

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



1999

Public hearing

held on Monday, 8 March 1999, at 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)*

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**Verbatim Record**

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

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*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 Zogbélérou 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 CLERK OF THE TRIBUNAL:** The International Tribunal for the Law of the  
2 Sea is now in session.

3  
4 **THE REGISTRAR:** The Tribunal will today hear argument on the merits of the  
5 *M/V SAIGA* (No. 2) case (*Saint Vincent and the Grenadines versus Guinea*). The  
6 case has been entered on the Tribunal's List of cases as case number two.

7  
8 The Tribunal has learnt with regret the passing away of Mr Bozo Dabinovic  
9 who was the agent of Saint Vincent and the Grenadines. In a communication the  
10 Prime Minister of Saint Vincent and the Grenadines has informed the Tribunal of the  
11 appointment of His Excellency Mr Carlyle D. Dougan, High Commissioner to London  
12 for Saint Vincent and the Grenadines, as agent for Saint Vincent and the Grenadines in  
13 the *M/V SAIGA* (No. 2) case.

14  
15 **THE PRESIDENT:** This public sitting is being held, pursuant to article 26 of the  
16 Statute of the Tribunal, for the hearing in the *M/V SAIGA* (No. 2) case.

17  
18 On 20 February 1998 the Government of Guinea and the Government of Saint  
19 Vincent and the Grenadines, through an exchange of letters, agreed to submit to the  
20 International Tribunal for the Law of the Sea the dispute between them concerning  
21 *M/V SAIGA*. The two governments agreed that a submission of the dispute to the  
22 Tribunal shall be on the following conditions, and I quote:

23  
24 "(One) The dispute shall be deemed to have been submitted to the  
25 International Tribunal for the Law of the Sea on 22 December 1997.

26  
27 "(Two) The written and oral proceedings before the International Tribunal for  
28 the Law of the Sea shall comprise a single phase dealing with all aspects of the  
29 merits (including damages and costs) and the objection as to jurisdiction raised  
30 in the Government of Guinea's Statement of Response dated 30 January 1998;

31  
32 "(Three) The written and oral proceedings shall follow the timetable set out in  
33 the Annex hereto;

34  
35 "(Four) The International Tribunal for the Law of the Sea shall address all  
36 claims for damages and costs referred to in paragraph 24 of the Notification of  
37 22 December 1997 and shall be entitled to make an award on the legal and  
38 other costs incurred by the successful party in the proceedings before the  
39 International Tribunal."

40  
41 By Order of 20 February 1998, the Tribunal accepted the submission of the  
42 dispute, pursuant to the Agreement of the two governments and on the terms specified  
43 in the Agreement.

44  
45 By Order of 23 February 1998, the Tribunal fixed the time limits for the  
46 pleadings in the case.

47  
48 Saint Vincent and the Grenadines filed its Memorial on 19 June 1998.

1  
2 On 8 September 1998, Guinea requested an extension of the time limit for the  
3 filing of the Counter-Memorial, which was originally fixed for 18 September 1998.  
4 The President of the Tribunal, on 16 September 1998, after consulting with the parties,  
5 issued an Order extending the time limit for the filling of the Counter-Memorial by four  
6 weeks to 16 October 1998. The Counter-Memorial of Guinea was duly filed on  
7 16 October 1998.

8  
9 By an Order dated 6 October 1998, the Tribunal fixed new time-limits for the  
10 filing of the second round of pleadings. Pursuant to the Order, the Reply of Saint  
11 Vincent and the Grenadines was filed on 20 November 1998 and the Rejoinder of  
12 Guinea was filed on 28 December 1998.

13  
14 By Order of 18 January 1999, the date for the opening of the oral proceedings  
15 was fixed of 8 March 1999.

16  
17 In conformity with article 67, paragraph 2, of the Rules of the Tribunal, copies  
18 of pleadings filed in the case and documents annexed thereto are being made accessible  
19 to the public as of today. Copies of the Notification by Saint Vincent and the  
20 Grenadines instituting the proceedings were made accessible to the public on 23  
21 February 1998, the date of opening of the oral proceedings on the request for the  
22 prescription of provisional measures in the case submitted by Saint Vincent and the  
23 Grenadines on 13 January 1998.

24  
25 I note the presence in court of The Honourable Carl Joseph, the Attorney  
26 General and Minister of Justice of Saint Vincent and the Grenadines. I also note the  
27 presence of His Excellency Mr Maurice Zogbélemou Togba, Minister of Justice of the  
28 Republic of Guinea and of Mr Harmut von Brevern, the Agent for Guinea.

29  
30 I now call upon the Honourable Carl Joseph to note and introduce the  
31 representation of Saint Vincent and the Grenadines and to indicate the schedule of  
32 submissions to be made on behalf of Saint Vincent and the Grenadines.

33  
34 **THE HON. CARL JOSEPH:** May it please you, Mr President, members of the  
35 Tribunal. I shall open.

36  
37 I shall deal with the reasons for seizing the Tribunal of this case. In particular,  
38 I shall deal with the claim for damages and, in accordance with the Tribunal's request,  
39 I will elaborate the claim for moral damages.

40  
41 Next Mr Howe will speak. He will explain why, in our submission, it is not  
42 open to the Republic of Guinea to challenge the jurisdiction of the Tribunal or the  
43 admissibility of the claim.

44  
45 Then Dr Plender will speak. He will explain why, in our submission, the  
46 Guinean objections to jurisdiction and admissibility are without substance. He will  
47 submit that if the Court were to entertain the objections at all, it should dismiss them.  
48 Dr Plender will then call our witnesses in the following order: first, Captain Orlov,  
49 Captain of *The Saiga*; second, Mr Laszlo Merenyi, of the ship's managing agent;

1 third, Mr Niasse, a member of the crew of *The Saiga*; fourth, Mr Alan Stewart, of the  
2 ship's managing agents, who will give evidence about the damage sustained by the  
3 vessel and the extent of the financial loss.

4  
5 There will then be speeches from Maître Thiam on questions of Guinean law  
6 and Dr Plender on issues of public international law.

7  
8 I shall then formally close the case for Saint Vincent and the Grenadines.

9  
10 **THE PRESIDENT:** I thank the Hon. Minister. I now call upon the Agent for  
11 Guinea, Mr Hartmut von Brevern, to note and introduce the representation of Guinea  
12 and to indicate the schedule of submissions to be made on behalf of Guinea.

13  
14 **MR VON BREVERN:** Mr President, Hon. Judges, the delegation of the Republic of  
15 Guinea will be composed, first of all, of the Minister of Justice, Mr Maurice  
16 Zogbéléroum Togba, who has not yet arrived. His flight is scheduled for tomorrow.  
17 Next is the Chargé d'Affaires of the Republic of Guinea in Bonn,  
18 Mr Namankoumba Kouyate, who is present. Next member of the delegation is  
19 Professor Rainer Lagoni, Professor at Hamburg University and Director of the  
20 Institute for Maritime Law and Law of the Sea and finally myself as Agent.

21  
22 It may be, Mr President, that we will have more members of the delegation.  
23 The problem is that the Minister of Justice and his colleagues have not yet arrived.  
24 I will be informed as soon as they arrive and as to who will share the membership of  
25 the delegation and I will inform the Tribunal as soon as possible.

26  
27 With respect to the schedule of submissions to be made on behalf of the  
28 Republic of Guinea, I will start with an outline of facts, then continue with questions of  
29 admissibility: first, admissibility of objections under the 1998 agreement, the  
30 agreement between the two parties that transferred the dispute to this Tribunal.

