

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



1997

Public hearing
held on Thursday 27 November 1997, at 3.00 p.m.,
at the City Hall of the Free and Hanseatic City of Hamburg,
President Thomas A. Mensah presiding

in the M/V “SAIGA” case

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

<i>Present:</i>	President	Thomas A. Mensah
	Vice-President	Rüdiger Wolfrum
	Judges	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Budislav Vukas
		Joseph Sinde Warioba
		Edward Arthur Laing
		Tullio Treves
		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		Tafsir Malick Ndiaye
	Registrar	Gritakumar E. Chitty

Saint Vincent and the Grenadines is represented by:

Mr. Nicholas Howe, Solicitor, Partner, Stephenson Harwood, London, United Kingdom,

as Agent;

Mr. Yérim Thiam, Barrister, President of the Senegalese Bar, Dakar, Senegal,

Mr. Oliver Heeder, Barrister, Büsing, Muffelmann & Theye, Bremen, Germany,

as Counsel.

Guinea is represented by:

Mr. Hartmut von Brevern, Barrister, Röhreke, Boye, Remé & von Werder, Hamburg, Germany

as Agent;

Mr. Barry Alpha Oumar, Conakry, Guinea,

Capt. Mamadou Salion Kona Diallo, Legal Adviser, Guinean Navy Headquarters, Conakry, Guinea,

as Counsel;

Capt. Ibrahim Khalil Camara, Commander, Naval Operation, Guinean Navy Headquarters, Conakry, Guinea,

Major Leonard Ismael Bangoura, Head of Customs Squad, Port of Conakry, Conakry, Guinea,

Mr. Mamadi Askia Camara, Head of Research and Regulations Division, Customs Service, Conakry, Guinea,

as Advisers.

1 **(The hearing commenced at 15:20 hrs)**

2

3 **THE CLERK TO THE TRIBUNAL:** The International Tribunal for the Law of the Sea is in
4 session.

5

6 **THE REGISTRAR:** The Tribunal will now take up its hearings in Case No. 1 on the list of
7 cases, the case M/V *SAIGA*, St. Vincent and the Grenadines, Applicant and the Republic of
8 Guinea, Respondent.

9

10 The Tribunal, having postponed the oral hearings of 21 November 1997 at the request of
11 Guinea, by its order of the same date will now resume the oral proceedings. Agents and
12 counsel for both St. Vincent and the Grenadines and the Republic of Guinea are present.

13

14 **THE PRESIDENT:** The Tribunal notes the presence in court of Mr Nicholas Howe, agent of
15 St. Vincent and the Grenadines, and the presence of Mr von Brevern , agent of Guinea. I will
16 now call on the agent for the Applicant, Mr Nicholas Howe, to note the representation of
17 St. Vincent and the Grenadines and give us the name of his team.

18

19 **MR HOWE:** Thank you, Mr President. The counsel with me are Mr Thiam and Dr Heeder,
20 and we also have a translator and Dr Heeder's assistant at the table with us.

21

22 **THE PRESIDENT:** Thank you. I now call on the agent of the Respondent Guinea, Mr von
23 Brevern, to note the representation of Guinea.

24

25 **MR VON BREVERN:** Thank you, Mr President. The delegation of the Republic of Guinea is
26 a rather big one: the Minister of Justice, the Ambassador of Guinea in Germany, Mr Barry
27 Alpha Oumar, Mr Amadou Diallo, Mr Abraham Khalil Camara, Mr Askia Camara, and
28 Mr Leonard Ishmael Bangoura.

1
2 THE PRESIDENT: Thank you. The Tribunal meets today in open session pursuant to Article
3 26 of the Statute of the Tribunal to hear the parties present their oral evidence and argument in
4 the M/V *SAIGA* case.

5
6 The case was submitted to the Tribunal under Article 292 of the United Nations Convention on
7 the Law of the Sea by the filing of an Application with the Registrar of the Tribunal on 13
8 November 1997. In the Application the Applicant submits, and I quote, that: "The Tribunal
9 should determine that the vessel, her cargo and crew be released immediately without requiring
10 that any bond be provided. The Applicants are prepared to provide any security reasonably
11 imposed by the Tribunal to the Tribunal itself, but in view of the foregoing seek that the Tribunal
12 do not determine that any security be provided directly to the Respondents."

13
14 By Order of 21 November 1997 the Tribunal fixed 27 November for the continuation of the
15 oral proceedings. The Respondent had, under article 111, paragraph 4, of the Rules until
16 twenty-four hours before the opening of the continuation of the proceedings to submit a
17 response to the Application submitted by the Applicant. The Respondent availed itself of this
18 right and a Response was filed with the Registrar of the Tribunal on 26 November 1997, that is
19 yesterday, twenty-four hours before the opening of these proceedings.

20
21 In its Response the Government of Guinea concluded that: "Guinea committed no illegal act
22 and no violation of the procedure; it sought and is still seeking to protect its rights. "That is
23 why" - according to the Response - Guinea "is requesting that it may please the Tribunal to
24 dismiss the Applicant's action."

25
26 Copies of the Application and the Response have been made available to the public in
27 accordance with the Rules of the Tribunal.

28
29 Following consultations with the agents of the parties, it has been decided that the Applicant, St.

1 Vincent and the Grenadines, will be the first to make its presentation. Accordingly, the Tribunal
2 will hear oral arguments from St. Vincent and the Grenadines first. This will be followed by a
3 short break before the reply of Guinea. All presentations will be given this afternoon and
4 evening.

5

6 I now give the floor to the agent of St. Vincent and the Grenadines.

7

8 MR HOWE: Thank you very much, Mr President. If I could start with three matters of
9 housekeeping I lodged with Mr Chitty late last night, outlining submissions on behalf of the
10 Applicant, which were written to supplement a bundle of documents which was provided
11 yesterday afternoon; could I ask if all the judges have had an opportunity to receive those
12 documents and possibly have an opportunity to look at them before today?

13

14 THE PRESIDENT: The judges have had such opportunity as was possible in the time
15 available to look at the documentation. So the documentation is validly in the hands of the
16 Tribunal.

17

18 MR HOWE: I am obliged. Two further matters: In relation to the witnesses the Government
19 of St. Vincent and the Grenadines wish to call, we understand that a notice that was provided
20 yesterday has been distributed identifying two witnesses that we wish to call, Captain Dimitros
21 Exarchos and Mr Sergey Klyuyev, but there is in fact a further third witness, Mr Mark Vervaet,
22 that we gave indication to Mr Chitty's office, again late last night, that we would like to call as a
23 witness here today. Has that been duly noted, Mr President?

24

25 THE PRESIDENT: That has been duly noted. With regard to the witnesses, I recall that a list
26 of three witnesses was given to the Tribunal. As you know the Tribunal needs to be informed of
27 the witnesses being called as well as the evidence that they are intended to introduce. We were
28 informed that the witnesses to be called included Captain Dimitros Exarchos who is the captain
29 of a vessel alleged to have been previously attacked by gun-boats from Guinea in May 1996.

1 The Tribunal finds it difficult to see the relevance of the evidence of that witness to the present
2 case; and therefore it is our ruling that that the evidence will not be admissible. However, the
3 notification in respect of the other two witnesses has been duly noted, and they may be called at
4 the appropriate time.

5

6 I would suggest, in accordance with the normal practice, Mr Howe, that you address the court
7 from the podium.

8

9 MR HOWE: The third matter of housekeeping relates to a supplementary submission
10 concerning the applicability of article 292 of the Convention. This was finalized very late this
11 morning. It would have been given to Mr Chitty shortly before the convening of this hearing this
12 afternoon, and I do not know if he has had an opportunity to give a copy of that and the
13 additional documents attached to that to any of the judges?

14

15 THE PRESIDENT: Will you be addressing that matter in your submission?

16

17 MR HOWE: It supplements the submissions I have already lodged and there are one or two
18 additional documents attached to it which I would like the court to have the opportunity to
19 review. But I think if the judges have not had an opportunity to see the document I can bring it
20 up as it arises during the course of my submissions.

21

22 THE PRESIDENT: I think that would be a much more appropriate procedure.

23

24 MR HOWE: Thank you, Mr President. This Application is an application made on behalf of
25 the Government of St. Vincent and the Grenadines for the prompt release of the vessel M/V
26 *SAIGA* from where she is currently detained in the port of Conakry by the Government of the
27 Republic of Guinea and instrumentalities acting on the Government of Guinea's behalf.

28

29 The Application is brought before the International Tribunal for the Law of the Sea pursuant to

1 article 292 of the Convention which I will refer to below as “the Convention”.

2

3 The Tribunal has my outline submissions. I do not propose to read every word of the
4 submissions as we go through; I think that would not be a sensible use of time.

5

6 THE PRESIDENT: You should take it that the Tribunal is fully aware of the terms of the
7 articles of the Convention.

8

9 MR HOWE: I am sure they are, Mr President. What I would propose to do is to take my
10 submissions as they arise through the submissions and on occasions I will simply refer to the
11 submissions without reading verbatim everything I deal with as I go through it.

12

13 The provisions of article 292 envisage situations for the release of vessels:
14 “.... for the prompt release of the vessel or its crew upon the posting of a reasonable bond or
15 other financial security”

16 These words mirror other provisions in the Convention which are specifically articles 73, 220
17 and 226, which respectively deal with rights of the coastal State in its exclusive economic zone
18 in relation to fisheries matters, pollution matters and investigation of foreign vessels generally.

19 There is some discussion, and I will make submissions later on, as to whether the provisions of
20 article 292 may properly relate to other provisions in the Convention if none of those articles
21 actually are applicable.

22

23 The Tribunal will be fully aware of article 113 of its Rules which sets out the manner in which it
24 should determine an application pursuant to article 292, and I am sure will be aware of the
25 difficulties in reconciling the interests of both the coastal State and its rights to exercise sovereign
26 jurisdiction in the areas over which it may exercise sovereign jurisdiction, and the rights of the
27 flag State of a vessel operating outside of the territorial waters of the coastal State.

28

29 This is mirrored in the provisions of article 113. It is mirrored in article 292 by the fact that the

1 Tribunal should not have regard to or should not investigate the substantive allegations in the
2 Application. I will come to that later in my submissions.

3

4 This Application concerns activities and instrumentalities of the Government of Guinea in the
5 exclusive economic zone of the Government of Guinea and its neighbouring State, Sierra Leone.

6

7 The Convention accords the coastal State limited and very specific rights to exercise its powers
8 as a sovereign over the area of its exclusive economic zone, which are particularly set out in
9 article 56.

10

11 So far as this Application is concerned the Applicant submits that insofar as the Government of
12 Guinea may have had any jurisdiction over the vessel, the M/V *SAIGA*, it has failed to comply
13 with the relevant provisions for the prompt release of that vessel and crew pursuant to the
14 relevant articles in the Convention.

15

16 Secondly, and I would suggest more importantly in terms of the time that will be taken up in the
17 course of this hearing, the Applicant also submits that the Government of Guinea has wrongly
18 purported to exercise its sovereign jurisdiction within the bounds of its exclusive economic zone
19 beyond the limited and prescribed rights that a sovereign state may exercise as prescribed in the
20 Convention, and moreover, indeed, the rights that are permitted by the local laws in Guinea.
21 Consequently the Government of Guinea has wrongfully interfered with the rights of St Vincent
22 and Grenadines flag M/V *SAIGA*, operating in its exclusive economic zone. Submissions will
23 be made as to the effect of that in the context of the Application under article 292 in due course.

