

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

1999

Public hearing

held on Monday, 8 March 1999, at 2.00 p.m.
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Uncorrected
Non--corrigé

<i>present:</i>	President	Thomas A. Mensah
	Vice-President	Rüdiger Wolfrum
	Judges	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		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. Carlyle D. Dougan Q.C., High Commissioner to London for Saint Vincent and the Grenadines,

as Agent;

Mr. Carl Joseph, Attorney General and Minister of Justice of Saint Vincent and the Grenadines,

as Counsel;

Mr. Richard Plender Q.C., Barrister, London, United Kingdom,
Mr. Yérim Thiam, Barrister, President of the Senegalese Bar,
Dakar, Senegal,

Mr. Nicholas Howe, Solicitor, Howe & Co., London, United Kingdom,

as Advocates.

Guinea is represented by:

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

as Agent;

Mr. Maurice Zogbélemou Togba, Minister of Justice,
of Guinea,
Mr. Rainer Lagoni, Professor at the University of Hamburg and
Director of the Institute for Maritime Law and Law of the Sea, Hamburg, Germany,

Mr. Nemankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn, Germany.

as Counsel

1 **THE PRESIDENT:** Dr Plender, you may continue.
2

3 **DR PLENDER:** Mr President, Members of the Tribunal. This morning, I addressed two of
4 the Guinean objections to admissibility in this case.; the objection based on the principle of
5 effective link and the objection based upon the principle of nationality of claims. I now turn
6 to the third main Guinean objection, that based on the principle of exhaustion of local
7 remedies.
8

9 We submit that the rule on exhaustion of local remedies would not apply in this case,
10 even if it were open to Guinea to raise objections to admissibility at this stage.
11

12 Where a State acts in breach of international law, in relation to a person or property
13 beyond its territorial jurisdiction, the State cannot demand that the individuals who have
14 suffered damage should exhaust local remedies, for such a demand would reinforce that
15 State's wrongful assertion of jurisdiction. It would be plainly unjust to compel a person to
16 submit to the jurisdiction of the court's of a State where his complaint is that the State has
17 acted without jurisdiction. An individual is obliged by international law to exhaust local
18 remedies only where he has put himself within the jurisdiction of the State by some voluntary
19 act. In the expression commonly used by writers, the requirement of exhaustion of local
20 remedies applies only where there is a jurisdictional connection between the State against
21 which the claim is brought and the person in respect of whom it is advanced.
22

23 In this case, the principal Guinean acts giving rise to the claim were done outside
24 Guinea's territorial jurisdiction that is beyond her territory, her territorial waters and such
25 extraterritorial jurisdiction as States are permitted to exercise in international law within the
26 exclusive economic zone or beyond it. To the extent that complaint is made of acts done
27 within Guinea's territory, such as the sale of the cargo, the vessel was within the jurisdiction
28 of Guinea only because she was brought there by force. There is therefore no scope for the
29 exhaustion of local remedies. The necessary jurisdictional connection is absent.
30

31 The International Court of Justice alluded to the requirement for a jurisdictional
32 connection in the *Interhandel Case* at Section 4 tab 6 of the authorities. In that case, the
33 Court stated that the local remedies rule
34

35 "has been generally observed in cases in which a State has adopted the cause of its
36 national where rights are claimed to have been disregarded *in another State* in
37 violation of international law. Before resort may be had to an international court in
38 such situation, it has been considered necessary that *the State where the violation*
39 *occurred* should have an opportunity to redress it by its own means."
40

41 The International Court thus spoke of the application of the local remedies rule where
42 the violation of international law has occurred within another State. It is "*the State where the*
43 *violation occurred*" that has the benefit of the local remedies rule. Therefore, where a State
44 commits a violation outside its territory, it cannot require the wronged persons to have
45 recourse to local remedies within that State.
46

47 Reference was made to the requirement of a jurisdictional connection by Counsel for Israel in
48 oral argument is the *Aerial Incident Case* at Section 4 tab 7. The passage has already been

1 quoted by both parties in written pleadings, but with your indulgence I will quote the central
2 part again. Counsel in that case stated that

3
4 "all the precedents show that the rule is only applied when the alien, the injured
5 individual, has created, or is deemed to have created, a voluntary, conscious and
6 deliberate connection between himself and the foreign State whose actions are
7 impugned."

8
9 What is required is that the vessel or crew must have brought themselves within the
10 territorial sovereignty of Guinea by a voluntary, conscious and deliberate act.

11
12 This rule, requiring a jurisdictional connection between the State and the wronged
13 person as a prerequisite for the exhaustion of local remedies receives widespread support
14 from the text writers. The principle applying to this case was expressed in a phrase which
15 has been much quoted in this litigation by Professor Meron in his article "The Incidence of
16 the Rule of Exhaustion of Local Remedies in International Law", which will be found at
17 Section 4 tab 8 of the authorities. He states that the local remedies rule applies only where
18 there is a "genuine link" between the wrongdoing State and the wronged individual.

19
20 The same principle is supported by Dr Amerasinghe in his book *Local Remedies in*
21 *International al Law* at Section 4 tab 3. He states

22
23 "There may be situations where the applicability of the rule may be questioned where, so to
24 speak, there is doubt as to whether there is an adequate jurisdictional connection."

25
26 He then goes on to give an example of absence of such a connection, using language
27 which is particularly appropriate to this case. He asserts that the local remedies rule will not
28 apply where

29
30 "naval officers of State A improperly treat nationals of State B on a ship belonging to State C
31 on the high seas."

32
33 At that point the author contemplates circumstances as close to those of the present
34 case as might ever be expected of any academic writer not possessed of divine prescience.

35
36 In this case the Vincentian complaint is that the Republic of Guinea has improperly
37 arrested and caused injury to a vessel and her crew outside the territorial waters of that State.

