English Version

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TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

1999

Public hearing

held on Tuesday, 16 March 1999, at 10.00 a.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

present:	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
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	Registrar	Gritakumar E. Chitty

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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,

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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,
Mr. Mamadou Saliou Diallo, Naval Staff Officer, Conakry, Guinea,
Mr. Mamadi Askia Camara, Director of the Division of Customs Legislation and Regulation, Conakry, Guinea,
Mr. André Saféla Leno, Judge of the Court of Appeal, Conakry, Guinea,

as Counsel.

THE PRESIDENT: Professor Lagoni, you may continue your submissions.

DR PLENDER: Before he does so, may I raise a translation point, which I shall make good by written notice in due course. It arises from yesterday. For much of yesterday afternoon the French word "e*ncablure*" was translated as "cable". In the literal sense, denoting a rope or strand, that is a correct translation. "*Encablure*" is a measure of distance; cable is a measure of distance, but one *encablure* does not equal one cable. That, it appears to us, has given rise to a very substantial misunderstanding in the course of yesterday afternoon. We shall supply the appropriate dictionaries, French and English, to show that one *encablure* does not equal one cable. I would suggest that throughout the English version the word "cable" is substituted for "*encablure*" wherever " *encablure*" was used.

THE PRESIDENT: Thank you very much.

DR PLENDER: I invite no comment at this stage. I thought it right, however, to mention the translation point at the earliest opportunity.

THE PRESIDENT: Thank you. Professor Lagoni, please continue.

PROFESSOR LAGONI: Mr President, Members of the Tribunal, I shall proceed with my speech from yesterday afternoon. The question of the speech was whether or not bunkering is considered as navigation in the legal sense. For this purpose, I have interpreted article 58(1) of the Law of the Sea Convention. I think that I have shown by now that, according to the textual interpretation of this provision, bunkering is not navigation. The context of article 58 shows that bunkering is also not navigation. The object and purpose does not require including bunkering in navigation and the bunkering of fishing vessels in the EEZ is not to be considered as another lawful use of the sea related to the communication rights.

Finally, I think I have shown that the *travaux preparatoire* of article 58 of the Convention does not say anything about the provision itself, but shows that at least African states, especially West African states, were well aware at UNCLOS III about the problem of the extension of the Customs laws over the exclusive economic zone.

Now I shall proceed with State practice. The last words lead on to my sixth and last observation on the interpretation of article 58, which is the State practice. According to the customary rules of interpretation, I might be very brief here. "Any subsequent practice of the treaty which established the agreement of the parties" regarding the interpretation of article 58 shall be taken into account. This is stated in article 31 of the Law of Treaties. But there is no such agreement between the parties.

Nevertheless, the State practice relating to offshore bunkering in the EEZ is of interest in our case because it sheds light on the economic and fiscal policies behind this practice. Many States allow ships to purchase fuel free of taxes and Customs duties in their ports. This will make their ports attractive for foreign ships and reduces the transport costs of exports from and imports into the country. Similarly, if a State is interested to attract foreign fishing vessels into its EEZ, it will allow the fishing vessels to bunker in its ports free of taxes and Customs duties. States following such shipping or fishing policies will not prevent offshore bunkering because this activity does not affect their Customs policy and fiscal income.

Other States require a licence for offshore bunkering in order to regulate this activity for other reasons. Apart from fiscal, especial environmental considerations may give rise to such regulations because offshore bunkering in the EEZ is normally more susceptible to accidents than bunkering in a port.

On the other hand, it is a sovereign policy decision of the Republic of Guinea that fishing vessels fishing with a licence in its EEZ are required to pay Customs duties on fuel in the port of Conakry. In order to prevent circumvention of its Customs laws, the coastal State can prohibit offshore bunkering in such situation - or make it at least subject to a licence as it has been envisaged for the future in the draft Joint Decree of 1998 –otherwise all ships, including vessels employed in coastal trade, would probably try to get fuel by way of offshore bunkering in the EEZ. This would severely affect the fiscal interests of the coastal State. I will come back to this fiscal interest in a moment.

Keeping these different economic and fiscal policies of States in mind, it is hardly surprising that States are treating offshore bunkering in different ways. But this would not mean that the practice of coastal States prevailing until now – and I would agree, vastly prevailing until now – to avoid the regulation of offshore bunkering is an expression of a general practice accepted as law. Neither would it mean that the Guinean solution is against international law.

In conclusion, a careful interpretation of article 58(1) of the Convention shows that offshore bunkering of fishing vessels by *The Saiga* in the Guinean exclusive economic zone does not constitute an "aspect of freedom of navigation or an internationally lawful use of the sea related thereto". Therefore, the Republic of Guinea submits that the applicant State's interpretation of article 58(1) of the Convention is not tenable.

Having said this, I turn now to the legal basis upon which Guinea is justifying its jurisdiction to prohibit offshore bunkering in its EEZ.

Not being an aspect of navigation, offshore bunkering neither constitutes a sovereign right of the coastal State. Offshore bunkering conducted by *The Saiga* is ancillary to fishing but it is not fishing. Accordingly, the Republic of Guinea does not rely on the first alternative of article 56(1)(a) of the Convention. Offshore bunkering, however, is, by its very nature, a commercial activity. Therefore, the question could arise: is it another activity for the economic exploitation and exploration of the zone such as the production of energy from waters, currents and winds as the second alternative of article 56(1)(a) reads. Being aware that the text of the provision gives rise to doubt on this point, the Republic of Guinea, nevertheless, invites the Court to assume this.

Notwithstanding the foregoing submission, the Republic of Guinea maintains that the legal basis in international law for prohibiting offshore bunkering of fishing vessels in the EEZ is the customary principle of the protection of its public interest against gross infringement. That customary principles apply in the EEZ as well is made clear by the Convention itself. It affirms, in the last operative sentence of its preamble:

> "Matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

Moreover, article 56(1)(c) confirms that in the EEZ the coastal State has also other rights and duties provided for in this Convention, which include the principles and rules of general international law mentioned already in the preamble. And, according to article 58(3) of the Convention, third States shall in the EEZ comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention "and other rules of international law" insofar as they are not incompatible with Part V. This means that the legal regime of the EEZ is not a closed regime; it is open to customary principles and to new developments.

Turning to the application of the customary principle of the protection of the Guinean public interest, we invite the Tribunal to take into account that, for three reasons, the issue in dispute here is a very narrow and specific one.

First, the Republic of Guinea has not generally extended its Customs law to its EEZ. Guinea does not regard its EEZ as a part of its Customs territory. It does not levy Customs duties within its EEZ. Instead, the Republic of Guinea, trying to prevent the refuelling – that means bunkering of fishing vessels and of other vessels in transit to Conakry in its waters – for this purpose has established by article 33 and 34 of the Customs Code a Customs radius. This is a Customs surveillance zone of 250 km which is about 135 nautical miles off the Guinean coast. This zone overlaps with the Guinean contiguous zone and partly with the EEZ.

While the measures of the Guinean Customs authorities in the Customs radius rest in the domestic law upon the Customs Code and other Guinean laws, they find their justification in international law in the customary principle of protection of its public interest against grave disadvantages.

Second, the Republic of Guinea does not generally prohibit all bunkering activities whatsoever within its EEZ. Bunkering of ships in transit to other States is not prohibited, because it would not affect Guinean fiscal interests.

Third, the Republic of Guinea does not invoke the mentioned principle as a justification for a single act against a single ship, but as a basis for the adoption of its laws and regulations with which foreign tankers supplying fishing vessels in the EEZ with fuel shall comply pursuant to Article 58(3) of the Convention.

It has been submitted that the protection of its public interest is the cogent reason and moving force for the Republic of Guinea. The general principle of international law at the basis of its measures against offshore bunkering is the principle of self-protection. The existence of this principle in customary international law and the related doctrine of necessity has been elaborated in the Counter-Memorial in paragraphs 112 and 113. I may take liberty to refer to this here in order to avoid repetition.