31  
32 Then I will address the question of the non-application of article 97  
33 (paragraph 1) of the Rules of the Tribunal. The following issue will be the registration  
34 of *M/V SAIGA*, then Professor Lagoni will deal with the question of the genuine link,  
35 followed by the question of nationality of the claims, and finally the question of  
36 exhaustion of local remedies.

37  
38 Then we will continue with the legal arguments. First, Professor Lagoni will  
39 address the exercise of jurisdiction over bunkering activities of the *M/V SAIGA* within  
40 the contiguous zone and the exclusive economic zone of Guinea, Professor Lagoni will  
41 then deal with the laws of Guinea relating to customs, contraband and bunkering in the  
42 Guinean exclusive economic zone, and with the pursuit and arrest of the *M/V SAIGA*.  
43 We will then hear Professor Lagoni or myself on the question of the extent of force  
44 used by the Guinean patrol boats when arresting the *M/V SAIGA*. Thereafter I will  
45 deal with of the *cédule de citation* and then I will speak about the non-violation of  
46 articles 292 (paragraph 4) and 296 of the Convention in connection with the question  
47 of the bank guarantee and release of the *M/V SAIGA*. Finally, I will address the subject  
48 of damages, followed by our submissions.

1 I am not in a position now to tell you exactly who we will call as witness or  
2 expert. I am sorry to say that I have to wait until the arrival of the delegation of  
3 Guinea. I will then be informed and will inform you as soon as I am in a position to do  
4 so.

5  
6 **THE PRESIDENT:** I thank the Agent of Guinea.

7  
8 The Tribunal will hear the submissions of the Applicant, Saint Vincent and the  
9 Grenadines, at this sitting. This sitting will be interrupted at 12 o'clock and resume at  
10 1400 hours.

11  
12 The submissions of Saint Vincent and the Grenadines will continue on Tuesday  
13 and Wednesday of this week, that is tomorrow and the day after. The Guinea  
14 submissions will be heard from Thursday to Saturday. Both parties will have the  
15 opportunity to reply to the submissions in a second round of presentations that will  
16 take place next week.

17  
18 In accordance with article 80 of the Rules of the Tribunal, any witnesses to be  
19 called by the parties shall remain out of court until they are requested to testify.

20  
21 I now invite The Hon. Carl Joseph to commence the submissions on behalf of  
22 Saint Vincent and the Grenadines.

23  
24 **MR JOSEPH:** Mr President, Members of the Tribunal, as Attorney General and  
25 Minister for Justice of Saint Vincent and the Grenadines, I have the honour of leading  
26 the Vincentian delegation. I appear with Dr Richard Plender, Queen's Counsel, senior  
27 member of Robinson College at Cambridge University, England; with Maître Thiam,  
28 Bâtonnier of the Senegalese Bar, and with Mr Nicholas Howe of Howe & Co,  
29 Solicitor of the Supreme Court, London. Following the demise of Mr Dabinovic, who  
30 will be sadly missed, the function of agent will be assumed by His Excellency  
31 Mr Carlyle Dougan, Queen's Counsel, High Commissioner for Saint Vincent and the  
32 Grenadines to the Court of Saint James.

33  
34 The Republic of Guinea has the advantage of the representation of Mr Hartmut  
35 von Brevern, *Rechtsanwalt*, as Agent, and Professor Lagoni of the University of  
36 Hamburg, and others.

37  
38 When I last addressed this Tribunal on 23 February 1998, I drew attention to  
39 the importance that my government attaches to respect for the law of the sea, in view  
40 of our position as a maritime nation. I spoke then of the grave concern that my  
41 government attaches to the violations of which we complain. In this address, I  
42 propose to identify the damage that Saint Vincent and the Grenadines has sustained  
43 and to explain why we claim damages, including moral damages.

44  
45 The Damage is that of the Claimant State

46  
47 In one sense, the damage sustained by Saint Vincent and the Grenadines is the  
48 conclusion, the end of these proceedings. When the Tribunal comes to consider the  
49 sum to be awarded, it may find it convenient to address this issue last of all. But in

1 another sense, the damage sustained by Saint Vincent and the Grenadines is our point  
2 of departure. It is the grievance that causes us to come to the Tribunal. It is to secure  
3 reparation for its losses, tangible and intangible, that my government advances its  
4 claim.

5  
6 On the date of arrest on 27 October 1997, as at all material times, *The Saiga*  
7 was a vessel of the Vincentian registry. The Tribunal has now seen the extract from  
8 the register which confirms this fact. She flew the Vincentian flag. She flew it literally  
9 where the laws and customs of the sea so required, and metaphorically at all times. It  
10 used to be the fashion for writers to compare a vessel with a floating piece of the flag  
11 State's territory. The simile, obviously, was not perfect but it expressed an essential  
12 truth. *The Saiga* and all those aboard her were subject to Vincentian jurisdiction. Sir  
13 Robert Jennings and Sir Arthur Watts make the point clearly and emphatically in the  
14 latest edition of *Oppenheim's International Law* (9<sup>th</sup> edition, Vol. 1 page 738,  
15 paragraph 487), (section 1, tab 2 of the blue folder containing the position of Saint  
16 Vincent and the Grenadines). It is quoted here:

17  
18 "a vessel, and persons and things aboard, are subject to the law of the State of  
19 the flag, and in general, subject to its exclusive jurisdiction".  
20

21 Quite so. It follows that an unlawful invasion of the vessel is an infringement of the  
22 rights of the flag State. It may be compared with an invasion of the State's territory. It  
23 is a violation of the State's sovereignty. Where the violation is manifest, it must be met  
24 by an award of damages. The award of damages must be proportionate to the breach.  
25

26 There is another consideration. The owners and crew of a vessel look to the  
27 flag State for protection. An unlawful invasion of a vessel is a particularly serious  
28 breach of the flag State's jurisdiction when it involves injury to the crew or damage to  
29 the vessel or its cargo. Since States exist for the welfare of their people, a violation of  
30 a State's sovereignty strikes at its most fundamental interests when it involves personal  
31 injury to those who look to the State for protection, or the destruction of the property  
32 of those individuals. That is why – to paraphrase the famous words of the Permanent  
33 Court in case of the *Mavrommatis* (PCIJ), Series A No 2, (1924) (section 1, tab 3) – a  
34 State is, in reality, asserting its own right when it seeks reparation for loss suffered by  
35 the crew or owners of the vessel. It asserts its own right to secure, in the person of the  
36 crew and the owners, respect for the rules of international law.  
37

38 This is not abstract legal theory. It is a matter of practical importance,  
39 regularly drawn to the attention of those, like myself, who hold public office. People  
40 who are subject to a State's jurisdiction rightly look to the State for protection. If the  
41 State cannot protect them - by legal process where necessary – they will either look for  
42 protection elsewhere or suffer enduring injustice. In either event, the flag State suffers  
43 a loss. Saint Vincent and the Grenadines' loss will be a material loss if the owners of a  
44 vessel, finding themselves without protection, take their business to another State,  
45 which can secure protection by military or other means. Our loss will be intangible,  
46 but nevertheless very great, if individuals under our jurisdiction suffer unlawful  
47 physical injury or endure unlawful detention and receive no compensation. That is why  
48 the injury to the individual is an injury to the State. They are two sides of one coin.  
49

1 The Tribunal will need to consider separately the claims that we advance in  
2 respect of material losses and intangible or moral losses.

