

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



1999

Public hearing

held on Friday, 19 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
	Anatoly Lazarevich Kolodkin
	Choon-Ho Park
	Paul Bamela Engo
	L. Dolliver M. Nelson
	P. Chandrasekhara Rao
	Joseph Akl
	David Anderson
	Budislav Vukas
	Joseph Sinde Warioba
	Edward Arthur Laing
	Tullio Treves
	Mohamed Mouldi Marsit
	Gudmundur Eiriksson
	Tafsir Malick Ndiaye
Registrar	Gritakumar E. Chitty

Saint Vincent and the Grenadines
represented by

Mr. Carlyle D. Dougan Q.C., High Commissioner to London for Saint Vincent and the Grenadines,

as Agent;

Mr. Richard Plender Q.C., Barrister, London, United Kingdom,

as Deputy Agent and Counsel;

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

and

Mr. Yérim Thiam, Barrister, President of the Senegalese Bar, Dakar, Senegal,
Mr. Nicholas Howe, Solicitor, Howe & Co., London, United Kingdom,

as Counsel and Advocates.

Guinea
represented by

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

as Agent and Counsel;

Mr. Maurice Zogbélé mou Togba, Minister of Justice and Attorney General of Guinea,

and

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

1 **THE PRESIDENT:** Dr Plender, I take it that you will continue with your submissions today?

2
3 **DR PLENDER:** Yes, Mr President. First, it is my pleasure and honour to present to the
4 Tribunal the Honourable Carlyle Dougan, Queen's Counsel, High Commissioner to the Court of
5 St James and Agent for Saint Vincent and the Grenadines in these proceedings. At the end of the
6 speeches today, or at such other point as the President may direct, Mr Dougan will formally
7 present the request made on behalf of the Applicant State for relief in this action.

8
9 **THE PRESIDENT:** Thank you. The Tribunal is pleased to welcome His Excellency, the
10 Agent. We look forward to hearing from him at the appropriate time.

11
12 **DR PLENDER:** Maître Thiam will now address the Tribunal on questions of evidence.

13
14 **MAITRE THIAM:** (*Interpreted from French*) Mr President, Honourable Judges of the
15 Tribunal, I shall be speaking to you about the testimony provided by Guinea. In doing so,
16 I should like to start by saying that the witnesses were not of the same quality and credibility as
17 the witnesses for the Applicant State.

18
19 First of all, with regard to the submissions produced by the witnesses of Guinea, you will
20 have noticed, as we did, the anomalies which mean that they are not credible. First and foremost
21 I should like to address mission order no 770 signed by the National Director of Customs at
22 Conakry. This mission order was not dated, but the Guinean party would like to make you
23 believe that it was drawn up on 26 October 1997 whereas it applies to a mission which was
24 supposed to start that very day. However, even if that were possible, one would be liable to
25 admit that it is not very probable, to the extent that it is quite clear that if you want to organise
26 a mission which implies the movements of different units, that is Customs and Navy, you have to
27 at least leave the units, or give them the time to co-ordinate their activities.

28
29 Furthermore, there was no particular and real urgency for the activities of these units to
30 commence because on 26 October 1997, *The Saiga* was not yet in the Guinean exclusive
31 economic zone. In any case, the date of the order of the mission cannot be considered as having
32 been established in a pertinent fashion.

33
34 The Guinean party would also like to make us believe that this order of mission had been
35 issued specifically with a view to searching for *The Saiga*. However, it was issued before the
36 vessel had entered Guinean waters, as I have just said. Above all, it was drawn up with the
37 following mention: "Search for and repression of fraud at sea and on land." If it really was a
38 way of defining a specific mission, one would then have had to wonder how, in Guinea, missions
39 of a general nature are defined. If it was just a case of finding *The Saiga*, which was definitely
40 not on land, we do not see how the editor of the order of mission would have taken the pains to
41 ask, furthermore, for "search for and repression of fraud on land" unless he thought that maybe
42 this vessel was moving on land.

43
44 I am sure that we all remember a song which was sung to us in our cradles and which
45 begins:

46
47 "Mother, do small vessels which go in the water have legs?"

48
49 However, we all realise here that the National Director of Customs in Guinea left his
adolescence behind a long time ago. As a result, he was unable to give a specific order to find

1 *The Saiga*, aiming at fraud which is committed on land. Furthermore, evidence has been given
2 that it was not *The Saiga* which was specifically being searched for. This evidence was given by
3 Lieutenant Sow himself At lines 25-26 of the Verbatim Report, French Version no.13, we have
4 a report of the following dialogue between the lieutenant and myself concerning the landbased
5 radar which was following the vessel.

6
7 "MAITRE THIAM: So, if he was pursuing *The Saiga* to the extent that they were able to
8 tell you at a certain point in time that they had dispersed, is the dispersion a motive to
9 lose the radar echo of *The Saiga*?

10
11 MR SOW: The radar was monitoring a grouping of vessels at such and such a position
12 and it reported on this. Therefore, if they had monitored them up to a certain point and
13 then there was dispersion of the vessels, they ascertained that there was dispersion. They
14 did not say, 'Such and such a vessel is *The Saiga*, therefore we must pursue it'."

15
16 The Tribunal will remember the particularly eloquent response of Lieutenant Sow who
17 thus gave evidence that land radar had monitored a grouping of vessels and that it did not have
18 a mission to monitor *The Saiga* particularly. Therefore, can we believe that this mission order
19 was particularly targeting *The Saiga*? Furthermore, as far as this mission order is concerned, we
20 must recall that the Guinean party waited to produce it. They waited until the Tribunal and the
21 other party were no longer able to question a witness who might have been able to answer
22 questions pertaining to this document. The only witness who might have been able to answer
23 such questions was M. Bangoura. This document was only produced after his evidence and
24 during the testimony of M. Camara. The latter, when he was asked about the order of mission
25 answered:

26
27 "When the order for mission was drawn up, only the agents who are involved in this
28 mission are told to go to a place x, y, z at such and such a time." (Verbatim Report p.23,
29 lines 17-18)

30
31 That means that they did not know anything about this order for a mission. Lieutenant Sow said
32 about this mission:

33
34 "As far as details are concerned, it is only my authorities who can answer this question."
35 (Verbatim Report no.12, French Version, p.20, line 45)

36
37 That meant, of course, that he did not know the circumstances under which the mission for this
38 order was established.

39
40 With respect to the Tribunal, I would not say that the method of proceeding, - that is to
41 produce a document at a point in time where no witness can explain the circumstances under
42 which it was drawn up - is sly and unfair as, unfortunately, Mr von Brevern said when he spoke
43 about the Applicant party. However, you cannot prevent yourself in this case from thinking that
44 there was a certain malice. The Tribunal will, therefore, reflect and consider that there was no
45 pertinent evidence, given that such a document was established, especially with a view to finding
46 *The Saiga*.

1 Secondly, as far as the submissions by the witnesses of Guinea are concerned, we are
2 talking about the famous notes of Lieutenant Sow. The defendant party wants to make us
3 believe that the Guinean Navy would be the only military navy in the world which does not use
4 logbooks for such a big vessel as a 328. Above all, this one is one of the biggest that they have.
5 On that point Lieutenant Sow lost himself in contradictions, which I am sure that the Tribunal
6 will have noticed. To a question put by Professor Lagoni, the lieutenant responded:

7
8 "On a small launch we do not have a logbook. On the large patrol boat, each time we are
9 due to leave we are given slips of paper which we can use to put down notes which will
10 serve our memory."

