 300 embodies general principles of International Law that emphasise “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 Saint Vincent and the Grenadines contends that the article is applicable per se and that the abuse of right, specifically abuse of Human Rights, is relevant because of the treatment of the Avellas. They testified that the manner in which they were treated by the Spanish authorities amounted to an abuse of their human rights. The interpretation of the said article is important. Article 300 embodies a general principle of International Law that in this case must be considered in the context of the Convention. Therefore, where it is necessary to apply the principles set out in the article and no method or guidance is provided, the judge has to give the article a wide and generous meaning.

K. The Arguments of the Parties

43. The contentions of the Parties, that is, whether or not the doctrine of abuse of right provided for in Article 300 of the Convention, are already set out in paragraphs 129-135 of the Judgment, and therefore, it is not necessary to repeat them here.

44. In order to determine the applicability of the said article in these circumstances, the construction and interpretation of the said article is crucial. The submission of Saint Vincent and the Grenadines is set out in paragraph 128 of the Judgment. Counsel submits that article 300 is all-encompassing and provides for an action once an abuse of right is established.

45. Spain contends that article 300 cannot be invoked on its own. Counsel for Spain argues that Saint Vincent and the Grenadines attempted during the oral submissions to “change the nature of the dispute” and present a “new case” relating to an abuse of right. Further, Spain contends that it has not had the opportunity to answer this claim in accordance with the principle of “equality of arms”.

46. I am of the view that Spain was aware that Saint Vincent and the Grenadines invoked the provisions of article 300, because Spain cited the said article in paragraph 75 of its response to the request of Saint Vincent and the Grenadines for provisional measures. I do not think that reliance on article 300 of the Convention creates a “new claim” It is implicit in the claim that there exists an abuse of right.

47. For purposes of emphasis, I have to repeat the relevant content of a letter, dated 25 September 2012, addressed to the Registrar of the Tribunal. Saint Vincent and the Grenadines stated that its advocate

will address certain jurisdictional issues, including but not limited to human rights violations committed by the respondent and its representatives in Cadiz and elsewhere. He will relate these violations to, inter alia, basic precepts of international law and article 300 of the Convention.

48. Spain responded and objected on the ground that article 300 was not mentioned in the Memorial or Reply of Saint Vincent and the Grenadines. It seems to me that Spain was aware of the claim and had many opportunities to prepare a defence, written or oral, to the claim. Nevertheless, Spain seems to rely on the principle that if an issue is not specifically pleaded, it cannot be raised at the trial. While this is the procedure in some municipal trials, where the Common Law is applicable, a party can apply to amend pleadings for just cause. If the amendment is granted, the other side can respond. As I understand it, this is not a specific requirement in a trial before an international court or tribunal where parties are not permanently present at the place of hearing. Written pleadings in the form of Memorials and Counter-Memorials and Replies are part of standard procedure. The court or tribunal does not and in my opinion should not depend solely on pleadings if evidence is presented and oral submissions are made. It is only fair and just that parties should be given an opportunity to fully present their arguments.

49. 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.

50. In construing article 300, the rules of statutory interpretation apply. It is necessary to examine the ordinary or plain meaning of the provisions of the article; secondly, to determine what is the object and purpose of the said provisions; and thirdly, to construe the true purport of the article. In doing this, the judge will not be making new law or leading to judicial legislation, but will be making a positive contribution to the development of international law. The law is not static; it is dynamic.

L. Statutory interpretation

51. The law on statutory interpretation will be helpful in construing article 300 of the Convention. Once more, I find the following passages relevant:

In construing an ongoing Act the interpreter is to presume that Parliament intended the act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, social conditions, technology, the meaning of the words and other matters. An enactment of former days is thus to be read today in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out; it also comprises processing by executive officials. (*Bennion on Statutory Interpretation, 5th edition, 2008, p. 887*)

52. In order to determine whether the court should apply a rectification, construction guidance is also taken from *Bennion on Statutory Interpretation, 5th Edition, 2008, p. 877, section 287*, which states:

A flawed text has been promulgated as expressing the legislative intention, this needs judicial correction, yet those who have relied on it are entitled to protection. This raises a difficult conflict between literal and purposive construction. *The Courts tread a weary middle* way between the extremes; the

Court must do the best it can to implement the legislative intention without being unfair to those who reasonably expect a predictable construction. The cases where rectifying construction may be required can be divided into five categories, which may overlap. These are: One, the garbled text, which is grammatically incomplete or otherwise corrupt; Two, the text containing an error of meaning; Three, the text containing a casus ommisus; Four, the text containing a casus male inclusus; and five, the case where there is a textual conflict.

53. I do not think the text of article is “flawed”. However, the text in article 300 provides a link to other relevant articles in the Convention. Therefore, I have resorted to article 2, paragraph 3, of the Convention, providing that “the sovereignty over the territorial sea [be] *exercised subject to this Convention and to other rules of international law*” (my emphasis).