3  
4 Article 111(8) of the Convention

5  
6 At a pre-trial hearing last Tuesday, the President directed that the parties  
7 should supply to the Tribunal a file containing the authorities on which counsel will  
8 rely. The Tribunal will find in our file, and in the section devoted to my opening  
9 speech, not only the authorities on which I am to rely but also two items that are  
10 central to this case and are supplied for convenience. One is a map of the area in  
11 question; the other a copy of extracts from the United Nations Convention on the Law  
12 of the Sea.

13  
14 When the Tribunal considers our claim for compensation in respect of the  
15 losses incurred by the vessel and its crew, it will be guided by paragraph 8 of article  
16 111 of that Convention. This provides that where a ship has been stopped or arrested  
17 outside the territorial sea in circumstances which do not justify the exercise of the right  
18 of hot pursuit, it shall be compensated for any loss or damage that may have been  
19 thereby sustained. The key words are those requiring that there shall be compensation,

20  
21 "for any loss or damage that may have been thereby sustained".

22  
23 The Convention envisages that any loss or damage sustained in consequence of the  
24 arrest shall be the subject of compensation; and plainly it envisages that the claim will  
25 be advanced by the flag State and not by a natural or legal person.

26  
27 As the Tribunal knows, the Republic of Guinea challenges our right to advance  
28 claims in respect of the vessel or its crew. Mr Howe and Dr Plender will deal shortly  
29 with the legal aspects of that challenge. Let me first make a statement of policy. We  
30 assert the right to protect our vessels, and those who serve on board, irrespective of  
31 their nationality. We do so because this is consistent with the United Nations  
32 Convention, particularly at article 111. We do so because this is consistent with  
33 international practice, described in some detail in our Memorial dated 19 June and  
34 Reply dated 19 November 1998. We do so because convenience and good sense so  
35 require.

36  
37 It would be preposterous to assert that a separate claim must be advanced by  
38 each of the States of nationality of the owners, charterers and members of the crew. If  
39 that were the rule, this Tribunal could expect to be confronted, in this case, with  
40 applications from the Ukraine, Senegal, Cyprus, the United Kingdom and Switzerland  
41 as well as Saint Vincent and the Grenadines. Most of all, we assert the right to  
42 advance a claim in respect of the vessel and foreign crew because justice so requires.  
43 In registering the vessel in Saint Vincent and the Grenadines the owners subjected her  
44 to our jurisdiction and placed her under our protection. In serving aboard the vessel  
45 that flies our flag, the crew placed themselves under our jurisdiction and protection.  
46 By doing so, the owners and crew undertook obligations towards Saint Vincent and  
47 the Grenadines, which they have fulfilled. In the case of the crew, they have done so  
48 with outstanding loyalty. We intend to protect them in return and are not to be denied  
49 the right to do so.

1  
2 The Claim in Respect of the Vessel  
3

4 The claim that we advance in respect of the damage to the vessel has been  
5 calculated with care. Following representations from the Guinean Agent, the  
6 Vincentian delegation prepared a detailed account, explaining the basis for each cent of  
7 the claim. The Tribunal is at liberty to scrutinise the claim; and the Respondent State  
8 will have the opportunity of putting questions about the claim to Mr Alan Stewart,  
9 who has had oversight of the preparation of the accounts. We are confident that the  
10 Tribunal will find the claim to be fully justified in general and in detail.  
11

12 Consistently with article 111, paragraph 8 of the United Nations Convention,  
13 our claim is in respect of the physical damage to the vessel, the loss of hire and the  
14 value of the items taken from her. Of the items taken, the most valuable by far was the  
15 cargo. The Guinean authorities have not contested our case, which is that the cargo  
16 was removed and sold for some US \$3 million. We seek the recovery of that sum, on  
17 the principle that the party in breach of the law should not profit from its wrong. We  
18 seek recovery of the costs of effecting repairs to the vessel, particularly in consequence  
19 of gunfire; the loss of revenue for the period when the vessel was off hire; and items  
20 stolen from the vessel, including money and bonded goods.  
21

22 The Claim in Respect of the Master and Crew  
23

24 We have been equally careful in advancing claims in respect of the master and  
25 crew. Since awards of damages for personal injuries and detention involve an exercise  
26 in judgment, we have gauged our claim in the light of international practice. In  
27 particular, we have taken account of the sums awarded by the Inter-American Court of  
28 Human Rights and the European Court of Human Rights; and we have paid particular  
29 attention to guidelines set by the United Nations Compensation Commission when  
30 making awards of damages to those who suffered in consequence of Iraq's invasion of  
31 Kuwait.  
32

33 In the case of the master we seek compensation for his detention at the rate of  
34 \$250 per day. The rate is rather higher than the rate considered normal in the first  
35 decade of this century; but it takes account of inflation and the conditions of his  
36 detention, of which the Tribunal will shortly hear. The Guinean submission is that he  
37 should receive "moral damages... only": meaning, apparently, no more than a nominal  
38 sum. That, we say, is manifestly at variance with international standards and with  
39 standards of common humanity.  
40

41 In respect of the crew, we claim compensation at the rate of \$100 per day.  
42 That sum is assessed on an extremely conservative basis. It is based on the amount  
43 considered normal some ninety years ago. The Guinean contention is that the skeleton  
44 crew should receive no compensation at all. They defend this position by asserting  
45 that the crew "stayed voluntarily on board". The Tribunal will hear from some of the  
46 crew members about the conditions under which they stayed on board the vessel and  
47 the reasons why they did so. When you have done so, you may consider that our claim  
48 in respect of the crew is as modest as it could properly be.  
49

1 We make separate claims in respect of the physical injuries suffered by the  
2 master and by two members of the crew. The Tribunal has already heard from  
3 Mr Klyuyev, one of the two crew members who were most seriously injured. He  
4 sustained gunshot wounds, including one approximately 8 centimetres long, requiring  
5 surgery under general anaesthetic, as well as shrapnel wounds. The Tribunal will  
6 shortly hear from a second crew member, Djibril Niasse. He suffered even more  
7 serious injuries, has undergone radical surgery and sustained traumatic injuries from  
8 which he has not recovered.

9  
10 The Republic of Guinea claims that Mr Niasse and his fellows of Senegalese  
11 nationality should receive no compensation at all, essentially because they were  
12 temporary members of the crew. If that were so, justice and law would part company.  
13 We have set out in our Reply the legal considerations that lead us to conclude that we  
14 are entitled to advance a claim on behalf of Mr Niasse and the other Senegalese on  
15 board the vessel. Let me add a practical consideration. It appears to be the case for  
16 the Republic of Guinea that if a flag State can protect foreign members of the crew at  
17 all, it can protect only those who are part of the vessel's permanent complement. We  
18 resist that suggestion, for practical as well as legal reasons. The suggestion would  
19 tend to divide the crew. In some cases, it might even be injurious to good relations  
20 between the crew, and discipline. The suggestion is also contrary to principle. We  
21 expect the loyalty of all those who serve aboard Vincentian vessels, whether on a  
22 permanent or a temporary basis. We assert the right to protect them in return.