24

25 At the time this Application was lodged the Government of Guinea had not sought any bond or
26 other financial security in respect of the detention of M/V *SAIGA*. Possibly more importantly, it
27 had not advised any interested party - the owners, the Government of St Vincent and
28 Grenadines, the charterers and, I understand, the crew - of the reasons for its action. Nor had
29 it allowed the owners or the charterers or other representatives of the vessel access to the crew

1 on the vessel. Accordingly, at the time the memorial was lodged with the Court, it was quite
2 difficult for us to anticipate exactly what allegations were being made against the vessel by
3 Guinea. Fortunately the Government of Guinea has since done a number of these things and
4 these will be discussed in the course of presenting the evidence in due course.

5

6 To do this, and to demonstrate how the allegations against M/V *SAIGA* come within the
7 provisions of article 292, the Applicant wishes to set out in considerable detail the events
8 leading up to the detention of M/V *SAIGA* and to demonstrate, by doing so, how we allege the
9 matter comes within article 73 and, possibly to a more limited extent, article 220.

10

11 If the Tribunal determines in due course that the allegation is well-founded, the Applicant, the
12 Government of St Vincent and Grenadines, will request that the Tribunal determine the amount
13 and nature and form of any bond or financial security, if any, that should be posted for the
14 release of the vessel and the crew. To do this, and particularly to determine the amount, if any,
15 of such a bond or financial security, we submit that it will be necessary for the Tribunal to
16 properly review the evidence concerning the detention of M/V *SAIGA* in order to determine
17 whether there has, in fact, been any breach of any provision of either Guinean law or the
18 Convention which should enable the Government of Guinea to demand such a bond and, if so,
19 the nature and extent of such breach to determine the amount of such bond.

20

21 I have set out the outline submissions in the volume of academic argument concerning the
22 Tribunal's powers to review the substantive issues, mindful of the fact that the Tribunal will not
23 want to interfere with any subsequent proceedings before any court in Guinea in due course. I
24 do not propose to talk the Tribunal through those submissions in any great detail and would
25 propose instead to move on to setting out the evidence in the context of the relevant
26 background matters.

27

28 I turn to the relevant background matters that bring the parties before the Tribunal today
29 concerning the ratification of the Convention. The Applicant deposited an instrument of

1 ratification of the Convention on 1 October 1993. The Respondent deposited an instrument of
2 ratification of the Convention on 6 September 1985. It is fair to note that the Respondent made
3 a reservation at the time of depositing that instrument of ratification to the effect that it reserved
4 the right to interpret any article in the Convention in the context and taking due account of the
5 sovereignty of Guinea and of its territorial integrity as it applied to the land space and sea.

6

7 In our submission that is merely another way of saying that the Government of Guinea may
8 exercise its rights within its sovereign jurisdiction but it does not have any effect over its rights to
9 exert sovereign powers over the exclusive economic zones and you would not give it any further
10 rights than would be contained within the Convention.

11

12 The Government of St Vincent and Grenadines has authorized this Application to be made on
13 its behalf pursuant to article 292(2). The documents evidencing that appear in the bundle
14 submitted to the judges underneath tab 2. Underneath tab 3 in the bundle is a document
15 received from the United Nations attaching the document by which the Respondent, the
16 Government of Guinea, has given due publicity to the geographical co-ordinates of its exclusive
17 economic zone by depositing Decree No 336 of 30 July 1980 of the Republic of Guinea with
18 the Secretary General of the United Nations pursuant to article 75 of the Convention.

19

20 These relevant provisions of that decree are set out in the submissions. I would now like to
21 show to the Tribunal, with reference to an overhead projector, the exact parameters of the
22 exclusive economic zone of Guinea. That will be developed in relation to the movements of
23 M/V SAIGA in due course.

24

25 By mapping the parameters set out in article 4 of 30 July 1980 Decree, the exclusive economic
26 zone can be seen to be the area roughly on this side. A much better map has been prepared.
27 We shall try to get the clearer map to the Tribunal later during the day, possibly after the
28 interval, but for the time being we can work with this document.

29

1 I now propose to put the detention of M/V *SAIGA* into the context in which it occurred. To do
2 this I would invite the Tribunal to review the documents that should be included in the bundle at
3 Tab 4 concerning a multi-national oil company, the Addax and Oryx Group.

4

5 THE PRESIDENT: You may proceed. We have seen the documentation on the multi-national
6 company. It is not here but I think that most of us have at least had sight of them; so you can
7 make your presentation.

8

9 MR HOWE: I appreciate it is not here. It is simply to put M/V *SAIGA* in context as she is a
10 bunkering vessel. She operates off seas in international waters and also in exclusive economic
11 zones of a number of countries. Her function is to supply gasoil primarily to fishing and mining
12 vessels. To do that she operates and moves around the coast of West Africa and other places.

13

14 The M/V *SAIGA* takes her bunkers from a storage terminal in Dakar and the Tribunal also has
15 the papers showing that the two previous supplies to the loading on board M/V *SAIGA* were
16 purchased legitimately from refineries in Portugal and Italy. There has been no suggestion that
17 there could be anything improper about either the refineries or the circumstances in which the oil
18 was purchased, which relates in particular to the submissions of the Government of Guinea that
19 the vessel was dealing in smuggled gasoil. This was perfectly legitimately purchased and sold
20 gasoil. There is nothing smuggled about it; there is nothing improper about the activities
21 involving this gasoil.

22

23 The gasoil is stored at the Oryx Terminal. It is purchased by an entity called Addax Bunkering
24 Services, part of the AOG Group, purchased on cif terms, which means it takes title upon the
25 product entering into tanks at Dakar and it remains their product, and we would submit remains
26 their product today, until it is sold legitimately by ABS to the fishing vessels.

27

28 Addax also charter vessels to carry the product to supply to the fishing vessels, and in this
29 instance the chartering company was called Lemania Shipping Company.

1
2 Addax and their associated companies had previously had incidents involving attacks by
3 gunboats off Guinea. Details of two of those are included in the bundle at Tabs 5 and 6. The
4 first in fact is not, as I understand it, a vessel related to Addax in any way whatsoever. It is a
5 vessel owned by the Government of Sierra Leone, the *Napetco 1* and on or shortly before 13
6 May 1993 the *Napetco 1* was shot at and attacked by gunboats coming from Guinea. A report
7 of that incident is at tab 5 of the bundle.

8
9 More recently a vessel also chartered by the Addax Company and Lemania Shipping Company
10 was shot at and attacked by gunboats from Guinea, this being the *Alfa 1* in the early part of
11 May 1996. I understand from your indication, Mr President, that you do not want us to adduce
12 evidence from the Master of the *Alfa*. I do not propose to develop discussion concerning those
13 previous incidents in any further detail.

14
15 Turning to the movements and developments concerning the *SAIGA*, I had prepared a
16 chronology of her developments that should have been attached to the outline submissions
17 received by the Tribunal. If that is the case, I do not propose again to go into any great detail to
18 track through the movements of the *SAIGA* bunkering each and every one of the fishing vessels
19 that she bunkered prior to the incident and after she left Dakar on 23 October.

20
21 In passing, though, I would comment, and it will probably be clearer when we can get the more
22 accurate map, that the most recent fishing vessels to be bunkered were bunkered in the
23 exclusive economic zone of Guinea, approximately 100 miles off the coast of Guinea, and some
24 considerable way out of its territorial waters. We have tried to indicate the rough position of
25 that with the first top cross shown on the map.

26
27 There was some suggestion that the fishing vessels that have been bunkered by the *SAIGA*
28 might have been flying the Guinean flag. We were able to adduce evidence ourselves
29 concerning two of those three vessels, showing one of them registered in Senegal and the other I

1 believe registered in Honduras. There was some question of the third but we helpfully received
2 some documents this morning from Mr Chitty which would indicate that the third vessel, the
3 *Guisepppe Primo*, was also registered under the flag state of Italy. I submit that nothing will turn
4 on that in any event but it may be relevant for the Tribunal to note that none of the vessels that
5 the *SAIGA* bunkered were in fact flying the flag of Guinea.

6

7 The correspondence which appears under tab 7 of the bundle is, I submit, highly material to the
8 present Application because it concerns what happened to the *SAIGA* following the bunkering
9 of the vessels in the northern part of the exclusive economic zone of Guinea but prior to the
10 attack by the gunboats. I do not propose to talk the Tribunal through the correspondence in
11 any detail. The correspondence is between Addax Bunkering Services, the owners of the
12 gasoil, and the Captain of the vessel but it will be noted from this correspondence that, at a
13 stage shortly prior to the attack by the gunboats, Addax Bunkering Services had received some
14 information that gunboats might be going to investigate vessels in the exclusive economic zone of
15 Guinea, and consequently Addax Bunkering Services advised the Master that he should go to a
16 safe position; in the first instance that he should not go any closer than 100 miles off Guinea and
17 subsequently that he should go to a safe position, which was a position given because it was out
18 of the exclusive economic zone of Guinea and in the exclusive economic zone of Sierra Leone.
19 That instruction appears from a telex I have timed at 18.42 on 27 October, followed by a
20 communication about an hour later asking for urgent confirmation that the Master would
21 proceed to do this. The Master responded that he was immediately proceeding to that position,
22 a very telling telex timed at 08.04 on the morning of 28 October from the Master back to
23 Addax Bunkering Services in Geneva, reporting that he had arrived at a position 9 degrees
24 north 14 degrees 59 minutes west, which is actually one minute out from the position requested
25 by Addax Bunkering Services, but it makes no material difference. It is well within the exclusive
26 economic zone of Sierra Leone and the Master reported that he had arrived there at 4 o'clock
27 that morning, so he had already been there for four hours, waiting for fishing vessels to supply
28 them with bunkers and that he was drifting. Being an oil tanker, a vessel drifting for four hours is
29 very difficult to get to move quickly again in the case of a problem. That telex was timed at

1 08.04.

2

3 In telex timed at 09.11, just over an hour later, the Master reported that he was being attacked.

4 The telex reads, "Attack, attack, attack". It appears that he tried to give his position and that

5 the communication was then cut off.

6

7 Nothing further was heard from the Master for some time until the evening of 28 October when

8 he reported that the vessel was attacked by two navy vessels, the Second Officer and one

9 Senegalese gentleman being wounded, and the vessel was being escorted into Conakry.

10

11 The medical reports of the two wounded gentlemen appear behind tab 8 in the bundle, a Mr.

12 Niasse, who I believe is the Senegalese gentleman who was injured by the shattering of glass,

13 from a bullet which hit the glass and the glass came into his face and throat, and the Ukrainian

14 gentleman who was wounded in the arm, Mr Sergey Klyuyev.

15

16 At this junction I would propose to defer to my learned colleague, Mr Thiam, who will call Mr

17 Klyuyev to give evidence surrounding the circumstances of that incident.

18

19 MR THIAM (Translation): Mr President, may I have your permission to ask the Second

20 Officer, Mr Klyuyev, to take the stand, please?

21

22 THE PRESIDENT: Yes. Please proceed.

23

24 MR SERGEY KLYUYEV, called

25 Examined by MR THIAM

26

27 Q Mr Klyuyev, could you tell us your name, please,

28 A My name is Sergey Klyuyev. I am Second Officer on the tanker *SAIGA*.

29

1 Q Were you on this vessel on 4 April 1987?

2 A On 4 April 1987? Yes, I have been on this vessel on 4 April 1997.

3

4 Q So you have been on board this vessel since April?

5 A Since March. We arrived at Brest where the vessel was under repair at the shipyard on
6 12 March.

7

8 Q In Dakar?

9 A Repeat, please, the translation?

10

11 Q When did you arrive in Dakar?

12 A In Dakar we arrived as I remember at the end of April. No, at the end of June -- May.
13 We have for the first time taken bunkers at [inaudible] and then we have proceeded --

14

15 THE PRESIDENT: May I draw your attention to the fact that we have perhaps gone too fast.
16 The witness has to be sworn before he completes his evidence. May I ask the Registrar to
17 arrange for the witness to make the declaration required under our Rules?