54. Therefore, there can be reference not only to article 300 but also to rules of international law

55. In my opinion, article 300 does not provide for a right per se. It specifies that parties must act in good faith and in the manner in which they exercise their rights recognised in the Convention and these rights must be recognised in the Convention to prevent an abuse of right. Article 300 must be paired with a substantive right in the Convention to be invoked. The article has a horizontal effect in the Convention and must be linked to a right in the Convention, for example under article 73 of the Convention where members of a crew have been arrested and detained. The article does not provide for the protection of human rights. If it did, the article would have so provided. However, by inference, it envisages an abuse of human rights. The Applicant cited article 300 in its Application for provisional measures. In its Counter-Memorial, Spain responded to the citation by the Applicant. In fact, both sides addressed the Tribunal on the interpretation and application of article 300 specifically as it relates to the allegations of the Avellas. There is little or no guidance on the interpretation of article 300 in this context by the courts. Therefore, it seems to be incumbent on a judge to interpret the article without “making new law”. Consequently, if the five categories mentioned above are applied to the articles, the reader will find that the judge is not making new law but rising to the challenge of contributing to the development of international law and providing an enhancement to the existing law set out in the Convention.

56. Article 31 of the Vienna Convention provides for methods of construction and I have applied it; I think references to this Convention will be helpful. Article 300 is set out under the rubric: *Good faith and abuse of rights*.

57. The questions are: What are the obligations Spain assumed under the Convention? Moreover, has Spain exercised its rights in a manner that has not constituted an abuse of rights? The obligations are set out in the relevant articles of the Convention. Spain has exercised its right to enforce its laws in its sovereign waters but in doing so, Spain must respect the rights of a person arrested and detained.

58. The principle of respect and protection of a person’s right is applicable throughout the Convention and this seems to be the true purport of article 300. The said article is set out under *General Provisions* and not in relation to any specific provision. It is a “golden thread” running throughout the Convention and as a result can stand by itself in relation to an abuse of a right or in conjunction with a specific provision. This article is applicable throughout the Convention and guarantees that good faith will be recognised and that States Parties will not abuse any right under the Convention. In other words, the article provides that States, in exercising their rights and fulfilling their obligations under the Convention, must do so in a manner that does not give rise to an abuse of right. It is noticeable that the word “Convention” appears twice in the article and this in the context can only mean that any obligation or right abused must be set out in an article in the Convention. It seems to me that in exercising its rights, jurisdiction and freedoms, the State must do so without abusing the right of any person.

59. I recognise that there is a view that such a right must exist under the articles of the Convention and that article 300 cannot prescribe a right per se. Nevertheless, the right must be provided for in an article under the Convention.

60. In the Preamble to the Convention the relevant part for purposes of this case reads: “Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law . . .”.

61. It therefore seems to me that abuse of right is a rule and principle recognized in international law.

62. In the Memorial and during the hearing in the Application for provisional measures, evidence was led that the Mario Avella’s right to a fair trial and a trial within a reasonable time was infringed. As I alluded to above, it was implicit in that Application that the right to a fair trial within a reasonable time is important in determining whether the rights of Mario Avella were abused. The question of what is a *reasonable time* will be considered later in this opinion. Therefore, it appears to me that Counsel for Spain must have known that this was part of the claim of Saint Vincent and the Grenadines, although the specific article was not mentioned until the hearing on the merits.

63. Bearing in mind that article 300 of the Convention must be linked to one or more of the articles of the Convention, I find that the said article can be linked to article 2, paragraph 3, of the Convention.

64. I think that in exercising its rights a State Party to the Convention must ensure that it respects and recognises the rights of those whom it has arrested. This is in accordance with the Rule of Law both nationally and internationally. Therefore, I do not agree with paragraph 154 of the Judgment.

65. I mentioned earlier that the M/V “Louisa” sailed into the Port of Cadiz with consent to conduct seismic research in the Bay of Cadiz for oil and gas deposits. It sailed into the Port on 20 August 2004 and began to conduct operations in the territorial sea and internal waters of Spain. The vessel, along with its workboat, the “Gemini III”, was detained on 1 February 2006, while in internal waters, for offences allegedly committed in the territorial sea of Spain. The territorial sea falls under the Convention (see article 2, paragraph 3, of the Convention, which reads: “The sovereignty over the territorial sea is exercised *subject to this Convention and to other rules of international law.*” (My emphasis)

66. It seems clear to me that the sovereignty of a State is qualified, because it is subject to the Convention. Consequently, it will include the provisions of article 300 of the Convention. This means that when a person is arrested for an alleged offence in the territorial sea, his rights must not be infringed. The circumstances are that Mario Avella was arrested for alleged offences that took place in Spain’s territorial sea. Therefore, article 300 applies. There is no need to rehearse the facts once more but for clarity to repeat that he was arrested and kept in custody for

an inordinately long time before he was released, and before an indictment was served on him. This contravenes article 2, paragraph 3, of the Convention and accordingly article 300 of the Convention.

