

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



1999

Public hearing

held on Monday, 8 March 1999, at 2.00 p.m.

at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Non-corrigé

Present:

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

Saint Vincent and the Grenadines
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 Zogbélemou 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, you may continue.

2
3 **DR PLENDER:** Mr President, Members of the Tribunal. This morning, I addressed two of
4 the Guinean objections to admissibility in this case.: the objection based on the principle of
5 effective link and the objection based upon the principle of nationality of claims. I now turn to
6 the third main Guinean objection, that based on the principle of exhaustion of local remedies.
7

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

48
49 That is at Section 4, tab 3.

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

12 It is of course alleged that the bunkering of fishing vessels took place within the
13 Guinean exclusive economic zone. Further, it is said that *The Saiga* voluntarily entered that
14 zone to perform those acts. Does that provide the necessary jurisdictional connection? The
15 answer must be "No". Since a State's sovereignty does not extend to its exclusive economic
16 zone, acts occurring there cannot be deemed to have occurred within the territory of that
17 State. The rule of international law requiring a jurisdictional connection is a consequence or
18 reflection of the function of the local remedies rule. The rule is, in Dr Amerasinghe's words
19
20 "a recognition of, emphasis on and perhaps a concession to the sovereign character of a
21 State."
22

23 Or, as he put it elsewhere
24

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

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

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

33 Section 4, tab 6.
34

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

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

47 "The sovereignty of a coastal State extends beyond its territory and internal waters...to
48 an adjacent belt of sea, described as the territorial sea."
49

1 Within the territorial sea there is sovereignty.

2
3 In relation to the exclusive economic zone Article 56 provides for certain sovereign
4 rights, but only in relation to specified purposes, none of which is in issue in this case. The
5 proposition that a distinction is drawn between "sovereignty" and the "sovereign rights"
6 enjoyed in an exclusive economic zone is too elementary to require authority, especially in this
7 Tribunal. Since however it appears to underlie certain of the arguments advanced by the
8 Republic of Guinea, we have set out at tabs 6, 7 and 8 of the authorities given in Section 5 of
9 our file, passages to that effect in the works of Orrego Vicuña, Attard and Extavour.

10
11 For instance, in the words of Orrego Vicuña at page 47:

12
13 "the coastal State can (only) exercise the rights of sovereignty and jurisdiction in those
14 matters to which the functionality of the concept confers ..."

15
16 Or, to quote Ambassador Jorge Castañeda, a person present at the Law of the Sea conference:

17
18 "In that zone, the coastal State exercised sovereign rights over resources, for the
19 purpose of exploration and exploitation, but did not exercise sovereignty over the zone
20 itself, as in the case of the territorial sea. This was its main characteristic."

21
22 That appears in his essay in the book of *Essays in Honour of Judge Lachs (Section 4, tab 10)*.

23
24 Statements to similar effect abound.

25
26 It is, therefore, the submission of Saint Vincent and the Grenadines that:

- 27
28 (i) the Exclusive economic zone is not assimilated to the territory or subject to the
29 sovereignty of the coastal State; and
30
31 (ii) the local remedies rule applies only to wrongs which occur within the sovereignty of
32 the State or where a foreigner brings himself within it by entering into a contract with
33 the State.
34

35
36 There might perhaps have been some scope for the argument to the contrary if
37 it were the Guinean case that *M/V SAIGA* had violated the rights of the coastal State,
38 for which provision is made in Article 56 of the Convention, but the Republic of
39 Guinea has been adamant in insisting the contrary. She states expressly that in
40 arresting *M/V SAIGA* she was not asserting the rights provided for in Article 56. To
41 quote from paragraph 108 of the Counter-Memorial:

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

44
45 As Dr Amerasinghe has stated:

46
47 "In terms of the policies behind the rule of exhaustion, it would seem that it is
48 only where the delinquent State can be said to be entitled to jurisdiction over
49 the issue that the rule may be applied."