I would like to point out here, however, that the measures taken against *The Saiga* were not an isolated incident of necessity justifying an act of self-help, but an application against the ship of Guinean customs laws which prohibit offshore bunkering in the EEZ. Therefore we submit that the case of the *Gabcikovo-Nagymaros Project* decided by the International Court of Justice in 1997 and Article 33 of Professor Ago's draft on State

Responsibility, which Maître Thiam invoked in his speech of 11 March are of no relevance in this case. They relate to the state of necessity as justification for a single act violating an international obligation. In the case of the *Gabcicovo-Nagymaros Project,* this international obligation was a bilateral agreement relating to a water reservoir between Hungary and Slovakia. This is quite another situation than invoking the protection of the public interest with respect to the extension of its customs laws in a narrow and carefully balanced manner over a part of the EEZ. In the latter situation there was no direct legal connection between the parties and the vessel could have avoided bunkering in the zone.

It has also been submitted that the principle of self-protection forms the basis of several provisions of the LOS Convention, for example Article 109(4) on unauthorised broadcasting or Article 221 on marine casualties. Unauthorised offshore bunkering is certainly of another nature than the effects of unauthorised broadcasting. But the effects on the fiscal interests of a small country can nevertheless be important, and they are important in the case of the Republic of Guinea.

The grave effects of the illegal offshore bunkering on the public interests of the Republic of Guinea are set forth in the Statement of purpose of the proposed Joint Decree No. 98. It says they are "regulating the activity of refuelling ships in the Republic of Guinea." According to the figures mentioned there, hardly 10% of the fishing fleet operating in the Guinean exclusive economic zone is presently receiving fuel from the *Sociètè Guinèenne des Pétroles* in Conakry. It is further estimated that almost 150 fishing vessels per month with an average consumption of 100 metric tonnes per vessel would have been able to refuel regularly in Guinea. This would amount to customs revenues of about 696 Million FG, this is equivalent to US$499.000 per month, which is a considerable amount for a small developing country. It is also stated that customs revenue on oil products represents at least 33% of the total customs revenues destined for the Guinean Public Treasury.

That "the loss of revenue might be regarded as an essential interest" of a State has been conceded by Saint Vincent and the Grenadines , which is itself a small developing country, in the Reply. Maître Thiam confirmed this in his speech of 11 March.

At this point, however, I ask for your understanding Mr President, that I have to refuse before this Tribunal the unwarranted allusions and allegations made in that speech with respect to purported interests of officers and soldiers or other officials of the Republic of Guinea in the arrest of *The Saiga.*

Turning back to my topic, I wish to state that the Republic of Guinea submits that the prohibition of offshore bunkering was necessary in order to protect its public interests. There were no other means available in order to prevent unwarranted offshore bunkering in the Guinean zones of national jurisdiction. Prohibition of such activity was the only solution to protect the public interests of the Republic of Guinea.

In the light of the prevailing circumstances the prohibition of offshore bunkering was also reasonable. It did not exclude the offshore bunkering industry for all future from the Guinean waters. Instead it paved the way to develop a legal regime which would reconcile the interests of the coastal State with the interests of the bunkering industry by introducing a licensed regime for offshore bunkering. Such regime is envisaged in the already mentioned Proposed Joint Decree of 1998. Article 1 of this Joint Decree would make offshore bunkering subject to approval by the competent minister and Article 5 charges customs duties

upon the fuel and the lubricants destined for fishing boats and other ships in transit to Conakry.

But not only the prohibition of offshore bunkering was necessary and reasonable in order to protect the public interest of the Republic of Guinea. Also the arrest of *The Saiga* was necessary and reasonable.

The ship had violated the respective prohibition. Prohibitions that are not enforced lose their practical significance. In the United States one would say they become moot. Moreover, the arrest of the ship was not unreasonable after several incidents of the violation of the Guinean prohibition by foreign tankers had been reported before. *The Saiga* was not the first ship arrested and escorted into the port of Conakry. But it was the first tanker which refused to accept the procedure provided in the Guinean Customs Code for the release from the arrest.

From this I conclude that the Republic of Guinea prohibited offshore bunkering in order to protect its public interest. The Republic of Guinea has a public interest in levying customs duties on fuel for fishing vessels operating in its EEZ. Illegal offshore bunkering grossly affects this public interest, because fishing vessels operating in the Guinean EEZ and other ships in transit to Conakry avoid purchasing fuel in the port of Conakry.

Therefore it is submitted that the Republic of Guinea may prevent offshore bunkering of Guinea may prevent offshore bunkering in its customs radius which is a part of its contiguous zone and its EEZ. And that this is in conformity with the UN Convention on the Law of the Sea.

Turning to another legal topic, which is the question of the hot pursuit, I proceed with my speech, Mr President, Members of the Tribunal.

It is common ground between the parties of this dispute that *The Saiga* was stopped and searched by two patrol boats of the Guinean Customs authorities within the EEZ of Sierra Leone, and that the ship was escorted thereafter to Conakry. Guinea is justifying the exercise of its jurisdiction over *The Saiga* in Sierra Leone's EEZ on the basis of the right of hot pursuit. Under the conditions laid down in Article 111 of the Law of the Sea Convention, the right of hot pursuit extends the enforcement jurisdiction of the coastal State over a foreign ship which violated the laws of this State within its zones of national jurisdiction and has been pursued from there into the EEZ of another State.

Hot pursuit of *The Saiga* by the Guinean patrol boats give rise to two principle issues.

First, has *The Saiga* violated laws and regulations of Guinea by bunkering foreign fishing vessels? This is Article 111(1) and (2) of the Convention?

Second, was the pursuit of *The Saiga* in conformity with the conditions laid down in Article 111 paragraphs 1, 2 and 4 for the beginning of the hot pursuit?

The answer to the first question presupposes that Guinea actually applies its relevant laws and regulations to offshore bunkering, and that these laws and regulations are legally opposed to *The Saiga*. Thus we have to indicate which laws are applicable to offshore bunkering in the Guinean EEZ and whether they could be applied to *The Saiga*.

But, before coming to that question, I would like to make a brief observation on the extent to which the Guinean laws are relevant before this Tribunal at all. According to article 293 of the Law of the Sea Convention, the International Tribunal shall apply the Convention and other rules of international law to the dispute. This means that rules and regulations of domestic law are only of relevance before this Tribunal if and to the extent that this is required by international law. Domestic rules and regulations are facts which, of course, have to be presented by the parties.

This means also that measures of national authorities or decisions of domestic courts applying the domestic laws and regulations are not subject to legal scrutiny under the national law of one party before this Tribunal. In other words, the International Tribunal is not a court of appeal which reviews decisions of domestic courts in accordance with national law.

The Guinean laws and regulations relevant in this dispute are indicated in article 58(3) and likewise, for the purpose of hot pursuit, in article 111 (2) of the Convention.

By article 58(3), *The Saiga* should comply in the Guinean EEZ "with the laws and regulations" that the Republic of Guinea adopted in accordance with the Convention and other rules of international law, and pursuant to article 111 (2) the right of hot pursuit shall apply to violations in the EEZ "of the laws and regulations of the coastal State applicable in accordance with this Convention" to the EEZ.

St. Vincent and the Grenadines has submitted that "the Customs laws and regulations upon which Guinea's actions were based are nowhere in its own legislation said to apply beyond its territorial waters". This was submitted in the Memorial, paragraphs 17 and 91 and also in paragraphs 106-110 and similarly in the Reply in paragraph 108 and 122-126.

The Republic of Guinea submits that this view is not correct. As set forth in our Counter-Memorial (paragraphs 8-9) Guinea prohibits offshore bunkering on the basis of its Law No. 94/007/CTRN of 15 March 1994 in a Customs radius of 250 km or about 135 nautical miles off its coast. This Customs radius was established by articles 33 and 34 of the Guinean Customs Code no. 094/PRG/SGG of 28 November 1990.

According to information given by Guinean sources, Customs officials may enter ships within the Customs radius. They also may use force in order to stop vessels that refuse to follow their orders to stop.

The Customs radius is not a special zone of international law, as I have already stated. It is a functional zone established for the purposes of Customs administration in the domestic law of the Republic of Guinea. It overlaps with the Guinean territorial sea and the contiguous zone as well as with large parts of its EEZ. The violations of Guinean laws by *The Saiga* took place within this Customs radius and the pursuit of the ship had commenced within the Customs radius, as will be shown later.