67. In construing article 300 I am also guided by the principles set out in article 31 of the Vienna Convention: firstly, to consider the ordinary meaning of the words used; secondly, the object of the provisions in the article; and thirdly, the true purport of the article.

68. It seems to me that construed as a whole, in the context of the Convention, article 300 focuses on an abuse of right. In this context, article 300 provides that States Parties shall act in good faith in fulfilling *obligations assumed under the Convention and to exercise the rights, jurisdiction and freedoms recognised in the Convention*.

69. Several questions arise: What are the obligations Spain assumed under the Convention in the relationship with the M/V “Louisa”? Did Spain exercise its rights, jurisdiction and freedoms in good faith? Further, does the evidence led prove the contention of Saint Vincent and the Grenadines when compared with that of Spain? How therefore does the article apply to the facts presented by the Applicant in the context of the submissions and the law?

M. Burden of proof

70. 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.

71. In common law, there are two main standards: one that is applicable in civil cases and the other in criminal cases.

72. 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”.

73. 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.

74. I have applied the foregoing when examining the documentary and oral evidence.

N. Evidence

75. Before dealing with the evidence, I refer to the following paragraph of the Judgment:

154. While 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.

76. In paragraph 61, the Judgment states that Spain contends that its actions complied with Spanish law.

77. The Tribunal merely “took note” but it did not make a finding. The question is therefore asked, “Why take note and what does that mean?” In these circumstances, I find it necessary to consider the evidence of the Parties.

78. Ms Alba Avella was examined in chief and cross-examined by Counsel. Having assessed her evidence, I am satisfied that she was speaking the truth. It is to be noted that her claim is not within the ambit of the Tribunal because she was not a member of the crew and only used the “Louisa” as a dormitory.

79. Mario Avella was an independent contractor of Sage and as such testified that he was not responsible for the items found in the vessel, neither was he directly responsible for any search for artefacts. These are issues for the trial judge to determine. He did complain about the inordinate time awaiting trial and the treatment he received from the authorities in Cadiz. It is noted that the charges against him are still pending.

80. Each Party led evidence of experts in the field of artefacts. Mr Wesley Mark McAfee, a gas consultant expert, on behalf of Saint Vincent and the Grenadines, and Mr James Preston Delgado, Director of Maritime Heritage in the Office of National Marine Sanctuaries in the National Oceanic and Atmospheric Administration, Department of Commerce, United States of America. Both witnesses were examined and cross-examined. Mr McAfee is indeed knowledgeable in his field but not as knowledgeable in the field of Maritime Heritage.

Mr Delgado’s evidence is clear and convincing and I accept his evidence as more informative and instructive.

81. Having considered the evidence of Mr Dorrik Stow, I am convinced that the equipment found on board the “Gemini III” can be used primarily in the search for artefacts; more so, when account is taken of the evidence that Sage hired divers and that one of them is a known treasure hunter. Mr Stow’s evidence is clear, cogent and compelling and is corroborated by the documentary evidence tendered, comprising photographs of the equipment on board the “Gemini III” and the curiously cut oxygen tanks found on board the “Louisa” (see annex 1).

82. The evidence of Ms Carmen Martinez de Azagra Garde is clear and specific. It reflects that Sage was not granted a licence to conduct seismic research in the area specified by Sage. She testified that she was aware of the procedural requirements for the granting of licences and that Sage had not received the required licence.

83. I accept the evidence of former Judge Palin. In his testimony he spoke of the procedure in the criminal justice system in Spain from the investigative stage until the charges on indictment. Apparently this process can take a very long time. He explained the application of the provisions of article 561 of the Criminal Code. He added that under this code a person should not be kept in custody for more than 72 hours before being charged. He said the record of the investigation was voluminous and could take a long time to prepare.

84. I am also aware of the evidence of Mr Javier Moscoso, a former prosecutor in Spain, a former Attorney General of Spain, former Speaker in the Parliament of Spain and Minister for the Presidency during the first government of Mr Gonzales. Excerpts from his testimony were read to the Tribunal. Mr Moscoso testified on behalf of Saint Vincent and the Grenadines during the hearing of the Application for provisional measures, which was heard by the Tribunal on 10 and 11 December 2010.

85. Mr Moscoso said with respect to the detention of the ship the M/V “Louisa” that the “the judge in Cadiz understands the ships are instruments of a crime – I do not share that opinion- but if the judge considers they are instruments of a crime, then he should apply article 127 of our Penal Code. . . . I think that quarantine should have ended very briefly with a motivated judicial decision that those ships would have been placed in the hands of their owners with the guarantees that civil legislation establishes”.