18

19 MR SERGEY KLYUYEV, sworn

20 Examined by MR THIAM

21

22 THE PRESIDENT: Thank you very much. I am sorry I interrupted you and I hope you
23 appreciate why. Please go ahead.

24

25 MR THIAM(Translation): Could you tell the Tribunal about the activities of the *SAIGA*?

26 A We have bunkered the fishing vessel.

27

28 Q In what areas in general?

29 A In general off Morocco, Mauritania, Guinea Bissau.

1

2 Q Do you often have to pass in the area of Guinea?

3 A At the end of August we have proceeded with the cargo to the Pointe
4 Noire, previously Republic of Congo, then we proceeded off Nigeria and then we have
5 proceeded to Dakar, so we have proceeded to the ports of Guinea Bissau, or Guinea.

6

7 Q Thank you. When you passed through Guinean territory, you were engaged in
8 bunkering at sea; is that correct?

9 A No, we have taken cargo off Nigeria and proceeded to Dakar. We have not at that
10 time intended bunkering of any fishing vessel.

11

12 Q And the last voyage?

13 A The last voyage, the last two or three vessels have been bunkered off Guinea Bissau
14 and then we have received a telex from Addax Bunkering Service to proceed to the appointed
15 point for bunkering of the fishing vessel.

16

17 Q What did you do then?

18 A After what?

19

20 Q After the bunkering you talked about and after receiving instructions to pass to the next
21 point?

22 A After we have received instructions to proceed to the next point, we have proceeded to
23 the next point. I do not remember exactly, but at that point we were at 4 or 5 o'clock GMT,
24 and we were adrift till the beginning of that time.

25

26 Q What happened after that?

27 A Approximately at 8 o'clock I have a rest because my watch is from 0000 till 0400. I
28 heard like hitting nuts but I heard automatic firing and then in two or three minutes later or
29 maybe more, maybe five minutes because I was thinking, I heard the announcement of the

1 Captain that there is a piracy attack of the vessel and all the crew should proceed downstairs to
2 the engine room.

3

4 Q So you confirm that at that time the vessel was drifting?

5 A Yes, the vessel was drifting and, as I know, in such a position, the engine is 30 minutes'
6 readiness, for preparing the vessel for movement, it is necessary about 30 minutes but maybe in
7 the case of emergencies this time can be reduced to 20 minutes but not less.

8

9 Q Did you hear the Captain say, or any other member of the crew, that there were either
10 visual or audible warnings from the Guinean authorities?

11 A No; as I know, there was no announcement from the Guinean authorities because in that
12 case there was no announcement from the Captain. All the announcements -- this is my
13 impression -- were that the vessel will be inspected by the official forces. As I remember, we
14 do not know what these forces are until we have been beside on the small boat, all the crew.

15

16 Q So when they arrived on board, how did the members of the Guinean armed forces
17 behave?

18 A At what time do you mean they arrived? Once upon arrival on the vessel or later when
19 the vessel was proceeding to Conakry? What time exactly?

20

21 Q I mean when they arrived on board?

22 A All the crew except, as I remember three members, two at the cabin and one at the
23 pump room, have been at the engine room. We were altogether. There was firing inside from
24 automatic machine, from the light automatic gun machine, and then it was a long shouting, maybe
25 five or six shouting. We did not know what that meant. Then there was silence. Then at
26 approximately five or ten minutes later our Captain proceeded upstairs and returned with
27 handcuffs and all the crew was taken to the boat by the armed forces.

28

29 We sat on the deck for approximately 40 minutes and then they took part of the crew for

1 proceeding of the vessel to Conakry to see what the problem is with the engine and can the
2 vessel proceed to Conakry. After that, we have all been taken inside the boat and maybe at 11
3 or 12 o'clock or maybe 1 o'clock -- I do not remember the exact time because we were inside
4 -- the vessel started proceeding to Conakry and we were proceeding after the SAIGA. We
5 were inside. At that time on the boat they came and as I know on the vessel they have treated
6 some people, the cook and asked him to get something to eat and drink. They take guns and
7 put them at his head and said, "If you don't give us what we want to eat, we will kill you". This
8 was exactly what the cook said. On the boat maybe one hour later they gave us food and
9 started speaking with us but they did not say where we were going for approximately maybe
10 more than two hours. We do not know where we are going, to Conakry or somewhere. Then
11 two people on the vessel have studied in the previous Soviet Union at the (inaudible) Academy.
12 The most conversation proceeding from these crew members and our crew and they said to us,
13 "Don't be afraid. The vessel will proceed to Conakry and be put under arrest and I and Mr
14 Niasse will receive medical assistance at the port of Conakry."

15

16 Q I did not hear that you had been wounded. Were you wounded indeed? I did not hear
17 you say you were wounded?

18 A I was wounded when I was at the engine room. I was proceeding to the place where
19 all the crew were. I received two fragments of bullet, at the left hand. That was approximately
20 when they were on the main deck exactly but I do not know, maybe they were firing from the
21 special.....

22

23 Q If you look at the photo there, is that you?

24 A Yes.

25

26 Q And the gentleman beside you, was he a member of the crew with you?

27 A Yes, this was one of three Senegalese crew members on our vessel.

28

29 Q He was also wounded?

1 A As I know, he has received glass at his throat and something happened to his eyes, but
2 on the boat he was lying very quiet and we do not know exactly what was wrong with him. I
3 only know that he had glass in his throat when we arrived at Dakar. At Conakry, as I
4 remember, they did not state it in the affirmative.

5

6 Q Did these Guinean soldiers have any reason to fire at him?

7 A No. On the vessel there were no arms, ammunition or any equipment with which we
8 could struggle with anybody.

9

10 Q Did you nonetheless attempt to resist, which might justify them firing at you?

11 A No, we did not prevent any arrest. We did not make any steps to prevent arrest or
12 inspection of the vessel. I do not know of any such steps.

13

14 Q When you arrived in Conakry were you taken off board to be taken care of?

15 A Yes. When we arrived at Conakry, *SAIGA* was sited at anchor and I on the small
16 speedboat was taken to the Conakry hospital where for about four hours they were trying to
17 take the fragments out but with local anaesthesia they could not take them out, and they only
18 sewed the wounds. I was taken again at 6 or 6.30 again to the boat. All the crew except those
19 who have been taken to the *SAIGA* have been all night at this boat. Then we have been taken
20 on board the *SAIGA* and proceeded to Conakry to the port for vessels. Then at all times they
21 were trying to take me again to this hospital but, as I have been before to a Russian hospital
22 under the Embassy of the Russian Federation, but only on the second day they took me to our
23 Embassy, first to the Embassy of the Russian Federation, and then I met with the Ambassador
24 of Ukraine and then they agreed to present me at the Russian hospital where I took some
25 medicine. Then the representative of the Addax Company arrived, Mr Mark Vervaet took me
26 the next day to Dakar for an operation.

27

28 Q The representatives of this company, you met them at the Ukrainian Embassy: is that
29 correct?

1 A No, I met him at the Russian hospital.

2

3 Q Very well. Did you hear any comments from the Guinean soldiers when they were on
4 board the vessel?

5 A Yes. We have received comments only after we were taken inside the boat. They said
6 the first reason why they started shooting was that they saw three black men on this (inaudible)
7 who were Senegalese. I do not know; maybe it is permitted for them to fire. Then they said
8 that if they had known that the other crew is white and there is a Ukrainian citizen, or one of the
9 previous Soviet Union, they will never fire. They said that it is not permitted for bunkering in
10 their economic zone. They do not say why they did not make any announcement.

11

12 Q If I understood you correctly, the Guinean soldiers said that if they had known that there
13 were only Ukrainians on board the vessel they would not have fired, but if it was Senegalese
14 they would have fired. Is that what you understood?

15 A They said that if they had known there were white people on the boat they would never
16 fire.

17

18 Q Can I conclude from that that if they fired they thought that there were black people on
19 board?

20 A Yes.

21

22 Q Personally I have finished, Mr President. Thank you.
23 Could I raise one final question. I simply wanted to know, were you informed that the vessel
24 had been subject to theft; were you able to establish this; had there been any thefts on board the
25 vessel?

26 A I am sorry – “theft”?

27

28 Q Could you say that the vessel in any way had been robbed or that any thefts had taken
29 place on board the vessel, or did you hear of this?

1 A I have said that I know exactly that after their soldiers had arrived on the vessel they
2 took a hammer and started opening all the cabins. With such hammers they opened the cabins
3 where two of our people were, the bosun and the A/B. They handcuffed them and after that, in
4 all the cabins except maybe two or three, they robbed and they tore my --- it was just like after
5 a bomb, all the cabins. We do not know what they were finding. I know exactly that they stole
6 money and some goods: shoes, shirts, and we have seen how they have taken the drinks, the
7 food, on their boats.

8

9 MR THIAM (Translation): Thank you very much. That concludes my presentation, Mr
10 President, thank you.

11

12 THE PRESIDENT: Thank you very much indeed. May I inquire whether the representatives
13 of Guinea wish to cross-examine the witness at this stage?

14

15 GUINEA REPRESENTATIVE (Translation): Mr President, may I have the floor?

16

17 THE PRESIDENT: Do you wish to examine the witness at this stage?

18

19 GUINEA REPRESENTATIVE: Mr President, we agreed that our spokesman would respond
20 to this and we were to complete then, and since he is in the other room we would like to wait
21 and we shall speak after him. We may have questions to put to the witness. If there are
22 falsehoods. The problem of theft and so on which we have heard about, if this had taken place
23 it would have been part of the memorial, and this has not been included in the memorial. It
24 seems to me such a fabrication that I expect first of all

25

26 THE PRESIDENT: The question is whether you want to cross-examine. I do not think it
27 would be appropriate for you to make a response at this stage.

28

29 REPRESENTATIVE OF GUINEA: We would prefer to wait, then, Mr President.

1

2 THE PRESIDENT: In that case we will ask the witness to retire. Mr Howe, would you
3 propose to continue with your submission? The witness is excused.

4

5 MR HOWE: At this stage, Mr President, I would propose that we call our second witness, Mr
6 Mark Vervaet, to take up the factual circumstances after the arrival of the *SAIGA* in Conakry.
7 Again, I would defer to my colleague, Mr Thiam, to conduct that examination.

8

9 MARK VERVAET, sworn

10 Examined by MR THIAM:

11

12 MR THIAM (Translation) : Mr Vervaet, can you give us your name, profession and function?

13 A My name is Mark Vervaet. I am based in Senegal where the Addax Group has an
14 affiliate. I am responsible for the area of Senegal. On this incident I was called to go to
15 Conakry and see what the problems were. I have been responsible for bunkering activities,
16 which *Alfa 1* was doing too.

17

18 Q Did Addax charter the ship *Alfa 1*?

19 A *Alfa 1* has been on charter for five or six years, doing exactly the same bunkering
20 activities as we have chartered the *SAIGA* for. *Alfa 1* has been operating over six years all over
21 the coast of Africa, let us say from Morocco up to Cape Town and has only had one incident.
22 That was last year in May, again off Conakry, where she was attacked and half-destroyed with
23 damage of \$500,000.

24

25 Q Can you very briefly tell the court how the attack was carried out; can you tell us about
26 the incident involving *Alfa 1* off the coast of Guinea?