I will not go any further into the details of Guinean domestic law here. Instead, I will briefly address the question of the Guinean enforcement jurisdiction, which has also been contested by the applicant State.

The Republic of Guinea does not only apply its relevant Customs laws to its EEZ within its Customs radius. It also encroaches the respective provisions against foreign vessels. The enforcement jurisdiction of the Republic of Guinea follows in international law also from the customary principle of the protection of the public interest, which I have expounded earlier. This principle includes the idea of taking the necessary and appropriate measures in order to enforce the applicable rules

In the domestic law of Guinea enforcement is provided by the Law 94/007/CTRN of 1994 and the Customs Code of 1990. Both laws regulate expressly the question of enforcement.

As regards the violation of the relevant Guineans laws, may I invite your attention to the fact that *The Saiga* supplied the foreign fishing vessels *GUILLERMO PRIMO, KIRTTI* and *ELENI G* on the morning of 27 October 1997 at 10°25.3N/15°42.6W with fuel. This position is about 22.5 and 22.9 nautical miles off the coast of the Guinean Island of Alcatraz. Accordingly, it is within the Guinean contiguous zone, the Guinean EEZ and the Customs radius as well. It violated the prohibition of offshore bunkering within the Customs radius contained in the Guinean Customs laws.

My last point, Mr President and Members of the Tribunal, in this context is the applicability of Guinean Customs laws to *The Saiga*.

According to article 300 of the Convention, States' parties "shall exercise the rights, jurisdiction and freedom recognised in this Convention in a manner which would not constitute an abuse of rights".

The applicant State alleges that invoking the provisions against the ship would constitute an abuse of rights because the Master of *The Saiga* was purportedly never informed that bunkering fishing vessels inside the exclusive economic zone of Guinea was prohibited. This is stated in the Memorial at paragraph 112.

This statement of Captain Orlov was obviously not true. There is sufficient documentary evidence that the Master of *The Saiga* knew that offshore bunkering in the EEZ of Guinea was prohibited and that the Guinean authorities enforced this prohibition against foreign ships.

M. Marc Albert Vervaet, the Regional Manager of *M/V SAIGA's* charterer, confirmed in a statement of February 1998, which has been submitted by the applicant State as a document in the Memorial, that the charterer knew that "Guinea was another regime than the other jurisdictions in the area". M. Vervaet reports also of measures of two patrol boats against the tanker *ALFA-1* in the Guinean EEZ in May 1996. *ALFA-1* was chartered by the same company as *The Saiga*. This knowledge of the situation in the Guinean EEZ also explains why the charterer instructed the Master of *The Saiga* "to try to remain at least 100 miles off the coast of Guinea".

The relevant orders of the Master in the Bridge Order Book of *The Saiga*, which is provided as documentary evidence before this Tribunal, are further documentary evidence for this. On 26 October 1997 off Guinea the Master wrote into the Bridge Order Book:

"3. Please keep a sharp lookout and observe by radar all times. If you notice any fast moving target towards our vessel call me at once."

On 27 October 1997 off Guinea again he wrote:

"2. [unreadable] the radar all time"

Apparently it means "observe the radar at all time.

"Pay attention for fast moving targets call me at once."

Finally, the knowledge of the Guinean prohibition to supply fishing vessels with fuel in the EEZ is documented in the telex communication between the Master of *The Saiga* and the AOG in Geneva. On 27 October 1997 at 16.22 hours the Master telexed:

"will not proceed closer than 100 miles of guinea-conakry".

That confirms that he knew that he should not go close to the coast.

Particularly clear documentary evidence is the telex of 27 October 1997 at 18.42 hours. In this telex the Master is informed that the envisaged meeting point with Greek fishing vessels at 09°50'N/16°15'W, which is within the Guinean EEZ, is "not safe". The Master was advised in the telex to proceed to another meeting point at 09°00'N/15°00'W, which is within the EEZ of Sierra Leone, slightly south of the boundary line of Guinea. This meeting point was obviously considered safe.

The relevant sentences of this telex read:

"Understand port authorities from Conakry are sending out patrol boats tonight and we advise you that above position is not safe repeat not safe."

Here the above position was the original meeting point envisaged before a new meeting point south of the boundary was given. I proceed with the quotation:

"We hereby give you the instruction not to deviate from this meeting point as alternative meeting point could be unsafe."

What does that mean? It was advised that he should immediately leave the exclusive economic zone of Guinea in order to have a safe meeting point slightly south of the boundary.

Finally, the quotation goes on:

"Furthermore please keep a watch day and night on your radar without interruption to check any vessel which could approach (normally fast navy speed boat."

I think this evidence speaks for itself.

Captain Orlov answered Dr Plender, however, that, according to his belief, he was not in breach of any law when he bunkered the fishing vessels on 27 October 1997. He also pretended to think, to the best of his knowledge, that "the ship worked legally and did not make any breach of any legislation of any country".

It would be surprising if a master of a ship in his situation were to give any other answer. The story about piracy involving soldiers and State officials in West African waters is, on its face, unbelievable. Captain Orlov has admitted himself that he had discovered soldiers on the approaching patrol boats and that he had no personal experience with pirates and, as his information came from the tales of the ominous Chinese translator Mr Lee, the story of the pirates obviously aims to divert from the truth.

From all of this evidence presented here, it follows that the master of *The Saiga* and the operators in Geneva knew very well that bunkering in the Guinean exclusive economic zone was prohibited and would not be tolerated by the Guinean authorities. It is therefore submitted that it was by no means an abuse of the right to apply the relevant Guinean customs laws prohibiting offshore bunkering in the EEZ to *The Saiga* and to enforce them against the ship.

Mr President, Members of the Tribunal, I now turn to the question of whether or not the hot pursuit of *M/V SAIGA* was justified.

Hot pursuit of *The Saiga* could be undertaken when the competent authorities of Guinea had good reason to believe that *The Saiga* had violated the laws and regulations of Guinea. The customs authorities are the competent authorities in Guinea to survey the customs radius and to enforce the Guinean customs laws. They had not only good reason to believe, but positive knowledge that *The Saiga* had violated the Guinean customs laws within the contiguous zone when she supplied the foreign fishing vessels, *GUILERMO PRIMO*, *KRITTI* and *ELENI G*. The system of radio and radar monitoring by which this was made possible has been explained by Lt Sow to the Tribunal.

The pursuit must be commenced when *The Saiga* was still within the zone where she violated Guinean laws.

As to the pursuit of the ship, one has to distinguish different phases of Guinean action. *The Saiga* had been expected, as we know from the taped conversations with different fishing vessels, before she entered Guinean waters. The customs authorities had issued an *Ordre de Mission* on 26 October 1997. The measures against *The Saiga* were to be conducted by the customs authorities with the help of a special unit of the Guinean Navy which has patrol boats for such purposes.

During the morning of 27 October 1997, the Guinean authorities discovered the violation of the customs laws by *The Saiga*. At 1330 hours, the small and fast patrol boat P35 left the port of Conakry to the north in order to stop *The Saiga*, but it got orders to return to the south and join the big patrol boat P328 when it was discovered that *The Saiga* was leaving the contiguous zone in order to sail to another meeting point for fishing vessels.

At 2019 hours *The Saiga* received a warning by radio from Conakry in the Greek language. Thereafter, the tanker did not communicate any more with fishing vessels until the

next morning at 0350 hours on 28 October 1997. At that time, *The Saiga* communicated by radio the envisaged new meeting point at 09°00N/15°00W to the fishing vessels *POSEIDON, PANORMITIS* and *COMBAT*.

It should be kept in mind that the patrol boats were searching for *The Saiga* during the whole night. There was at no time any intention of the Guinean authorities to give up this pursuit. The commanding officer of the patrol boats, Lt Sow of the Guinean Navy, has given convincing evidence about the tactics that the patrol boats used and the measures that were taken in order to rediscover the pursuit vessel before she would have left the Guinean EEZ. He was well aware of the legal importance of this point. Lt Sow demonstrated every course on the basis of a report that he had written for his superiors and a naval chart that he had prepared. On the basis of the logbook of *The Saiga*, which has remained in the possession of the Guinean authorities since the arrest of the ship, he convincingly demonstrated before this Tribunal the movements of both the Guinean patrol boats and *The Saiga* during the night of 27/28 October 1997.