86. The evidence of both witnesses was very helpful in understanding the Spanish judicial system.

87. Apparently, Spain contends that the allegations of plundering the patrimony of Spain in the Bay of Cadiz find support in the exhibits that are tendered in evidence, such as the equipment on board the “Gemini III”, the cannon balls found on the “Louisa” and the stones with holes that could have been used as weights for fishing nets. There is no evidence to identify the persons who placed them in the “Louisa” and who had control and possession of these artefacts (see annex 2). The captain and owner were not present, and although the person responsible will be, the captain, he has not given a statement . . . Mario Avella said he is unable to provide an explanation because he was not in charge of the “Louisa”.

88. As I said earlier, the “Louisa” arrived in the Port of Cadiz, Spain, on 20 August 2004. From that date until 4 October 2004 it conducted seismic research operations to determine whether there were deposits of oil and gas in the seabed. Apparently, the research was conducted under a licence with a Spanish firm, Tupet. On 1 February 2006, the “Louisa” was boarded, searched and arrested. The boarding and arrest were in accordance with an Order of the Court of Criminal Investigation No. 4 in Cadiz. Spain alleges that the “Louisa” was involved in the plundering of Spain’s patrimony in the Bay of Cadiz.

89. Evidence in support is that the authorities found pieces of artefacts, five rifles and a handgun on board. The rifles and handgun were seized and charges were preferred against Mr Foster and Mario Avella. Saint Vincent and the Grenadines led evidence through their expert that these artefacts are of little or no value. On the other hand, the expert of Spain testified that all such artefacts are valuable but a fixed price is difficult to specify. The fact is that artefacts were found on the “Louisa” and have financial value. Further, there are other exhibits consistent with diving, for example: oxygen tanks, equipment, and a carefully cut dive tank with an empty space. Saint Vincent and the Grenadines submits the dive tank was being sent for repairs, the Respondent says the space can be filled with materials and sealed. It is a matter for the municipal court to determine whether the artefacts are sufficient evidence to support a charge of theft or plundering Spanish heritage in the Bay.

90. The “Louisa” was arrested in the Port of Cadiz within the internal waters of Spain and is subject to the sovereignty of Spain. Spanish domestic law and procedure is applicable.

91. The following statement of Counsel for Saint Vincent and the Grenadines is noteworthy. In his closing address, he submitted:

We have been very open that Sage entered into this joint venture agreement with a person, Mr. Valero, which, as Mr. Nordquist later said, was a bad decision. It turns out he is apparently some notorious fellow in the annals of Spanish heritage police. He does not seem to have been in jail or anything but, they have criticised us heavily for having done business with him. Is that detrimental? Certainly, we do not think it is in terms of the outcome of the case.

92. I think, in the circumstances of the case, that the benefit of doubt is in favour of the veracity of the statement and that Sage may not have been aware that Mr Valero is a person of alleged notoriety.

O. Applicable law

93. It is trite law that the legal status of a foreign ship in the territorial sea is governed by the rules of law set out in the Convention. However, when a ship enters internal waters in a foreign port, the ship puts itself within the jurisdiction of the coastal State and that State is entitled to enforce its laws and regulations thereunder against the ship and those on board the ship. Article 2, paragraph 3, of the Convention set out above provides that:

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

94. There is no equivalent provision in relation to internal waters or in a Port. It is not disputed that the “Louisa” was in the Port when it was arrested. It was not in the territorial sea; therefore the rules of the Convention do not apply. Vessels are subject to the laws of the State and the Port regulations made under these laws.

95. Counsel for Saint Vincent and the Grenadines is asking the Tribunal to apply a rule outside the Convention and in accordance with article 300 to found an action for abuse of rights and release of the “Louisa”.

96. Mario Avella testified that he was an engineer on the vessel and was not the officer in charge at the time of the arrest, boarding and search. He was arrested sometime thereafter, and alleges inhumane treatment and arrest without trial for a long period. His passport was seized and he had to obtain a new passport to leave Spain. If his allegations are true, and there was no evidence before the Tribunal to refute his allegations, I think this is an issue to be determined by the Court in Cadiz whenever the charges against him are heard.

97. Mario Avella said that the “Louisa” was fitted with diving and sonar equipment. He was informed that they had “some sort of permits, authorisation to work in the waters off the coast of Spain. Someone who had a permit offered to enter into a joint venture and approached Foster. The contract was with Tupet and permitted them to work in the area.” He understood that Tupet was interested in wrecks and shipwrecks and if a shipwreck was discovered by happenstance, Tupet would take further action.

98. It is noteworthy that Mr Foster did not testify before this Tribunal or in the Spanish court at the investigative stage of the proceedings. He is subject to the domestic laws of Spain and subject to the procedural requirements before trial. Former Judge Palin in his testimony set out for the Tribunal the procedure adopted and followed in the Spanish courts. I accept his testimony as the truth and find that while one may find the procedure of investigation long and tardy, this is an issue to be determined.

99. Mr Foster, the owner of the “Louisa”, has not testified in person in Spain and in fact has not appeared in Spain. A considerable time also elapsed before Mario Avella was charged and indicted.