#### 23 24 The Claim for Moral Damages

25  
26 I turn now to the claim for moral damages: a matter on which the Tribunal has  
27 particularly invited us to address oral argument. The case for Saint Vincent and the  
28 Grenadines is that the violation of which it complains was particularly serious.  
29 Guinean agents violated our jurisdiction over a Vincentian vessel well beyond Guinea's  
30 territorial sea. The Guinean action was not justified by hot pursuit. Guinean agents  
31 used armed force against an unarmed crew. They fired weapons indiscriminately.  
32 They threatened one member of the crew at gunpoint, traumatised another and  
33 inflicted serious injuries on two of them. The master and crew were detained *de jure*  
34 and *de facto* for a substantial period. A Guinean court even issued a summons  
35 directed at the sovereign State which I now represent. The violation was compounded  
36 by the subsequent conduct of the Guinean authorities. Despite the Tribunal's Order of  
37 11 March 1998, the Guinean Government has prepared a decree proposing to make it  
38 an offence to bunker vessels outside Guinean territorial waters, but within her  
39 exclusive economic zone, unless the parties hold a licence. Far from issuing an  
40 apology and indicating that it will alter its policy, the Republic of Guinea shows itself  
41 determined to assert her authority over merchant vessels well beyond her territorial sea  
42 and to compel compliance by force of arms. In these circumstances, we submit that  
43 the Guinean violation deserves to be met with an award of substantial moral damages.

44  
45 At paragraph 170 of her Rejoinder, the Republic of Guinea contends that no  
46 moral damages should be awarded at all, claiming that there is no firm precedent for  
47 such an award. It is fair to say that precedents are few. Violations of the kind of  
48 which we now complain are uncommon. The arbitral tribunal in the second *Rainbow*  
49 *Warrior* case (Section 1, tab 4) observed that there are not many recorded awards of

1 moral damages, because the circumstances giving rise to them occur infrequently. In  
2 the arbitral tribunal's words:

3  
4 "It is true that such orders are unusual but one explanation of that is that these  
5 requests are relatively rare".

6  
7 Having said so, the arbitral tribunal proceeded to make an award of moral damages, in  
8 view of the gravity of the violation of New Zealand's sovereignty.

9  
10 Regrettably, the circumstances of the present case are not wholly  
11 unprecedented; and in the light of modern experience, international law clearly  
12 provides for the grant of moral damages where such breaches occur. In our  
13 memorials, we have drawn attention in particular to the award of moral damages in  
14 several cases, including *The Im Alone* (3 R.I.A.A. (1935) 1609) (Section 1, tab 5) and  
15 *Letelier and Miffitt* (88 ILR 727 AT 735) (Section 1, tab 6) and that of the *Rainbow*  
16 *Warrior* (74 ILR 241 at 274) (Section 1, tab 7). Two of these three cases, like the  
17 present case, involved unlawful attacks on an unarmed foreign vessel, outside the  
18 defendant State's jurisdiction; and all, like the present case, involved the infliction of  
19 injuries on foreign civilians.

20  
21 It would be fair to comment that the award of moral damages is a feature of  
22 modern international law and particularly of the United Nations era. That being the  
23 case, the legal representatives of the Republic of Guinea have been able to locate  
24 certain passages, particularly in the older literature, expressing scepticism about such  
25 awards. As we have shown in our Reply, however, the overwhelming majority of  
26 modern writers acknowledge the availability of moral damages; and those who do so  
27 most vigorously include many of the most authoritative publicists. For instance, the  
28 late Professor Schwarzenberger wrote (in the third edition of his treatise on  
29 *International Law*, Volume 1, at page 664) (Section 1, tab 8):

30  
31 "Damages may be awarded in addition to satisfaction, where redress for  
32 insulting the national honour of the claiming State is in question".

33  
34 In language equally appropriate to this case, Professor Brownlie states (in his new  
35 edition of *Principles of Public International Law*, 1998, at page 461) (Section 1,  
36 tab 9):

37  
38 "Compensation is paid for a breach of duty which is actionable, without proof  
39 of particular items of financial loss, for example ... illegal arrest of a vessel on  
40 the high seas".

41  
42 In view of the overwhelming preponderance of authority on the point, both judicial and  
43 academic, I venture to describe as "plain" the proposition that moral damages may be  
44 awarded. The more difficult question is how to assess the amount. In our submission,  
45 the sum to be awarded should be greater than that in the *Rainbow Warrior* award. We  
46 say that because the present case has a number of features which make the violation  
47 more serious than in that case. First, the sinking of the *Rainbow Warrior* was a single  
48 isolated incident. As you have read, however, and as you will hear from witnesses, the  
49 attack on *The Saiga* was not isolated. It was part of a pattern.

1  
2 Second, in the *Rainbow Warrior* case, the French authorities promptly offered  
3 an apology. In the present case, by contrast, the Guinean authorities show every  
4 intention of persisting in their conduct and continue to assert their right to do so.  
5

6 There is a third feature to which special importance should be attached, when  
7 the amount of damage is under consideration. The French action in the *Rainbow*  
8 *Warrior* case was not taken for any economic reason. By contrast, the Guinean action  
9 in seizing *The Saiga* and its cargo was economically motivated, and at today's date, has  
10 yielded a profit to the Respondent State. Unless substantial damages are awarded, she  
11 will reap a reward from her actions  
12

13 Fourth, in the *Rainbow Warrior* case, the resulting fatality was accidental. In  
14 the present case, on the other hand, the Guinean agents know very well that the vessel  
15 was manned and that their gunfire might well result in injury. Their mistreatment of  
16 the crew was sustained and grave; and on the evidence of the Second Mate, Mr Kluyev  
17 it was affected by racial consideration. For all these reasons, and for others which will  
18 become apparent in the course of the evidence, we submit that this is an appropriate  
19 case for substantial moral damage.  
20

## 21 Conclusion

22

23 In conclusion, Mr. President, Members of the Tribunal, our decision to bring  
24 this matter to this forum was not taken lightly. We have felt compelled to do so, by  
25 the gravity of the infringements of which we complain, the threat presented by Guinea's  
26 action to the freedom of navigation in her area and her proclaimed determination to  
27 persevere. Mr. Howe will now address the Tribunal on an aspect of admissibility.  
28 Thank you Mr. President, Members of the Tribunal.  
29

30 **THE PRESIDENT:** I thank the Honourable Carl Joseph and I invite Mr. Nicholas  
31 Howe to continue the submissions on behalf of Saint Vincent and the Grenadines.  
32

33 **MR HOWE:** Mr President, Members of the Tribunal, it is my pleasure to appear  
34 before you again. My task today is to explain why it is not open to the Republic of  
35 Guinea to raise objections to the jurisdiction of the Tribunal or the admissibility of the  
36 case.  
37

38 Your jurisdiction in this case is based on the exchange of letters dated  
39 20 February 1998. For convenience, a copy of the Guinean letter of that date is  
40 included in the file of authorities accompanying my speech. By that exchange of  
41 letters, and you will find this at Section 2 tab 1, the parties agreed that the Tribunal  
42 shall deal in a single phase  
43

44 "with all aspects of the merits (including damages and costs) and the objection  
45 as to jurisdiction raised in the Government of Guinea's Statement in response  
46 dated 30 January 1998."  
47

48 It appears that the Republic of Guinea no longer objects to the jurisdiction of the  
49 Tribunal. However, she does object to the admissibility of the various claims that form

1 the basis of this case. It is my submission that the Republic of Guinea is precluded  
2 from doing so.

3  
4 In the first place, the effect of the exchange of letters constituting the  
5 agreement to subject the dispute to the Court is to prevent the filing of objections to  
6 the admissibility of the case or to the jurisdiction of the Court, except for the objection  
7 specifically mentioned by the agreement.