38
39 It might be said on behalf of the Republic of Guinea that there are not many cases
40 where courts have applied this rule of jurisdictional connection. The answer to such an
41 argument is simple and expressed by Dr. Amerasinghe himself. He reminds us that

42
43 "it would appear that in almost all decided cases that have been reported, where the rule has
44 been applied the question never arose whether there was an adequate jurisdictional
45 connection, because apparently one did exist. In general most of the cases concerned
46 situations in which the alien was temporarily or permanently resident in, or was physically
47 present in, or had some kind of contractual connection with the host State."

48
49 That is at Section 4, tab 3.

1
2 Both in her Counter-Memorial and in her Reply, the Republic of Guinea pleads that
3 there was such a jurisdictional connection between *The Saiga* and the Respondent State. She
4 argues that "this connection has been duly established because *The Saiga* had been
5 voluntarily in the Guinean exclusive economic zone and was escorted into the Port of
6 Conakry by the Guinean authorities". It is our submission that presence in the exclusive
7 economic zone is not sufficient to establish a jurisdictional connection for the purposes of
8 exhaustion of local remedies. First of all, the Tribunal will recall that the arrest and injury to
9 the crew occurred outside the exclusive economic zone of the Republic of Guinea. That is
10 not disputed. It is expressly accepted by the Republic of Guinea. at paragraph 16 of her
11 Counter-Memorial.

12
13 It is of course alleged that the bunkering of fishing vessels took place within the
14 Guinean exclusive economic zone. Further, it is said that *The Saiga* voluntarily entered that
15 zone to perform those acts. Does that provide the necessary jurisdictional connection. The
16 answer must be "No". Since a State's sovereignty does not extend to its exclusive economic
17 zone, acts occurring there cannot be deemed to have occurred within the territory of that
18 State. The rule of international law requiring a jurisdictional connection is a consequence or
19 reflection of the function of the local remedies rule. The rule is, in Dr Amerasinghe's words

20
21 "a recognition of, emphasis on and perhaps a concession to the sovereign character of a
22 State."

23
24 Or, as he put it elsewhere

25
26 "the rule results mainly from recognition of the Respondent State's sovereignty..."

27
28 To quote Judge Cordova in the *Interhandel case*

29
30 "respect for the sovereignty of States is achieved by granting priority to the
31 jurisdiction of a State's domestic courts in cases where foreigners appeal against an
32 act of its executive or legislative authorities."

33
34 Section 4, tab 6.

35
36 In other words, the purpose of the local remedies rule is to secure respect for the
37 sovereignty of States. Where a breach occurs within a State's sovereign jurisdiction, that
38 State is given the first opportunity to put it right. Where a wrong occurs outside that
39 sovereign jurisdiction a complainant state may have recourse to an international tribunal
40 directly.

41
42 Of course it is accepted that a coastal state has certain rights within its exclusive
43 economic zone. For certain carefully defined purposes it even enjoys "sovereign rights". It is
44 however equally indisputable that the exclusive economic zone is not subject to the state's
45 sovereignty. The United Nations Convention draws a clear distinction between a coastal
46 State's sovereignty and the authority that it may exercise within the exclusive economic zone.
47 Article 2, when dealing with the territorial sea, states that

1 "The sovereignty of a coastal State extends beyond its territory and internal waters...to
2 an adjacent belt of sea, described as the territorial sea."
3

4 Within the territorial sea there is sovereignty.
5

6 In relation to the exclusive economic zone Article 56 provides for certain sovereign
7 rights, but only in relation to specified purposes, none of which is in issue in this case. The
8 proposition that a distinction is drawn between "sovereignty" and the "sovereign rights"
9 enjoyed in an exclusive economic zone is too elementary to require authority, especially in
10 this Tribunal. Since however it appears to underlie certain of the arguments advanced by the
11 Republic of Guinea, we have set out at tabs 6, 7 and 8 of the authorities given in Section 5 of
12 our file, passages to that effect in the works of Orrego Vicuña, Attard and Extavour.
13

14 For instance, in the words of Orrego Vicuña at page 47:
15

16 "the coastal state can (only) exercise the rights of sovereignty and jurisdiction in those
17 matters to which the functionality of the concept confers ..."
18

19 Or, to quote Ambassador Jorge Castañeda, a person present at the Law of the Sea conference:
20

21 "In that zone, the coastal state exercised sovereign rights over resources, for the
22 purpose of exploration and exploitation, but did not exercise sovereignty over the
23 zone itself, as in the case of the territorial sea. This was its main characteristic."
24

25 That appears in his essay in the book of *Essays in Honour of Judge Lachs (Section 4, tab 10)*.
26

27 Statements to similar effect abound.
28

29 It is, therefore, the submission of Saint Vincent and the Grenadines that:
30

- 31 (i) the Exclusive economic zone is not assimilated to the territory or subject to the
32 sovereignty of the coastal state; and
33
34 (ii) the local remedies rule applies only to wrongs which occur within the sovereignty of
35 the state or where a foreigner brings himself within it by entering into a contract with
36 the state.
37

38 There might perhaps have been some scope for the argument to the contrary if
39 it were the Guinean case that *M/V SAIGA* had violated the rights of the coastal state,
40 for which provision is made in Article 56 of the Convention, but the Republic of
41 Guinea has been adamant in insisting the contrary. She states expressly that in
42 arresting *M/V SAIGA* she was not asserting the rights provided for in Article 56. To
43 quote from paragraph 108 of the Counter-Memorial.
44

45 "Guinea does not contend that bunkering the fishing vessels would constitute a
46 part of its sovereign rights in the Exclusive economic zone."
47

48 As Dr Amerasinghe has stated:
49

1 "In terms of the policies behind the rule of exhaustion, it would seem that it is
2 only where the delinquent state can be said to be entitled to jurisdiction over
3 the issue that the rule may be applied."
4

5 Quite so.
6

7 Where a coastal state does not have jurisdiction over an issue and particularly
8 where the coastal state adamantly insists that it is not asserting any such jurisdiction,
9 the principle of exhaustion of local remedies cannot apply.
10