11
12 Lieutenant Sow, in answer to one of my questions concerning the small launch, said:

13
14 "I do not know whether or not there are 'board notes'."

15
16 He said later on that the small launch did have loose sheets. (Verbatim Report no.12, French
17 Version, p.21, lines 15-26.)

18
19 Mr President, Honourable Judges of the Tribunal, in all of this, where is the truth? Even
20 if it had been true that there is not a logbook on one of the biggest war vessels in Guinea, why
21 was Lieutenant Sow not able to present here the original of these so-called, 'board sheets'? Why
22 was he not able to do that? If he was able to produce the original chart, why was he not able to
23 do this for these notes on board? That is a mystery.

24
25 Lieutenant Sow presented a report which he had established according to these loose
26 sheets and he had copied them out. But this document is very carefully drawn up and written.
27 There are no crossings out. Even the Customs officers at Conakry with the aid of a secretary and
28 a typewriter were unable to type out their PV against Captain Orlov. This document contains no
29 stamp or receipt proving that it had been submitted to the command of the Navy. Nothing has
30 been given to prove that it had been approved by the Navy Commander. Therefore, the result is
31 that the loose sheets might have been filled in with this writing just before the beginning of this
32 process. Nothing can establish, with pertinence, to the contrary.

33
34 It contains the number of the chart which was used on board. It is a detail which is as
35 surprising as it is useless for a sailor who does not know that he will have to appear in front of
36 a court. If the Navy Commander knew and inserted this number, it was not necessary to remind
37 them of the number in a report that was going to be submitted only to them. Did Lieutenant Sow
38 know in advance that there was going to be an affirmation concerning his mission? In spite of
39 the answer given to the Tribunal to this question, which was put to him beforehand by Professor
40 Lagoni, we must, time and again, ask ourselves the same question. Whereas it contains this
41 surprising detail concerning the number of the chart, the document, on the other hand, does not
42 contain any details on the strength of the wind, wind direction or currents. That is information
43 which would have been useful for a sailor.

44
45 The document contains no information on the heading and the speed of the launch P328
46 from the port of Conakry until the point where it met with P38. It does not contain any
47 information on the heading and the speeds of the movement of the launch P35 from
48 8.30 onwards on 27 October 1997.

1
2 It also does not contain, furthermore, information on the course and headings and the
3 speed of the launch P328 from this moment onwards. As if by coincidence, it does not contain
4 anything other than information on points which Guinea has never been able to establish because
5 there has been no logbook since 1997. We are in the third procedure and the Tribunal is not in
6 favour of coincidences and it does not like mysteries, as I mentioned at the beginning of the oral
7 phase of this case. The Tribunal will probably bear this in mind when it considers the evidence
8 given by Lieutenant Sow.
9

10 The original chart was not produced in the two preceding phases. We had to wait for the
11 second part of the first oral phase for it to be suddenly provided, as a magician has doves coming
12 out of a hat but, of course, a chart that has the appearance of a dove is suspect, even if it is as
13 beautiful as a dove. Furthermore, Lieutenant Sow confirmed that he had drawn up the route of
14 *The Saiga* according to the logbook of the vessel but the logbook of the vessel was confiscated
15 as soon as the Customs agents boarded *The Saiga*. The parties have never disagreed on this
16 point. All other documents were confiscated, too.
17

18 The Customs have never proved or declared that at any point in time it had taken these
19 documents from the officers of the Navy, which it would not have been able to do without a
20 grave violation of the law. Therefore, at what point in time was Lieutenant Sow, who according
21 to his own evidence had never been on *The Saiga*, able to become familiar with a document that
22 had been locked away.
23

24 Everything leads us to believe that the logbook which was in the hands of the Customs
25 and not the Navy would not have been able to serve as a basis for the establishment of charts that
26 were produced by Lieutenant Sow and submitted to the jurisdiction of this Tribunal.
27 Furthermore, Lieutenant Sow affirmed that he had plotted the chart of *The Saiga* without any
28 modifications in comparison to the logbook of this vessel. He said, and I quote:
29

30 "We cannot change what *The Saiga* wrote in its logbook." (Verbatim no. 13, p.12, lines
31 5-6.
32

33 That of necessity implies that the charting of *The Saiga's* route was done without any
34 type of modification in comparison to what was written in the logbook by Captain Orlov.
35 Nevertheless, later, as far as the co-ordinates 9°57.7N and 15°51.6W, he ended by admitting that
36 he had not put down the route of *The Saiga* as it resulted actually and as it was laid down in the
37 logbook. He then uttered the following sentence.
38

39 "On this chart we put down what was of interest to us and what we extracted from the
40 logbook of *The Saiga*."
41

42 Everyone understood in reality, as we had supposed in the preceding paragraph, that
43 Lieutenant Sow established his chart without ever having personally read the logbook of
44 *The Saiga*, which had been confiscated by Customs. In any case, everyone has understood that,
45 unfortunately, even if Lieutenant Sow had drawn up his chart having consulted the logbook of
46 *The Saiga*, he had however only taken from the logbook what was of interest to him and only of
47 interest to him. Everyone has understood therefore that this chart had not been seriously plotted.
48

1 Another element of interest in this respect is the position at which *The Saiga* was
2 detected, supposedly by radar, at 3.50 on the morning of 27 October 1997. Lieutenant Sow
3 mentions in his report that from his position 0°900N and 15°00,W he had a view of *The Saiga*,
4 he detected it, at 445 cables on a heading which was approximately 40° to port of his own; that
5 is, at a heading of about 205°.
6

7 Let us not enter into a debate on semantics. Let us assume for the time being that the
8 Lieutenant really wanted to say that *The Saiga* was 44.5 nautical miles away. In any case.
9 According to the chart produced by the Lieutenant, this point is not charted on the route which
10 was being taken by *The Saiga*. As for the co-ordinates 09°57, 7N and 15°51.6W, where *The*
11 *Saiga* was supposed to be according to its logbook at 2000 on 27 October 1997, whereas it was
12 not there, Lieutenant Sow took the liberty himself of rectifying the course of the vessel, basing
13 this on a simple deduction or supposition. Why did he not, therefore, take the same liberty for
14 the point at which *The Saiga* was supposed to be according to its logbook at 3.30 that same
15 morning to correct the route of *The Saiga* a second time, and then he would not have had to base
16 himself on suppositions but on actual statements and he would have been able to do that himself.
17 Why did he plot a chart on which he does not mention the positions of *The Saiga* according to its
18 own logbook? Is it because he is not sure of his own attestations? In any case, in producing a
19 chart which plots the route of *The Saiga*, according to the affirmations of the Applicant State,
20 Guinea admits *ipso facto* that this chart is plotted correctly. As we say in internal law, admission
21 is not divisible.
22

23 Guinea has taken in the declarations of Captain Orlov what it finds interesting and has
24 rejected all the rest. Either it should take all declarations by Captain Orlov which do not result
25 from a simple mistake in writing, or reject them in their entirety.
26