8  
9 Secondly, the objections filed by the Republic of Guinea were made after the  
10 90 days provided for the making of such objections by article 97(1) of the Rules of the  
11 Tribunal. The objections are therefore out of time and the Republic of Guinea is  
12 estopped from advancing any such objections which would preclude the Tribunal from  
13 dealing with the merits of this case.

14  
15 The effect of the Exchange of Letters is to exclude the Possibility of Advancing  
16 Objections to the Admissibility of the Action or to the Tribunal's Jurisdiction

17  
18 Mr President, Members of the Tribunal, let me first turn to the effect of the  
19 agreement between the parties. By entering into that agreement the parties submitted  
20 all aspects of the merits for the decision of the Tribunal. This is clear from the  
21 wording of the exchange of letters and from their context. In that agreement, the  
22 parties "agreed to submit to the International Tribunal the dispute between the two  
23 States relating to the M/V Saiga". What else could this mean but that parties intended  
24 that the Tribunal would be competent to adjudicate on the dispute between them?  
25 Indeed, the parties went further to provide that the Tribunal will deal with "all aspects  
26 of the merits". The language used does not therefore contemplate that one of the  
27 parties will later be able to raise arguments so as to preclude the Tribunal from  
28 exercising the jurisdiction so conferred. As a matter of fact, the parties were careful to  
29 include within their agreement, the one situation in which they contemplated that a  
30 party, that party being the Republic of Guinea, might wish to exclude the Court from  
31 adjudicating on the dispute. Suffice it to say that the objections subsequently advanced  
32 by the Republic of Guinea are not the same as the objection to jurisdiction specifically  
33 permitted by the exchange of letters. The objections advanced should therefore be  
34 rejected.

35  
36 Where parties enter into a special agreement by which they submit a dispute to  
37 an international tribunal, it must be presumed that unless they provide otherwise, the  
38 parties intend that the Tribunal will adjudicate over the whole of the dispute as  
39 submitted to it. Evidently, such an intention usually constitutes the object and purpose  
40 of such an agreement. It cannot be lightly presumed that the parties seek to take back  
41 with one hand what they have given to the Tribunal with the other. Where the parties  
42 seek to leave themselves free to subsequently challenge the jurisdiction of the Tribunal  
43 or the admissibility of the claim, they have usually incorporated that right into their  
44 original agreement. In fact, Saint Vincent and the Grenadines cannot find any case in  
45 which the parties have entered into a special agreement by which they agree to refer a  
46 matter of dispute to an international tribunal and where one of the parties has  
47 subsequently been allowed to raise an objection to the jurisdiction or admissibility in  
48 relation to matters covered within that special agreement.

1 As we have shown in our Reply dated 19 November 1998, the ordinary  
2 meaning to be given to the terms of exchange of letters, in their context and in the light  
3 of their object and purpose is that the International Tribunal is authorized to resolve all  
4 aspects of the merits of the dispute between the two States relating to the *M/V SAIGA*.  
5 That you will see in Section 2, tab 2. Sir Gerald Fitzmaurice has defined the merits of  
6 a case as consisting of

7  
8 "all those propositions of fact and law which must be established by a party in  
9 order to enable it to obtain a judgment in its favour, *on the assumption that the*  
10 *tribunal has jurisdiction to entertain these propositions, and that there is no*  
11 *objection to the substantive admissibility of the claim...*"

12 (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, (1986),  
13 p.448). Thus a mandate to the Tribunal to examine all aspects of the merits includes  
14 an assumption (or a provision) that there is no objection to jurisdiction or admissibility.

15 In her Rejoinder (at paragraphs 35 to 50) the Republic of Guinea asserts that  
16 the word "merits" is ambiguous; so that where a State agrees to submit the merits of its  
17 dispute to a court or tribunal, it may nevertheless object to the admissibility of the  
18 claim. In support of that proposition, the Respondent relies on certain writers,  
19 commenting on the judgment of the International Court of Justice in the *Ambatielos*  
20 *case*. On closer examination, none of those writers will be found to support the  
21 Guinean case.

22 One of the writers the Republic of Guinea refers to is Sir Gerald Fitzmaurice. I  
23 have just quoted the definition Sir Gerald gives to the merits. This is a definition that  
24 excludes jurisdictional or admissibility points from the merits. The work of Sir Gerald  
25 Fitzmaurice to which the Republic of Guinea refers at paragraph 37 of her Rejoinder is  
26 the very same work as that from which I have just read. In fact, the Guinean quotation  
27 is extracted from the page immediately following the one in which Sir Gerald offers his  
28 definition of the merits. It cannot be supposed that Sir Gerald Fitzmaurice intended to  
29 contradict himself, by encompassing issues of admissibility within the definition of  
30 merits, in the very page following the one in which he excluded such issues from the  
31 definition.

32 What then was Sir Gerald referring to in relation to the *Ambatielos* case? The  
33 Tribunal will recall that the issue before the International Court in that case was  
34 whether the United Kingdom had an obligation to submit a dispute with Greece to  
35 arbitration. The Court had first to determine whether it had jurisdiction to determine  
36 whether or not the United Kingdom had such an obligation. It decided that issue in the  
37 first phase: the jurisdictional phase. Having concluded that it had jurisdiction, the  
38 Court turned to the merits. The point at issue on the merits was whether the United  
39 Kingdom had to submit the dispute to arbitration. The point being made by  
40 Sir Gerald Fitzmaurice was that the International Court's function at the merits phase  
41 did not involve a decision on the underlying dispute, which could only be a matter for  
42 determination by an arbitral tribunal. Of the two other writers cited by the Republic of  
43 Guinea one was making the same point. That is Professor Verzijl (writing in the  
44 Netherlands Yearbook of International Law), which you will find in Section 2 tab 4.  
45 He points out that Greece did not ask the Court to decide on the underlying dispute

1 between the parties: Greece asked the Court only to determine whether there was an  
2 obligation to arbitrate. The other author cited was Professor Brownlie. The  
3 Respondents refer to a superseded edition of his textbook, *Principles of Public*  
4 *International Law*, which you will find at Section 2 tab 5, where he makes the  
5 observation that subsequent practice is an aid to treaty interpretation. That is neither  
6 controversial nor relevant.

7 In short, the *Ambatielos* case does not stand for the proposition that a State  
8 which has agreed to submit the merits of its dispute to a court or tribunal may  
9 challenge the admissibility of the action in the same tribunal.

10 Furthermore, the circumstances of the *Ambatielos* case were far removed from  
11 those of this case. The issues of admissibility which the Republic of Guinea now seeks  
12 to raise are points relating to the competence of this Tribunal - not to the competence  
13 of another body. In this case, the parties have agreed that this Tribunal shall deal with  
14 the ultimate merits of the dispute between them. There can therefore be no room for  
15 the argument that the use of the term "merits" in the exchange of letters included  
16 reference to points of jurisdiction. The agreement is clear, the parties have submitted  
17 "all aspects of the merits" to this Tribunal.