100. By a letter of 11 October 2012, the Registrar of the Tribunal posed the following questions, *inter alia*, to the Parties:

What were the terms of the contract concluded between the company Sage and the company Tupet? Is it possible to receive a copy of the contract?

101. Saint Vincent and the Grenadines tendered a copy after the close of the oral proceedings. Spain was advised and expressed reservations and objections. I regret that this agreement was not tendered in evidence before the closure of proceedings. If that had been done, I am certain pertinent questions would have been asked which would have been of assistance in arriving at the truth of the matter. However, a court or tribunal cannot speculate. The evidence provided is that the “Gemini III” was a workboat carrying equipment that was more consistent with a search for artefacts than with seismic research only. This is reflected in the photographs and the evidence of the expert Mr Dorrik Stow, who said *inter alia*: “neither the equipment nor the ships or the area where they were working, as far as I can see, have any bearing on serious oil and gas exploration.” This sums up his evidence that the physical evidence he had seen in the photographs was inconsistent with exploration for oil and gas in the Bay of Cadiz.

102. The Applicant called Mr Wesley Mark McAfee, an expert in the oil industry who has worked with several oil companies. Based on his interpretation of the maps and data he had seen, he felt that there were good prospects for oil and gas in the Bay of Cadiz. Mr Foster, the owner of Sage industries and the “Louisa”, contacted him. He suggested that if Mr Foster had a permit that overlapped any areas that were not subject to production permits, he could use it. In relation to the Tupet agreement Mr McAfee was shown a map of two permit areas granted to Tupet; he responded that “two areas marked in green show that someone has a search permit in that area”. He said that divers are used to take samples of soil for analysis. When asked by Judge Cot whether Sage or Tupet paid the divers, he said he did not know. However, Mr Mesch, a qualified accountant, testified that Sage Maritime and/or John Foster have been clients of his firm for over three decades. Sage was primarily engaged in exploration for oil and gas. His evidence with respect to potential damages was not refuted; he did say, among other things, that Tupet had divers on board the “Louisa” and that the records show “that people were paid”.

103. Ms Martinez De Azagra Garde testified that she is an adviser to the office of the Secretary of State for Energy at the Ministry of Industry. She read and studied the permit that was obtained by Tupet. She said that the said permit could not be considered a permit authorising searches for hydrocarbons under Spanish

law. There is no evidence that Sage Maritime Research Inc., Sage Maritime SL, Tupet Sociedad de Pesquisa SA or Plangas obtained any authorisation to carry out activities related to hydrocarbons in Spanish waters, specifically in the Bay of Cadiz or the Gulf of Cadiz. Such applications are sent to the administration and must be registered. Her search of the registry reveals that no application has been filed. Martinez was cross-examined and was not shaken. I believe she is speaking the truth.

104. In the light of the foregoing, it seems to me that Sage was not operating under a valid licence and that the primary concern was allegedly to search for artefacts. Notwithstanding the agreement with Tupet that was not admitted in evidence during the oral hearing, there is evidence that the equipment on board the “Gemini III” was more consistent with a search for artefacts. Further, there is evidence that Tupet and Sage employed divers. Spain alleges that these divers were treasure hunters in the employ of both Tupet and Sage, so it appears that there may be some truth in the allegation. This is supported by the fact that some artefacts, weights for nets and cannon balls were found on the “Louisa” and seized. Further, it is not disputed that one of the divers, Mr Bonifacio, is a well-known treasure hunter. The question is: Why was he hired? When all the evidence is assessed, it appears to me that the real interest of Tupet was not only to conduct seismic research for hydrocarbon deposits but also to salvage wrecks in the hope of finding treasure. It is curiously strange that neither the Applicant nor the Respondent asked for the production of the Tupet agreement during the submission of pleadings or during the oral hearings. It was only at the request of the Tribunal that the Applicant produced the Tupet agreement. Unfortunately, it was submitted after the close of the oral hearings. Counsel for the Applicant said he thought it had been produced and Counsel for Spain never asked for its production, although both sides led evidence of the agreement and witnesses were cross-examined about its contents. Strictly adhering to the rules of the Tribunal results in the said document not being admissible in evidence and I have not considered the contents of it in arriving at my conclusion.

105. Nevertheless, in my opinion the evidence provided is insufficient to prove that Sage was a partner with Tupet, Mr Valero and Mr Bonifacio in an enterprise to search for and plunder treasure under the pretence of conducting seismic research for oil and gas.

106. It seems to me that in the light of the evidence, the only issue for consideration is whether there is an abuse of right.

P. Abuse of right

107. The “Louisa” was arrested and detained in the internal waters of Spain and is subject to the domestic laws of Spain. Mario Avella was arrested and later detained in the Port of Cadiz. Ms Avella is not a member of the crew. She used the “Louisa” as a dormitory. Based on the evidence, she was not implicated in the commission of any criminal offences. Nevertheless, there is clear and cogent evidence that the Spanish authorities at the Port abused her rights. She is a citizen of the United States of America. I am satisfied that her rights were abused.