11 It might be contended that the Republic of Guinea asserts within her Exclusive
12 economic zone the right to control the bunkering of fishing vessels there.
13 Maître Thiam will in due course show that Guinean law does not, even on its face,
14 purport to do so. Leaving that aside, the contention that Guinea asserts such a right
15 would serve only to prove that the principle of exhaustion of local remedies could not
16 apply. A dispute as to whether Guinea enjoys a right in international law, opposable
17 to other states, to assert jurisdiction within an area beyond her territorial sea is
18 inherently an international dispute. The principal of exhaustion of local remedies
19 could not apply to such a dispute.
20

21 It is also our submission that the local remedies rule does not apply to the
22 wrongs occasioned whilst the vessel was detained in port at Conakry. I refer in
23 particular to the sale of the cargo and the second attack on the vessel there. Our
24 submission is based on the universally accepted rule that a person is not bound to
25 exhaust local remedies when he has come to a state as a result of unlawful seizure
26 made by its agents. This rule is stated by Dr Amerasinghe to be based upon the
27 principle *ex injuria non oritur ius* – they cannot find a basis for a right in its own
28 wrong. The rule is also supported by Professor Meron in the article to which
29 I referred earlier.
30

31 In the present case *M/V SAIGA* was taken into port from a point beyond the
32 territorial jurisdiction of the Republic of Guinea against her will. She cannot be
33 deemed to have submitted voluntarily to the jurisdiction of that state and she cannot
34 be required to have recourse to the system of justice there.
35

36 It is also our case, and in my submission it is clear, that Saint Vincent and the
37 Grenadines is not bound to exhaust local remedies in respect of the violations
38 occurring directly in relation to herself, her citation before the Guinean courts. It is
39 well established that where a direct injury has been caused by one state to another, the
40 latter is not bound to submit to the jurisdiction of the former.
41

42 That then raises this question: how is the Tribunal to determine when a state's
43 claim is one for direct injury and when the claim is simply brought on behalf of
44 private persons?
45

46 On this point I wish to be particularly clear. The fact that individuals have suffered
47 injuries and that a state claims damages designed in part to provide compensation for them
48 does not mean that the state is merely asserting diplomatic protection rather than asserting a
49 claim in respect of its own injury. As Professor Meron has stated:

1
2 "Most cases of direct injury contain, in a certain degree, also elements of diplomatic
3 protection. It may well be that at the bottom of almost every international claim there
4 is the motivating factor of interests of individuals which need protection."
5

6 To take an obvious case, if a state brings a claim in respect of an attack upon its
7 diplomat, the cause is one of direct injury, but part of the factual matrix is the injury done to
8 the diplomat and part of the purpose is to provide compensation for him. The claim is,
9 nevertheless, advanced in respect of a violation of the integrity of the state's diplomatic
10 mission. Professor Meron goes on to state:

11
12 "the classification of a case as one of direct injury or as one of diplomatic protection
13 depends on the element or elements that are preponderant."
14

15 Dr Amerasinghe, for his part, suggests that the real question is not so much the 'nature
16 of the claim' but the 'nature of the injury or the right violated'. Thus, if the state's right in its
17 essence has for its object the protection of its nationals as such and if this is the main interest
18 sought from it, it may be concluded that the exhaustion of local remedies applies to it. But if
19 the essence of the violated right belongs to the state, there is no need to exhaust local
20 remedies.
21

22 In this case the primary right that has been violated is the right of Saint Vincent and
23 the Grenadines to freedom of navigation. That is a right that belongs essentially to the state.
24 Articles 56(2), 58, 87 and 90 of the Convention state expressly that this is a right belonging
25 to the state. It is therefore incorrect for the Republic of Guinea to assert, as is done in her
26 Counter-Memorial at paragraph 82, that the right to freedom of navigation is one that belongs
27 to the ship. The right is exercised by private and other vessels in the name of the state. They
28 exercise a right which is in essence the right of the state whose flag they fly.
29

30 Since Saint Vincent and the Grenadines has brought this case in order to protect her
31 rights in the Exclusive economic zone of the Republic of Guinea, including her right to
32 freedom of navigation, we invite this Tribunal to find that Saint Vincent and the Grenadines
33 has suffered a direct injury and need not exhaust local remedies.
34

35 Mr President, Members of the Tribunal, I have not canvassed in oral argument each
36 and every one of the points made in our written observations on questions of jurisdiction and
37 admissibility. This is not because I resile from anything we have written. On the contrary,
38 I reiterate every submission on admissibility made in writing, particularly in the Reply; but
39 I do not repeat by word of mouth all that has been said in writing. For I remember, not only
40 what Horace said about brevity but also that which is said in a more recent and binding
41 source, Article 75 of this Court's Rules. This expressly forbids repetition of the written word,
42 and I defer.
43

44 I propose to say no more about admissibility at this stage and turn to the merits.
45 I propose, Mr President, with the Court's leave, to turn to witnesses.
46

47 **THE PRESIDENT:** Very well, you may proceed.
48

1 **DR PLENDER:** Before calling the first witness, I shall have some introductory remarks to
2 make about the witnesses, and then to seek your direction, Mr President, on the way of
3 proceeding in the light of comments made to my by Mr von Brevern.
4

5 First, my introductory remarks. At the hearing on 27 November 1997 you heard the
6 evidence of the second officer of *M/V SAIGA*, Sergei Kluynev about the circumstances of the
7 arrest of the vessel. You heard the evidence of the Regional Manager of the Addax Group,
8 Mark Vervaeet about the circumstances of the detention of the vessel.
9