27 If they themselves do not include the attestations of its Lieutenant for the benefit of the
28 logbook of *The Saiga*, they must also include all the indications that are given in this logbook;
29 that is, anything which is mentioned there that proves incontestably that at 3.50, the time at
30 which *The Saiga* was detected, the vessel was already in the exclusive economic zone of Sierra
31 Leone.
32

33 I must add that the *procès-verbal* no.13, page 12, lines 1 and 2, reports the following
34 exchange between Lieutenant Sow and myself on *The Saiga's* logbook:
35

36 "Q Was the logbook precise?
37 A The logbook was precise."
38

39 There was no reservation at all in this answer. There was no nuance which would enable
40 you to say that the Lieutenant had any doubt about the sincerity of what Captain Orlov had
41 written. There was no prosecution in Guinea concerning this of Captain Orlov. If *The Saiga's*
42 logbook was therefore precise and exact, was it precise on all points except a small material error
43 which the Lieutenant corrected himself, and that was where the vessel was located at 2000 on
44 27 October 1997?
45

46 There is no doubt that the pursuit of *The Saiga* could not have started before it crossed
47 the southernmost boundaries of the exclusive economic zone of Guinea, as laid down in its

1 logbook, but it is extremely remarkable that we arrive at exactly the same conclusion by two
2 different methods in fact.

3
4 The first method is the following. When Lieutenant Sow was requested to plot
5 course 205 in comparison to the position that he had 3.50 on 27 October, he did it. The line that
6 he plotted crosses the course of *The Saiga* at a point which is exactly on the southernmost
7 boundary of the exclusive economic zone of Guinea but below that. Of course he took time to
8 realise this. Finally we see in procès-verbal no.13, p.35, line 24 the following dialogue:

9
10 "MAITRE THIAM: The line which you have plotted there ends just after the southern
11 frontier; yes or no?

12 MR SOW: I think so."
13

14 Therefore, if the plotting of the route of *The Saiga* was precise, and this is no longer
15 being contested because the Lieutenant admitted it, and if that is the position at which he says he
16 was, then Lieutenant Sow really saw *The Saiga* on a heading 205, without any possible contest;
17 *The Saiga* had just at that moment crossed the southernmost border of the exclusive economic
18 zone of Guinea.

19
20 At this point of my submissions I would like to give you an argument which might be or
21 presented to you. I doubt it, but we never know. The Lieutenant said in this report that the
22 heading on which he determined the position of *The Saiga* was approximate. On the other hand,
23 the distance was established; it was certain. But, how can you be sure of a distance and not
24 a heading when it is the same instrument, the radar, that enables you to calculate both the one
25 and the other? What are you going to believe? Are you going to believe an officer of the Navy
26 who looks you in the eye and has you believe that he is in command of a warship without a
27 logbook and who does not give you the original of the so-called blue sheets that he fills in on
28 board? Are you going to believe an officer of the Navy who dares to look you in the eye and say
29 that he only took what he found of interest in the logbook of a vessel which he had arrested? Are
30 you going to believe an officer of the Navy who, after taking an oath to speak only the truth,
31 submits a marine chart to a Tribunal as prestigious as yours affirming and asserting that he had
32 established the plotted lines on the chart without changing the logbook of the arrested vessel and
33 who then withdraws this argument without any word of excuse? Are you going to believe
34 someone who, having recognised on a photograph those whom his men had injured and insulted
35 and where theft had taken place, where no help had been given, dares to look you in the eye and
36 say, "I consider that their injuries are only light because I was afraid that they could have been
37 more serious"? I know your answer: what is in your hearts and what is therefore in my heart are
38 no different.

39
40 For my part, I think that the world needs diplomacy, but I cannot believe that the superior
41 interests of true justice must give way systematically to those of diplomacy, because a world
42 without justice is called upon to live in chaos and brutality without limits. Edith Piaf said to her
43 lover, "The earth is not sufficiently round in order to stun me as much as you do". Although
44 there are requirements of diplomacy which are extremely burdensome, they are not burdensome
45 enough to stun us all. I am sure that you will find a good method and a good equilibrium to
46 respond to the questions that I have put to you.

1 The second of the other methods which enable us to arrive at the conclusion that
2 *The Saiga* had not been detected until after it had crossed the southern limits of the exclusive
3 economic zone of Guinea is as follows: Professor Lagoni prefers to see God in the details. Be
4 that as it may, let us look together at what the other side of the Bar wishes to pass off as a detail.
5 I am talking about distances and measurements taken by Lieutenant Sow to localise *The Saiga*
6 on 27 October 1997 at 03h50.

7
8 The lieutenant did this by talking about *encablures* in French. He said that the ship was
9 in a heading of 205 at a distance of 445 *encablures*. Today, obviously we have been told that
10 *encablures* in French does not necessarily represent a tenth of a nautical mile. But the cry came,
11 "How can you calculate distances in kilometres at sea when they are measured in nautical
12 miles?"

13
14 However, we have noticed that the chart produced by the Guinean party itself was
15 graduated not in nautical miles but in kilometres, and I would like to beg your indulgence from
16 now on to say that I cannot accept that those who have reproduced these charts in kilometres can
17 reproach me for having asked the Tribunal to check their calculations and readings using the
18 same unit of measure.

19
20 If we had considered the measurement taken in *encablures* as being a measurement taken
21 in tenths of nautical miles, there would have been obvious inconsistencies in the facts submitted
22 for consideration by the Tribunal, and these inconsistencies would indubitably be due to the
23 evidence which the Guinean party is attempting to introduce into the hearings. In fact, these
24 inconsistencies cannot stem from the logbook on which the claimant State is basing its
25 arguments. As I said before, this logbook has been recognised as exact by all the witnesses
26 produced by Guinea.

27
28 The inconsistencies stem from the fact that Guinea would like us to believe that the
29 vessel had changed course so as to be at 03h50 on 27 October 1997 further to the north than the
30 master intended. These inconsistencies stem from the fact that the ship would have been
31 detected at a place which has not been able to be found on the route defined by the Guineans
32 themselves.

33
34 There is nothing in the file that enables us to conclude that Master Orlov deliberately
35 changed his course, and there is nothing to lead us to think that he would have been a poor sailor
36 if he had changed course without knowing it. No affirmation based on these measurements of
37 speed and direction of the current at that time would have enabled us to conclude that the ship
38 had been taken off course by currents.

39
40 If we were to consider that the word *encablures* had been used by the Guinean lieutenant
41 to represent a tenth of a nautical mile, it would be perfectly incomprehensible that the
42 calculations could fix a geographic point where the vessel had never been, both in terms of its
43 logbook and according to the chart produced by Guinea itself.

44
45 It is absolutely remarkable that, on the other hand, if you retain the French definition of
46 the word *encablures* and the distance of 1994.88 metres which it implies, the statements of
47 Lieutenant Sow would be practically in conformity with the logbook of *The Saiga*.

1 Mr Howe very kindly submitted to the Tribunal and to me the proof that the *encablure*
2 does not represent a tenth of a nautical mile. If it represents 120 fathoms and if this measure
3 varies according to whether you are talking about a British fathom or a French fathom, it is
4 absolutely certain that it cannot represent a distance which is less than that indicated to the
5 Tribunal, that is 194.88 metres, because all the other measurements go beyond 200 metres,
6 including the measurements taken in Germany according to the encyclopaedia that I have been
7 able to consult there.