18 In the Rejoinder, particularly at paragraph 39, the Republic of Guinea argues  
19 that a special meaning is to be given to the term "merits" as used in the exchange of  
20 letters. According to that special meaning, the merits of this dispute will include any  
21 objections as to admissibility. For a special meaning to be given to the terms of a  
22 treaty, it has to be shown that the special meaning was intended by the parties. That is  
23 expressly stated in article 31(4) Vienna Convention on the Law of Treaties, on which  
24 the Guinean Agent relies. The burden is on the party that relies on the special meaning  
25 to establish the common intent of the parties to ascribe that special meaning to the  
26 term. Whilst pointing to the ascription of a special meaning to the term "merits" in  
27 cases such as *Ambatielos*, the Republic of Guinea has not submitted any material which  
28 shows that the intention of the parties in this case was to give a special meaning to that  
29 term.

30 To support her assertion that when submitting "all aspects of merits" to the  
31 Tribunal, the parties intended to permit objections to admissibility, Guinea also relies  
32 on the words "a single phase". She contends that this expression indicates that the  
33 parties were concerned not to split the case into separate elements. On that issue she  
34 is correct. The parties did indeed wish to avoid litigation in successive phases. That is  
35 not to say that the parties intended to permit objections to admissibility. The exchange  
36 of letters itself identifies the elements to be addressed in a single phase.

37 Those elements are the merits and "the objection to jurisdiction as raised in the  
38 Government of Guinea's Statement of response dated 30 January 1998." There is no  
39 need to go fishing for other possible and unstated phases. The parties wanted the  
40 Tribunal to deal in one phase with "all aspects of the merits" plus the particular  
41 objection to jurisdiction already raised. By using the expression "all aspects of the  
42 merits", the parties made it clear that there was to be no obstacle to dealing with any  
43 aspect of the merits, save that the Republic of Guinea was free to raise its prior  
44 objection to jurisdiction.

1 Contrary to article 97(1) of the Rules of the Tribunal, the objections raised by  
2 the Republic of Guinea to the admissibility of the action have not been raised in  
3 writing within 90 days from the institution of the proceedings.

4 We submit that the Republic of Guinea is precluded by article 97(1) of the  
5 Rules of the Tribunal from submitting any objections to the admissibility of the claims  
6 after 90 days from the date on which the present case was instituted. As you will be  
7 aware, this article provides that:

8 "Any objection to the jurisdiction of the Tribunal or to the admissibility of the  
9 application, or other objection the decision on which is requested before any  
10 further proceedings on the merits, shall be made in writing within 90 days from  
11 the institution of the proceedings."  
12

13 The exchange of letters constituting the basis of the Tribunal's jurisdiction  
14 provides that

15  
16 "the dispute shall be deemed to have been submitted to the International  
17 Tribunal for the Law of the Sea on 22 December 1997 ...."  
18

19 For any objection falling within article 97(1) to be valid, it must therefore have  
20 been made in writing by 22 March 1998. The first time that the Republic of Guinea  
21 filed in writing any objections to the admissibility of the case was in her Counter-  
22 Memorial submitted on 16 October 1998. As Saint Vincent and the Grenadines has  
23 pointed out in her Reply, the Guinean objection to admissibility would still be out of  
24 time, even if the 90-day period were computed from the date of the exchange of letters  
25 or from the date of the submission of the Vincentian Memorial.  
26

27 The Republic of Guinea nevertheless submits, at paragraph 53 of the  
28 Counter-Memorial, and paragraph 42 of the Rejoinder, that:

29  
30 "it is for her to decide whether or not objections to the admissibility of the  
31 claims should be raised as formal preliminary objections in accordance with  
32 article 97 (1) of the Rules."  
33

34 She goes on to argue that she has not made objections to the admissibility of  
35 the application as a whole but only to the admissibility of certain claims. She argues  
36 that it is up to her to choose whether she will seek a decision before any further  
37 proceedings on the merits or not. The assumption is that if a decision on the objection  
38 is not sought before further proceedings on the merits, the 90-day period is  
39 inapplicable.  
40

41 One of the difficulties with this argument is that it is based on a false factual  
42 premise. The assertion is that there has been no objection to the admissibility of the  
43 application but only to the admissibility of certain claims. The Republic of Guinea  
44 therefore accepts, as it must, that if it had objected to the admissibility of the action as  
45 a whole, the objection must be made in writing within the time limit stipulated in article  
46 97(1).  
47

1 Let us therefore look at the objections to admissibility raised by the Republic of  
2 Guinea. The Republic of Guinea has submitted the following objections to  
3 admissibility:

4  
5 (i) At paragraphs 56-71 of her Counter-Memorial she raises the objection  
6 that the Vincentian claim relating to the flag State's freedom of navigation  
7 and/or other internationally lawful uses of the sea is inadmissible because of an  
8 alleged absence of a genuine link with the vessel.

9  
10 (ii) At paragraph 72 of the Counter-Memorial, she objects that we are not  
11 entitled to bring a claim on behalf of the *M/V SAIGA* because that vessel,  
12 allegedly, does not have the nationality of the applicant as a result of absence of  
13 a genuine link.

14  
15 (iii) At paragraphs 73-78 of the Counter-Memorial, she objects that we are  
16 not entitled to bring a claim on behalf of the injured individuals because they  
17 are not nationals of Saint Vincent and the Grenadines.

18  
19 (iv) At paragraphs 79-89 of the Counter-Memorial, she objects that we are  
20 not entitled to bring a claim on behalf of the injured individuals and private  
21 persons because of an alleged non-exhaustion of local remedies.

22  
23 If these are not objections to the admissibility of the entire case, we fail to see  
24 what is left. Saint Vincent may not claim in respect of her own rights. She may not  
25 claim in respect of the damage to the vessel and its detention. She may not claim in  
26 respect of the losses suffered by the owners. She may not claim in respect of the  
27 injuries to the crew and their detention. Every claim we advance is alleged to be  
28 inadmissible.

29  
30 In these circumstances, it is apparent that the Republic of Guinea has failed to  
31 bring herself within the rule that she advances. Even were it to be accepted that a  
32 distinction can be drawn between objections to the admissibility of the action as a  
33 whole and to the admissibility of particular claims, with the former being subject to a  
34 time limit and the latter not, it is clear that the objections advanced by the Republic of  
35 Guinea in this case are to the entire action. Consequently, article 97(1) of the Rules  
36 requires that they ought to have been made in writing within 90 days of the institution  
37 of the case.

38  
39 The Republic of Guinea has contended, in paragraph 32, of the Rejoinder, that  
40 she did advance at least certain objections within the 90-day period. She alleges that  
41 during the oral hearings in the provisional measure phase she raised the objection of  
42 non-exhaustion of local remedies. Members of the Tribunal may indeed recall  
43 Mr von Brevern raising this issue briefly towards the end of those oral hearings.  
44 Mr Sands, then appearing as one of the Counsel for Saint Vincent and the Grenadines,  
45 objected that Mr von Brevern was raising an issue that had not been raised in the  
46 written pleadings. That objection was sustained by the President and Mr von Brevern  
47 did not persist with his point. The cursory raising of an issue in this way does not  
48 satisfy the provisions of article 97(1) of the Rules, the terms of which are explicit, that  
49 the article requires the submission in writing of any of the objections listed therein.

1 Oral objections will not suffice. Brief and elliptical oral comments, made without prior  
2 warning and against an objection, sustained by the President, will certainly not suffice.

3  
4 Mr President, Members of the Tribunal, our principal submission is that Guinea  
5 is precluded from raising objections to admissibility. In case, however, the Tribunal  
6 should decide to deal with any of those objections, we submit that they are without  
7 merit. Dr Plender will now deal with each of the Guinean objections in turn.