Q. Delay

108. The evidence also discloses that the delays were occasioned by the reluctance of Mr Foster to appear in person before the Investigating Judge in Spain. Spain contends that this obviously resulted in stymieing the investigation. Counsel for Saint Vincent and the Grenadines strenuously argued that it was not fair to permit such a delay because “delay defeats justice”. A delay militates against the human rights and dignity of an arrested person. Such treatment can be deemed “cruel and unusual”. He added that it was not fair for any person to have a charge pending for such a long time. As I mentioned earlier, the criminal proceedings are still pending in the National Court in Cadiz, Spain. The Tribunal cannot and should not interfere in domestic criminal proceedings. The “Louisa” is obviously an exhibit in the Criminal Court case and there is no application before the Spanish Court to release the vessel on the signing of a bond.

109. The claim that Spain infringed the articles mentioned in the final submissions of the Applicant has, *with the exception of article 300 in its link with article 2, paragraph 3, of the Convention*, not been proved. Further the claim of abuse of right of Mario Avella, based on the inordinate delay of his trial, needs further consideration. Therefore, as a judge I have to consider, examine and assess testimony, both oral and documentary. Mario Avella has denied any participation in carrying out “the crime of possession and depositing of weapons of war [...] together with the

continued crime of damaging Spanish historical patrimony”. He is not the captain of the M/V “Louisa” and was not the officer in charge at the time of the boarding, arrest, search and detention of the said vessel. He was not in possession of the “weapons of war”; neither did he have control over the said weapons seized. He did not have access or the keys to the vault in which the weapons were kept. Spain did not lead any evidence to rebut or contradict his evidence. He was cross-examined at length and was not shaken. Therefore, I accept his evidence as the truth.

110. It is an accepted principle in criminal law that a man is innocent until proven guilty. This means that a judge and/or jury must be convinced beyond reasonable doubt that he is guilty. The evidence against him must be clear, cogent and convincing. This is not the case here. Therefore it is unjust and unfair to have him awaiting trial for such an inordinate time.

111. Paragraph 155 of the Judgment is instructive in that it sums up the relevant law on human rights and obligations of States. It reads:

The Tribunal is of the view that States are required to fulfil their obligations under international law, including human rights law, and that considerations of due process of law must be applied in all circumstances(see M/V “SAIGA” (No. 2) Saint Vincent and the Grenadines *v.* Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 61, para. 155: “Juno Trader” (Saint Vincent and the Grenadines *v.* Guinea Bissau) Prompt Release, Judgment, ITLOS Reports 2004, p. 17 at pp. 38-39, para. 77; “Tomimaru” Japan *v.* Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007, p. 74 at p. 96, para.76).

112. I have considered and applied the above in the light of the law and evidence.

R. Damages

113. Before considering an award for damages for Mario Avella, for purposes of completeness I will deal with the claims of Mr Foster, the claim of the Hungarian crew members and that of Alba Avella. Firstly, Alba Avella was arrested in the Port of Cadiz. She was not a member of the crew and, as I alluded to earlier, was on the “Louisa” in the Port to use same as a place to stay. She is a citizen of the United States of America. Her evidence was not refuted. However, I do not think the question of citizenship is relevant when a person’s human rights are infringed. The “Louisa” is registered in Saint Vincent and the Grenadines and as such Saint

Vincent and the Grenadines is the flag State. The question must be what are the responsibilities of the flag State to ensure and make a claim if the rights of one of its guests is infringed? A State must ensure that the human rights of its citizens are not abused. This State responsibility applies to any person who is resident in the country or is a guest in the country. While Ms Avella may have a claim against the Spanish authorities for an abuse of right, I think the flag State has the legal right to enforce her claim. She testified that she was arrested while awaiting transportation to the “Louisa”. She was not brought before a judge after arrest and was detained in a small room in the basement of the police station in Cadiz; there was no chair, no place to sleep, and no bathroom facility. She was taken to court and presented to a judge five days after her arrest on 6 February 2006 and released from custody that day. However, she was unable to leave Spain, because the Spanish authorities retained her passport for eight months, during which time she had to report on a regular basis to the Spanish authorities. No charges were brought against her. Spain did not lead any evidence to contradict what she alleges but contends that

the basic rights of Ms Avella, Mr. Avella and the two members of the crew have not been breached. They were detained in strict compliance with the law; they were informed of their rights; they were brought before a judge; that judge heard them; they were able to submit written statements, applications and appeals to defend their rights and interests.

114. In my opinion, the above statement does not answer the allegations of Ms Avella.

115. Therefore, I consider that in the light of the cogent and convincing evidence an award will be adequate.

116. Before awarding damages, a court or tribunal must consider several factors: firstly, the direct nexus between the unlawful action or inaction against the person claiming damages; secondly, evidence of an abuse of right and in the case of a claim for special damages, concrete proof of injury and medical evidence. There is no medical evidence, either physical or psychological; therefore a claim for special damages cannot be sustained. However, in a claim for general damages a claim on the evidence led can be sustained. Mr Geller Sandor and Mr Szuszkzy Zsolt, two crew members of Hungarian nationality, and Mr John Foster did not testify and

were not cross-examined. I did not have the opportunity to observe their demeanour and conduct in court and I cannot in these circumstances award damages.