8
9 I have to add that, as was said when I was interrupted, the fathom is generally used to
10 measure depth. This is not the case for the *encablure*, although it represents 120 fathoms. In
11 fact, one says in current French that a vessel is at so many *encablures* from the shore, and this,
12 I think all of us agree, has nothing to do with the depth.

13
14 As far as I know, in the French speaking world only the Canadian Navy has been able to
15 establish two different lengths for the *encablure* according to whether it is a measure of depth or
16 a measure of distance over surface. However, the Guinean Navy does not, as far as I know, use
17 the methods of the Canadian Navy.

18
19 Of course, the word *encablure* can be translated literally into English by the word *cable*,
20 but it does not have the same meaning. Therefore, I would ask the interpreters from now on at
21 this Tribunal from now on, those who have helped us and to whom I pay my respects for their
22 work, to no longer translate the word *encablure* by the word *cable* in English when they are
23 translating my comments. I would prefer them to retain the German translation *kabel*, which is
24 defined as a measure of distance of 200 metres.

25
26 Having made these calculations, nothing beyond the scarcely viable declarations of
27 Lieutenant Sow enables us to conclude that he had the intention to refer to nautical miles when
28 he noted the measurements of distance in *encablures*. This leads us to believe, on the other
29 hand, if you use the language of Voltaire, that this officer wanted to refer very precisely to the
30 French definition of the word, although he was trained in the Soviet Union.

31
32 This is the only way to harmonise the entries in the logbook of *The Saiga* with the
33 claimed affirmations of the Guinean Navy on 27 October 1997 at 03h50. This enables me to
34 conclude that at that time the vessel *M/V SAIGA* was beyond the exclusive economic zone of
35 Guinea.

36
37 To conclude with the documents produced by the defence witnesses, I must mention that,
38 when doing so, I wondered why Professor Lagoni was taking so many precautions to indicate to
39 the witness Sow that they had never met and had never spoken to each other before the arrival of
40 the witness in Hamburg, and to have him say that the documents brought by the witness had
41 been drawn up in Conakry. I very sincerely must reflect that a person enjoying the reputation of
42 Professor Lagoni certainly did not need to waste time by trying to convince the Tribunal of the
43 fact that he could never have been an accomplice to the fabrication of documents.

44
45 Continuing in my reflections on this point, I would terminate by concluding that, like all
46 of us, the professor was particularly disturbed and concerned by the extraordinary appearance
47 during the proceedings of documents drawn up in Conakry. This last reflection concludes the
48 analysis of the evidence produced by the witnesses for the defendant.

1
2 I would now like to analyse the other aspects of the various testimony. First of all, let us
3 look at the testimony of Mr Bangoura, the expert who became the witness. The fact that I am
4 examining this testimony first of all is not because it is the most interesting aspect for the
5 Tribunal but because he was the first witness called by Guinea. It is edifying to maintain that in
6 the closing submissions of the first part of the hearings Professor Lagoni could not rely once on
7 such a testimony, and how could it be otherwise for a witness who has not seen the impact of the
8 bullets on *The Saiga*?

9
10 How could it have been otherwise for a witness who himself recognised implicitly that he
11 had been guilty of falsifying an official State document, recognising, as he mentioned in his
12 *procès-verbal*, that *The Saiga* had tried to capsize the two launches of the Navy, although he
13 finished by admitting that one of the launches had arrived at the place only after the other launch
14 had arrested *The Saiga* and the other launch had not been perturbed except by the movement of
15 waves? He said, "The waves caused by the ship tried to act upon the small vessel." How could
16 it be otherwise for a witness who refused to recognise holes shown to him on the photographs in
17 front of the Tribunal? How could it be otherwise for a witness who refused to recognise that he
18 kept the crew of *The Saiga* prisoner on board the vessel but who says, "Yes, we put guards on
19 board for the security of the members of the crew and the ship itself", as if it were possible,
20 gentlemen, to imagine that the crew was in need of being protected?

21
22 How is it possible to believe a witness who confirms that the small launch was not
23 armed, when this was denied by the person who was commanding the launch? How can we
24 believe a person who, having said that there was only one warning shot, concluded by saying "I
25 do not know how many men were firing. They fired two or three warning shots"? How can we
26 believe a person who affirms that goods must necessarily – and this is the term that he used – be
27 declared as soon as they enter into the maritime Customs radius? How can we believe a person
28 who refused to recognise something that even children know, that is that a tanker cannot travel
29 faster than a high speed launch of the National Navy?

30
31 It would be too fastidious to highlight all the inconsistencies and imprecisions of the
32 testimony of Mr Bangoura. The Tribunal therefore cannot rely any more than Professor Lagoni
33 on this testimony.

34
35 Turning now to the testimony of Mr Camara, I will be more extensive. Professor Lagoni
36 did not cite him only once, and I understand this. This is a witness who said, without batting an
37 eyelid, that he was not afraid of anyone. I think that we must not confound my comment that he
38 was not afraid of anyone. He said, "We felt threatened because we encircled the vessel twice.
39 We saw no-one. We issued a warning by firing in the air. We saw no-one". (Verbatim Report
40 No.11, p.15 lines 12-13, French version). Is it not strange, gentlemen, to claim that you feel
41 threatened although you have not seen anyone?

42
43 We should look again, without comment, at this strange reflection of the witness: "I do
44 not want to say here that when one fires in the air this can be precise." This is not a comment but
45 a question. On what precise target can one fire when one is firing in the air?

46
47 This witness confirmed that he signed the *procès-verbal* of the Customs without having
48 read it and that he could not say anything as to its contents. He admitted having signed a

1 *procès-verbal* which contained references to facts which he personally did not witness. This
2 says it all!

3
4 Let us moan together in silence for poor Africa and let us not add any further comments
5 to this. This testimony cannot be retained any more by the Tribunal than the other one.
6 However, let us come back. There was a question by Professor Lagoni relative to the free
7 passage of the vessels through the Customs radius. The witness responded, and I quote: "There
8 is no inspection", which contradicts the false affirmations of his superior, who claimed to have
9 exercised general obligation for declaration of any merchandise entering into the Customs radius
10 by sea.

11
12 Let us underline also that questioned on the point of knowing at what time *The Saiga* was
13 targeted, the witness replied: "I do not know what time". This is the *Procès-Verbal* no. 11, p.22
14 line 10. I refuse to believe that the person who from the beginning, because he was on the
15 smaller launch at the time when it was heading for the Isle of Sorro at the beginning of the
16 mission, and was assigned to lead a boarding crew, an arresting crew for the vessel, was not kept
17 informed of the time when the vessel was targeted.

18
19 Let us now return to the testimony of Lieutenant Sow. This testimony is interesting on
20 one point, because it confirms that in this case Guinea never intended to act in virtue of its laws
21 on the protection of the marine environment and fishing. In fact, the witness said that he had not
22 been commissioned by the Department of the Environment of Fisheries, but the Customs
23 Departments. I think there is no serious discussion on this question. The declaration of the
24 witness is also interesting, because on several occasions he confirmed that the launch of P35 did
25 indeed have ammunition for its machine guns. This is in the *Procès-Verbal* no. 12, p.11, lines
26 13 and 14. For the remainder, the declaration of this witness is not any more coherent than the
27 others.