8  
9 **THE PRESIDENT:** Thank you very much, Mr Howe. I now invite  
10 Mr Richard Plender, QC, to continue the submission on behalf of Saint Vincent and the  
11 Grenadines.

12  
13 **DR PLENDER:** Mr President, Members of the Tribunal, it is an intimidating privilege  
14 to appear before this Tribunal, especially for the first time. Your jurisdiction is young,  
15 but the importance of your work and the calibre of those appointed to perform it are  
16 sufficient to daunt the most intrepid of advocates.

17  
18 For this reason, among others, I shall try to be brief, but I bear in mind the  
19 words of Horace: *Brevis esse laboro, obscurus fio* – the more I struggle to be brief,  
20 the more obscure I become. If my remarks are longer than I would wish, that is  
21 because I strive for clarity.

22  
23 I shall this morning begin to deal with the objections to admissibility raised on  
24 behalf of the Guinean Government. I expect to complete those submissions after the  
25 adjournment. My present submission is that the Tribunal should dismiss the objections  
26 to admissibility. For, even if it were open to Guinea to raise those objections, they  
27 would not carry conviction.

28  
29 The first objection to the admissibility of this action is the allegation that  
30 *M/V SAIGA* did not have a genuine link with Saint Vincent and the Grenadines at the  
31 material time. That objection is expressed in two ways. At paragraphs 56–71 of the  
32 Counter-Memorial, Guinea argues that we cannot advance a claim based on freedom  
33 of navigation since the freedom is that of the vessel, which was not genuinely linked  
34 with the claimant State.

35  
36 Then, from paragraph 72, Guinea argues that we cannot advance a claim in  
37 respect of the damage to *The Saiga* because the vessel was insufficiently linked to the  
38 claimant State.

39  
40 If the Tribunal considers it right to consider the objections to admissibility,  
41 notwithstanding the points raised by Mr Howe, the claimant State will be content for  
42 the Tribunal to dispose of the objections on the evidence. You have now had an  
43 opportunity of examining the certificate of registration of the vessel for the relevant  
44 period, together with the certificate of inspection of the classification society. You  
45 have been supplied with a copy of the Vincentian Merchant Shipping Act. You have  
46 been given an account of the regulatory and administrative steps taken in Saint Vincent  
47 and the Grenadines to secure compliance with the numerous international conventions  
48 on merchant shipping to which she is a party. You may ask the Attorney General to  
49 answer any questions that you may consider appropriate about the administrative

1 arrangements taken in Saint Vincent and the Grenadines to supervise compliance with  
2 her international obligations and her domestic laws. You will also have, this afternoon,  
3 an opportunity to question the master of the vessel about those matters.  
4

5 The evidence demonstrates overwhelmingly, and further enquiries will confirm,  
6 that there is a genuine link between the vessel and the claimant State. The evidence  
7 establishes, among other points, the following:  
8

- 9 (i) *The Saiga* is represented in Saint Vincent and the Grenadines by a Vincentian  
10 company formed in Saint Vincent and the Grenadines, resident and established  
11 there.  
12
- 13 (ii) She is subject to the supervision of the Vincentian authorities to secure  
14 compliance with the SOLAS Convention, the MARPOL Convention and other  
15 conventions of the International Maritime Organization to which Saint Vincent  
16 and the Grenadines is party.  
17
- 18 (iii) Regular supervision of the vessel's seaworthiness is secured by surveys on at  
19 least an annual basis conducted by reputable classification societies.  
20
- 21 (iv) Preference is given to Vincentian nationals in respect of her manning.  
22
- 23 (v) Saint Vincent and the Grenadines has been vigorous in attempting to secure her  
24 protection at the international level both before and throughout this litigation.  
25 Before the matter was brought before this Tribunal, the Vincentian authorities  
26 were placed at a disadvantage by the failure of the Guinean authorities to notify  
27 them of the action which the Guinean authorities had taken in respect of the  
28 Vincentian vessel, and the failure of the Guinean authorities to respond to the  
29 intervention of Mr Dabinovic, then Commissioner for Maritime Affairs. The  
30 action that he took is described in an article published in the *International Ship*  
31 *Registry Review* which is included among the authorities accompanying this  
32 speech (section 4, tab 1 of the blue bundle).  
33

34 It is, therefore, unnecessary to consider the hypothetical question, raised by the  
35 Guinean agent, as to whether a State is precluded from advancing a claim for  
36 violation of freedom of navigation or for damage to a vessel, in the absence of  
37 an effective link between the relevant vessel and the claimant State.  
38

39 Mr President, Members of the Tribunal, I must not be taken to  
40 concede, for a moment, that a State is precluded from advancing a claim in  
41 such circumstances, but those circumstances do not arise in this case.  
42

43 The Republic of Guinea appears to assert in her Rejoinder  
44 (paragraph 59) that there can be a genuine link between a vessel and a State  
45 only when the owner of a vessel is a national of that State or is domiciled or  
46 incorporated there. I venture the observation, in passing, that if this  
47 proposition were accepted, a substantial proportion of the world's tonnage  
48 would immediately be deprived of the protection of international law.  
49

1 To make good that argument, the Republic of Guinea continues to rely  
2 upon the United Nations Convention on Conditions for Registration of Ships.  
3 A copy of that Convention is appended to our Reply. Neither Saint Vincent  
4 and the Grenadines nor Guinea is a party to it. Indeed, as Members of this  
5 Tribunal will know very well, the Convention failed to secure widespread  
6 support and has yet to come into force 13 years after the adoption of its text.  
7 As of 1 March this year, it had only 14 signatories of which only 11 had  
8 proceeded to ratification. The Convention falls far short of the 40 ratifications  
9 that would be needed to bring it into force. Its provisions do not represent  
10 customary international law. However, even if it had been in force, it would  
11 not assist the Republic of Guinea.  
12

13 The first paragraph of article 10, upon which the Republic of Guinea  
14 relies, does indeed contemplate that one basis for entering a vessel on a ship's  
15 register is that the owner is established or has a place of business within the  
16 territory of that State; but, the second paragraph of the same article provides  
17 that registration may proceed where,  
18

19 "a representative or management person who shall be a national of the  
20 flag State, or be domiciled therein."  
21

22 That requirement is reflected precisely in Section 9 of the Merchant  
23 Shipping Act 1982 of Saint Vincent and the Grenadines (also annexed to our  
24 Reply). The requirements of article 10 (paragraph 2) are met in the case of *The*  
25 *Saiga*.  
26

27 Further, the establishment of a genuine and effective link may be  
28 formed under the Convention either by ownership or by manning. Vincentian  
29 law gives precedence to Vincentian nationals in respect of the manning of  
30 Vincentian ships, including *The Saiga*. It is true that at the date of her arrest or  
31 seizure, *The Saiga* did not have Vincentian nationals aboard. Such a situation  
32 may be expected to occur more frequently in the case of ships from small  
33 States than from those States with large populations. The United Nations  
34 Convention is not to be read, however, as making the effective "nationality" of  
35 a vessel dependent upon the national composition of the crew at any moment.  
36 If that were the case, vessels would change their effective nationality rather  
37 frequently. On a single voyage a vessel would change its nationality perhaps  
38 several times depending upon those who come aboard and those who leave.  
39 That cannot be the intention of the United Nations Convention.  
40

41 Further, it must be remembered that the purpose of the effective link is  
42 (in the words used by the Guinean agent himself, in Guinea's own Rejoinder at  
43 paragraph 59) to ensure that:  
44