These measures of the Guinean patrol boats included radio observation, radar and the use of radio direction finders (goniometers) on board the patrol boat P328. As Lt Sow has explained, he had watched a group of vessels on the radar during part of the night and in the early morning. He recognised some of them as merchant vessels, while others were fishing vessels. Both types of vessel could and can be distinguished by their speed and course.

When at 0350 hours *The Saiga* took up radio conversation with the mentioned fishing boats, he could pinpoint *The Saiga* on his radar screen in combination with the radio direction finder and the indicated meeting point for which *The Saiga* was heading. *The Saiga* itself gave to the fishing vessels *POSEIDON, PANORMITIS* and *COMBAT* the new meeting point. At that moment *The Saiga* was at a distance of 44.5 nautical miles away from the patrol boat P328. The distance was exactly measured by radar. Knowing the position of the patrol boat P328 by means of the general position finding system (GPS), Lt Sow could assure himself by "such practical means as may be available" that *The Saiga* was still within the EEZ and correspondingly the customs radius of Guinea. This is in accordance with the first sentence of article 111 of the Convention.

Lt Sow maintained these facts on 16 March 1998 during what I would describe as a severe cross-examination of more than three hours by Maître Thiam before this Tribunal in an impressive manner.

His evidence is in conformity with calculations undertaken on the basis of geographical positions and times contained in the logbook of *The Saiga*. According to the entries relating to the positions of *The Saiga* on 28 October 1997 at midnight and 0400 hours, and taking into account the calculated speed that the tanker made over the ground, *The Saiga* had crossed the boundary between the exclusive economic zones of Guinea and Sierra Leone after 0350 hours on 28 October 1997. At that time she had been discovered by the Guinean patrol boats.

From that moment on, the pursuit was not interrupted until the vessel was arrested shortly after 9 o'clock. The fact that *The Saiga*, feeling safe, lay drifting between 0424 hours and about 0830 hours on the morning of 28 October 1997 has no legal relevance to the

pursuit conducted in the meantime by the patrol boats. The details of this pursuit were also convincingly explained by Lt Sow to this Tribunal.

Mr President, Members of the Tribunal, I now turn to my last point, which is the necessary signals. According to article 111(4), the second sentence, of the Convention:

> "The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship."

Lt Sow has given evidence that he called *The Saiga* on the radio when he discovered the ship at 0350 hours. The call was made by the use of channel 16, which is the usual communication channel for this purpose. In addition to this, several witnesses confirmed that the small patrol boat P35, which actually stopped *The Saiga*, had its blue signal lights switched on and gave sounds by way of a siren. Besides that, warning shots had been fired above the ship, which attempted to escape. Therefore, the use of signals is amply proven.

The legal question, however, is whether these signals are sufficient to fulfil the conditions of article 111(4), the second sentence, of the Convention. There are some writers who take the traditional view that the electronic signals are not sufficient. Against this, one has to recognise that in our days electronic signals between ships are not any more exchanged by way of Morse code. Signals given by radio, as in this case, are auditory signals.

On the bridge of a ship, usually channel 16 is permanently switched on so that calls cannot be overheard. This view is shared by eminent writers like McDougal and Burke.

THE PRESIDENT: Professor Lagoni, may I just ask a question of clarification? When you say "may not be overheard", do you mean so that they may be heard?

PROFESSOR LAGONI: Yes.

THE PRESIDENT: So that they may not go unheard or may not be overlooked?

PROFESSOR LAGONI: I apologise for my poor English, Mr President. "Overheard" in this context means "they must be heard in any case on the bridge."

THE PRESIDENT: That is right. Thank you.

PROFESSOR LAGONI: This view that signals given by radio are sufficient for hot pursuit is shared *inter alia* by eminent writers such as McDougal and Burke. I must stress, of course, that we share this view as well.

In support of this view I should like to point to the fact that the practical means available for satisfying that the ship pursued is still within the relevant zone have been developed extensively since 1958. To make sure that the signals mentioned in the second sentence of this paragraph can keep pace with this technical development, one has to assume that signals given by radio are sufficient for hot pursuit as well. Besides that, considering the breadth of exclusive economic zones, the coastal State would not have any chance to commence hot pursuit in the outer parts of the EEZ in the range of radar because perpetrators

would discover police forces long before these could come close enough to give a visual or auditory signal. I should add that not every small coastal developing country has aeroplanes to give signals to perpetrators in fishing matters, for example.

In conclusion, Mr President, Members of the Tribunal, Dr Plender mentioned the other day in this place the importance that the great Irish writer, Sir Arthur Conan Doyle attributed to details. May I remind you that according to an old saying in the western world, the devil is supposed to sit in the detail. But after you heard the impressive, precise and convincing evidence given by the young naval officer, Lieutenant Sow, who was present at the scene on the early morning of 27 October 1997 and who was aware of the importance of all decisions he had to take, I prefer to quote Aby Warburg, the famous cultural anthropologist and great son of the City. He once wrote: "The good Lord sits in the detail." From the point of view of Guinea, I fully agree with him in this case.

Mr President, Members of the Tribunal, that brings me to the end of my presentation of legal issues involved in *The Saiga* saga. In conclusion, the Republic of Guinea submits that the pursuit and arrest of *The Saiga* was justified under the Convention.

THE PRESIDENT: Thank you, Professor Lagoni. Mr von Brevern?

MR VON BREVERN: Mr President, the next speaker for the Republic of Guinea will be Mr Askia Camara, head of Customs Legislation, on questions of Customs legislation.

MR CAMARA: Mr President, Members of the Tribunal, after the explanations of the witnesses of the two parties in this case, the great privilege falls upon me to present to you a brief communication concerning the legal basis for the Customs activities which led to the immobilisation and arrest in Conakry on 28 October 1997 of the vessel *M/V SAIGA*, as well as the procedures which were undertaken in the Guinean courts in order to finalise this matter.

In order to enable you to well understand the Guinean position in this problem, we would like to draw your esteemed attention to the fact that the Customs represent one of the principal sources of income for the budget of Guinea. The main part of this income comes from Customs duties in trade with oil products: petrol, diesel and oil. In other words, as soon as there is fraudulent activity with these products, a large part of income for the Customs is in danger. This is the reason why the State of Guinea has adopted new legislation which is more suited to the situation at this current time.

As far as the *M/V SAIGA* is concerned, which we are discussing today, we must say that there was pursuit of this vessel because it had bunkered fishing vessels in the contiguous zone near the island of Alcatraz. These were fishing vessels which had a fishing licence which had been given by the Guinean authorities. These vessels were *KRITTI, GIUSEPPE PRIMO* and *ELENI G* and they were bunkered on 27 October 1997. *The Saiga* was aware of the fact that this was an infraction of the laws. Such operations constitute a violation of the law number 007CTRN of 15 March 1994 and articles 4, 5 and 6 as well as the Customs Code in articles 33, 34 and 317. I am sure that you have been given copies of these Customs laws.

These articles demonstrate thus clearly that the *M/V SAIGA* had, in fact, violated Guinean law by distributing oil on 27 October 1997 at the position at which it was at sea. In conformity with the provisions of article 4 of the law 007CTRN of 15 March 1994, the three vessels, that is *KRITTI, GIUSEPPE PRIMO* and *ELENI G*, should have taken on board diesel at a dock because they were holding a licence which had been delivered by the Guinean authorities. So, in any respect, *M/V SAIGA* and its bunkered clients have incontestably violated Guinean laws. If at a certain moment of the debates in this hall there was a certain confusion about the Customs radius and Customs territory of Guinea, we would like to outline that these are realities which do not pose any limitation to Customs activities. The Customs territory covers the entirety of national territory as well as islands along the coast and on territorial waters. The Customs radius is a well-defined band along the borders of a country in which there must be permanent monitoring by the Customs services. Its width varies depending on States. It always has a terrestrial zone and a maritime zone in the countries, of course, which have borders along oceans.