28
29 Let us note first of all for the beginning of the mission that the witness confirmed that he
30 did not know that he had to search for *The Saiga* until he was at sea, after having left the port of
31 Conakry. In fact, in reply to a question put by Professor Lagoni regarding the moment when he
32 had mention of *The Saiga* for the first time, he said: "Personally I heard about *The Saiga* when
33 I was at sea. This is in the *Procès-Verbal* no. 12, p. 17, nos. 24 and 25 in the French version.

34
35 We have all understood that he had already left the port of Conakry at that time, because
36 Professor Lagoni himself made this remark: "You have just indicated that you heard about
37 *The Saiga* after left the port of Conakry". *Procès-Verbal* no. 12, p.18, lines 15-16 in the French
38 version.

39
40 However, further on the witness declared precisely the contrary to one of my questions.
41 This is the dialogue:

42
43 "MR SOW: I say that before leaving the port, I did not know that we were leaving to
44 look for *The Saiga*. It is when the launch was prepared we were about to cast off, and the
45 transmission officer came to say 'Here is the frequency; set this on the radio. You are
46 going to search for a vessel which is broadcasting on this frequency'.

47
48 MAITRE THIAM: And you were told its name?

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MR SOW: Of course".

This is in the *Procés-Verbal* no. 13, p.25, lines nos 27 and 28 and *Procés-Verbal* p.26 lines 1 -4 in the French version. Therefore, the Lieutenant has perjured himself.

Again, on the same point the witness declared, and I quote: "No-one talked to me about *The Saiga* before I left, and no member of the crew on the naval side knew that we were going out in search of a vessel called *The Saiga*. This is *Procés-Verbal* no. 13 p.15, lines 27-28 in the French version. But later he replied: "Yes." To the question of whether the person in command of the launch P35 knew he was going to search for *The Saiga*, and in reply, to my astonishment "Yes, if the second in command is assigned by his superior he may have more information. This is in the *Procés-Verbal* no. 13, p.18 lines 22-23. So the witness claimed at one time that no member of the naval crew on the mission had been informed of the name of the vessel they were looking for. Then he said that the person piloting the smaller of the launches was informed nonetheless.

The witness perjured himself again. He confirmed that the small launch had been sent at 13.14 towards the island of Alcatraz, where the Customs only affirmed in their PV that they had left in reconnaissance towards the Isle of Sorro. Because the mission was a joint mission between them and the Navy, the Navy was to help them by transporting them. I do not see how Lieutenant Sow could claim that he had sent the small launch to Alcatraz, whereas the Customs officers directing the mission wanted to stop at the island of Sorro.

Lieutenant Sow claims that they recalled the small launch for the following reasons: "We cannot leave it to go out in such deep waters on its own. If it is in sight of land, we think it is more secure than on the high sea." This is in *Procés-Verbal* no.13, p.20 lines 1-3.

But the island of Alcatraz is more than 48 nautical miles from the coast. Furthermore, the launch had just completed a route to and fro of more than 100 nautical miles, and was more than 21 nautical miles from the coast, and from the point of view of security, there is absolutely nothing which changes for the vessel according to whether it is 21 nautical miles from the coast or further.

Lieutenant Sow therefore did not tell the truth to the Tribunal on the true motives of the sortie to sea of vessel P35 at 13.14 hours on 27 October.

Lieutenant Sow recognises that he does not understand Greek, but he confirmed that he can understand a warning given in Greek, and when he thinks that a tanker has been warned, and that it is going to try to escape towards the south, it is precisely this moment that he chooses to head north. Lieutenant Sow claims that when he targeted *The Saiga* at 3.50 on 20 October he could not increase his speed to beyond 7.5 knots in view of the state of the sea. But we have produced weather reports at these hearings proving that the weather was calm at that time.

Lieutenant Sow claims that at the same time he called *The Saiga* on the radio, and so there would have been no further reason to camouflage himself. But talking about the reason why he changed the towing system to take the small vessel aft, he did not say that there was no further necessity to camouflage, and he justifies his decision completely differently. He says:

1 "From that point we changed our system of towing because we could not really increase the
2 speed of the vessel towing at the side." This is in the *Procès-Verbal* no. 12, p.29.

3
4 In your soul and conscience, Mr President, Members of the Tribunal, you cannot retain
5 a testimony, given indeed with such skill, but with a skill which has not enabled the witness to
6 avoid contradicting himself and perjuring himself. You will consider that *The Saiga* was not
7 pursued until after it had left the exclusive economic zone of Guinea. You will consider that it
8 was the subject of an attack which was carried out with an unjustifiable brutality, when all the
9 members of the crew were hidden, and that they represented absolutely no threat to the Guinean
10 agents.

11
12 I am going to conclude by invoking a conversation which I had in Guinea at a higher
13 level, because a witness thought that he could refer to this contact. Indeed, I was received by a
14 very high person, and I would like to emphasise that he received me with extreme courtesy, and
15 I had the opportunity to thank him for his solicitude, and he listened to me attentively. When
16 I said that *The Saiga* had been the victim of brutality, he replied: "What do you want me to tell
17 you, Maître, because we ourselves have been savagely bombarded?"

18
19 It is high time that in Africa our states and our peoples cease to be the hostages of their
20 officials. This is why we are waiting and expecting from you, the Tribunal, that when you look
21 at this closely, you will render a greater service to Guinea than you now believe.

22
23 I would like to conclude by thanking you Mr President and Members of the Tribunal.
24 The hearings have been of very high quality, and it has been a real pleasure for me to make your
25 acquaintance, since my father has often spoken to me of most of you in terms which I think
26 would offend your sense of modesty. I pray to Almighty God to render you the best decision,
27 and I pray to Him that He gives us all the possibility of living for a long time in a world of
28 justice and law.

29
30 I would like to pay my respects to the Guinean delegation, which is going to return to its
31 country, a country which is also part of myself, because three of my children have half of their
32 ancestors there. May they return to their native country with a light heart, knowing that
33 everything that has been said here was said only to advance the cause of justice and law.

34
35 Having paid my respects yesterday to Professor Lagoni, I would also like to pay my
36 respects to Mr Von Breven, who has given his best for a file where certainly he did not have the
37 easiest of tasks. His country is hospitable and friendly. I will return to this country with great
38 pleasure.

39
40 This case has given me the opportunity also of meeting two British men, Mr Howe and
41 Dr Plender. What a pleasure it was for me to work with them and to benefit from their
42 experience. Dr Plender, Excellency, I can never thank you enough for having given me the
43 opportunity to listen to your submissions which are just as brilliant and powerful before this
44 Tribunal

45
46 Doctor, I hand over to you, thank you.

47
48 **THE PRESIDENT:** Thank you very much, Maître Thiam. Dr Plender, please.