27 A In May a similar thing happened. The boat left Dakar, moving towards Abidjan to
28 operate there. It was about 50 miles away from Kamsa to the North of Guinea, Conakry. It
29 was simply attacked, a surprise attack, an attack lasting about half an hour. It was subjected to

1 heavy fire. There were hundreds of holes in the boat. The boat caught fire.
2

3 THE PRESIDENT: You may recall that I informed you that the Tribunal does not consider that
4 the evidence in respect of ships not involved in the incident is relevant to this particular case.
5 Therefore I repeat: if the evidence to be given is in connection with the *Alfa* incident, then the
6 Tribunal has already ruled that such evidence is not permissible. You indicated that you would
7 be calling three witnesses, but I informed you that the evidence on an incident on a vessel not
8 connected at all with the incident before the Tribunal would not be admitted. Accordingly you
9 should, please, not ask the witness to give us any evidence relating to the alleged attack on the
10 *Alfa*. Evidence about what took place on the arrested vessel and what took place after the
11 arrest would, of course, be perfectly in order. I hope I am clear on the point.

12

13 MR THIAM (Translation): Mr President, that is indeed what is suggested. If you do not
14 mind, I will explain briefly. In the documentation that you have received there are some
15 messages which were sent by the charterer to the Captain of *SAIGA*. Some of these messages
16 ask the Captain to go to a different position and these messages have been taken by the
17 Guinean authorities as indicating proof that we were intending to flee because of supposed
18 smuggling activities. Now, via the evidence of this witness, we are trying to show that the
19 instructions that were given to the Captain to move away from the Guinean Zone were not due
20 to the fact that smuggling was being carried out but because one year before there had been a
21 savage attack under similar circumstances, and others several years previously. We are only
22 talking about one of those attacks. But in the documentation you can see that there have been
23 an incredible number of attacks on similar merchant vessels supported by the Guinean
24 authorities. So the documentation is in the file. The message that was sent that is in the
25 documentation, a message which concerns the *Saiga*, was seized by the Guinean authorities and
26 used in the official report (Custom PV). I am just trying to explain the background to sending
27 that message, and I do not have any particular claim to make with regard to *Alfa 1*, I just
28 wanted to use this evidence for that purpose. If you do not mind, I would like to spend another
29 thirty seconds on it.

1

2 THE PRESIDENT: Thank you very much. You may proceed.

3

4 MR THIAM (Translation) : Thank you, Mr President. (To the witness:)

5 Q So could you explain what happened in the course of the attack on *Alfa 1*?

6

7 A The boat was quite attacked for about a half an hour. When the attack had finished the
8 crew went up and found that the superstructure of the boat was on fire. It took two or three
9 hours for the crew to put the fire out. It was very dangerous for an oil tanker. It is very
10 fortunate that the cargo did not catch fire. When the crew went up and saw the fire they no
11 longer saw the boats that were carrying out the attack. They saw them in the distance.
12 Therefore they abandoned the boat when it caught fire.

13

14 Q Were any court proceedings instituted by the Guineans against the Captain, the owner
15 or the charterer of *Alfa 1*?

16 A No. Neither side instituted proceedings. We tried to get information from the Guinean
17 authorities. They said they did not have any boats there and that they were not involved in the
18 attack. Guineans did not lodge a claim in the court. Nor did we. We were only able to say
19 that we had been attacked by unidentified boats.

20

21 Q Coming to the *SAIGA* now, can you tell us exactly what the *SAIGA* does?

22 A The *SAIGA* is a boat that we have had since April approximately. It carries out the
23 same activities as the *Alfa 1* did. It supplies fishing vessels and other vessels in the high seas,
24 particularly off the coast of Mauritania and Morocco. It twice sailed from Dakar to Pointe
25 Noire, in the Congo with a cargo and then, on the way back, it was carrying a cargo from
26 Nigeria to Dakar, so it has been past Guinea twice. This was the first time it has been off the
27 coast of Guinea to deliver gasoil to fishing boats. We had avoided Guinean waters because of
28 our experiences last year and we had advised the boat to keep its distance to avoid problems.

29

1 Q So you went to Conakry, then, after the attack?
2 A Yes. Our Geneva office asked me to go there to see what the problem was and what
3 we had done wrong. I was in Conakry for two weeks and there with Maitre Bangoula Richard,
4 our local lawyer, we did not get any access to the boat, nor were we able to get in touch with
5 the Captain, nor did we get any information about any offence we might have committed. The
6 only information we got was in meeting with the Minister for Justice, the Minister himself, and a
7 meeting with the Customs and marine authorities, and they quite simply said that we were
8 smugglers engaged in contraband activities and that they had all the evidence but they did not
9 want to give us any of it; that is what they said. We tried to get in touch with the Customs and
10 other Ministries, without success. In the end we had to leave. We talked with many people
11 down there who had had similar experiences, and they said essentially this was a personal
12 matter. We are an established company. We have a reputation to defend, and therefore we
13 decided to take recourse to the courts.

14

15 Q What do you mean by “a personal question”?

16 A Normally these things are settled between two people in a closed room.

17

18 Q Could you express yourself a little more clearly, please?

19 A That means that you have to pay cash.

20

21 Q To whom?

22 A To someone in Customs.

23

24 MR THIAM (Translation): I have finished, Mr President.

25

26 THE PRESIDENT: Thank you. May I ask again whether the representative of Guinea wishes
27 to pose any questions to this witness at this stage?

28

29 (The verbatim reporter indicated that no translation was coming through at this point:)

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18 Cross-examination:

19

20 REPRESENTATIVE OF GUINEA (Translation): You have said that you lived in Dakar and
21 that you went to Conakry to get information, so you were not there at the actual time of the
22 incident; is that true?

23 A Yes.

24

25 REPRESENTATIVE OF GUINEA: Thank you. That is enough.

26

27 THE PRESIDENT: Thank you very much. Mr Thiam, do you want to re-examine the witness
28 in the light of that question?

29

1 MR THIAM (Translation): No, thank you.

2

3 THE PRESIDENT: The witness is excused. I take it then, Mr Howe, you will continue your
4 submission?

5

6 MR HOWE: If I can very quickly take the Tribunal through the subsequent developments after
7 the vessel's arrival in Conakry. As Mr Vervaet has testified, efforts were made to discuss with
8 the relevant officials in Conakry the terms of the release of the vessel. Those discussions were
9 not in any way fruitful. At tab 9 of the bundle the Tribunal will have documents showing and
10 evidencing the discharge of the cargo of the remaining gasoil on board the vessel. Although the
11 vessel had bunkered half a dozen or so fishing vessels, it was not a large quantity of gasoil, so
12 that the vessel was nearly full, and the quantity of cargo that the Guineans ordered to be
13 discharged would have been worth - and is worth - approximately US \$1 million. Details of the
14 discharge are contained behind tab 9 in the bundle, and discharge commenced on
15 10 November and concluded in the early morning of 12 November.

16

17 In the light of this conduct obviously all parties concerned were very keen to explore other
18 avenues of recourse to secure the release of the vessel and the crew. Communications took
19 place between the owners, the charterers, and the representatives of St. Vincent and the
20 Grenadines. I understand that the Ambassador of St. Vincent and the Grenadines in Geneva
21 met with a representative of Guinea in Geneva shortly before 11 November and days before
22 that. That meeting proved again wholly unfruitful, and in the light of these developments and the
23 fact that it seemed there was nothing else that could be done, with no disrespect to the Tribunal,
24 the only avenue of recourse appeared to be through this honourable Tribunal with the
25 Application by the flag State to secure the release of the vessel and crew pursuant to article
26 292, which the flag State was very happy to endorse and has endorsed, the rights of one of the
27 vessels flying her flag she believed having been very seriously infringed.

28

29 Consequently notice of this Application was given to the Government of Guinea on

1 11 November. A copy of that notice appears at tab 10 in the bundle. It now being
2 27 November, the Government of Guinea have had over two weeks in which they have known
3 this Application has been pending and to be brought, a factor which I believe is relevant in the
4 light of the discussions over the last week or so concerning delays, adjournments, problems in
5 producing evidence, by Guinea.

6

7 Against this background, on 13 November in Guinea the Customs authorities finally revealed
8 their hand and gave some indication as to the charges, the circumstances leading up to the
9 detention of the *SAIGA* and the charges they maintained they were entitled to bring against her.
10 This document is contained in a document called the “*procès-verbal*”. It is a French
11 expression which I have conveniently used as I do not think there is an English equivalent.

12

13 The *procès-verbal* appears in full at tab 11 of the bundle, together with translations of both the
14 French version and also the handwritten statement of the Master which is in Ukrainian, the PV
15 having purported to have been based on the handwritten statement of the Master, and, tracking
16 the statements given in the Master’s handwritten statement, although the circumstances in which
17 the vessel was detained and caught, the Tribunal has already heard evidence about members of
18 the crew being forced to provide food to people at gunpoint, one has to question how voluntary
19 the statement given by the Master could have been in these circumstances. But even in these
20 circumstances the translation of the Master’s statement does reveal certain discrepancies
21 between what the Master said and what the Guinean Customs authorities chose to write into the
22 PV. One particular example which we have already touched upon is the flag State of the three
23 bunkering vessels that are admitted to have been bunkered in the northern territory of the
24 exclusive economic zone. The PV states that these were all Guinean flag vessels. There is no
25 statement to that effect in the handwritten statement of the Master.

26

27 In the outline submissions I have highlighted a number of other striking features of the PV by
28 reference to the Jane’s reference to the gunboats in the world. I have obtained details of the
29 two gunboats that were used on this occasion according to the PV itself. These details are

1 included at tab 12 of the bundle. One of the vessels has a capacity to reach speeds of up to 26
2 knots, a second vessel a capacity to reach speeds of up to 35 knots, and according to the PV -
3 and as subsequently developed in the defence submissions that the Guineans submitted
4 yesterday - it would appear the Guineans' case is that the customs vessels and the *SAIGA* were
5 engaged in a 4-hour chase from the exclusive economic zone of Guinea into the exclusive
6 economic zone of Sierra Leone; it is submitted that in the circumstances with vessels of this kind
7 it is simply not feasible, and that the reference to the *SAIGA* having attempted to do damage to
8 the customs vessel is again submitted to be completely unrealistic.

9

10 The submissions are developed in further detail in the document; I do not propose to take the
11 Tribunal through the particular detail now.

12

13 The one aspect of the PV, though, that I think is very important and crucial to this Application is
14 the notification of alleged offences that the Guineans rely upon in the action against the *SAIGA*.
15 The PV at page 8 sets these out. There are four provisions which are in French. I speak
16 appalling French so I will not embarrass myself by trying to read them in French. Roughly the
17 English translations are article 40 of the Marine Code, articles 1 and 8 of the Law of 1994,
18 articles 217 to 316 of the Customs Code and article 361 and 363 of the Penal Code in Guinea.

19

20 The documents behind tabs 15, 16, 17 and 18 of the bundle are copies of the relevant
21 provisions of those enactments that we have been able to obtain. In most cases we have the
22 whole document. Unfortunately, particularly with regard to the Penal Code, we have not been
23 able to obtain the whole document. We have only been able to obtain the provisions relied on
24 by the Respondents, but they appear.

25

26 In the outline submissions we then quote the relevant provisions from each of those enactments,
27 including the provisions relied upon in the PV but also including provisions which we would rely
28 upon as being relevant to the Application of those enactments to the circumstances of this
29 particular case. We submit, and will develop the submissions in this regard in due course, that

1 the second, third and fourth enactment the Guineans purport to rely upon are in fact enactments
2 of Guinean law which apply solely and exclusively to the area of its sovereign state, that is its
3 territory and its sovereign twelve mile zone water. It is vehemently maintained by the Applicant
4 that there can be no application of general provisions of Guinean law at large to the entire area
5 or indeed any area of the exclusive economic zone. The principles on which a coastal state may
6 exercise jurisdiction within its exclusive economic zone are set out in the Convention and any
7 attempt by the Guineans to exceed or to extend the jurisdiction of its territory for its normal
8 penal codes to within the exclusive economic zone we submit is simply untenable.