In the Customs radius, for those who have or transport goods to be exported or imported, observation must be made of police legislation, health legislation and Customs legislation. As far as Customs legislation is concerned, goods which are inside the Customs radius must be taken by legal procedures to the border Customs officers to be declared there. There is a risk that they will be confiscated by the Customs authorities if they are sold or otherwise diverted from legal channels before they have been presented to the competent authorities.

If they are traded outside of national legislation, they can be confiscated. If there is the intention of fraud, there comes the risk of confiscation. Therefore, actions by the States in the Customs radius are preventive but also suppressive. These are the considerations which *M/V SAIGA* ignored or neglected when it committed violations, maybe counting on a material under-equipment of the Customs brigades in Guinea as far as missions at sea are concerned. However, this was an error or a false appreciation of the reality in this country. Thanks to the assistance of the United States for some time with the provision of four patrol boats for sea, the chances of success of smugglers have been reduced.

As far as the hot pursuit is concerned which enabled the arrest on 28 October 1997, of the fleeting *M/V SAIGA*, we can remark that this action was undertaken in conformity with the provisions of article 111 of the Convention of the United Nations on the Law of the Sea. In fact, for a violation committed in the contiguous zone, pursuit commenced at a moment at which the smuggling ship, *M/V SAIGA*, was bunkering in this zone and it was not interrupted until the effective arrest of the *M/V SAIGA* until 28 October 1997.

The vessel and its cargo were then taken to the closest competent Customs officer in order to accomplish the other formalities which were requested in the case of an arrest. The PV was correctly drawn up and signed by the arresting persons. The Guinean jurisdiction judged that it was in line with existing laws. The cargo and the vessel were confiscated and fines were pronounced in virtue of article 8 of Law 007CTNR of 19 March 1994. In any case, let us recall that there are legally two procedures in order to regulate contentious cases for the Customs. One is the legal procedure and the other is a compromise settlement. It was the legal proceedings which have been referred to until now in *The Saiga* case. In a compromise settlement the parties agree mutually to regulate a conflict administratively. It can take place in a case before, during or after a judgment. The legal basis for a compromise

settlement in Guinea is the Customs Code in article 251. In *The Saiga* case there was neither a compromise settlement nor a release of the means of transport in view of the fact that the fuel, which is the subject of fraud, fell into the category of prohibited goods which are referenced in article 29 of the Customs Code.

The representative of the owner, Mr Laszlo, who had freely solicited in writing on 25 November 1997 in a letter directed to the *Direction Nationale* of the Customs, requested the release and at the same time the giving up of the cargo. This is irrefutable proof that the owner was well aware and convinced of the violation which had been committed by Guinea in its vessel, *The Saiga*. To deny today in front of a Tribunal that any violation had been made of legislation in Guinea is an absolute right of M. Laszlo, but in the light of the facts which have been adduced, no jurisdiction would accept this guise. The Guinean laws were violated by *M/V SAIGA* in the month of October 1997. The arrest of *The Saiga* was done legally on 28 October 1997.

As far as the prompt release of *The Saiga* is concerned, in conformity with the decision of your jurisdiction, Mr President, as a result of its first hearing in December 1997, allow us to remind you that the application of this measure was subject to a letter of guarantee being submitted to the Republic of Guinea which was acceptable by both parties and granting of bail of US$400,000. I should like to say that it is for the reason that this letter was unacceptable to the Guinea authorities that prompt release was not carried out.

The reasons were the following. The validity of the commitment expired before the date of signature of the document and it is as if somebody had signed on 15 March 1999 a document of commitment whose validity expired on 31 December 1998.

Secondly, there was an ambiguous expression. That is the alleged violation of Guinean laws.

Thirdly, the function, the quality and the complete names do not make clear the identity of those who had signed the letter from the Crédit Suisse bank.

It was evident that no state would be able to accept from anyone a commitment document which contained such imprecisions. But once this was corrected by the bank involved, there was immediate release of the vessel.

After the arrest of *M/V SAIGA* and it being taken to the specialised office, a request for sale before judgment was presented to the Tribunal of First Instance on 14 November 1997.

On 20 November 1997 an ordinance no. 675 was issued by this Tribunal according to Article 289. According to this ordinance, the revenue from sale was transferred to the Special Receiver of Customs to be further processed at a later date. It was only after the expiry of the appeal period against the judgment no. 12 of 3 February 1998 which announced the confiscation for the benefit of customs for the cargo of *The Saiga* that the proceeds of the sale were transferred to the Public Treasury.

The use of force in pursuit. Article 1 of the Criminal Code of Procedure in Guinea says the following: Public action is allowable in order to maintain public order. Some of the

provisions allow us to appreciate that, in order to ensure the repression of violence, the Guinean legislator knew that there might be inadmissible conduct which might be imputable to holders of power. This is why they subjected them to the same law. In this case we must be aware of the fact that it is not the Customs officials who were prosecuted. They were just assuming their tasks.

As far as the vessels which were bunkered by *The Saiga* on 27 October in the contiguous zone, we must say that contrary to the affirmation there was no prosecution of them. In correspondence 839 the Public Prosecutor addressed a letter to the command to find and arrest these vessels and their Masters for infractions which had been attributed to *The Saiga*. They can be prosecuted according to Article 4 of Law 7 of the 15 March. This prosecution can be exercised within a period of three years from the date when the violation was stated. according to Article 252 of the Customs Code relative to these actions. Therefore there is no willingness not to prosecute fraudulent vessels.

As far as the procedure in Guinea, there were two judgments in *The Saiga* case. The first was the First Instance Tribunal in Conakry, and the second at the Appeal Court, when on 18 December 1997 the lawyer for the Master appealed against a decision which was issued by the First Instance Tribunal. After this appeal the file was transmitted to the Appeal Court, where it was inserted in the list for a criminal hearing on 12 January.

THE PRESIDENT: Mr Camara, would you go a little more slowly.

MR CAMARA: Upon this appeal the file was transmitted to the Appeal Court where it was inserted in the list for criminal hearing on 31 January 1998. At this stage, lawyers for the defendant requested a postponement with the reason that they had insufficient time to prepare their defence. In order to do this, they invoked Article 138 of the Code of Criminal Proceedings. T

The Court granted this request and postponed the case for hearings on 19 and 22 January. The criminal court hearings, took place at this latter date in the constant presence of the defendant and his two lawyers. The decision was announced at a sitting on 3 February 1998. The court set aside the judgment in all its provisions. The court issued Judgment no. 12 on 3 February 1998. The court then reminded the parties of the pertinent provisions of Article 87 of the State Authorities Act L91008 of 23 December 1991 concerning the Supreme court. These are the provisions which are relative to an appeal en Cassation to criminal proceedings.

Article 87. When a decision in last instance has been issued *inter partes* the Public Minister and all the parties to the suit have six days after the issue of the judgment in order to request an appeal. The law gives the jurisdiction the power for a stay of execution of the judgment for the decision which is contested by one of the parties if the execution of this would cause irreversible damage. That is to say that the Master of *M/V SAIGA* did not have recourse to all means of appeal which are open to him by Guinean law. He could easily have appealed to the Supreme Court as he did to the Appeal Court, and this is the occasion to outline and emphasise the fact that the production by the State of Saint Vincent and the Grenadines of a copy of the Cédule de Citation which appoints the flag state of *The Saiga* similarly responsible for penal infringement caused by its Master was subject of an annulment of the first judge. The decision of the Court made no reference to this.

Henceforth the complaints which have been articulated by Saint Vincent and the Grenadines no longer exist.

Finally, Mr President and Judges, I hope that with this communication that I have just given, the confusion which was sown here by persons of the Bar speaking about a legal void in Guinea has been set aside. Thank you very much.

THE PRESIDENT: Than you Mr Camara. Mr Von Brevern, please.

MR VON BREVERN: Mr President, Honourable Judges. I intend to deal with four issues, and then this will be the end of our presentation. I would like to deal with the question of excessive force; very shortly of the question of prompt compliance with your judgment, and then the Cédule de Citation shortly, and finally damages. In total Mr President I think I need about an hour.