1
2 **DR PLENDER:** Mr President, Members of the Tribunal. When he opened the case for Saint
3 Vincent and the Grenadines, the Attorney General explained why we seek an award of damages.
4 We do so to secure reparation for the losses that Saint Vincent and the Grenadines have suffered.
5 Those losses are both tangible and intangible. Some were suffered directly by Saint Vincent and
6 the Grenadines and the Grenadines itself. Some were suffered indirectly in the person of those
7 individuals and corporations for whose protection the Applicant State is responsible.
8

9 It now falls to me, in my closing speech, to deal with the quantum of damage and with
10 costs and to respond to some points made on those subjects by the Agent of Guinea. In the
11 course of his address on 16 March, Mr von Brevern raised a common objection to several
12 distinct claims for damages; this was the assertion that Guinea had acted lawfully. For instance,
13 at page 23, line 2 he argued that there should be no damages for violation of the rules of hot
14 pursuit because there was no such violation. At page 23 line 6 he argued that there should be no
15 damages for violation of Vincentian jurisdiction over *The Saiga* because the Guinean arrest was
16 lawful, and so forth.
17

18 Let me reassure him. Saint Vincent and the Grenadines does not seek damages on the
19 premise that Guinean authorities acted lawfully; she claims damages on the premise that they
20 acted unlawfully. If, therefore, the Tribunal should find that there was no violation of
21 international law, the issue of damages would not arise. It is only if the Tribunal finds a
22 violation that it will need to consider the question. For this reason, the plea that the Guinean acts
23 were lawful has no place in the consideration of damages. We address the question of damages
24 on the premise that Guinea is found to have violated the rights of Saint Vincent and the
25 Grenadines.
26

27 At page 23, line 23, the Agent of Guinea advanced a related argument, that the award of
28 damages should be mitigated or reduced on the premise that the Captain of *The Saiga* was guilty
29 of contributory negligence. His negligence was said to be his act of entering the Guinean
30 exclusive economic zone knowing that he would run a risk of being pursued and arrested there.
31 I do not challenge the proposition that where there is contributory negligence damages may be
32 reduced. I must, and do most vigorously, contest the proposition that a person who suffers
33 interference with a right protected by international law is to suffer a reduction in damages if, at
34 the time when he sought to exercise that right, he knew or had reason to believe that the agents
35 of a foreign state might interfere with his rights unlawfully. Such a proposition would be a
36 recipe for oppression. A State which had repeatedly violated its international obligations would
37 be able to rely upon its own wrongful acts so as to reduce its liability to future victims. That
38 could not be right.
39

40 The Agent of Guinea made another preliminary point. He observed that we have not yet
41 responded to the argument advanced in the Rejoinder on the basis of article 106 of the United
42 Nations Convention. I confess, we had taken the view that consideration of article 106 did not
43 illuminate the present case, but since the Respondent State persevered with the argument, I shall
44 address it.
45

46 Article 106 deals with the liability of a State for the wrongful seizure of a vessel on
47 suspicion of piracy. Since *The Saiga* was not seized on suspicion of piracy, the article has no
48 direct relevance. The Agent for Guinea points out, however, that article 106 speaks of the duty

1 to compensate the flag State whereas article 111, paragraph 8, speaks of the duty to compensate
2 the ship in the event of the wrongful exercise of hot pursuit. This, as the philosophers say, is
3 "true but not interesting". Since the ship can be represented only by the flag State, no
4 significance is attached to the fact that article 111, paragraph 8, says that "it", meaning the ship,
5 "shall be compensated for any loss or damage." The result is the same: the flag State claims the
6 compensation.

7
8 Guinea contends, of course, that the only damages payable under article 111 paragraph 8
9 are damages "sustained by the unjustified exercise of hot pursuit". (Rejoinder, paragraph 129.)
10 On that premise, there would be no basis in the Convention for awarding damages for the
11 subsequent Guinean actions including the seizure of the cargo, the detention of the Master and
12 crew and the attack on the vessel dated 30 January 1998. To test that argument one has to revert
13 to the words of article 111, paragraph 8. This envisages compensation for "any loss or damage
14 that may have been thereby sustained". The word "thereby" refers to the stopping or arresting of
15 a vessel outside the territorial sea in circumstances which do not justify the exercise of the right
16 of hot pursuit."

17
18 I accept that it is, in each case, a question of fact and degree to determine whether a
19 particular loss has been occasioned by the unlawful stopping of a vessel. In the circumstances of
20 the present case it will be absurd to maintain that the removal of the cargo was not effected by
21 the stopping of *The Saiga*. The Guinean Customs officers could not take 5000 tonnes of gasoil
22 aboard their patrol boats. In order to seize the oil, they had to stop *The Saiga* and take her into
23 Conakry. The owners suffered the loss of the cargo by the stopping of the vessel. Similar
24 arguments apply *mutatis mutandis* to the detention of the crew and the attack on the vessel dated
25 30 January 1998. Had the vessel not been stopped, these losses would not have been suffered.
26 The losses were the consequence of the arrest.

27
28 The Agent for Guinea next stated that it was to be inferred that Saint Vincent and the
29 Grenadines had abandoned the claim to be compensated for those losses that arose from the
30 devotion of governmental time and resources to the case. We know of no reason for drawing
31 such an inference unless it be that this aspect of the case was not specifically reiterated in the
32 Attorney General's opening speech. For the avoidance of doubt, therefore, I must state that Saint
33 Vincent and the Grenadines has not abandoned any aspect of the claim. If we fail to repeat
34 orally what we have already said in writing, we must not be taken to have resiled from the
35 written submission.

36
37 A similar comment was made on behalf of the Respondent State when the Agent for
38 Guinea considered the evidence of Allan Stewart. Referring to my observation that Mr Stewart's
39 report had not been challenged for its accuracy, even to the extent of one cent, the Agent for
40 Guinea informed the Tribunal that he took this as an acknowledgement that there were no other
41 claims against the Republic of Guinea. As the Tribunal will see, the report drawn up by Allan
42 Stewart is designed to quantify and prove those claims that are capable of quantification. It
43 provides precise evidence of the nature and extent of the damage done to the vessel and the cost
44 of effecting repairs. It is not, of course, a substitute for the exercise of this Tribunal's judgment
45 when assessing claims which cannot be quantified precisely, such as the sum to be awarded by
46 way of compensation for injured members of the crew.

1 It is the Guinean case that the claim for damages on behalf of the injured crew is
2 excessive. The Agent for Guinea did not appear to advance that argument on the premise that
3 we had applied an incorrect scale when assessing the sum to be awarded in respect of an
4 identified injury, but rather on the premise that the extent of the injuries was unproven. Thus, in
5 the case of Mr Niasse, he expressed scepticism about the provenance of the x-rays presented to
6 the Tribunal suggesting that these might not record injuries actually suffered by that witness.
7 We invite the Tribunal to conclude that the x-rays were certainly those of Mr Niasse's injuries, as
8 he confirmed and as appears from the medical reports. We further invite the Tribunal to
9 conclude that Mr Niasse suffered severe physical and psychological injuries which demand
10 substantial reparation. In reaching its conclusion on that point, the Tribunal should bear in mind
11 Mr Niasse's own account; that of the Captain and the second mate; two medical reports; the
12 photograph taken in Dakar; the x-rays and the visible evidence of his condition when he
13 appeared as a witness.
14