10 With our Memorial dated 19 June 1998, you were supplied with a written statement of
11 the Master, Captain Orlov, describing the circumstances of his arrest, a second statement by
12 Captain Orlov, the statement of Maître Bangoura describing the conduct of the Guinean
13 proceedings, the statements of Vincent Kanu, of the Sierra Leone National Petroleum
14 Company, and Captain Wyse, the Master of the *NAPETCO*, describing action taken by the
15 Guinean authorities in relation to other vessels. You were also supplied with medical
16 reports on the condition of Mr Niasse and technical reports on the damage to *M/V SAIGA*.
17

18 To this date the Republic of Guinea has not yet called a single witness, nor disclosed
19 any witness statements. Mr von Brevern informed the Tribunal this morning, and I quote:
20

21 "I am not in a position to say whom we will call as witnesses or experts."
22

23 Members of the Tribunal will be very familiar with Article 72 of the Rules, which
24 requires that each party shall communicate in sufficient time before the opening of the oral
25 proceeding information regarding the evidence, which it intends to produce.
26

27 The situation in which we find ourselves is that we do not know what case we have to
28 face. The Respondent states in its Rejoinder that there may be a question "whether there
29 have been proceedings against the Master or owners of the trawler". The exact time when the
30 patrol boats reached *M/V SAIGA* may be an issue. Whether *M/V SAIGA* has been damaged
31 by a Guinean patrol boat before she was arrested may be raised. On these points we do not
32 know what the Guinean position may be.
33

34 In preparing witness statements, consistent with the President's direction given on
35 2 March, we have tried to concentrate upon the issues, which we consider to be relevant. We
36 may have failed to anticipate correctly the way in which the Guinean delegation will present
37 its case. I therefore, particularly invite Members of the Tribunal, to exercise to the full their
38 right to put questions to my witnesses, in accordance with Article 80 of the Rules.
39

40 That said, Mr President, I now seek direction as to the way in which we are to
41 proceed with Captain Orlov. In accordance with the President's direction and in accordance
42 with Article 72 of the Rules, we have provided first a summary of the points to be made by
43 Captain Orlov, and then a full statement which is before the Tribunal today.
44

45 It had, until today, been my intention to ask Captain Orlov to elaborate upon only two
46 paragraphs of his written statement. That would have left the remainder of the afternoon for
47 his cross-examination. Unless we finish with Captain Orlov today, we may not be able to
48 keep to the timetable that the Tribunal has in mind. Mr von Brevern has, however, asked me
49 not to rely upon the statement but to take Captain Orlov through his evidence-in-chief. That

1 presents no difficulty for me, save as regards time. It would occupy an extra two hours. We
2 would then be a half-day behind schedule. If we repeat this exercise with each witness we
3 shall be much behind schedule. I am in the Tribunal's hands and will take whatever course
4 the Tribunal considers appropriate.

5
6 **THE PRESIDENT:** Thank you very much. Mr von Brevern?

7
8 **MR VON BREVERN:** Mr President, honourable judges, there might be a
9 misunderstanding on the side of Dr Plender. This morning I was asked to introduce the
10 delegation of the Republic of Guinea. I introduced the four persons which are sure to be
11 members of the delegation. Then – at least I wanted to say so – I said that it might be that
12 one or another gentlemen will also be a member of the delegation. With respect to the
13 question which witnesses and experts the Republic of Guinea will call, I may refer you to my
14 letter of 4 March in which I have mentioned, in time and sufficiently, under due mentioning
15 of the issues, all witnesses and experts to be called by Guinea. This is to that point.

16
17 The other point which Dr Plender mentioned in quoting my wish indeed refers to the
18 statement of Captain Orlov, which we have just received, at the end of our first meeting. It
19 comprises 30 different points, a lot of pages, and I do not feel in a position to be aware of all
20 of what is in here. Therefore, I really would ask you that Captain Orlov or the witness gives
21 his own answers to the replies he will be asked for by Dr Plender, and does not just refer to
22 the written statement. Thank you very much.

23
24 **THE PRESIDENT:** Thank you. We did inform the parties that the procedure of this court
25 is intended to be expeditious and cost-effective. It was understood in the consultations that
26 where a witness has produced a statement reasonably in advance of their appearance, that
27 counsel and agents may be able to refer to that statement and they need not go through the
28 statements word by word.

29
30 I believe that it should be possible, both in cross-examination and also in
31 examination-in-chief to make reference to particular paragraphs of the statement and to have
32 that paragraph, if necessary, read out in court. That would, I think, serve the purpose of
33 enabling the point on which evidence has been addressed specifically to be clarified, but at
34 the same time obviate the need for the statements – all of them – to be read, even if they are
35 not the subject of cross-examination. I would therefore state that in compliance with the
36 agreement and explanations which I already gave during the consultations, the statements
37 need not be read extensively but that counsel, whenever they are referring to any part, might
38 ask the witness to read out a particular portion which is going to be the subject of re-
39 examination or cross-examination. I hope that is clear and is acceptable to both parties.
40 Dr Plender, you may proceed.

41
42 **DR PLENDER:** My first witness is Captain Mikhailo Alexandrovich Orlov.

43
44 **THE REGISTRAR:** Mr President, I will first call for the administration of the oath for
45 Mr Boris Dorofeev who will be the interpreter from the Russian language to the official
46 language of the Tribunal, as required by paragraph 4 of Article 85 of the rules of the
47 Tribunal.

48
49 **THE PRESIDENT:** Will the interpreter please now make the declaration required.

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(Interpreter sworn)

MIKHAYLO ALEXANDROVICH ORLOV, sworn

Examined by DR PLENDER

DR PLENDER: Mr President, is it consistent with the intention of the direction that you have given that Captain Orlov may be supplied with a copy of his statement and asked, in the first instance, whether it is true?

THE PRESIDENT: Yes, it is.

DR PLENDER: May that be done, please? Can Captain Orlov be supplied with a copy of his statement and its annexes. (Same handed) (To the witness) Captain Orlov, do you recognise the document before you?

A Yes. It is my statement concerning this case.

Q Do you understand the whole of that document?

A Yes, it is my document. I have written it. I wrote it and I recognise it.