9

10 I would, if I may, take some time discussing the first provision relied upon by the Guineans
11 which is article 40 of the Marine Code which is a law enacted on 30 November 1995 and is
12 therefore a law enacted after Guinea acceded to the Convention and would appear to be a law
13 enacted to take into account the provisions of the Convention and to increase the scope of the
14 sovereignty of Guinea into its exclusive economic zone in the light of the powers available to it
15 under the Convention.

16

17 The enactment starts under article 4 that the sovereignty of Guinean State extends into its
18 territorial sea. Article 5 sets out the territorial sea of Guinea, bearing in mind that this is a law to
19 set out the maritime and river navigation, territorial sea and public maritime domain of Guinea.

20

21 Article 40 of this code then goes on to develop and extend the sovereign rights of Guinea so far
22 as permitted under the Convention into the two hundred mile area of its exclusive economic
23 zone. The Respondents rely upon article 40 in their PV. We also rely very heavily on article 40
24 in our submissions that section 292 is applicable to this particular matter, and it being a short
25 provision I will read it in full:

26

27 "The Republic of Guinea exercises, within the exclusive economic zone which extends
28 from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign
29 rights concerning the exploration and exploitation, conservation and management of the

1 natural resources, biological or non-biological, of the sea-beds and their sub-soils, of
2 the waters lying underneath as well as the rights concerning other activities bearing on
3 the exploration and exploitation of the zone for economic purposes.”

4

5 The Tribunal will be fully aware, although I not quoting verbatim, that the formulation of the
6 wording of article 40 mirrors wording appearing within the Convention. In particular, article 73
7 of the Convention refers to the exploration and exploitation, conservation and management of
8 the natural resources but the provision also appears to go on and incorporate as well provisions
9 from article 76 of the Convention, being the seabeds and sub-soils which form part of the
10 continental shelf. For present purposes it is submitted that the provisions regarding the
11 continental shelf have absolutely no bearing on the present matter and article 40 is relevant,
12 therefore, only insofar as it attracts the provisions of article 73 of the Convention.

13

14 In the PV, the Guineans do not specifically allege any specific breach of article 40 by M/V
15 *SAIGA*; they simply quote the provision. It appears to the Applicants that by quoting the
16 provision the primary aim is probably to say that because under article 40 they can extend their
17 sovereign rights to areas within the exclusive economic zone, because they are able to do so, the
18 subsequent provisions of the subsequent three enactments of the laws of Guinea which they
19 quote should equally apply within the exclusive economic zone of Guinea. It is submitted that it
20 would be contrary to the Convention for that to happen. It is not actually the intention, even of
21 article 40 of the Guinean law, and there would be no substance for an allegation by the
22 Guineans to that effect.

23

24 However, for the purposes of M/V *SAIGA*, article 40 is equally relevant because it does
25 provide that the Republic of Guinea may exercise sovereign rights concerning, amongst other
26 things, the exploration and management of natural resources. Ordinarily these rights are
27 assumed to be rights connected with fishing and fishing vessels, the fish obviously being the
28 natural resources. But it is submitted, and there is authority to which I will come in a moment,
29 that these rights need not necessarily be confined simply to fishing vessels and can extend to

1 other activities connected within the fishing industry.

2

3 To put that submission in context, I would postulate a circumstance where a small fishing vessel

4 may only be able to travel to limited areas within the exclusive economic zone with the full tank

5 of fuel loaded at a port in the coastal State which would therefore limit the fish that that vessel

6 could catch were it obliged to bunker in that port. However, given the opportunity to bunker at

7 high seas as well, the small fishing vessel could multiply its potential catch by a number of times

8 because it would be able to travel further distances within the exclusive economic zone and stay

9 within the exclusive economic zone for longer without having to return back to the port of the

10 coastal state for bunkers.

11

12 That being the case, it is not difficult to imagine that the fishing stocks of coastal States could be

13 depleted over time by smaller fishing vessels taking the opportunity to bunker in the exclusive

14 economic zone and thereby increasing their catches, such that it is submitted that a coastal State

15 would be entitled to exercise sovereign rights over such activities pursuant to article 73, that

16 being rights concerning the exploitation and management of the natural resources.

17

18 This is not a new approach. The bundle which I indicated had been prepared very shortly

19 before the Tribunal convened this afternoon, copies of which we will endeavour to get to the

20 Tribunal as quickly as possible, includes a number of documents relevant in this regard. In

21 particular – and I am afraid I only have a French copy - legislation from Guinea Bissau, which is

22 the sovereign state slightly to the north of Guinea. Under article 3 of this legislation the

23 government have determined that operations connected with fishing will be subject to the

24 Minister of Fisheries. Against this background I understand that ABS have been obliged to

25 enter into an agreement with relevant authorities in Guinea Bissau in order to continue their

26 bunkering activities within the exclusive economic zone of that state.

27

28 That is the only instance we can find so far of a sovereign state purporting to exercise its rights

29 within the exclusive economic zone in relation to bunkering of fishing vessels. Many states have

1 already enacted provisions which take into account the fact that fishing vessels may bunker in
2 the exclusive economic zone of their territory, and rather than put prohibitions on the bunkering
3 vessel, they put prohibitions on the fishing vessel and oblige the fishing vessel to obtain a licence
4 to bunker in the exclusive economic zone of that state. We have documents from Sierra Leone
5 and Mauritania which are two such countries wherein they have purported to exercise their
6 jurisdiction within the exclusive economic zone over bunkering activities by requiring fishing
7 vessels to obtain licences to so bunker.

8

9 Consequently, we submit that the activities of M/V *SAIGA* in bunkering within the exclusive
10 economic zone of Guinea is an activity which could potentially come within article 40 of Guinean
11 law, the Marine Code, and as such it is a provision that clearly comes within, we submit, article
12 73 of the Convention. This being a matter coming within article 73 of the Convention, it is
13 therefore subject to article 292 and the jurisdiction of this Tribunal.

14

15 In fact, so far as we are aware, despite extensive researches and the Guineans now having
16 presented their case in an outline of their case before the Tribunal today, it would appear that
17 the Guinean Government have not yet themselves enacted any specific legislation concerning the
18 rights of bunkering vessels within its exclusive economic zone and consequently there is no
19 legislation which it could be said M/V *SAIGA* was infringing or in breach of, and consequently it
20 is not within the potential but as yet unexercised rights of the Government of Guinea to exercise
21 powers over bunkering vessels in their exclusive economic zone to actually impose any penalty
22 on M/V *SAIGA*. If and when the Guineans do enact such legislation, obviously St Vincent and
23 Grenadines, the owners, the charterers and everybody else connected with vessels like M/V
24 *SAIGA*, will pay very close attention to it and make sure that they comply with it insofar as it is
25 a legitimate exercise of their sovereignty of Guinea.

26

27 The second relevant factor in relation to the application of article 73: we simply make the point
28 that the Guineans themselves have relied upon article 40, which reflects article 73, in their PV as
29 a fact which we submit endorses the fact that this comes within the provisions of article 73 and

1 therefore article 292.

2

3 The submission document continues to discuss the other three provisions of Guinean law relied

4 upon: a decree from 1994 concerning the fight against fraud covering the import, purchase and

5 sale of fuel in the Republic of Guinea. The Respondents rely upon articles 1 and 8, but even a

6 cursory view of article 1 which says:

7

8 “The legislation provides and applies to … the import, transport, storage and

9 distribution of fuel by any national person or corporate body not legally authorized are

10 prohibited in the Republic of Guinea.”

11

12 Clearly the Republic of Guinea includes its land and its territorial waters. We submit it does not

13 include its exclusive economic zone, and nor is there is any reason why it should be applied to

14 its exclusive economic zone.

15

16 Further submissions are developed in relation to the 1994 Decree in the submission paper. In

17 particular, we would like to draw the attention of the Tribunal to the penalties which were set

18 out in article 8 of the 1994 Decree which say that when a misdemeanour under this article has

19 been committed by more than six people, sentences of imprisonment are possible and a fine

20 equal to four times the value of the confiscated items in addition to the additional penalties

21 provided for under article 6 of this law.

22

23 It would appear that what the Guineans have done in this instance is to have said: “We think you

24 are in breach of this article. We are therefore going to take your vessel into Conakry. Your

25 vessel is worth approximately” - I believe the figure they use is \$800,000, although that is not

26 accepted - “and your cargo is worth approximately \$1.5 million” – although again that figure is

27 not accepted – “and we are going to multiply that by 4 and we want you to pay us \$x million.”

28 At one stage the figure of \$15 million was postulated in Guinea.

29

1 We say that that clearly is a wrongful evocation of the article upon which the Guineans purport
2 to rely. We also say that this is relevant to the duties of good faith set out in article 300 of the
3 Convention, of which I am sure the Tribunal are fully aware, that States Parties should fulfil in
4 good faith obligations assumed under the Convention and will not act in a manner which would
5 constitute an abuse of right. Arguably it is not something that comes within the Convention
6 anyway. It is a simple illegal act by the Government of Guinea, but insofar as the Guineans are
7 subject to the Convention and we are here to discuss application under article 292, we would
8 suggest that this is a bad faith application of the article by the Guineans.

9

10 Equally the Customs Code Section 1 provides that the customs territory extends to the coastline
11 of Guinea and its territorial waters. Consequently this has no bearing in the exclusive economic
12 zone of the Guineans, and the Penal Code, of which we have only been able to obtain two
13 dictations of the provisions relied upon, does not take the matter any further. In fact, one
14 provision defends the Guinean authorities allegedly for shooting at people; the other provision
15 sets out punishment for fraudulent import of money, so that has no bearing on the situation
16 whatsoever.

17

18 The outline submission was prepared substantially before the Guineans indicated they would be
19 present, and certainly before we had their defence document. I think it may be appropriate to
20 leave further submissions and comments on the defence of the Respondents until after the
21 Guineans have presented their defence. But I would like to make two final comments at this
22 stage with regard to the applicability of article 292. We will see exactly how the Guineans
23 develop this argument in their submissions, but there is an allegation that the vessel was doing
24 something wrong because she was failing to fly the flag of her flag state. We will see how that is
25 developed, but it may be that that comes within article 226 of the Convention.

26

27 Secondly - and it is very unfortunate that we have not been able to get a copy of this
28 supplemental submission to the Tribunal before this hearing - we have located a comment in a
29 learned journal, "The International Journal of Marine and Coastal Law" by Professor Tullio

1 Treves, which discusses the applicability of article 292 in cases of detention of vessels. The
2 obvious point to be made, and I do not want to try to put words into what the Professor said, I
3 will just rely upon a quote of his in a moment - but it is accepted under the Convention that there
4 are several cases in which a coastal state may detain a vessel. Some of those one could
5 possibly characterize as more serious offences or alleged offences - piracy is stated,
6 transportation of slaves, illegal broadcasting - and it is clear that under the Convention there is
7 no right under article 292 to make an application to this Tribunal in respect of that sort of
8 allegation.

9

10 The wording of Section 292 and the use of the words “prompt release of the vessel upon
11 providing a bond or other security” mirror and track the wording of the Convention in respect
12 of other matters over which it is accepted that a coastal state may exercise its sovereignty in the
13 exclusive economic zone – the articles 73, 220 and 226 as referred to previously.