The applicant State has concluded on the basis of the testimony given by its witnesses that the Guinean customs authorities have used excessive force when arresting the *M/V SAIGA*. Guinea would like to emphasise strongly that this was not so. From the Guinean perspective, the events surrounding the arrest and detention of *The Saiga* present themselves quite differently. The witnesses called by the applicant State did not give the evidence they were supposed to give.

Captain Orlov's statement that Guinean soldiers on the patrol boats would have fired at *The Saiga* without warning is not credible. The testimony given by the Senegalese painter Niasse contradicts the Master's statement. Niasse described very clearly that Captain Orlov ordered the crew to go into the engine room at a moment when the small patrol boat P35 had not yet reached *The Saiga* and before any shots were fired. This statement serves as proof that the allegation that the Guinean soldiers fired without a warning is incorrect. Before the order to flee to the engine room, Mr Niasse was on the deck of *The Saiga*. It can clearly be assumed that he would have heard any shots being fired if this had really been so. This is more indicated by the fact that Captain Orlov did not see for himself that anyone on board the patrol fired with machine guns.

Further contradiction lies in the fact that Captain Orlov said that he had put the alarm on before he sent the crew down to the engine room. This is not confirmed by Mr Niasse who said that he only heard and saw Captain Orlov's order but did not perceive any ringing of the alarm.

Moreover, Captain Orlov's statement that he located two targets on the radar that would have moved fast towards *The Saiga* at a distance of 11.5 miles does not conform with the uniform testimony given by the three Guinean witnesses, Messrs Bangoura, Camara and Sow, that at a distance of about 11 miles only one of the Guinean patrol boats, namely P35, was moving fast towards *The Saiga*.

In Guinean perspective Captain Orlov was not a credible witness. The statement does not conform with the testimony given by the Guinean witnesses that the small patrol boat, after having separated from the bigger one, switched on the blue warning light and the siren and called *The Saiga* on channel 16.

Captain Orlov knew that the approaching boat was an official Navy boat. This is clearly demonstrated from the telex from ABS Geneva to the Captain, dated 27 October, which warned *The Saiga* that the authorities in Conakry had sent out patrol boats in search of the bunkering oil tanker. In this telex, as you know, *The Saiga* was ordered to a new position which lay outside the Guinean EEZ because the old meeting point was considered to be unsafe.

Guinea does not find Captain Orlov's allegation to be credible that he feared a piracy attack. There was no mention of any piracy attack in the telex to which I just referred. Quite the opposite; the Master was warned to look out for fast navy speed boats. Guinea holds that the *M/V SAIGA* knew that she was being pursued by official Guinean forces. It should not be regarded as a coincidence that the new meeting point that was supposedly safe, lay just outside the Guinean EEZ. It is obvious that pirates would not let themselves be stopped by a borderline some 60 miles off the West African coast. Only for official forces would such borderline be of importance in order to act in conformity with Article 111 of the Convention.

Captain Orlov tried hard to give another impression when he was cross-examined some days ago. His answer to the question on his understanding of the expression "fast Navy speed boats being sent out" as mentioned in the telex was not satisfactory. He replied that he "was tending to think that these were pirates", thereby completely ignoring the contents of the telex. Captain Orlov was not credible as regards his fear of a piracy attack. He admitted that he had never had any experience with pirates. He also said that he recognised that he was being approached by a Navy boat and that he saw soldiers in uniforms on board.

In the light of what I have just said, I invite this Tribunal to conclude that Captain Orlov knew very well that Guinean Navy patrol boats were approaching *The Saiga* in order to stop the tanker for unwarranted bunkering activities in the waters off the Guinean coast.

The reason for Captain Orlov having ordered the crew to go to the engine room lies in the fact that the Guinean authorities had asked *The Saiga* via channel 16 to stop and that the Master saw the patrol boat approaching on radar and through his binoculars.

The Master's order that the crew should hide in the engine room was neither justified nor reasonable. The only reaction in this situation would have been to stop the tanker and to speak and perhaps negotiate with the Guinean Customs authorities. Such a reaction would have avoided any damage to the vessel and any injury to the crew.

Guinea submits that the damages and injuries incurred during the arrest of *The Saiga* were caused by Captain Orlov's unreasonable and inexcusable refusal to stop his tanker, although he was being asked to do so. At any rate, if this Tribunal puts responsibility on Guinea for the damages and injuries sustained, the refusal of the Master to stop should be seen as a contribution to the damage in the form of a provocation of the Guinean enforcement actions.

Mr Manguè Camara was the only witness who gave testimony on the exact circumstances when the small patrol boat approached and arrested *The Saiga*. He stated that the patrol boat had its siren and blue light switched on and that *The Saiga* was repeatedly asked to stop on channel 16. He also stated that the patrol boat went twice around *The Saiga* to make it halt, but the tanker did not stop. After the unsuccessful manoeuvre, one shot was

fired into the air with the submachine gun. This happened at a time when *The Saiga* should have already proceeded at full speed. Mr Camara explained in a very credible way that the crew of the patrol boat was afraid that the waves caused by *The Saiga* would capsize the small boat. He also said that the Guinean authorities feared that it would still take a lot of time to make *The Saiga* stop. This situation was perceived to be dangerous for the small patrol boat with a very high consumption of petrol, which might have run out, without there being the bigger patrol boat assisting it.

When trying to assess the situation, it should always be borne in mind that the patrol boat, P-35, was an open-air boat with a length of only 6 meters. The boat was like a nutshell in comparison to the big oil tanker *M/V SAIGA* . Furthermore, there were six people on board, three of them with arms, which means that the crew felt confined and was consequently more susceptible to fear. It is not too surprising that in this situation a shot was fired above *The Saiga*. This should not be called excessive force.

When the Customs officers were finally successful in boarding *The Saiga*, they found no-one on board. Mr Camara has very credibly described his feelings when he boarded. It was his first mission of that kind. He was afraid. He did not know the vessel and he did not know the reaction of the crew of *M/V SAIGA* . It could not be excluded that he would be welcomed with weapons.

In these circumstances, it was understandable and also tolerable that another shot was fired in the direction of the bridge where a crew member of *The Saiga* was seen to spot at him. Mr Camara felt threatened and acted in self-defence, which is also in accordance with Guinean law.

Moreover, Mr Camara convincingly stated that the other shot into the engine room was necessary in order to immobilise the vessel. At that time the bigger patrol boat had not yet arrived. *M/V SAIGA* was still going at full speed and the crew of the small patrol boat was afraid that their petrol would run out. In this situation, the Customs officers had to make *The Saiga* stop, if necessary by the use of force. So, when Mr Camara finally found an entrance into the engine room, he saw no other possibility to make the vessel stop quickly than by damaging a part of the engine, and he was successful.

The Customs officers wanted to inspect the vessel and crew but the crew had hidden and the cabin doors were closed. It is clear that the inspecting Customs officers had to use force in this situation to open them. As was made clear last week, they were not opened with guns.

To conclude, the Guinean actions might be regretted but they do not constitute excessive force. In the circumstances at that time, as I have just portrayed them, these were reasonable, necessary and adequate police measures against a tanker that had violated Guinean laws and refused to comply with Guinean orders.

Now, Mr President, only two sentences with respect to another submission of Saint Vincent and the Grenadines. As you know, Saint Vincent and the Grenadines claims that Guinea violated the provisions of the Law of the Sea Convention concerning prompt compliance with the judgement of your Tribunal of 4 December 1997 by not releasing

M/V SAIGA and its crew upon posting of a bank guarantee of Crédit Suisse of 10 and 11 December 1007.

Guinea has extensively replied to the allegations of the applicant State in the Counter-Memorial and the Rejoinder. Since no new arguments have been made in the presentation of the applicant State so far, Guinea considers at this stage it is sufficient to refer to her pleadings and requests that the claim be dismissed for the reasons already given.

The next short part of my statement today concerns the *cédule de citation* or schedule of summons issued by the *Procureur de la République de Guinée* on 10 December 1997. St Vincent has asked you, Honourable Judges, in submission no. 5. to adjudge and declare that the citing of Saint Vincent and the Grenadines as the flag State of *M/V SAIGA* in the criminal courts and proceedings instituted by Guinea violates the rights of Saint Vincent and the Grenadines under the Convention.