Q Is the whole of it true?

A I approve that everything that is written there is true.

Q In the first three paragraphs, you describe your background and *The Saiga*. In paragraph 4 you turn to voyage number 12. You remember that voyage?

A Yes. The first point concerns me, the birth date of mine, and the second paragraph concerning the ship and when the voyage was started, and the region where we were sailing.

Q There will now be projected a map and I shall ask you questions about that map.

MR VON BREVERN: On which channel do we hear the Ukrainian language? I think that everything that is asked in English is translated into Ukrainian. Is that correct?

THE PRESIDENT: Yes, it is translated into Russian. The English is on channel one and the Russian is on channel three. Dr Plender, you may continue now.

MR PLENDER: Members of the Tribunal will find a copy in black and white at section 1, tab 1 should they find that convenient. (To the witness) Captain Orlov, do you recognise the map or chart which is now being projected?

A Yes, we worked in this region and we worked by this map, by this chart.

Q On the chart, can you tell us what the orange line represents? That orange line will now be pointed out to you.

A This is the route of proceedings of the tanker *Saiga*.

1 Q There is a red line on the map running along the Guinean coast. Was any such line
2 shown on charts that you were using at the time when *The Saiga* followed the route
3 that you have described?

4 A The territorial waters are not specified on charts, on nautical charts.
5

6 Q What do you understand the red line to indicate?

7 A This is the territorial waters of Guinea which extend to the sea by 12 miles.
8

9 Q On the same chart a green line and a blue line may be seen. These will be pointed out
10 to you. Were those lines on the chart used at the time of the voyage of *The Saiga*?

11 A Such lines are never on such charts, on the charts, because that is not customary.
12 They were not there.

13 Q What do you now understand those lines to signify?

14 A This is a line which shows the territory of the Exclusive economic zone of Guinea.
15

16 Q Will you please look at the annexes to your statement. There is a receipt at page one.
17 Will you please look at that? It may be convenient for me to pass it to the witness.
18 (Same handed) It is at page one of the bundle. For the assistance of the Members of
19 the Tribunal, it bears a record of the vessel, *The Flipper* together with a navigational
20 point. Captain Orlov, will you identify the document that I have just handed to you?

21 A This is a receipt for bunkering which shows that *Saiga* gave 100 tons of bunkering to
22 fishing trawler number one.
23

24 Q Is the point at which that bunker was supplied on the map which is projected or not?

25 A (No reply)
26

27 Q Captain Orlov, if you cannot remember, do you see the navigation points and
28 particularly points of latitude shown on this document in the top right hand corner,
29 highlighted?

30 A This point I see. This point, it is not indicated on the chart. It was before the first
31 point which is on the map, on the chart. This initial point is not indicated.
32

33 Q Having bunkered *The Flipper* did you then proceed to the point marked one on the
34 map, which will now be pointed out to you? Would you just look at the projected
35 map, please?

36 A Yes, we were heading to this point. This point we reached at eight o'clock on
37 25 October and usually at eight o'clock I pass over the information about the voyage,
38 its speed, encountering ships and so on.
39

40 Q Would you now look at the bundle of documents provided? At page two a telex will
41 be found. Again, I may pass it to you. What do you see from that telex?

42 A This is my information. At eight o'clock on 26 October the position of the ship, its
43 co-ordinates and its first point, the course and the amount of load on board and bunker
44 which is left on the tanker.
45

46 Q Will you now look at the logbook which you have before you. Can you confirm from
47 the logbook the accuracy of the telex message that you have just identified?

48 A Yes. At eight o'clock here the co-ordinates of the ship and 11 degrees and
49 0.2 northern latitude.

1
2 Q That is the log for 26 October, the first two lines; is that correct?
3 A Yes, it is an excerpt from the logbook on 26 October.
4
5 Q Can we then move to position 2, shown. Captain Orlov did you reach position two?
6 A Yes, it is the position of the ship at noon on 26 October.
7
8 Q Will you now look at pages 3, 4 and 5 of the bundle of telexes, which I will now give
9 to you and say what you get from those three pages.
10 A Yes, these are receipts for bunkering the consecutive three fishing trawlers.
11
12 Q Will you then move to position 3 on the map.
13 A This point is the point where we were bunkering the three ships.
14
15 Q Do you find bunkering receipts at pages 6, 7 and 8 and a message at 9 in the bundle
16 annexed to your statement?
17 A Would you please repeat your question?
18
19 Q Do you find in the telex messages evidence of bunkering at position 3 and, if so, in
20 which telexes?
21 A I have other receipts before me and I need the previous ones.
22
23 Q Would you look at the ship's log for 26 October and indicate where on that log we
24 find evidence of the position when the vessel was at point 3?
25 A From the logbook on 26 October, there is an entry at 1320 and the position is the
26 latitude 10 degrees north and longitude is 16.2 in west. The ship was anchored. This
27 is exactly at point number 3, which is indicated on the chart, and we started the
28 bunkering of the fishing trawler *ITTIPESCA*.
29
30 Q In the final line of the same page you will find a new latitude position. Can you tell
31 the court what that is?
32 A This is the position of the ship and coordinates of the ship on 26 October 1997, at
33 24 hours, at midnight.
34
35 Q Point 4 will be pointed to you. Does that correspond with the position of the
36 coordinate that you have just identified?
37 A Yes, this is the fourth point, the coordinates of the fourth point, latitude 10.30
38 northern direction and latitude 16 46 in western direction.
39
40 Q We come to point 5. I will hand to you page 10 of the bundle, which contains
41 references to the *KRITTI* and the *ELLENI G*. Is it correct that *The Saiga* bunkered
42 vessels at point 5?
43 A Yes, it is the point number 5 where the last three fishing trawlers received their
44 bunkering.
45
46 Q Now the ship's log for 27 October under the heading "Remarks" in the seventh line.
47 Does the ship's log confirm that the vessels were bunkered at that point?