117. Spain did not lead evidence to refute the evidence of Mr Mesch in respect of the damages for Mario Avella. Spain has submitted that the Tribunal does not have jurisdiction to hear the case on the merits. Nevertheless, Mr Mesch was cross-examined, presumably out of an abundance of caution. The questions to the witness were long and seemed to include the position of Spain. It is therefore quite difficult to discern what exactly the witness meant in his answers. Mr Mesch did agree that it is difficult, as he put it, “to come up with a value on someone’s liberty.” He based his assessment on a statement of Mario Avella of the amount he worked for per day. In assessing damages, I do not think this is sufficient. Further I have not seen any payment vouchers to support loss of earnings. I find it strange that he “took his word” and said, “That sounds reasonable”. In addition, he arrived at a figure of \$1,000 (USD) per day. So the question seems to be: What does a court do in such circumstances when there is a paucity of evidence? A judge has to consider what is reasonable in the circumstances. There is no concrete and compelling evidence to support the claim for damages given by Mr Mesch. The criminal proceedings are still pending; therefore I cannot find that Mario was unlawfully incarcerated or imprisoned and consequently unable to work. However, nominal damages for the inordinate delay before trial will be adequate.

118. The question whether it was fair to keep Mario Avella in custody for a long period seems to be a matter for the domestic courts. The outcome of the trial on indictment is crucial to the issue because the court may find him guilty. If on the other hand he is acquitted then the question of abuse of rights with respect to his incarceration pending trial will be considered in a court dealing with human rights.

119. Having found that the question of an abuse of right was raised, and the Convention is silent on the procedural aspects of same, I have considered Articles 5(3) and 6(1) of the European Convention on Human Rights (ECHR). Under the Convention I am permitted to refer to the ECHR because the ECHR is part of the corpus of international law and indeed a codification of “other rules of international law” that are referred to in article 2, paragraph 3, of the Convention. Counsel for Saint Vincent and the Grenadines contends that a delay of over six (6) years amounts to an abuse of process.

120. I have considered the decisions of cases heard at the European Court of Human Rights. It seems to me that the threshold of proof that must be crossed before a breach of the articles is established is high. The reasonable time requirement in article 5(3) cannot be translated into a fixed number of days, weeks, months or years, *Steugmuller v Austria* (1979-1980) 1EHRR 155,191 at para. 4. Further, the circumstances must be exceptional. Consequently, the question must be asked: what are the exceptional circumstances in the applicant’s case on behalf of each complainant? Apparently, there may be such circumstances because the criminal trial against Mario Avella and John Foster is still pending. Therefore, I consider that in the light of the evidence an award will be adequate.

S. Delay

121. The European Convention on Human Rights (ECHR) and the Inter-American Convention on Human Rights expressly require that hearings take place within a “reasonable time”. I have read the recent report of the Icelandic Human Rights Centre dealing with the subject of reasonable time. The report reads:

The European Convention and the American Convention expressly require that hearings take place ‘within reasonable time’. The ICCPR speaks of expeditious hearings, thereby also implying that justice be delivered expeditiously and within a reasonable time. A delay of justice is often equal to no justice at all; as the old saying goes: ‘Justice delayed is justice denied.’ It is especially important for a person charged with a criminal offence not to remain longer than necessary in a state of uncertainty about his/her fate. No other subject of human rights is so often the subject of case-law before the European Court as ‘the reasonable time requirement’. The European Court and the other major supervisory mechanisms have assessed what is reasonable time on a case-by-case basis. Elements to be considered include a) national legislation; b) what is at stake for the parties concerned; c) the complexity of the case; d) the conduct of the accused or the parties to the dispute; and e) the conduct of the authorities.

122. The provisions of article 6 of the ECHR are relevant and helpful in determining whether Mario Avella has suffered an abuse of right. Article 6 reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

T. Fair trial

Main article: Article 6 of the European Convention on Human Rights

123. Article 6 provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time; the presumption of innocence is important.

124. It seems clear to me that Mario is being denied justice for an inordinately long time and has been, and continues to be, in a state of uncertainty and, I add, mental distress for a longer period that necessary. He is entitled to damages .