14

15 As a matter of construction it may be said that in order to evoke the jurisdiction of the Tribunal
16 under article 292, the applicant state must bring itself within the provisions of either article 73,
17 220 and 226 and not the other way round, ie must not be matters that are covered by the more
18 serious offences of piracy and transportation of slaves and the like. However, in Mr Treves’
19 paper which is set out in the submission – and I will endeavour to get copies of the submission
20 to the Tribunal later today – he says:

21

22 ‘Even though the above-mentioned three articles of the Convention are the only ones in
23 which the Convention sets out an obligation of prompt release upon the posting of a
24 reasonable bond or other financial security, it would seem possible to resort to the
25 prompt release procedure in other cases also. These are cases in which the Convention
26 prohibits detention of ships and crews. If a vessel or its crew has been detained in
27 contravention of a provision of the Convention which prohibits detention, it seems
28 reasonable to hold that the most expeditious procedure available should be resorted to
29 in order to ensure the release of the vessel or crew, independently of the question of

1 international responsibility for the violation of the Convention. It would seem absurd to
2 me that the prompt release procedure should be available in cases in which detention is
3 permitted by the Convention, such as those of articles 73, 220 and 226, and not the
4 cases in which it is not permitted by it.”

5

6 In effect he is saying that if the flag State has done something wrong and it contravenes articles
7 73, 220 or 226, it may yet be able to rely on the jurisdiction of the Tribunal to ensure the
8 prompt release of the vessel. However, if the flag state has done absolutely nothing wrong, as
9 we submit is the case here with M/V *SAIGA*, and it is purely that the coastal State of their own
10 volition decide to come into the exclusive economic zone of another state - in this case Sierra
11 Leone - with guns and force the vessel back into its port at gunpoint, clearly there is a very
12 strong case to be made out that the provisions of the Convention for ordering the prompt
13 release of a vessel should be more applicable to that situation than the situation in which the
14 vessel had actually done something wrong.

15

16 Mr President, that concludes my submissions. I would now like to hand over again to my
17 colleague, Mr Thiam, for the final twenty-five minutes of our time and invite him to develop
18 further comments before the Tribunal.

19

20 THE PRESIDENT: Thank you. Mr Thiam, you may proceed now.

21

22 MR THIAM (Translation): Mr President, Members of the Tribunal, my excellent colleague, Mr
23 Howe, has already made the essential points and I do not feel I can add anything except
24 perhaps to give you a rather more colourful illustration of what happened. The Republic of
25 Guinea is effectively accusing us of smuggling. Their documentation is clear. What they are
26 saying is that we have smuggled. It is not for the Tribunal to adjudicate on that claim by the
27 Republic of Guinea. It is true that cases will be heard before other courts in Guinea or
28 elsewhere. But I do think, as the last speaker explained, that the Tribunal should assess the PV
29 of the Guinean customs, not in order to judge its merits but as a piece of evidence which is, in

1 fact, involved in the case before you.

2

3 If you look at this document closely you will see that a large portion of it is based on things that
4 did happen but are distorted and falsely interpreted; that at other times it is based on things that
5 are not facts and that it includes some fairly extraordinary gaps for a report drawn up by officials
6 of the level involved.

7

8 As far as false facts are concerned, it has been said that the boat, M/V *SAIGA*, was in Guinean
9 waters on a clandestine basis. That is false, there is no evidence of that. It is not true that the
10 boat was in Guinean waters. It is true that the boat was in the Guinean exclusive economic
11 zone, but what is clandestine about the fact of travelling through Guinea's exclusive economic
12 zone?

13

14 You will also see, on page 2 of the PV, that the customs officials say that M/V *SAIGA*
15 appeared to be moving faster than their boats. In the bundle you have information about the
16 boats involved and the Guinean army's boat, you will see, can go extremely fast while ours
17 cannot go any faster than eight knots. Even supposing that the witness, since I heard the other
18 party say that one of the witnesses apparently had made false statements, even supposing that
19 there might have been a pursuit, I see no way that any customs official could in fact claim that a
20 military boat could not go any quicker than a tanker.

21

22 It is then claimed that we attempted to capsize their launch, but further on in the PV it is said that
23 the engines of M/V *SAIGA* were on automatic pilot, so you will ask yourselves how it is
24 possible for a boat running on its automatic pilot to be able to manoeuvre in order to try to
25 collide with a launch which is quicker than it is. I will leave out other details, for example the
26 talk about cutting the fuel lines in fact they shot at them. When they said that there were two
27 people slightly wounded, there were two people who were, in fact, seriously wounded. The
28 Ukrainian was taken to his embassy and to the Russian hospital, and was regularly visited by the
29 ambassador. The Senegalese is still in hospital. He was very seriously wounded and it is

1 possible that he may never recover. He has not received any such favourable treatment, and I
2 myself had to go to Conakry to get the Minister for Justice to give instructions to the effect that
3 the Senegalese should be freed. Had it not been for this, the Guinean authorities would not have
4 noted the seriousness of his condition, and in this PV, in this report, they say that he was only
5 slightly wounded.

6

7 So as far as false facts are concerned, to take one at random, it is said, for example, in the
8 report that the boats that were bunkered by M/V *SAIGA* were sailing under the Guinean flag.
9 That is absolutely and undeniably false. There are distorted facts. I will mention but one of
10 them: the questioning of the captain which was done without the presence of any interpreter. In
11 the PV you will not find any indication of how that was done. It would be interesting if we could
12 hear some explanations about that when we hear their response in a few minutes.

13

14 Then there are unknown factors in the report. The reporting officer says that they recognized
15 M/V *SAIGA* on their radar based on the parameters they had been given – if you read the PV
16 you will see that the parameters are never, in fact, indicated. There is no indication of what they
17 parameters were when they found M/V *SAIGA*. I would submit that that is no accident. This is
18 because they talk about the right of hot pursuit later on, and they say that the boat was in
19 Guinean waters without saying exactly where it was when they “located” it.

20

21 They also said, “The captain was ordered to stop.” You have heard from the young second
22 officer that no such order was given. And in the PV, a PV written by men who, in principle,
23 write with accuracy, you find no indication of the warnings or of the instructions that were given.
24 These were suddenly referred to in the submissions communicated to us by the Guinean side
25 yesterday. They say, “There were audible signals, there was this, there was that” But in the PV
26 there is no mention of how warnings were given, except that some questions were put to the
27 captain and replies received without the presence of any interpreter.

28

29 So we have distorted facts and imprecise facts. Apart from that the Guinean authorities invoke

1 a number of arguments in law which have been discussed at length - for example, article 40, of
2 the Merchant Navy Code which essentially is a carbon copy of a couple of articles of the
3 Convention - it does not give us anything new; articles 1 and 8 of the 1994 Decree which
4 cannot be extended into the exclusive economic zone of Guinea for reasons which we are all
5 acquainted with. Perhaps Guinea can explain this in a while. You will see that these articles
6 provide for sentences of imprisonment and if they are meant to apply in the exclusive economic
7 zone, then that is a violation of article 73 of the Convention. Articles 316 and 317 of the
8 Customs Code are classical definitions of the offence but they only apply to the customs
9 territory, and we were not in customs territory.

10

11 As for the articles 361 and 363 of the Penal Code which are mentioned, we find it extraordinary
12 that they have been referred to. It talks about officers pursuing criminals, smugglers, traffickers,
13 and there is a clause that protects them, not the smugglers themselves. The text states that they
14 cannot be called to account. Officials such as customs officials or police officers, cannot be
15 called to account for injuries that they may cause in the exercise of their duties.

16

17 It is quite extraordinary that these officials who have not yet been accused of anything invoke
18 these texts to cover themselves. What must be going on in their minds I think is something that
19 you will be able to follow, and you will understand the value of the customs report in
20 consequence.

21

22 In the Guineans' response I have seen they say that the vessel was in Guinean waters, but, as
23 you will not fail to read, you will see that there is no article, no legal argument which would
24 support the claim that we were in Guinean waters. We were in the exclusive economic zone,
25 that is a fact. But is passing through the exclusive economic zone the same thing as being in
26 Guinean waters?

27

28 Now, of course, being so vague allows quite extraordinary shifts and short-cuts in legal
29 reasoning. It allows them to say, "But we have an extension of our territorial sovereignty,"

1 shifting from dry land to territorial waters then to the contiguous zone. That is not even
2 mentioned. Apparently it does not exist. Then there is the exclusive economic zone which
3 forms part of the Republic of Guinea. These are our waters. At times in the report, they do not
4 even say Guinean waters, it is so natural, they say “our waters”. It is true that international
5 conventions, such as the one you are interpreting here, do make distinctions based on a certain
6 number of things that all the states of the world are going to have to understand and they will
7 have to stop adopting texts such as those seen in Guinean legislation, some parts of which are
8 rather strangely not invoked here. It is quite remarkable. They do not invoke it but it is true that
9 in the Guinean Customs Code it is mentioned that the limit of activity of customs is 250
10 kilometres from the coast. That is very strange, given that the Guineans have acceded to the
11 Convention, but luckily they have not invoked that clause in their response. There is no legal
12 argument or even argument of fact that could justify the claim that the boat was in “our waters”,
13 in Guinean waters.

14

15 They say that the Guinean authorities had a right to confiscate the goods. It is true that the
16 goods were in the harbour. The goods had arrived and no reports had been drawn up until
17 then. It says in the *procès-verbal* that it would not be drawn up until the boat had been
18 unloaded. So there is a cargo about \$1 million in the harbour in Guinea and the information that
19 we have had is that orders were given to local companies to buy that oil. Right from then the
20 Guineans had apparently confiscated the goods. That is contrary to article 291 of the Customs
21 Code and contrary to normal procedure. How can we be sentenced and have our goods
22 confiscated at a time when we have not even been charged in the Republic of Guinea?

23

24 They make express reference to article 111(1) of the Convention, the right of hot pursuit, but
25 that sets out detailed conditions for the right of hot pursuit. There is a point of departure; there
26 is a point at which it is necessary to stop and there is the manner in which hot pursuit is carried
27 out. None of these conditions were met, according to the explanations of the officials of
28 Guinea, as set out in the PV.

29

1 I do not want to talk for too long because essentially everything has already been said. I do not
2 think there is any doubt about the jurisdiction of the Tribunal. There is no problem about the
3 form of the Application, but that also has not been raised by the Respondents. We have not
4 heard anything about admissibility from the other side or about the capacity of the parties or
5 anything that would call into question our right to bring such a case before the Tribunal.

6

7 If there are any surprises, I would reserve the right to respond then to any points that may be
8 made that are not included in the written submission of the Guinean side.

9

10 The Guineans said that most of the crew has in fact been freed. It is true that some of the sailors
11 have been able to leave but they do admit that the Captain has been detained. If the boat has
12 been detained, if its cargo has been detained, if members of the crew or even one member of
13 the crew is being detained, then we are in the ambit of Article 292 and our action is admissible.

14

15 As far as the bond that we are asking the Tribunal to fix is concerned -- and here I will conclude
16 -- here the Tribunal has unfettered discretion. But when you are assessing the value of the
17 bond that is to be provided by the State that I am representing today, you will take into account
18 the fact that the goods have already been unloaded.

19

20 Either the Guineans return the boat with its cargo, and the Tribunal will take account of the
21 return of the cargo in setting the bond or, the Guineans have already confiscated the cargo, and
22 I take it that the bond would be of a purely symbolic nature. Even if the cargo and the boat
23 were returned -- I am still talking about the bond -- I still feel that the bond should be purely
24 symbolic because, without going into the merits of the case, *prima facie* the Guineans are
25 accusing us of an impossible crime. They are accusing us of smuggling in a place where there is
26 no police authority, where it is not possible for any offence to be committed against the Republic
27 of Guinea, so the offence is clearly impossible.