1 A Yes, in the logbook on 27 October 1997 there is an entry. The time is 0420. The
2 engine was stopped. The left anchor was off. The coordinates of the ship at the
3 moment of anchoring: latitude 10.25 north, and longitude is 15.44 west.
4

5 Q Having bunkered those vessels, did you then sail onwards and, if so, in which
6 direction?

7 A After bunkering the last trawlers, it was around 14 o'clock on 27 October. Initially,
8 I proceeded towards south-west to point 9 degrees 50 minutes, and this is latitude, and
9 longitude was 16 degrees 15 west.
10

11 Q Did there come a time when you changed course?

12 A Yes, at point number 6, when I followed in the south-western direction, I passed the
13 Charterer about my course, about my destination.
14

15 Q What caused you to change course?

16 A It means that on 27 October at 1800 hours I got a telex from the Charterer which
17 advised me to follow to another point, at this point, 9 degrees north and 15 degrees
18 west.
19

20 Q I now pass to the witness a copy of a telex from page 251, tab 16 of the annexe to our
21 Memorial. Is this a copy of the telex message to which you are referring?

22 A Yes, it is exactly the message which I received and changed the course of the ship.
23

24 Q What did you understand when you received that message?

25 A Literally to translate, this entry says that the port authorities in Conakry sent out
26 patrol boats at night and at the point to which we were proceeding was not any more
27 safe for the tanker *Saiga*, and therefore it was advised immediately to proceed to the
28 point 9 degrees north and 15 degrees west.
29

30 Q What danger did the telex message lead you to believe might have existed?

31 A I received the telex message and it was prior we left the car on 24 October from our
32 charter, who said that in the region of Guinea Conakry it was not safe to bunker
33 fishing trawlers because there is a hunt for the tankers bunkering fishing trawlers.
34

35 Q Do you have a copy of that earlier telex with you here in Hamburg?

36 A Yes, I have it about me.
37

38 Q Can you produce that? Having received two telex messages warning you, the second
39 from the port authorities, what was the danger that you foresaw, if any?

40 A Before we left Dakar, I had met with a translator, Mr Lee – he is a Chinese
41 interpreter - who worked as an interpreter on the tanker *ALPHA 1*. He helps to
42 communicate with the Chinese fishing trawlers, because they usually don't know
43 English. In a private conversation, he told me that anchor *ALPHA 1* was shelled in
44 the region of Conakry while bunkering fishing trawlers and perhaps that it was
45 possible that the officials of the port took part in that, and I underline the word
46 *perhaps*. He did not refer directly to the port authorities but said that it was possible.
47 So upon receiving both of these telex messages, I understood that to work in the
48 region Guinea Conakry was not safe because there could have been attacks both from
49 the pirates and perhaps from the official port authorities.

1
2 Q Did you confirm to the Charterers that you had changed course?
3 A At point number 6, I changed the course of the ship and proceeded parallel to the
4 seashore, so that in the future follow to the 9 degree point north and 15 degree point
5 south.
6
7 Q I now show you page 11 of the bundle annexed to your statement. Is this a telex
8 confirming the change of course?
9 A What is your question?
10
11 Q Does this confirm the change of course of which you have spoken?
12 A Yes, this is my message which I signed and it says that I understood the telex which
13 I was received and that I was following to the point 09 north and 15 west.
14
15 Q Now look at the ship's log for 27 October. Do the last two entries show the position
16 of the vessel on its new course?
17 A Yes, on 27 October, at 20 o'clock, the course was 132 to the south-*ouest*, and the
18 coordinates are here. The latitude is 09.50 north and the longitude is 15.51 west.
19
20 Q Is that point 7 on the map?
21 A Yes.
22
23 Q Does the last entry on the page show point 8 on the map?
24 A Yes, this is the ninth point at 24 hours, midnight, on 27 October: latitude 9 degrees
25 and longitude 15.26 west.
26
27 Q Will you turn over to 28 October? The second entry shows a position at 9.27 north,
28 I believe. Is that correct?
29 A At what time?
30
31 Q I have difficulty reading the copy myself. At 04.24, I see in the second line is "Stop
32 engine"?
33 A On 28 October at 4 o'clock, the coordinates of the ship were latitude 09.02 north and
34 latitude 15.02 west.
35
36 Q Is that point, the point now being shown to you, point 9?
37 A This is approximately the point of crossing the southern border of the Exclusive
38 economic zone
39
40 Q Between point 6 and point 9, what was the approximate speed of the vessel?
41 A The average speed was about 7 knots.
42
43 Q Is it correct that at 04.24 the vessel stopped its engine?
44 A In the logbook on 28 October at 4.24, there is an entry that the engine was stopped
45 and coordinates latitude 9 degrees north and longitude 15.00 west.
46
47 Q From what you said about the latitude and speed, is it possible to determine the time
48 when *The Saiga* crossed out of the Guinean exclusive economic zone?

1 A Of course one can count at the speed of 7 knots. We have made about five miles from
2 the economic zone and I think that at 5 o'clock we have crossed the southern border
3 of the exclusive economic zone.
4

5 Q Would you now look to telex page 12. What activity does that describe *The Saiga* as
6 engaging in?
7 A This is again my message to the charters at 8 o'clock in the morning on 28 October.
8 The latitude 9 degrees North and longitude 13 -- 14.59 West. That is to say that the
9 ship was adrift towards South and then there is an amount of cargo on board, the
10 amount of bunker and the consumption of bunker, the weather, the windforce and
11 waves and the last message on 28th we have arrived to point 8 and are waiting for
12 patrolling ships to come.
13

14 Q How long was *The Saiga* drifting at that point?
15 A Before the time of the arrest --
16

17 Q Is it your evidence that the vessel was drifting from 4.24 when the engine was
18 stopped and continuously thereafter until an arrest?
19 A Yes, the ship was adrift and it was drifting southwards, perhaps one mile.
20