1
2 Quite so.
3

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

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

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

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

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

38 That then raises this question: how is the Tribunal to determine when a State's
39 claim is one for direct injury and when the claim is simply brought on behalf of private
40 persons?
41

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

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

1
2 To take an obvious case, if a State brings a claim in respect of an attack upon its
3 diplomat, the cause is one of direct injury, but part of the factual matrix is the injury done to
4 the diplomat and part of the purpose is to provide compensation for him. The claim is,
5 nevertheless, advanced in respect of a violation of the integrity of the State's diplomatic
6 mission. Professor Meron goes on to state:

7
8 "the classification of a case as one of direct injury or as one of diplomatic protection
9 depends on the element or elements that are preponderant."
10

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

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

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

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

40 I propose to say no more about admissibility at this stage and turn to the merits.
41 I propose, Mr President, with the Court's leave, to turn to witnesses.
42

43 **THE PRESIDENT:** Very well, you may proceed.
44

45 **DR PLENDER:** Before calling the first witness, I shall have some introductory remarks to
46 make about the witnesses, and then to seek your direction, Mr President, on the way of
47 proceeding in the light of comments made to me by Mr von Brevern.
48

1 First, my introductory remarks. At the hearing on 27 November 1997 you heard the
2 evidence of the second officer of *M/V SAIGA*, Sergei Klyuyev about the circumstances of the
3 arrest of the vessel. You heard the evidence of the Regional Manager of the Addax Group,
4 Mark Vervaeet about the circumstances of the detention of the vessel.
5

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

14 To this date the Republic of Guinea has not yet called a single witness, nor disclosed
15 any witness statements. Mr von Brevern informed the Tribunal this morning, and I quote:
16

17 "I am not in a position to say whom we will call as witnesses or experts."
18

19 Members of the Tribunal will be very familiar with Article 72 of the Rules, which
20 requires that each party shall communicate in sufficient time before the opening of the oral
21 proceeding information regarding the evidence which it intends to produce.
22

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

30 In preparing witness statements, consistent with the President's direction given on
31 2 March, we have tried to concentrate upon the issues which we consider to be relevant. We
32 may have failed to anticipate correctly the way in which the Guinean delegation will present its
33 case. I therefore particularly invite Members of the Tribunal to exercise to the full their right
34 to put questions to my witnesses, in accordance with Article 80 of the Rules.
35

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

41
42 It had, until today, been my intention to ask Captain Orlov to elaborate upon only two
43 paragraphs of his written statement. That would have left the remainder of the afternoon for
44 his cross-examination. Unless we finish with Captain Orlov today, we may not be able to keep
45 to the timetable that the Tribunal has in mind. Mr von Brevern has, however, asked me not to
46 rely upon the statement but to take Captain Orlov through his evidence-in-chief. That
47 presents no difficulty for me, save as regards time. It would occupy an extra two hours. We
48 would then be a half-day behind schedule. If we repeat this exercise with each witness we

1 shall be much behind schedule. I am in the Tribunal's hands and will take whatever course the
2 Tribunal considers appropriate.

3
4 **THE PRESIDENT:** Thank you very much. Mr von Brevern?

5
6 **MR VON BREVERN:** Mr President, honourable judges, there might be a
7 misunderstanding on the side of Dr Plender. This morning I was asked to introduce the
8 delegation of the Republic of Guinea. I introduced the four persons which are sure to be
9 members of the delegation. Then – at least I wanted to say so – I said that it might be that one
10 or another gentleman will also be a member of the delegation. With respect to the question
11 which witnesses and experts the Republic of Guinea will call, I may refer you to my letter of 4
12 March in which I have mentioned, in time and sufficiently, under due mentioning of the issues,
13 all witnesses and experts to be called by Guinea. This is to that point.

14
15 The other point which Dr Plender mentioned in quoting my wish indeed refers to the
16 statement of Captain Orlov, which we have just received, at the end of our first meeting. It
17 comprises 30 different points, a lot of pages, and I do not feel in a position to be aware of all
18 of what is in here. Therefore, I really would ask you that Captain Orlov or the witness gives
19 his own answers to the replies he will be asked for by Dr Plender, and does not just refer to
20 the written statement. Thank you very much.