15 In the case of Mr Kluyev, the Tribunal should make an assessment on the basis of the
16 witness's own evidence, that of the Captain and the photograph. In the light of that evidence the
17 Tribunal is invited to apply a scale similar to that established for the United Nations
18 Compensation Commission when assessing claims arising from the invasion of Kuwait. The
19 same scale provides a convenient measure for the assessment of the sums to be awarded in
20 respect of the detention of the Captain and the detention of members of the crew, *de jure* or
21 *de facto*.
22

23 The assessment of damages to be paid in respect of the vessel should not, in my
24 submission, present the Tribunal with difficulties. There is now in evidence an accurate record
25 of the sums paid by way of repair and the revenue lost when the vessel was off hire. The record
26 has not been challenged.
27

28 There has been a challenge to the claim that the damage quantified by Allan Stewart was
29 the product of Guinean action. The Tribunal should dismiss it without difficulty. The
30 photographic evidence alone is compelling and there has not been so much as speculation from
31 the Guinean side as to how the obvious signs of gunfire could have come to be on the vessel had
32 the damage not been inflicted by armed Guinean personnel.
33

34 More difficult issues are raised by the claim for moral damages, on which the parties
35 continue to be divided. The Agent for Guinea observed correctly that in his opening speech the
36 Attorney General for Saint Vincent and the Grenadines drew no distinction between any moral
37 damages that might be awarded to compensate the Claimant State for damage that it had suffered
38 directly and any moral damages that might be awarded to compensate it for losses suffered
39 indirectly in consequence of a physical injury to an individual. He drew no such distinction
40 because there is no basis for it in the case law.
41

42 Where awards of moral damages have been made, they have sometimes covered both the
43 injury suffered by the State directly and the injury suffered indirectly in the person of a private
44 individual. The second *Rainbow Warrior* award is an example of moral damages calculated to
45 cover both the violation of New Zealand's sovereignty and the injuries suffered by those aboard
46 the vessel. The relevant passage from the award is cited in our reply at paragraph 197.
47

1 The International Law Commission, furthermore, has expressed the view that moral
2 damages may be awarded to compensate the State for gross infringement of its rights irrespective
3 of losses to private individuals. The relevant passage from the report is identified in our
4 Memorial at page 78.

5
6 When responding to the speech by the Attorney General and Minister of Justice, the
7 Agent for Guinea complained that the former had failed to answer the Guinean argument that
8 there is a continuing doctrinal dispute about the availability of moral damages. He complained
9 further that the Attorney General had not dealt with the Respondent's State's authorities other
10 than by drawing attention to their antiquity. He then cited a relatively old authority himself,
11 Schwarzenberger's *General Principles of International Law*.

12
13 I trust that if the Tribunal reads the Attorney General's speech, it will receive a different
14 impression. He did indeed acknowledge the point that some writers have doubted the
15 availability of moral damages, exactly as was pleaded by the Republic of Guinea. His response
16 was that the great majority of modern writers now accept that such damages are available.
17 Reference to the relevant literature set out more extensively than in the Attorney General's
18 speech will be found at paragraphs 192-198 of our Reply. On this point public international law
19 has developed rapidly in recent years, particularly under the influence of three modern decisions:
20 the two *Rainbow Warrior* awards and *Letelier and Moffatt*.

21
22 As the Attorney General showed, however, the view held by modern writers has
23 a respectable pedigree, which may be traced at least to *The I'm Alone*. That is why the Attorney
24 General considered it appropriate to cite an older publication by Schwarzenberger, as well as
25 a modern one by Brownlie, the latest edition of his *Principles of International Law* published in
26 1998.

27
28 The important question for this Tribunal is not whether moral damages are available as
29 a matter of principle, but whether this is a suitable case for their awarded and, if so, how the
30 award should be quantified. On that question, the Agent for Guinea draws attention to the sum
31 attributed in the second *Rainbow Warrior* case and points to some aggravating features which
32 were present in that case but absent in this. Against that, I have to point to the features of the
33 Guinean conduct in the present case which, in my submission, merit not only an award of moral
34 damages but the assessment of a greater sum than in the second *Rainbow Warrior* case.

35
36 On the evidence that the Tribunal has heard and in the light of the sub missions made on
37 that evidence by Maître Thiam this morning, I invite the Tribunal to draw the following
38 conclusions as to the facts. The *M/V SAIGA* was an unarmed merchant vessel. It carried
39 a valuable cargo. It was engaged in lawful activity well beyond Guinea's territorial waters. By
40 the use of radar and by interception of her radio messages, Guinean authorities discovered that
41 she was about to approach a point within range of Guinean patrol boats. An armed patrol boat
42 was despatched to seize her. When the *M/V SAIGA* announced a change of direction by radio,
43 the Guinean patrol boat changed course. The *M/V SAIGA* announced by radio a rendezvous
44 point well beyond Guinea's territorial waters, and even beyond her exclusive economic zone.
45 She sailed to that point, stopped and drifted for some hours. She was then attacked by an armed
46 Guinean boat. The Guinean agents on that boat had seen men on the deck of *The Saiga*. They
47 were very well aware of the danger in which they were putting them. They gave no warning.
48 They raked *The Saiga* with machine guns, certainly with light machine guns and probably with

1 heavy machineguns, too. They boarded the vessel and injured, handcuffed, threatened and
2 insulted members of the crew. They pillaged the ship, stealing money and bonded goods. They
3 took the vessel to Conakry where the cargo was seized and sold. Two members of the crew, who
4 had been seriously wounded in the attack, were not given adequate medical attention. One was
5 refused attention on the grounds that he was a foreigner, despite the obvious severity of his
6 wounds. The passports of the remaining crew members were seized, although returned to some
7 of them later on. Armed guards were put on the vessel. Conditions for the crew were harsh.
8 Two of them were subsequently beaten by Guinean armed personnel.
9

10 In order to justify their actions, and to support a monetary claim, the Guinean authorities
11 drew up and presented a *procès-verbal*; it was seriously flawed. The principal witness, on
12 whom the Guinean authorities relied for the account of the central facts in the *procès-verbal*,
13 confirmed to this Tribunal that he signed it without reading it. The head of the Customs mission,
14 who also signed the *procès-verbal*, was eventually driven to acknowledge in this Tribunal the
15 falseness of important allegations in the document. It was on the basis of that document that
16 a Guinean court authorised the seizure of the cargo, the imposition of a massive fine and a
17 penalty on the Captain.
18

19 This Tribunal was seized of the case. It ordered the prompt release of the vessel. The
20 vessel was not promptly released. It was attacked again in the port of Conakry. The Agent of
21 the flag State was denied access to the vessel and crew. The representatives of the P&I Club
22 also failed to gain access. The Ambassador of the State of nationality of the Captain and some of
23 the crew gained access to them only with difficulty and after a delay. Eventually, with
24 diplomatic effort and the intervention of this Court, the vessel was released and was able to limp
25 to Dakar for repairs.
26

27 This was not an isolated incident. There has been a course of such attacks previously and
28 subsequently. These are not undertaken to defend national security or to protect life. They are
29 undertaken for economic reasons. In the present case, the seizure yielded revenue in excess of
30 \$3 million. The Republic of Guinea does not apologise. She does not undertake to refrain from
31 similar attacks in the future. On the contrary, she proclaims before this Tribunal her
32 determination to persist in such conduct.
33