21 Q Now I will show you the last item that I will show you from the bundle, which is
22 page 13. What does that telex message show?
23 A This telex was sent over by the radio officer according to my command, and it means
24 the three words are written here "attack, attack, attack". We did not have more time
25 to send a longer message.
26

27 Q Thank you. Captain Orlov, I refer you now to paragraph 11 of your written statement.
28 What was the first point at which you became aware of events leading to the "attack,
29 attack, attack"?
30 A This refers to an attack on a ship when they started shelling at us.
31

32 Q What is the first you knew, the first sign you saw of any attack?
33 A At 8 o'clock in the morning on the 28th I took watch on the bridge. Not far from the
34 ship there were two or three fishing trawlers which were fishing. At 8.30 I saw the
35 weather was fine, and I saw the appearance of two new boats and on the radar the
36 distance was 11.5 miles. I observed these boats on the radar and during the 50
37 minutes I came to the conclusion that these were two not big boats which were
38 following toward us, and the distance was shorter and their direction was the same.
39

40 Q As the vessels approached did they convey any message to you?
41 A The first to come was a small cutter. It was moving at a greater speed. No message
42 by light, by flag, by order was not given to us.
43

44 Q Did you hear any sound from the vessels?
45 A Initially this was about 9 o'clock, 10 past 9. I heard certain sounds and the radio
46 officer was also on the bridge together with me. At first I did not understand what it
47 was and then I looked through the binoculars and I saw the soldiers on a small boat
48 which was closer to us, and then I realised that our ship was shelled at.
49

1 Q We now show you photographs of *The Saiga*. The first is photograph no. 1. Do you
2 recognise the vessel?

3 A Yes, it is anchored *Saiga* on which I worked.
4

5 Q Is it loaded or unloaded in this photograph?
6 A At present it is empty because the board is above the water line.
7

8 Q On 27 October at the time of the attack that you have described was the vessel laden
9 or unladen?
10 A At the time of the attack we have unloaded about 500 tons of cargo and it was a small
11 amount and practically speaking the ship was fully loaded.
12

13 Q In that state where would the water line have come to measured against the rear of the
14 hull?
15 A In a loaded state the level of the main deck is very close to the water line.
16

17 Q What distance is the main deck or freeboard from the water line when fully laden?
18 A The general altitude from the bottom to the deck is 8 metres and when fully loaded
19 the ship is 6-7. One metre and 30 cm will be from the surface of the water to the deck
20 when the ship is fully loaded.
21

22 Q Will you now look at photograph 5. Does this show *The Saiga* laden?
23 A Yes. From this picture one can see that the cargo deck is on the level of the pier and
24 the ship is fully loaded and this photograph was taken before we left Dakar.
25

26 Q When the vessel is so laden is it possible for a person or persons to transfer to *The*
27 *Saiga* at sea while *The Saiga* is moving?
28 A Of course practically we have taken people from a cutter to the cargo deck when there
29 was a person to guide us in the coastal waters.
30

31 Q On 22 October did you see anybody alight to the freeboard of *The Saiga*
32 A Do you mean from the cutter? When I heard the shots and then I saw a cutter coming
33 nearby to the ship I went to the left side of the bridge to close - to lock the waterproof
34 door, and at this moment I saw how from the small cutter soldiers were boarding our
35 ship.
36

37 Q As they were boarding, was *The Saiga* stationary or was it moving?
38 A At this moment *The Saiga* was already moving. It was at the beginning and it was
39 turning to the right.
40

41 Q At approximately what speed was *The Saiga* moving at that moment?
42 A For a fully-loaded ship when there is such a course to change it is very hard to get full
43 speed and practically the speed was 4 or 5 knots.
44

45 Q What caused you to start *The Saiga's* engines?
46 A As I said, I went to the left part of the bridge and I saw the soldiers boarding our ship
47 and the shooting was going on. I logged the watertight door on the bridge and then
48 I saw how one glass on the bridge was broken and then the side porthole on the bridge
49 and there were cracks and holes in the glass. After that I raised the alarm, a general

1 alarm, on the ship and told everybody to go to the engine room, which was below the
2 waterline and then I started the autopilot and the ship was continuing to turn to the
3 south-west, in a south-westerly direction. At this moment the shooting was
4 continuing from submachine guns and from big machine guns.
5

6 Q Will you now look at photograph No. 3 and tell the court what you see?

7 A At the upper part, the orange part, of the hull you can see white spots. These are
8 exactly the traces from the shots.
9

10 Q Were you on the bridge immediately below those shots at the time when these shots
11 struck?

12 A I have already told you that I was there on the bridge and saw directly how the
13 portholes were hit.
14

15 Q Will you now look at photograph 4 and tell the Tribunal what you see?

16 A On this photograph one can see again the orange part or the upper part. This is a
17 signal bridge and one can see the white spots which are the traces from bullets and,
18 apart from that, on the left side at the front structure nearer the two left portholes one
19 can see also two white spots, and they are traces of bullets.
20

21 Q Can nothing special be seen from the tyres or fenders?

22 A What is the meaning of "fender"?
23

24 Q I am trying to use a nautical term. Can you deduce anything from the tyres that are
25 seen on the deck?

26 A This is exactly these tenders or (Krancys). We see two full fenders to the left from the
27 crane and on the right side it is obvious that it is deflated and it was also hit during the
28 attack.
29

30 Q What was it hit by?

31 A Most probably it was the bullet ricoched but perhaps they aimed directly at this thing.
32

33 Q Will you look at photograph 7 and tell the Tribunal what you see?

34 A On this picture one can see the upper signal bridge. There is a head of a microphone.
35 One can see the head of a microphone and below the head of the microphone there is
36 another trace from a bullet. This is already on the left side, on the left side of the ship,
37 on the signal bridge.
38

39 Q Did you see this damage occurring?

40 A I immediately, when they were shooting, did not see it because I was inside on the
41 bridge and later on, when we inspected the state of the ship, then I saw it.
42

43 Q Would you look at photograph 8 and tell the Tribunal what you see?

44 A Here already one can see quite well the fender. One is deflated and another is not
45 deflated.
46

47 Q Now look at photograph 11. Can you tell the Tribunal anything?

48 A This is again the signal bridge on top and it is the satellite antenna on this antenna
49 there are seen three holes. The antenna was practically destroyed, out of order.