125. However, a wide and generous interpretation of article 300 of the Convention allows the Tribunal to consider an abuse of right. With respect to the two crew members, I think there is a case to answer. However, the evidence in support is insufficient. Payment vouchers have not been submitted. Evidence of financial loss does not meet the standard required: I do not think the evidence of Mr Mesch can suffice in these circumstances where only one party led evidence. Nevertheless, I am satisfied that this inordinate delay before trial amounts to an abuse of right. It is contrary to the rule of law and amounts to an abuse of process. I have applied the law on human rights as set out in the Inter-American Convention on Human Rights, the European Convention on Human Rights, the relevant case law, and recent decisions including the financial awards of the courts. I find that Mario Avella’s right to trial within a reasonable time has been abused. He is entitled to an award for damages for a period of four years. I award him damages for four years because I have considered the fact that the investigation could have taken some time before he was charged; however, the trial on those charges is still pending.

126. After I determined the facts, I applied the relevant law established under the Convention and rules of international law.

127. In the light of my interpretation of article 300 of the Convention, I find that the Tribunal has jurisdiction in this case.

128. The Request is admissible.

129. The case should be determined on the merits, in other words on an assessment on the law and evidence.

130. While Spain has not violated articles 73, 87, 226, 227, 245 or 303 of the Convention, Spain has committed an abuse of right as provided in article 300 of the Convention.

131. Bearing in mind that the right to a trial within a reasonable time is of great importance for the proper administration of justice, and the high threshold that must be crossed before a breach is established, I consider nominal damages would be adequate compensation for Mario Avella.

132. As I mentioned above, I am of the view that a nominal award of damages will be adequate for Ms Avella.

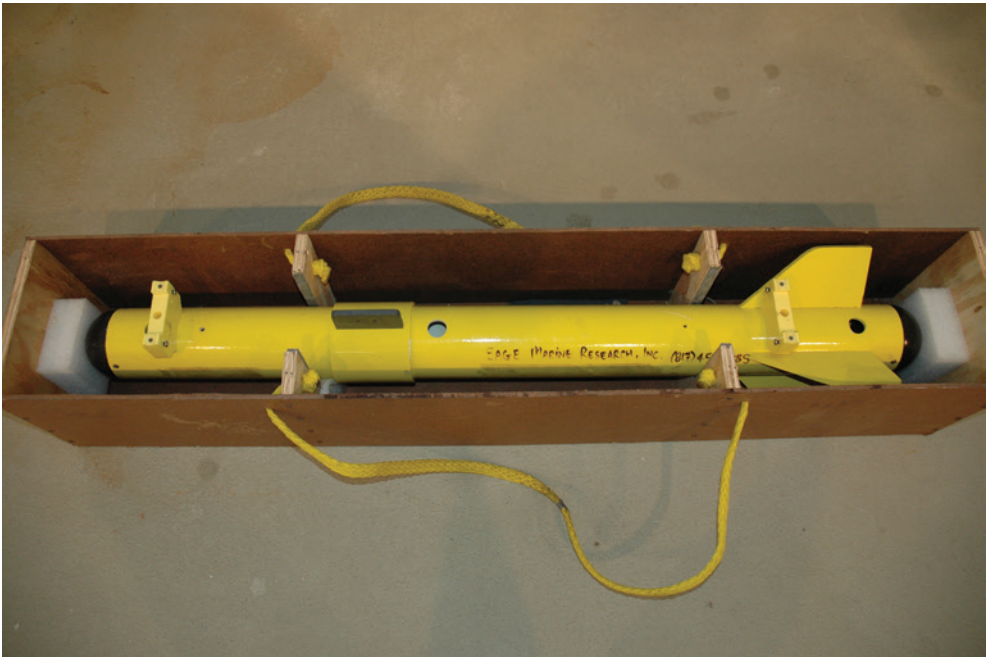
133. Since its arrest and detention in the port of Cadiz, the M/V “Louisa” continues to deteriorate. The artefacts found on board have been seized and are in the possession of the Spanish court authorities. In most legal systems, the following can occur: the vessel can be released if the owner enters into a bond or guarantee to return the vessel if ordered by the judicial authority, or gives an undertaking, or makes a cash deposit for the release, upon agreeing that the sum deposited will be forfeited if the owner does not comply with the order. Mr Moscoso said words to this effect in his testimony. Bearing in mind the foregoing, it is my view that, subject to the sale of the M/V “Louisa”, substantial damages by the appropriate court would be adequate for Sage Maritime Research, Inc.

(*signed*) Anthony A. Lucky

ANNEXE 1

ANNEX 1

Magnétomètre G-882 de marque Geometrics
Geometrics G-882 Magnetometer



Détecteur de métaux téléguidé RMI-1 de marque JW Fishers
JW Fishers ROV RMD-1 Metal detector



Détecteurs de métaux manuels à bord du « Louisa »
Handy metal detectors aboard the *Louisa*



Défecteurs anormaux à bord du « Gemini III »
The abnormal deflectors on board the *Gemini III*



Bouteille d'oxygène dont le fond a été scié

The dive tank boQom-shell



ANNEXE 2

ANNEX 2

Objets archéologiques
Archaeological objects



Objets archéologiques
Archaeological objects



Objets archéologiques
Archaeological objects



Objets archéologiques

Archaeological objects