21
22 **THE PRESIDENT:** Thank you. We did inform the parties that the procedure of this court is
23 intended to be expeditious and cost-effective. It was understood in the consultations that
24 where a witness has produced a statement reasonably in advance of his appearance, counsel
25 and agents would be able to refer to that statement and the witness need not read the
26 statements word for word.

27
28 I believe that it should be possible, both in cross-examination and also in examination-
29 in-chief to make reference to particular paragraphs of the statement and to have that
30 paragraph, if necessary, read out in court. That would, I think, serve the purpose of enabling
31 the point on which evidence has been addressed specifically to be clarified, but at the same
32 time obviate the need for the statements – all of them – to be read, even where certain parts
33 are not the subject of cross-examination. I would suggest therefore that, in compliance with
34 the agreement and the explanations I already gave during the consultations, the statements
35 need not be read in full. Whenever counsel wishes to refer to any part of the statement, the
36 witness may be invited to read out a particular portion which is the subject of re-examination
37 or cross-examination. I hope that is clear and is acceptable to both parties. Dr Plender, you
38 may proceed.

39
40 **DR PLENDER:** My first witness is Captain Mikhaylo Alexandrovich Orlov.

41
42 **THE REGISTRAR:** Mr President, I will first call for the administration of the oath for
43 Mr Boris Dorofeev who will be the interpreter from the Russian language to the official
44 language of the Tribunal, as required by paragraph 4 of Article 85 of the rules of the Tribunal.

45
46 **THE PRESIDENT:** Will the interpreter please now make the declaration required.

1 (Interpreter sworn)

2
3
4

5 **MIKHAYLO ALEXANDROVICH ORLOV, sworn**

6 **Witness examined by DR PLENDER**

7

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

11

12 **THE PRESIDENT:** Yes, it is.

13

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

17 A (Interpretation from Russian) Yes. It is my statement concerning this case.

18

19 Q Do you understand the whole of that document?

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

21

22 Q Is the whole of it true?

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

24

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

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

29

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

31

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

34

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

37

38 **Dr. PLENDER:** Members of the Tribunal will find a copy in black and white at section 1, tab
39 1 should they find that convenient. (To the witness) Captain Orlov, do you recognize the
40 map or chart which is now being projected?

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

42

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

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

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

1 A The territorial waters are not specified on charts, on nautical charts.
2
3 Q What do you understand the red line to indicate?
4 A This is the territorial waters of Guinea which extend to the sea by 12 miles.
5
6 Q On the same chart a green line and a blue line may be seen. These will be pointed out
7 to you. Were those lines on the chart used at the time of the voyage of *The Saiga*?
8 A Such lines are never on such charts, on the charts, because that is not customary. They
9 were not there.
10
11 Q What do you now understand those lines to signify?
12 A This is a line which shows the territory of the exclusive economic zone of Guinea.
13
14 Q Will you please look at the annexes to your statement. There is a receipt at page one.
15 Will you please look at that? It may be convenient for me to pass it to the witness.
16 (Same handed) It is at page one of the bundle. For the assistance of the Members of
17 the Tribunal, it bears a record of the vessel, *The Flipper*, together with a navigational
18 point. Captain Orlov, will you identify the document that I have just handed to you?
19 A This is a receipt for bunkering which shows that *Saiga* gave 100 tons of bunker to
20 fishing trawler number one.
21
22 Q Is the point at which that bunker was supplied on the map which is projected or not?
23 A (No reply)
24
25 Q Captain Orlov, if you cannot remember, do you see the navigation points and
26 particularly points of latitude shown on this document in the top right hand corner,
27 highlighted?
28 A This point I see. This point, it is not indicated on the chart. It was before the first
29 point which is on the map, on the chart. This initial point is not indicated.
30
31 Q Having bunkered *The Flipper* did you then proceed to the point marked one on the
32 map, which will now be pointed out to you? Would you just look at the projected
33 map, please?
34 A Yes, we were heading to this point. This point we reached at eight o'clock on
35 25 October and usually at eight o'clock I pass over the information about the voyage,
36 its speed, encountering ships and so on.
37
38 Q Would you now look at the bundle of documents provided? At page two a telex will
39 be found. Again, I may pass it to you. What do you see from that telex?
40 A This is my information. At eight o'clock on 26 October the position of the ship, its co-
41 ordinates and its first point, the course and the amount of load on board and bunker
42 which is left on the tanker.
43
44 Q Will you now look at the logbook which you have before you. Can you confirm from
45 the logbook the accuracy of the telex message that you have just identified?
46 A Yes. At eight o'clock here the co-ordinates of the ship and 11 degrees and
47 0.2 northern latitude.
48
49 Q That is the log for 26 October, the first two lines; is that correct?