1
2 Q Did you see that damage occur?
3 A Exactly at the moment I did not see it but then later during the inspection I found it.
4
5 Q Will you look at photograph 12 and tell the Court what you see?
6
7 Q Here one can see the porthole, the port side of the ship, and the biggest hole was
8 caused by a big calibre machinegun. The other traces, which are smaller, were caused
9 by sub-machine fire and practically all penetrated or pierced the metal.
10
11 Q How do you know that large hole was caused by a heavy machinegun?
12 A I suggest that it was because on patrol on the bow part there was a big machinegun
13 and they fired from that machinegun at us.
14
15 Q How do you know they fired from the machinegun at you?
16 A It is so only because this hole is bigger than others and I am not a specialist; I cannot
17 pass a reasonably good judgement.
18
19 Q Will you look at photograph 13 and tell the Tribunal what you see?
20 A Here one can see the port board and this is a fly of the bridge where I was, and a big
21 hole which I believe was caused by fire from a high calibre or big calibre
22 machinegun.
23
24 Q Now will you look at photograph 23 and tell the Court what you see?
25 A This photograph was taken from inside the bridge and on the left side, the left
26 porthole, the pane is broken. It is reinforced glass. It was not completely broken but
27 it was all in cracks. The bullet hit the pane.
28
29 Q Were you on the bridge at the time when the bullet hit the pane?
30 A Yes. I saw this particular moment.
31
32 Q Will you now look at photograph 27 and tell the Tribunal what it is?
33 A This is the radio room and the desk of the radio officers, where he sits.
34
35 Q Where would the radio officer sit in this picture, in relation to the picture?
36 A Exactly closer to us, before us and on the right side there is a piece of intersatellite
37 system and to the left, his desk.
38
39 Q Now will you look at photograph 30 and tell the court what it shows?
40 A This photograph was taken in the radio room, and the partition of the radio room.
41 One can see a pillow and a sofa and also a hole pierced by a bullet.
42
43 Q It is correct, is it not, that you were not there to see the bullet come through?
44 A I was not there but the radio officer was there and he was passing on his message.
45
46 Q Where would the radio officer have been in relation to this photograph had he been
47 sending out his message at that time?
48 A Just luckily he was more to the right and he was not hit by the bullet.
49

1 Q Now look at photograph 29. What do you see there? A door can be seen to the room
2 of the crew, and where the handle is there are cracks. It is obvious that they were
3 hitting it.
4

5 Q Finally, will you look at photograph 21 and tell the Tribunal what it shows?

6 A Here, it is hard to say. Here we see a partition between the ballast tank. I know it is
7 because I saw this partition between the ballast tank to the right and the central ballast
8 tank, and it is flexed.
9

10 Q How does it come to be flexed?

11 A During the attack, during the shooting, the first officer, together with the chief
12 mechanic, they were receiving ballast to the right tank because we have already
13 emptied the central tank and therefore it was needed for the differential, and during
14 the attack the ballast pump was at work. The openings to the ballast tank on the right
15 were closed and, sure, nobody watched the work of the pump, because it was
16 shooting and it was over-filled, and started to flex the partition.
17

18 Q I have only very few questions left. Did you see any members of the crew injured in
19 the course of these events?

20 A Yes, during the shooting the second officer was wounded two times in his left hand.
21 He was in the engine room and a Senegalese sailor, Mr Naisse was injured in the eyes
22 and neck and the splints from the pain struck him in the neck and around the eyes.
23

24 Q Were the injuries slight?

25 A These are serious injuries because further on they needed an operation, both for the
26 second officer to extract the bullet from his bone and the sailor, he is here and I
27 understand that he has partially lost his eyesight and therefore he wears glasses.
28

29 Q At the time did you think the injuries were slight?

30 A These were serious injuries, serious wounds, because we did not have any materials
31 just to stop bleeding, and we had done it with a piece of fabric and therefore I went up
32 from the engine room. On the deck I met the soldiers, and afterwards our people were
33 all gathered on the deck, and only afterwards the help was rendered to the second
34 officer.
35

36 Q Finally, did the soldiers treat you properly and well?

37 A When I went up to the deck, I was handcuffed and they told me immediately to go to
38 the engine room and that I should tell the people, the seamen, just to go upstairs. The
39 soldiers were very rough with us. They did not beat us but they pushed us. Also,
40 when I came to the deck I saw that the bosun was handcuffed and also another sailor.
41 At the beginning it was rough treatment, but we were not beaten.
42

43 **DR PLENDER:** Thank you, Captain Orlov. I have no further questions. Mr President, I
44 have conducted the examination-in-chief in what I hope represents the spirit of your
45 directions. I have not questioned the Captain upon each and every point for to do so would
46 occupy a great deal of point, but I have taken him through the principal points. If that meets
47 the spirit of your objection, I am happy now to offer him for cross-examination.
48

1 **THE PRESIDENT:** Thank you very much. I think that what you have done is what I
2 expected, but in accordance with what I gave as the ruling, the other side will have the
3 opportunity to cross-examine him. They will be able to cross-examine him on any aspect of
4 the statement, not only those to which you have made a reference.
5

6 It is now exactly four o'clock. I wish to thank you for keeping to the time almost to
7 the minute. It is an appropriate time for us to break. The sitting will close and the Tribunal
8 will sit again tomorrow, starting at 10 o'clock in the morning.
9

10 **(Adjourned until 10 am, Tuesday 9 March 1999)**
11