45 "the flag State can effectively exercise jurisdiction (including enforcement  
46 jurisdiction) over the ship owner or operator in order to fulfil its obligations  
47 under international law."  
48

1 But we have demonstrated how Vincentian law does secure effective  
2 compliance with her international obligations in respect of vessels under her  
3 flag. In short, Saint Vincent and the Grenadines effectively exercises  
4 jurisdiction over her flag vessels, including *The Saiga* which had, at all material  
5 times, an effective link with that State.  
6

7  
8 I turn to the next objection raised by the Republic of Guinea: her  
9 assertion that the Tribunal cannot entertain a claim in respect of damage  
10 suffered by members of the crew of *The Saiga* who were not Vincentian  
11 nationals.  
12

13 The parties are agreed – for, indeed, it is elementary and obvious – that,  
14 as a general rule, a State may not advance a claim against another State. It is,  
15 however, very well established that there are exceptions to that general rule. It  
16 is on one such exception that we rely. By customary international law, a State  
17 may advance a claim against another State in respect of the alien crew of the  
18 former's vessel. In her Counter-Memorial at paragraphs 74 –78, the Republic  
19 of Guinea doubted the existence of such a rule. After we had set out in our  
20 Reply ample authority and practice demonstrating the existence of the rule, the  
21 Republic of Guinea, in her Rejoinder, appeared to withdraw the argument that  
22 there is no such rule. Instead, she appeared to contest the application of the  
23 rule to this case.  
24

25 Among the many authorities upon which we relied were opinions  
26 expressed by three distinguished judges of the International Court: Judges  
27 Hackworth and Badawi Pasha in *Reparations for Injuries* (ICJ Rep 1949, 174  
28 at 202 and 206-7) (Section 5, tab 9 of our bundle) and Judge ad hoc Riphagen  
29 in the *Barcelona Traction Case* (ICJ Rep 1970 S at 346) (section 4, tab 2).  
30 Judge Hackworth said:  
31

32 "Alien seamen are assimilated to nationals"

33  
34 for the purpose of diplomatic protection. Judge Badawi Pasha states that in the  
35 case of:

36  
37 "the protection of the flag and of the armed forces, protection extends  
38 to everyone in the ship or in the armed forces".  
39

40 Judge Riphagen endorsed those comments, speaking of the "functional  
41 protection" extended to members of the crew flying the flag of a State.  
42

43 At paragraph 67 of her Rejoinder, the Republic of Guinea comments  
44 upon those three judgments as follows:  
45

46 "Ships or seamen constituted neither in the Advisory Opinion nor in the  
47 Judgment a part of the subject matter or related in any way to the case".  
48

1 She asserts further, at paragraph 67 of the same Rejoinder, that the references  
2 to scholarly literature cited in our Reply are not "the result of a legal scrutiny of  
3 the issue"; and she maintains that the rule permitting a State to advance a claim  
4 on behalf of foreign crew members can apply only where the nationality of the  
5 ship is not in dispute.

6  
7 I take the last objection first, for we may dispose of it by agreement. It  
8 is clear that the rule whereby a flag State can protect alien seamen presupposes  
9 that the vessel has the nationality of the flag State. Indeed, the protection of  
10 the crew by the flag State follows from the protection which that State is  
11 entitled to give to the vessel. As the arbitral tribunal put it in *Worth v United*  
12 *States* (Moore's Digest of International Arbitration, Vol. III (1898) 2350-1,  
13 Section 5, tab 1) the principle is that

14  
15 "the flag protects the ship and every person and thing thereon not  
16 contraband".

17  
18 Therefore, it is only when the flag protects the ship that it protects the persons  
19 on board. On this the parties are agreed.

20  
21 The Guinean objection to our claim in respect of injuries to the crew  
22 adds nothing to her objection to our claim in respect of the vessel. If we are  
23 entitled to advance a claim in respect of the vessel – and I have submitted that  
24 manifestly we are – the Guinean challenge to that claim in no way supports or  
25 assists her challenge to the claim in respect of the seamen.

26  
27 Guinea's objection to our reliance upon judgments of judges of the  
28 International Court of Justice, on the other hand, raises issues both novel and  
29 disturbing. It is trite that international law, unlike the common law, does not  
30 know of the doctrine of binding precedent. In a system based upon precedent,  
31 a quest for the *ratio decidendi* (reasons for decision) is crucial, and *obiter dicta*  
32 (remarks by the way) have lesser significance. But even in such systems, *obiter*  
33 *dicta* are not ignored. They usually form the building blocks for later decisions.  
34 In the international system, greater significance is attached to statements of law  
35 made by judges in relation to issues that are not central to the case. The  
36 International Court of Justice itself frequently cites parts of its judgments that  
37 do not relate to the specific facts of the case. In a recent article in the  
38 *International and Comparative Law Quarterly*, Sir Robert Jennings, a former  
39 President of the Court, has written that:

40  
41 "even a casual acquaintance with almost any judgment of the  
42 International Court of Justice will reveal that the Court itself uses  
43 reported cases in both these different ways".

44  
45 (*The Judiciary, International and National and the Development of*  
46 *International Law* ICLQ (1996) 1, at 9, Section 4, tab 4).

47  
48 While Sir Robert Jennings himself favours a recognition of the  
49 distinction between *ratio decidendi* and *obiter dicta*, he recognizes that "an

1 *obiter* opinion can of course be valuable and important even though not part of  
2 the precedent." Sir Hersch Lauterpacht (who, as you will know, shared with  
3 Sir Robert the two distinctions of being a Judge of the International Court of  
4 Justice and Whewell Professor of International Law at Cambridge University)  
5 wrote:

6  
7 "It is not conducive to clarity to apply to the work of the Court the  
8 supposedly rigid delimitation between *obiter dicta* and *ratio decidendi*  
9 applicable to a legal system based on the strict doctrine of precedent."

10  
11 (Lauterpacht, *The Development of International Law by the International*  
12 *Court* (2<sup>nd</sup> edition, 1958, p.6, Section 4, tab 5).

13  
14 Yet this is precisely what the Republic of Guinea invites this Tribunal to  
15 do. She invites the Tribunal to accept that certain statements are *obiter dicta*  
16 and to infer that they are therefore of no precedential value. That proves too  
17 much.

18  
19 Nevertheless, it must be remembered that the statements of the judges  
20 in the International Court relating to a claim on behalf of foreign crew do not  
21 stand in isolation. They stand together with the approval of scholars and, more  
22 importantly, they stand alongside a long and amply demonstrable practice of  
23 States together with a substantial body of judicial and arbitral decisions, both  
24 national and international. That body of authority has been compiled in our  
25 Reply. We continue to rely upon it.

26  
27 In conclusion, Saint Vincent and the Grenadines submits that she does  
28 have a right under international law to bring a claim before this Tribunal on  
29 behalf of crew members of the *M/V SAIGA* not of the nationality of that State.

30  
31 Mr President, I am in the Court's hands. The next issue with which  
32 I propose to deal is *Exhaustion of Local Remedies*. You may consider that it  
33 would be convenient to adjourn at this point and for me to be invited to deal  
34 with that separate issue this afternoon.

1           **THE PRESIDENT:** Thank you very much indeed. I think this is a convenient  
2           time for us to break. We will break the sitting and resume at 2 o'clock, at  
3           which time you will continue with your submissions.  
4

5           **(Adjournment 11:45 a.m.)**