28

29 Even a brief look at the facts, based simply on what the Republic of Guinea has said, which

1 admits that everything happened in the exclusive economic zone of Guinea, except the arrest of
2 the vessel, which was in Sierra Leone's economic zone, all that recognizes that nothing was
3 done in Guinean territorial waters. I think that that should be reflected in any bond that is set.

4

5 Since I do not speak English very well, perhaps I was not able to follow everything that my
6 colleague, Mr. Howe, said, but there was one argument which did not seem to be mentioned;
7 namely, that the Guineans said that we did not offer a bond. Now, it is clear -- and I say this is
8 our inalienable right to reply -- that the Guineans cannot accuse us of having failed to offer a
9 bond since we tried to get in touch with them many times and, with the exception of the one
10 occasion I talked about, we failed. Nor did they notify us, as they claimed they did. It is very
11 strange for Guinea to say that their waters extend for 250 kilometres and that we have not
12 respected article 73 but then to claim that we do not have the right to rely on even one small
13 paragraph of an article which provides that if a ship flying our flag is arrested, we have the right
14 to be notified. In their conclusions the Guineans appear to wish to challenge that. I believe that
15 the Tribunal will put matters in order.

16

17 I thank you for your attention. I hope that I have not taken up too much of your time.

18

19 THE PRESIDENT: Thank you very much, Mr Thiam.

20

21 As I indicated at the beginning of the presentation by Guinea, we will now break for half an
22 hour. When we return, the representative for Guinea will be given the opportunity to make
23 submissions along the same lines and under the same conditions.

24

25 The meeting is now adjourned until that time.

26

27 **(The Tribunal adjourned from 17:50 to 18:10 hrs)**

28

29 THE PRESIDENT: The Tribunal is now in session. I will invite the agent of Guinea to make his

1 submission.

2

3 MR VON BREVERN: Mr President, Members of the Tribunal, I am happy to be presenting
4 before you the first case ever of this Tribunal.

5

6 I will not be the only person to talk from this side. I have a great number of colleagues in my
7 delegation. I will ask my colleagues to present the points they have dealt with.

8

9 ?-I would like just to make two preliminary points which may not be too important but we at
10 least mention them. The first one refers to the authorization of my esteemed colleague from
11 Stephenson Harwood. I refer to article 110 of the Rules of the Tribunal.

12

13 In our understanding, only the person who has the authorization to authorize someone could
14 have authorized Stephenson Harwood; the Attorney General of St Vincent and the Grenadines
15 has authorized the Commissioner for Maritime Affairs of St Vincent and the Grenadines to
16 apply to the Tribunal. Therefore we thought that it should be a direct authorization from the
17 Attorney General to Stephenson Harwood.

18

19 The second preliminary remark refers to the question: who is the owner of the M/V *SAIGA*? I
20 think we all have a right to know this. In my colleague's paper it is said that the owner is a
21 company named Tabona Shipping Company Limited. I have gone into Lloyd's Maritime
22 Information Services. There it states that the owner of M/V *SAIGA* is SeaScot Ship
23 Management Company and in Lloyd's confidential there is no vessel mentioned under the
24 ownership of Tabona. This was the second preliminary remark.

25 Now, as to the merits of the case: you all know what has happened. M/V *SAIGA* has supplied
26 gasoil to some fishing vessels under the Guinean flag in the waters of Guinea and there has been,
27 according to the Guinean laws, a violation of these laws, and therefore the Government of
28 Guinea has pursued the M/V *SAIGA* and has taken it into the Port of Conakry. This was all in
29 conformity with national Guinean law.

1
2 Now we come to the question of the applicability of article 292. Our opponents have explained
3 why they think that they have a right to apply to you (referring to article 292 of the Convention).
4 We are not of the opinion that this is correct. I am very sorry to say that in our opinion in the
5 first case presented to you we have great doubts about your competence to decide the case.

6
7 There are two points that are of importance in this connection. The Applicant has, to our
8 understanding, not alleged that the Government of Guinea has not complied with the provisions
9 of this Convention for the prompt release of the vessel or its crew upon the posting of a
10 reasonable bond or other financial security. It is our understanding that article 292 only applies,
11 if for and on behalf of the State Party whose vessel has been detained, or on behalf of the
12 owner of the vessel, a reasonable bond or other financial security has been posted, or at least
13 has been offered to the detaining State Party. No security or bond has been offered on behalf
14 of M/V *SAIGA* . That is the first point in connection with article 292.

15
16 Article 292 of the Convention, in our view, furthermore, is not applicable because the reference
17 of our opponents to article 73 of the Convention, which the detaining State allegedly has not
18 complied with, is not an allegation in conformity with article 292. Article 73, para. 2, in
19 accordance with article 292, para. 1, orders the prompt release of an arrested vessel and its
20 crew only upon the posting of reasonable bond or other security. None has been posted by or
21 on behalf of M/V *SAIGA*.

22
23 In my colleague's statement today I had the feeling that he has seen this problem and therefore
24 he has referred to two other articles of the Convention: namely to articles 220 and 226. I will
25 not develop at length on these articles but I think they really do not apply and, in particular, do
26 not apply in connection with article 292. Both Articles are in connection with pollution. We do
27 not speak here, as you all know, about pollution. We speak about contraband, about
28 smuggling.

29

1 Therefore, to conclude this first item of our submission, we think that our opponents do not have
2 a right to call you as a Tribunal.

3

4 In case you do not follow us, we have to deal with the merits and we think that if you answer
5 your competence in the affirmative, the first thing then in your decision would be that you
6 determine that the allegation made by the Applicant is not well founded.

7

8 When arresting M/V *SAIGA* outside Guinean waters -- this is undisputed -- the Government of
9 Guinea made use of the right under article 111 of the Convention, namely the right of hot
10 pursuit. The pursuit of M/V *SAIGA* has been commenced when the *SAIGA* was still within the
11 territorial waters of the Republic of Guinea.

12

13 Now I would like to present to you Mr Khalil Camara, who will explain to you and give
14 evidence by referring to the annexes which are in your possession, explaining the exact position
15 of M/V *SAIGA* when in contact with Guinean fishing vessels.

16

17 MR CAMARA (Translation): First I would simply like to explain the position in which the
18 *SAIGA* was seen, not even in the EEZ but in the contiguous zone, because here, we have
19 certain areas that are defined in the Convention; that is inland waters, territorial waters, the
20 contiguous zone and beyond the EEZ, the high seas.

21

22 We know very well that in international law the UN accords each nation its own maritime areas,
23 and we know that the rights of the State diminish as you proceed towards the high seas. The
24 further you proceed from the high seas towards the coast, the more the rights of the international
25 community diminish until the territorial waters of the State where the rights of the State in
26 question are greater.

27

28 Guinea knows its rights within this area and there is no question of Guinea violating the
29 Convention of the United Nations on the Law of the Sea. The *SAIGA* was apprehended on

1 27th when crossing the northern maritime frontier of Guinea; that is the frontier with Guinea
2 Bissau on 27 October 1997 at 1.20 standard local time in Guinea, that is Greenwich mean time.
3 The same day at the point of latitude 10 degrees 25' 3 north and longitude 15 degrees 42'6
4 west the *SAIGA* sold gasoil to three fishing boats; that is, the *Guisepppe Primo*, the *Kriti* and
5 the *Eleni G.*

6

7 The Master of the ship, when questioned, stated that these ships were flying the Guinean flag.
8 They were not. The first ship was a Greek ship; the second was an Italian ship and *Guisepppe*
9 *Primo* is an Italian ship but it operates in the fishing sector on the basis of co-operation between
10 the EC and Guinea. The EC has allowed certain vessels to operate within the framework of this
11 co-operation treaty.

12

13 These ships do not fly the Guinean flag: They are what we refer to as Guinea-ised. That is that
14 we call ships which benefit from certain privileges because they are in Guinea on the basis of
15 bilateral or multilateral agreements.

16

17 The pursuit began when the ship was in the proximity of the first buoy of the *Cité Minière de*
18 *Kamsar*; less than 24 miles from, that is within the limits of, the contiguous zone of the island
19 known as Alcatraz. We submitted the chart of this area to you. I do not know if each member
20 of the Tribunal has this chart but I am not here to teach you how to read charts. I think you can
21 appreciate this for yourself.

22

23 One begun, the pursuit was not interrupted; it was continued from this position where the vessel
24 was located until the limit of the territorial waters and the frontier of Sierra Leone.

25

26 The opponents have given us co-ordinates. We have been more honest. They said 9 degrees
27 and whatever, but we said that we arrested the vessel at 8 degrees 58 minutes, which is a
28 position belonging to Sierra Leone. This is one of the basic arguments behind the claim, that we
29 arrested the vessel in Sierra Leone's territory. But imagine that you see a boat committing an

1 offence under conditions as described in the memorial submitted by the Republic of Guinea, a
2 vessel that refuses to respond to any warnings given; that is firstly the communication by which
3 we identified ourselves. It is very easy to identify us because we fly the flag of the State; our
4 ships are marked with markings on board; and we communicated on an international channel,
5 channel CS. We identified ourselves and asked the vessel to stop, the vessel did not do so.
6 We then transmitted acoustic signals, even ringing the bell on board the launch, but the vessel
7 did not stop. We also gave visual warnings. The vessel did not stop. It crossed the border
8 with Sierra Leone. Why? Because historically this country has certain problems, and they
9 wanted to cross the Sierra Leone border because then we could not follow them. But,
10 according to article 111, I would ask the Applicant to read this on the right of hot pursuit, let it
11 read the conditions of the right of hot pursuit. If it had read them, it would have realized what
12 the situation was.

13

14 Then, there is an argument which is a subsidiary argument: it is not the reason why we arrest the
15 vessel. Sierra Leone being what it is, they chose to go there. There is a United Nations
16 Security Council resolution of 7 October 1997 which justified certain obligations on Sierra
17 Leone's neighbours to undertake certain activities against certain units which are likely to
18 contravene the provisions of the United Nations embargo. This vessel, first of all, was in our
19 area; it also met other vessels in our area. But it hid in Sierra Leone waters and this did not
20 prevent us pursuing it.

21

22 I would like to ask the Tribunal to consult certain documents from the vessel, from the *SAIGA*.
23 These are not references from the logbooks of the launches. If you look at the first logbook and
24 also at the navigation map where you can follow the route, you will also find some messages
25 translated here asking them to stop 100 nautical miles away from the coast because Guinea was
26 organizing operations against illegal bunkering.

27

28 The bunkering of fuel was their main activity in our area and if they smuggle, then they are
29 sabotaging our economy, which will not be tolerated.

1

2 This is what I have to say. You also have here the book where the received messages are
3 noted concerning the fuelling and supplying of vessels in our area. You know the activities the
4 *SAIGA* was engaged in.

5

6 Finally, I would like to recall one point, that the distance in question was 100 nautical miles. A
7 nautical mile is 1.852 kilometres and 200 nautical miles, the breadth of the exclusive economic
8 zone which is recognized under the Convention for each state, is much wider than 250
9 kilometres that appeared to shock my opponent, it is 300 kilometres.

10

11 Thank you very much, Mr President.

12

13 MR HOWE: Mr President, I have to interrupt, but are we to understand that members of the
14 Guinean delegation will be adding factual evidence in the course of their submissions and if so,
15 can we have the opportunity to cross-examine them on that factual evidence?

16

17 THE PRESIDENT: Yes, you will have the opportunity in your response to comment on
18 anything that has been said. It would perhaps have been better if reference to the information
19 given had been in the written pleadings; and I would suggest that any documentary evidence
20 they have on the matter should be made available to you.