1 A Yes, it is an excerpt from the logbook on 26 October.
2
3 Q Can we then move to position 2, shown. Captain Orlov did you reach position two?
4 A Yes, it is the position of the ship at noon on 26 October.
5
6 Q Will you now look at pages 3, 4 and 5 of the bundle of telexes, which I will now give
7 to you and say what you get from those three pages.
8 A Yes, these are receipts for bunkering the three consecutive fishing trawlers.
9
10 Q Will you then move to position 3 on the map.
11 A This point is the point where we were bunkering the three ships.
12
13 Q Do you find bunkering receipts at pages 6, 7 and 8 and a message at 9 in the bundle
14 annexed to your statement?
15 A Would you please repeat your question?
16
17 Q Do you find in the telex messages evidence of bunkering at position 3 and, if so, in
18 which telexes?
19 A I have other receipts before me and I need the previous ones.
20
21 Q Would you look at the ship's log for 26 October and indicate where on that log we find
22 evidence of the position when the vessel was at point 3?
23 A From the logbook on 26 October, there is an entry at 1320 and the position is latitude
24 10 degrees north and longitude is 16.2 in west. The ship was anchored. This is
25 exactly at point number 3, which is indicated on the chart, and we started the
26 bunkering of the fishing trawler *ITTIPESCA*.
27
28 Q In the final line of the same page you will find a new latitude position. Can you tell the
29 court what that is?
30 A This is the position of the ship and coordinates of the ship on 26 October 1997, at
31 24 hours, at midnight.
32
33 Q Point 4 will be pointed to you. Does that correspond with the position of the
34 coordinate that you have just identified?
35 A Yes, this is the fourth point, the coordinates of the fourth point, latitude 10.30 northern
36 direction and latitude 16 46 in western direction.
37
38 Q We come to point 5. I will hand to you page 10 of the bundle, which contains
39 references to the *KRITTI* and the *ELLENI G*. Is it correct that *The Saiga* bunkered
40 vessels at point 5?
41 A Yes, it is point number 5 where the last three fishing trawlers received their bunkering.
42
43 Q Now the ship's log for 27 October under the heading "Remarks" in the seventh line.
44 Does the ship's log confirm that the vessels were bunkered at that point?
45 A Yes, in the logbook on 27 October 1997 there is an entry. The time is 0420. The
46 engine was stopped. The left anchor was off. The coordinates of the ship at the
47 moment of anchoring: latitude 10.25 north, and latitude is 15.44 west.
48

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

3 A After bunkering the last trawlers, it was around 14 o'clock on 27 October. Initially,
4 I proceeded towards south-west to point 9 degrees 50 minutes, and this is latitude, and
5 longitude was 16 degrees 15 west.
6

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

8 A Yes, at point number 6, when I followed in the south-western direction, I told the
9 Charterer about my course, about my destination.
10

11 Q What caused you to change course?

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

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

18 A Yes, it is exactly the message which I received and changed the course of the ship.
19

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

21 A Literally to translate, this entry says that the port authorities in Conakry sent out patrol
22 boats at night and the point to which we were proceeding was not any more safe for
23 the tanker *Saiga*, and therefore it was advised immediately to proceed to the point
24 9 degrees north and 15 degrees west.
25