Saint Vincent and the Grenadines has failed, however, to describe which of her rights under the Convention were violated. I do not see any. The *cédule de citation* is purely an administrative document preparing for the holding of the hearings in the criminal proceedings against the Master of *M/V SAIGA*. It was addressed and serviced solely to the Master. The mention in the *cédule de citation* of the State of Saint Vincent and the Grenadines did not have any legal effect, particularly not the effect that the State of Saint Vincent and the Grenadines was made jointly liable for any charges imposed on the Master of *The Saiga*.

The mention in the *cédule de citation* was undertaken because Saint Vincent and the Grenadines as flag State of *The Saiga* stood behind the Master and his vessel and would support the position of the accused Master. The *Procureur de la Répubique* called, or one could say invited, representatives of St. Vincent to appear in the criminal proceedings against the Master because the *Procureur* thought that St. Vincent might have an interest in attending and contributing to the hearings in the proceedings. Neither the *Procureur* nor the Guinean courts regarded the state of Saint Vincent and the Grenadines as a party to the proceedings against the Master. This is apparent if one takes a look at the judgements of 17 December 1997 and 3 February 1998, which are solely directed towards the Master of *The Saiga*. There is not one word of mention of any civil liability of the State of Saint Vincent and the Grenadines, nor did anything happen after delivery of the judgements that might support such an assumption.

To be quite clear, Guinea does not hold the State of Saint Vincent and the Grenadines liable for the violation of her Customs laws, nor did Guinea ever do so previously.

To conclude on this point, I would like to state very clearly that Guinea finds submission no. 5 of Saint Vincent and the Grenadines completely unfounded and it should be rejected.

Mr President, I would now like to deal with the last issue and that is with reference to damages.

Besides interest and legal costs, Saint Vincent and the Grenadines claims compensation and damages under four heads:

- the claim on behalf of the loss or damage to the vessel arising from the detention and arrest and its subsequent treatment, to a total of more than US$ 1 million;

- the claim for the benefit of the Master and crew, including personal injury and deprivation of liberty, to a total of about US$276,000;

- the claim in respect of the removal of the cargo from the vessel, in the amount of US$3 million; and

- the claim in respect of both material and immaterial damages suffered by the State of Saint Vincent and the Grenadines in the amount of US$1 million.

Guinea submits that these claims are unjustified and excessive.

As a legal basis for damages, Saint Vincent and the Grenadines rely on article 111(8) of the Convention, which implies an unlawful hot pursuit of *The Saiga* by the Guinean customs authorities. As Professor Lagoni, Mr Camara and I have previously pointed out, Guinea has lawfully exercised its right of hot pursuit in accordance with article 111(2) of the Convention and did not violate any other rule of international law. The Republic of Guinea requests you, Honourable Judges, to dismiss the claims advanced by Saint Vincent and the Grenadines. The following statements concerning damages are made on an entirely auxiliary basis in case this Tribunal does not follow the Guinean assumptions and conclusions with respect to the lawfulness of the Guinean acts. Guinea is only arguing on damages now because the parties agreed in the 1998 Agreement that the proceedings before this Tribunal should be limited to one single phase dealing with all aspects of the merits, including costs and damages.

Before dealing with the specific claims advanced, some general remarks concerning all claims need to be made.

The first concerns the applicability of article 111(8) of the Convention. Guinea notes that Saint Vincent and the Grenadines has not responded to the arguments made in the Guinean Rejoinder. There, Guinea had contended that a comparison of the wording of article 106 on the one hand and article 111(8) of the Convention on the other hand would indicate that article 111(8) would only serve as a legal basis for damages incurred to shipowners and/or charterers of the arrested ship and only for damages sustained as a result of the pursuit and arrest and not of subsequent actions, for example, the removal of the cargo.

My second general point is that any compensating award, if such an award is to be granted at all, should consider the fact that the *M/V SAIGA* entered the Guinean contiguous and exclusive economic zone in the knowledge that bunkering activities were considered by Guinea to be illegal and that the *M/V SAIGA* by doing so would run the risk of being pursued and arrested. This behaviour may be called a contribution in the form of either a provocation of the Guinean enforcement actions or, at least, in the form of negligence, because *The Saiga* should have known that enforcement actions would have followed her bunkering activities off the Guinean coast. Guinea submits that it is a well established principle in assessing damages in international law that any contribution, provocation or negligence with respect to the sustained damages reduces the amount of compensation that may be awarded.

Before the opening of the hearings, Mr President, you invited the parties to further address the issue of moral damages. Guinea has given quite a detailed account of this topic in both the Counter-Memorial and the Rejoinder. Nevertheless, she perceives some misconception of the issue on behalf of the applicant which should be commented upon.

In his opening statement for the applicant State, the Attorney-General and Minister of Justice of Saint Vincent and the Grenadines did not seem to draw a distinction between moral damages sustained by individuals and subsequently claimed by their nation State and those sustained by a State in its own right. Guinea is aware of the statement expressed by the Permanent Court in the *Mavrommatis* case that a State is, in reality, asserting its own right when it seeks reparation for loss suffered by its nationals. But this statement does not mean that pecuniary compensation will automatically be granted for moral damages that are not sustained by individuals but a State in its own right, for example as a result of a breach of an international obligation.

The applicant State has argued that individuals have suffered moral damages in the present dispute, yet Guinea assumes that Saint Vincent and the Grenadines is seeking moral damages in its own right, not just as a consequence of moral damages sustained by individuals but also as a result of a breach of the Convention or a violation of its national honour. Otherwise, it would have to be concluded that Saint Vincent and the Grenadines would try to seek double compensation for the moral damages which were claimed to have occurred to individuals. This would not be in accordance with international law.

As this Tribunal will be aware, there is a lot of academic controversy with regard to whether substantive pecuniary compensation or, in other words, satisfaction, may be granted to moral damages sustained by a State without injury to individuals. In their pleadings, the parties have been discussing three potential precedents for such an award. Guinea has argued that these cases do not constitute compelling authority for such an award and that such an award would not be covered by customary international law. The only direct comment that the applicant State made on the Guinean arguments was to criticise the date of publication of the cited literature. Following this comment, the applicant State cited one sentence from Professor Schwarzenberger's Treatise on International Law, with a publication date about 30 years before the publication date of the research mainly cited by Guinea.

Guinea submits that there is no legal basis for the claim advanced by Saint Vincent and the Grenadines in its own right for moral damages. Neither article 111(8) of the Convention covers such a claim, nor is the claim warranted by customary international law. The observations and comments of the Governments to article 45(1) and (2c) of the draft articles on State responsibility by the International Law Commission clearly indicate that State practice only allows for moral damages as compensation for mental shock and anguish suffered by individuals. The granting of substantive monetary satisfaction for direct moral injuries of States would suggest a punitive function for satisfaction which clearly would be contrary to international law.

The most that may be said is that article 45 of the ILC draft indicates the development of public international law but, even if it was applied in the present case, the claim by Saint Vincent and the Grenadines would be groundless. Article 45(2c) of the ILC draft only provides that substantive pecuniary satisfaction is to be awarded in cases of gross infringement of the rights of the injured State. In its commentary, the International Law

Commission has pointed to the exceptional character of this remedy and mentions the *Rainbow Warrior* case as an example for a gross infringement.

Yet Guinea submits that the *Rainbow Warrior* case is not comparable with the present case. It concerned the sinking of a ship in Auckland harbour by two French agents who had used forged Swiss passports to enter New Zealand. The incident involved a violation of the territorial integrity and State sovereignty of New Zealand, as well as the entry into that country by fraudulent means. One crew member was killed. The French actions caused serious public outrage both in New Zealand and the rest of the world.

THE PRESIDENT: Mr von Brevern may I interrupt you? It is now almost 12 o'clock. Unless there is any difficulty, I suggest that we should proceed until about 12.30, by which time I am sure you will have concluded your submissions, which means that we will be spared the ordeal of coming back for the afternoon session. Would that be acceptable to you, Dr Plender?

DR PLENDER: Entirely acceptable, Mr President.

MR VON BREVERN: Very well. Thank you, Mr President.

THE PRESIDENT: You may proceed.