21

22 MR HOWE: We will have the opportunity to question these gentlemen on the issues they were
23 discussing?

24

25 THE PRESIDENT: Do you mean the representative of Guinea?

26

27 MR HOWE: I believe it would be helpful to question the gentleman who has just spoken on
28 the factual matters he has raised, yes.

29

1 THE PRESIDENT: But he is not a witness.

2

3 MR HOWE: I appreciate that, Mr President, but he has given factual evidence as to what the
4 vessel was doing.

5

6 THE PRESIDENT: That is part of the submission of Guinea. So you can obviously comment
7 on it in your response.

8

9 MR HOWE: I have a right. Thank you.

10

11 MR VON BREVERN: Mr President, I think that all the documents Mr Khalil Camara referred
12 to have been presented to you in the annexes otherwise we would hand over another document
13 to you.

14

15 May I now come to the question of why is it forbidden under Guinean law to refuel fishing boats
16 with gasoil offshore? This will be explained to you by Maitre Bao.

17

18 MR BARRY ALPHA OUMAR (Translation): Mr President, firstly I would like to excuse
19 myself but I have not been able to wear my robe as a Guinean barrister. I arrived today but my
20 luggage did not. I am sorry, Mr President, that I am not robed. I apologize also to the other
21 judges. I am wearing my badge so please allow me to speak as an attorney at law.

22

23 Having said that, Mr President, I would like to say a few words about Guinean legislation, about
24 fraud and the import of fuel into the Republic of Guinea.

25

26 My colleague from the other side commented on this at some length. He called it a decree. I
27 would like to make it clear that, although he said this is a decree, this is in fact a Law. You can
28 see that in the documentation and you can see clearly written on it that this is a Law and not a
29 decree. A decree is an administrative act and a Law is adopted by the National Assembly, that

1 is to say by Parliament. There is a clear distinction there.

2

3 Having said that, Mr President, Guinean legislation is very clear as far as the protection of its
4 rights over the sea and over its waters is concerned. Article 1 of the text speaks volumes, as do
5 articles 2, 4, 6 and 8. I am not going to tell you to read all of them now. They are in the
6 documentation. I am not going to read them all out to you but I would like to make a few
7 points, for example, on article 2.

8

9 Article 2 talks of fishing vessels which are fuelled with oil in port, ashore. They are not allowed
10 to refuel at sea. They must fuel in port and that is for clear reasons because our country has
11 seen that every time that a boat used by smugglers, such as *SAIGA*, which sells fuel to trawlers
12 at sea, the State loses money because it loses the duty on the fuel that has been fraudulently
13 sold. One of my colleagues will speak on this.

14

15 At a time when the International Monetary Fund and the World Bank are calling on all
16 developing countries to increase their own resources, this practice is essentially a crime.

17

18 Article 6 states that anyone who fraudulently imports fuel into national waters without paying
19 duties deprives our State of revenue. Now the *SAIGA* was in Guinean waters, in territorial
20 waters, and sold fuel to three trawlers. That can be seen from the documentation of the boat
21 itself, from the navigation log and from the ship's log. It is forbidden to add anything to or
22 delete anything from a ship's log. Specialists confirm this. We have the document there. We
23 have the original document. You can look the original itself and see what has been written there
24 by the Captain himself in his own hand. There is no dispute about that.

25

26 Let us move on to decree 336 that my colleague referred to when talking about its article 5.
27 The second paragraph states: in the 24 hours after disembarkation they must submit their
28 reports, official reports of any evidence that an offence has been committed to the public
29 servants responsible for the merchant navy and regional government. This text mainly concerns

1 fishing.

2

3 In the present case, it is the sale of fuel to vessels in our waters, not fishing. The PV is sent in

4 that case to the Public Prosecutor, because it is his job to prosecute offenders.

5

6 We are talking about an offence. If you read articles 3, 2, 4, 6 and 8 of the Law which I

7 quoted, you will see that this is a matter for the Public Prosecutor of the Republic. We cannot

8 be accused of not having sent a report to the Governor or whatever or to the bodies mentioned

9 in this text, because this is a matter for the Public Prosecutor.

10

11 I would like to add, Mr President, that the Republic of Guinea has firmly decided to protect its

12 rights in its waters pursuant to the national legal texts in force supported by international texts.

13

14 Thank you, Mr President.

15

16 THE PRESIDENT: Thank you.

17

18 MR VON BREVERN: Mr Askia Camara will explain to you the situation of the Guinean

19 customs economically and legally.

20

21 MR CAMARA (Translation): Thank you, Mr President.

22

23 Now that the members of my delegation have spoken to you, I would like to give you some

24 further details on the customs aspects of the questions we are discussing here today.

25

26 Mention has just been made of smuggling and I heard the Applicant say that the *SAIGA* did not

27 commit an act of smuggling, that it had bought petrol in Senegal. The PV of the Customs, which

28 you have received in your file, mentions an activity of smuggling. I would like to point out the

29 definition of smuggling -- it is not necessary for me to bring it up here, but I would simply like to

1 say that we only need to refer to Article 317 of the Customs Code. We are not talking about
2 selling goods officially but passing goods by unofficial means into the country where they
3 consumed. We also talked about the fine being four times the value of the goods. Again, I
4 would like to point out that this is in absolute conformity with our Customs Code in article 316.
5 Why do we have this provision? It is simply because in the PV offenders must be reminded the
6 texts which have been infringed, the ones which point out the nature of the offence and also the
7 sanctions. This is in the PV to help the courts to judge these offences. We mention them in the
8 PV, the articles of our Code which punished the offences established.

9

10 The bond is mentioned in the PV of the Customs. It is said that the Customs did not offer
11 prompt release but I would like to point out that in our legislation the Customs is not obliged to
12 offer prompt release after any arrest of a ship. Only in the case of non-prohibited or lightly-
13 taxed goods may Customs settle or go to court. There are two ways; settlements or a court
14 case. If the Customs took every case to court, then the courts would have nothing else to do
15 than judge customs cases.

16

17 This is why, as far as petroleum products are concerned, the tax authorities and the customs
18 have the right to settle minor cases of little consequence to our national economy and this is why
19 we cannot accept this type of offence.

20

21 In view of the importance of oil products in our economy, of the revenue accruing to the public
22 purse from customs duties on oil products, Customs do not agree to settle systematically with
23 offenders in such cases. When an official report is made of the arrest, the matter is referred to
24 the courts and the goods confiscated are paid to the public purse. This leads me to try to
25 submit the importance of petroleum products to our economy. I would like to point out that in
26 the customs revenues, 37 per cent of our customs revenue come from petroleum products, so
27 you can see the importance of fuels and carbons in our customs revenues. In the Guinean
28 national economy customs revenue accounts for 53 per cent. This is the reason for which the
29 Government and the Parliament have taken decisions and passed legislation to strictly govern

1 the import of fuels into our country. When these products represent 37 per cent of our revenue,
2 we cannot allow of any kind of fraud in dealing with these products. This is why the text we
3 referred to mentions that our security and police forces go out to sea to apprehend smugglers, if
4 they are dealing with oil in particular. Each time we do so our revenue increases.

5

6 We note that the consumption of fuel increases via legal channels because everything that is not
7 imported fraudulently -- that is as soon as we combat fraud -- means that the consumption by
8 legal means goes up. The customs revenue from customs duties also increases.

9

10 Let me give you an example. Since we started combatting fuel smuggling we have noted that
11 the consumption of fishing vessels - rather than fuelling fraudulently at sea, we have now tried to
12 act against this - their consumption has indeed increased so that they are buying much more at
13 the quayside rather than buying their fuel on board vessels which are sailing under clandestine
14 terms.

15

16 In October 1997 our fishing vessels consumed 1,400,000 litres against 1,234,295 litres in the
17 first 22 days of the previous month. You see that once we started arresting the smuggler
18 vessels, the consumption increased considerably and our revenue has increased accordingly.

19

20 I would also like to point out that in Guinea the oil products are kept in special bonded storage
21 facilities and it is only when the fuel is sold and consumed that the duties are calculated. This is
22 done over periods of ten days. So we call this period of calculation a decade. In the period we
23 are talking about, over three decades, we have noted an increase. And because we have
24 succeeded in combating smuggling to a certain extent, we have seen a certain increase in our
25 revenue.

26

27 For example, during the months of August and in September, in each ten day period we had
28 revenues of about 2 billion, but after we arrested the smugglers the amount for each decade, in
29 each ten day period, went up to 3 billion. This is the reason why the authorities decided that we

1 must not drag our heels and we have to combat smuggling because it is important for our
2 national economy.

3

4 For example, in October around 5,500,000 litres were supplied to filling stations - that is for 31
5 days in October - and for 22 days in November the amount delivered to filling station, was
6 4,900,000 litres approximately. We are sure, because we have already arrested the largest
7 group of smugglers, that is in particular M/V SAIGA, we are sure that the consumption in
8 November and December, particularly in December, and in January will increase because the
9 more we immobilize and detain these vessels, the more our consumption increases.

10

11 I would like to sum up by saying that the repression of smuggling, especially of petroleum
12 products, increases customs revenue and the Treasury benefits from this. So the more we fight
13 against smugglers the more our revenue increases, and as you know, as I mentioned before, the
14 importance of customs revenues to the Guinean economy is considerable.

15

16 This is the reason that I took the floor to explain to you, in a few words, the reasons why our
17 administration did not want to accord prompt release in this matter. We think that this should
18 go before our courts and we think that an offence has been committed, a customs offence,
19 which should be judged by our own tribunals.

20

21 Thank you very much.

22

23 THE PRESIDENT: Thank you.

24

25 MR VON BREVERN: Mr President, Members of the Tribunal, this was the presentation of
26 the Guinean Government. It was not necessary for us to have two hours. What we have
27 presented to you was in addition to what has been presented in written form. We think that it
28 was convincing or at least it gives you the possibility to take a decision.

29

1 There is no question that the Government of Guinea are sorry about the injuries of the crew
2 members but M/V *SAIGA* has violated the national laws of Guinea, and Guinea is a sovereign
3 country and has to defend itself against contraband. It has made use of the right of hot pursuit.

4

5 I repeat what I have said in the beginning: we question whether the Tribunal is competent and
6 we would like you at least to reject the Application as unfounded.

7

8 Thank you very much.

9

10 THE PRESIDENT: Thank you, Mr von Brevern. That, as you said, concludes the
11 presentation of Guinea. That was the purpose of the resumed oral proceedings.

12

13 I would like, first of all, before we adjourn, to thank sincerely on behalf of the Tribunal the two
14 agents and their collaborators for having acceded to the request of the Tribunal to confine their
15 presentation to within the two and a half hours agreed: none of them exceeded it. And
16 secondly, I have been impressed, as I am sure all the judges have been, by the fact that the
17 presentations have been very professional and have addressed the main issues which have been
18 raised either in the Application or in the Response. I am pleased that we have not, if I may use
19 the expression in this case, “gone fishing” far afield.

20

21 We are going to adjourn today in accordance with the decision of the Tribunal taken in
22 consultation with the parties. Another session will be held tomorrow. The representatives will
23 have the opportunity to address the Tribunal in response to the submissions made today by the
24 Applicant and by the Respondent.

25

26 The oral hearing for tomorrow will commence in this room at two-thirty in the afternoon. I
27 would like to be able to meet the agents of the parties tomorrow at twelve o’clock in the offices
28 of the Tribunal at Wexstrasse.

29

1 May I now declare the oral proceedings adjourned until tomorrow, Friday 28 November at
2 2:30 p.m.

3

4 **(The Tribunal rose at 19:00 hrs)**

5

6