34 The Agent of Guinea said of the second *Rainbow Warrior* case that it provoked outrage.
35 The Tribunal would be misled if it imagined that that is not also true of this case. From Saint
36 Vincent to Ukraine, from Scotland to Senegal, these events are regarded with the gravest
37 concern. The feature that is most disturbing is the current attitude of the Guinean Government.
38

39 The most charitable construction that can be placed upon Guinea's conduct is that the
40 episode began with a genuine misunderstanding. It would be possible to approach the case on
41 the premise that initially M. Bangoura, M. Camara and Lieutenant Sow were labouring under the
42 misapprehension that *The Saiga* was breaking some law. If that were so, the time must certainly
43 have come when they must have appreciated that it was not breaking a law. At the latest, that
44 point must have been reached at the hearing of the application for Provisional Measures.
45

46 If at that stage an apology had been offered with an offer of amends, it might have been
47 right to make only a modest award of moral damages, as was done in the second
48 *Rainbow Warrior* case. There has been no apology. There has been no offer of amends.

1
2 Guinea's conduct, I submit, has added insult to injury. Indeed, in the case of Mr Niasse,
3 that is literally true. For this reason, substantial moral damages are warranted.
4

5 All that remains is that I should deal with the question of costs. The agreement of
6 20 February envisages that the Tribunal will adjudicate on that question. We request the
7 Tribunal to do so. It is our submission that the Tribunal should make an award of costs in favour
8 of the successful party and that it should quantify the costs by stating a precise sum in a
9 denominated currency.
10

11 In this context, I must, however, draw attention to a typographical error, which, alas,
12 appears in both the Memorial and the Reply. Application is made there for the costs of the
13 "arbitral proceedings". This should of course be a reference to the costs of the proceedings
14 before this Tribunal. I apologise for the error and for the failure to detect it at an early stage, but
15 I trust that the meaning has at all stages been plain.
16

17 When assessing costs, the Tribunal will, no doubt, take account of the extent to which
18 each party has succeeded and the extent to which it has failed. It will not, however, apportion
19 costs on that basis in a simple mathematical way. It will take account of the fact that the
20 principal element of costs is likely to be incurred when a party decides to institute proceedings
21 so that, if that party is successful in part, it should receive a substantial proportion of the total
22 costs incurred.
23

24 Subject to the President's direction, we understand that the Tribunal expects the two sides
25 to present a written account of the costs arising from this litigation, which are to be the subject of
26 this claim. That will be done within such time and in such form as the President may direct in
27 due course.
28

29 Mr President, Members of the Tribunal, the first case of a new international court could
30 not fail to be a significant event. The acerbity of the present dispute invests this case with
31 special significance.
32

33 The case also presents special difficulties. These lie not in the law, nor in the assessment
34 of evidence, but in the sensitivity that the litigation has provoked on both sides of the Atlantic
35 Ocean. We know that your judgment will be judicious and measured. At the same time, we
36 expect that the Tribunal will demonstrate its authority and will make an award in proportion to
37 the gravity of the breaches of which we complain.
38

39 As I began with Horace, so may I end with him? *Grammatici certant et adhuc subjudice*
40 *lis est*. The scholars have had their disputation; it is now for the Court to give its judgment.
41 Saint Vincent and the Grenadines is confident that it may rely upon the wisdom and, most of all,
42 the authority of this Tribunal.
43

44 I now call upon His Excellency, the Honourable Carlyle Dougan, one of Her Majesty's
45 Counsel, High Commissioner for Saint Vincent and the Grenadines to The Court of St. James's
46 and Agent to this Tribunal, to present the Applicant's formal submission.
47

48 **THE PRESIDENT:** Thank you.

1
2 **MR DOUGAN:** Mr President, Members of the Tribunal, my Lords, for the reasons given in
3 writing and in oral argument, or any of them, or for any other reason that the International
4 Tribunal deems to be relevant, the Government of Saint Vincent and the Grenadines asks the
5 International Tribunal to adjudge and declare that:
6

- 7 (1) the actions of Guinea (*inter alia* the attack on the *M/V SAIGA* and her crew in the
8 exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and
9 the removal of cargo of gasoil, its filing of charges against Saint Vincent and the
10 Grenadines and its subsequent issuing of a judgment against them) violate the
11 right of Saint Vincent and the Grenadines and vessels flying its flag to enjoy
12 freedom of navigation and/or other internationally lawful uses of the sea related to
13 the freedom of navigation, as set forth in articles 56(2) and related provisions of
14 the Convention;
15
16 (2) subject to the limited exceptions as to enforcement provided by article 33(1) of
17 the Convention, the customs and contraband laws of Guinea, namely *inter alia*
18 articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, articles 316 and 317 of
19 the Code des Douanes, and articles 361 and 363 of the Penal Code, may in no
20 circumstances be applied or enforced in the exclusive economic zone of Guinea;
21
22 (3) Guinea did not lawfully exercise the right of hot pursuit under article 111 of the
23 Convention in respect of the *M/V SAIGA* and is liable to compensate the
24 *M/V SAIGA* pursuant to article 111(8) of the Convention;
25
26 (4) Guinea has violated articles 292(4) and 296 of the Convention in not releasing the
27 *M/V SAIGA* and her crew immediately upon the posting of the guarantee of
28 US\$400,000 on 10 December 1997 or the subsequent clarification from Credit
29 Suisse on 11 December;
30
31 (5) the citing of Saint Vincent and the Grenadines as the Flag State of the *M/V SAIGA*
32 in the criminal courts and proceedings instituted by Guinea violates the rights of
33 Saint Vincent and the Grenadines under the 1982 Convention;
34
35 (6) Guinea immediately return the equivalent in United States Dollars of the
36 discharged gasoil;
37
38 (7) Guinea is liable for damages as a result of the aforesaid violations with interest
39 thereon; and
40
41 (8) Guinea shall pay the costs of the proceedings before this Tribunal and the costs
42 incurred by Saint Vincent and the Grenadines.
43

44 My Lords, we shall so for ever pray. Thank you.
45

46 **THE PRESIDENT:** Thank you very much, Your Excellency. Dr Plender, I take it that that
47 brings you to the conclusion of all your submissions?
48

1 **DR PLENDER:** Yes, Mr President, that concludes the submissions on behalf of the Applicant
2 State.

3

4 **THE PRESIDENT:** Thank you. It has been agreed by the Tribunal, in consultation with the
5 parties, that there will be no sitting this afternoon. The sitting will be resumed tomorrow
6 morning at 10 o'clock, when Guinea will have the opportunity to make its final submissions. We
7 are operating on a pragmatic schedule. If it becomes possible for Guinea to complete its
8 submissions in three hours, the Tribunal will sit until 1 o'clock. If it becomes clear that this will
9 not be possible, the sitting will close at 12 o'clock and resume at 2 o'clock until 4 o'clock. This
10 has been agreed in consultation with the parties. The sitting will now be closed and we will
11 resume tomorrow morning at 10 o'clock on the basis that I have indicated. The sitting is
12 suspended.

13

14 **(Adjourned at 1137 hrs until 1000 hrs on Saturday, 20 March 1999)**

15