MR VON BREVERN: The situation in the present case is completely different. The Guinean authorities did not violate the territorial sovereignty of Saint Vincent and the Grenadines. In the light of the rather loose link between *The Saiga* and the alleged flag State of Saint Vincent and the Grenadines, it is not justified to equate *The Saiga* with a piece of Saint Vincentian territory. Moreover, the Guinean authorities did not deceive *The Saiga* in any way. As has been shown, *The Saiga* was well aware that she was being pursued and that bunkering activities in the Guinean maritime zones were regarded as illegal. *The Saiga* was merely arrested and detained, whereas the *Rainbow Warrior* was sunk. No crew member died in the present case. Moreover, the applicant State has not indicated that any public arousal was caused by the arrest of *The Saiga* either in the country or anywhere else.

Guinea invites this Tribunal not to follow the argument of the applicant State that the present case involves more serious violations of international law that the *Rainbow Warrior* affair. As has been shown, the Guinean authorities were simply enforcing Guinean laws in the maritime zones off the Guinean coast with respect to an activity prohibited under Guinean law and which has not been expressly regulated by the Convention.

Guinea submits that the present case does not involve a gross infringement of the rights of Saint Vincent and the Grenadines. In fact, Guinea maintains that there is no infringement at all. At any rate, Guinea submits that she did not insult the dignity and honour of Saint Vincent and the Grenadines in a way that could justify pecuniary satisfaction for immaterial damage suffered.

The claim by the applicant State in its own right should also be dismissed insofar as material damages are claimed. Guinea notes that the Attorney-General and Minister for Justice seems to have withdrawn the claim on the basis of costs entailed by devotion of public servants of Saint Vincent and the Grenadines to the *M/V SAIGA* affair. Guinea also notes that her

argument with respect to both the non-existence of any loss of registration and the missing connection between any loss of registration and the Guinean enforcement actions have not been met by any statement by the applicant.

Guinea submits that the claim should be dismissed. The claim is completely speculative and no proof or estimation had been given whatsoever as to the amount of any material damage.

Besides claims in its own right, the applicant State has advanced a variety of claims on behalf of individuals and/or companies. The first of these claims concern the damages and losses sustained by the shipowner or by the charterer arising from the arrest and detention of *The Saiga*. By submitting extensive further material, the applicant State has positively responded to the criticism made in the Guinean pleadings that the damages had not been fully and comprehensively documented. The Attorney-General and Minister of Justice of Saint Vincent and the Grenadines has called this material "a detailed account explaining the basis for each cent of the claim." Guinea takes this statement as confirmation on behalf of the applicant State that only those damages or losses could be compensated that have fully been proven by documentary evidence.

Guinea finds that proper documentary evidence also includes information as to which company of the several interested parties has suffered concrete damages. Mr Stewart, the witness, has stated that arbitral proceedings are pending with respect to the payment of the damages now claimed. Guinea also submits that any payment by insurance companies should be taken into account, be it hull insurers or P&I clubs.

The claimed amount is a total of US$1 million. Guinea does not contest that some smaller damages have been caused to *The Saiga* as a result of the arrest by the Guinean Customs authorities. Nevertheless, Guinea has serious doubts about the claimed amount and consequently also about the submitted documentary evidence.

As I have already said, Guinea rejects the assumption that her Customs authorities applied any excessive force and thereby caused excessive damage. The photographs presented some days ago do not prove the case of the applicant State. Neither the cause of the damages, nor their time and location, are explained. What credit can be given to a picture of a vessel from a far distance which shows some spots of white colour on the bridge? It must also be mentioned that the vessel is old. Could some of the damages not have occurred at a later stage?

The witnesses called by Guinea did not testify to any greater damages. Also, the witness Captain Merenyi, when explaining trying to come to an agreement with the Customs authority of Guinea, according to article 251 of the Guinean Customs Code did not refer to any damages.

In this context it should be asked why there has not been any examination of the damages while the vessel was still in Conakry on a contradictory survey basis. It is to be remembered that the Master and the vessel were represented by several lawyers in Conakry. The Guinean authorities could have inspected the vessel at the same time and the present argument would have been avoided. Another question is why the damages to the vessel have not been recorded in the Deed of Release.

The Guinean answer is that the damages have obviously not been as serious as they are now being portrayed. Guinea requests the Tribunal - in case it finds Guinea responsible to compensate pursuant to Article 111(8) of the Convention - to take the Guinean doubts into consideration and to scrutinise with a sharp eye the material provided by the applicant State.

As regards the claims for the benefit of the Master and crew of *The Saiga*, in particular because of deprivation of liberty and personal injury, Guinea submits that there is no sufficient basis for such an award. Neither the Master nor any crew member were illegally detained.

It is not in dispute that the Master was held in Conakry in the course of criminal proceedings which had been instituted against him. Guinea contends that it is incorrect to speak of an illegal detention in the present case. The Master was held in the country in the course of criminal proceedings. The Conakry Court of First Instance and the Conakry Court of Appeal confirmed in their judgments that it was not unlawful to hold him in the country. Both courts sentenced the Master to a criminal fine on the grounds of contraband.

Similarly, no compensation for detention of the crew should be awarded in the present case. Compensation requires either material or immaterial damage. I see neither here. It lies in the nature of the duty of a crew of a ship that it stays on board the ship, in particular while it is sailing. There is no significant difference as regards the freedom to move between a situation in which the crew stays on board while the ship is detained in a foreign port and the situation in which the ship is sailing.

There is no material damage. The crew members continued to receive their salary. Their contracts had not expired and they would have remained on board of the sailing ship anyway. In fact, the 14 crew members that voluntarily stayed on board *The Saiga* after 17 November 1997 received a bonus payment of 20 per cent of their salary. Furthermore, for the crew members, accident insurance was provided, as could be seen from the documentary evidence provided by Saint Vincent and the Grenadines.

Neither is there moral damage, since the crew was not forced to stay on board. As has been stated by the witness, M. Bangoura, the crew was allowed to leave both *The Saiga* and the Guinean territory. Guinea submits that the crew stayed on board of *The Saiga* for financial and logistical reasons. This was confirmed by the superintendent of *The Saiga*, Captain Merenyi, who stated that he did not want any crew member to leave the vessel during the initial time in the port of Conakry. From the Guinean perspective, the crew could have left the vessel. It could also have been exchanged.

There is, neither, any justification for any moral damages arising from an excessive use of force. As I have shown before, the Guinean measures were necessary and appropriate police measures in order to stop the unwarranted bunkering activities and to exercise the right to search and detain the vessel.

With regard to the injuries suffered by the painter, Mr Niasse, the applicant State tried to give evidence of the seriousness of his injuries. Guinea regrets strongly if any injuries should have been caused by her officials; yet doubts remain, in particular with regard to the seriousness of the injuries sustained.

The applicant State tried to prove that Mr Niasse was hit by a ricochet by producing an x-ray photo of a chest with a projectile. Guinea submits that this x-ray photo does not prove anything. It could be by anyone else. Furthermore, the applicant State did not explain the reason why there was so much confusion about the actual sustained injuries. We still wonder how Mr Niasse could have survived with a metal projectile in his chest and with only receiving first aid a long time after the attack of *The Saiga*. I also wonder why Captain Orlov did not record the seriousness of the injuries in his memoranda of 29 October and 4 November 1997 which have been produced as documentary evidence.

The total of the claims for the benefit of the Master and crew is US$267,150. Guinea requests this Tribunal to dismiss these claims. Mr President this brings me and the delegation of Guinea to the end of our submissions in this first round.

THE PRESIDENT: Thank you, Mr von Brevern. As you say, that brings us to the end of the first round. The Tribunal and the parties have already agreed that there will be no sitting tomorrow. There will be a sitting on Thursday. I would like to have an arrangement that enables the parties to prepare their case sufficiently but also enables us to make a much more rational use of the time available. For this purpose, the Tribunal has a suggestion which I should like to discuss with the agents briefly for about five minutes after the sitting. The time for the sitting on Thursday will then be determined. For the meantime, the sitting is adjourned. We will sit again on Thursday at a time to be agreed between the Tribunal and the parties.

(Adjourned at 1215 hrs until Thursday, 18 March 1999 at a time to be determined)

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