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

27 A I received the telex message, and it was prior we left Dakar on 24 October from our
28 charterer said that in the region of Guinea Conakry it was not safe to bunker fishing
29 trawlers because there is a hunt for the tankers bunkering fishing trawlers.
30

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

32 A Yes, I have it about me.
33

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

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

47 Q Did you confirm to the Charterers that you had changed course?

1 A At point number 6, I changed the course of the ship and proceeded parallel to the
2 seashore, so as in the future to follow to the 9 degree point north and 15 degree point
3 south.
4

5 Q I now show you page 11 of the bundle annexed to your statement. Is this a telex
6 confirming the change of course?
7 A What is your question?
8

9 Q Does this confirm the change of course of which you have spoken?
10 A Yes, this is my message which I signed and it says that I understood the telex which
11 I had received and that I was following to the point 09 north and 15 west.
12

13 Q Now look at the ship's log for 27 October. Do the last two entries show the position
14 of the vessel on its new course?
15 A Yes, on 27 October, at 20 o'clock, the course was 132 to the south-*west* and the
16 coordinates are here. The latitude is 09.50 north and the longitude is 15.51 west.
17

18 Q Is that point 7 on the map?
19 A Yes.
20

21 Q Does the last entry on the page show point 8 on the map?
22 A Yes, this is the ninth point at 24 hours, midnight, on 27 October: latitude 9 degrees
23 and longitude 15.26 west.
24

25 Q Will you turn over to 28 October? The second entry shows a position at 9.27 north,
26 I believe. Is that correct?
27 A At what time?
28

29 Q I have difficulty reading the copy myself. At 04.24, I see in the second line is "Stop
30 engine"?

31 A On 28 October at 4 o'clock, the coordinates of the ship were latitude 09.02 north and
32 latitude 15.02 west.
33

34 Q Is that point, the point now being shown to you, point 9?
35 A This is approximately the point of crossing the southern border of the exclusive
36 economic zone
37

38 Q Between point 6 and point 9, what was the approximate speed of the vessel?
39 A The average speed was about 7 knots.
40

41 Q Is it correct that at 04.24 the vessel stopped its engine?
42 A In the logbook on 28 October at 4.24, there is an entry that the engine was stopped
43 and coordinates latitude 9 degrees north and latitude 15.00 west.
44

45 Q From what you said about the latitude and speed, is it possible to determine the time
46 when *The Saiga* crossed out of the Guinean exclusive economic zone?
47 A Of course one can count at the speed of 7 knots. We have made about five miles from
48 the economic zone and I think that at 5 o'clock we have crossed the southern border of
49 the exclusive economic zone.

1
2 Q Would you now look to telex page 12. What activity does that describe *The Saiga* as
3 engaging in?
4 A This is again my message to the charterers at 8 o'clock in the morning on 28 October.
5 The latitude 9 degrees North and longitude 13 -- 14.59 West. That is to say that the
6 ship was adrift towards South and then there is an amount of cargo on board, the
7 amount of bunker, and the consumption of bunker, the weather, the windforce and
8 waves and the last message on 28th we have arrived to point 8 and are waiting for
9 patrolling ships to come.
10
11 Q How long was *The Saiga* drifting at that point?
12 A Before the time of the arrest --
13
14 Q Is it your evidence that the vessel was drifting from 4.24 when the engine was stopped
15 and continuously thereafter until an arrest?
16 A Yes, the ship was adrift and it was drifting southwards, perhaps one mile.
17
18 Q Now I will show you the last item that I will show you from the bundle, which is
19 page 13. What does that telex message show?
20 A This telex was sent over by the radio officer according to my command, and it means
21 the three words written here are "attack, attack, attack". We did not have more time
22 to send a longer message.
23
24 Q Thank you. Captain Orlov, I refer you now to paragraph 11 of your written statement.
25 What was the first point at which you became aware of events leading to the "attack,
26 attack, attack"?
27 A This refers to an attack on a ship, when they started shelling at us.
28
29 Q What is the first you knew, the first sign you saw of any attack?
30 A At 8 o'clock in the morning on the 28th I took watch on the bridge. Not far from the
31 ship there were two or three fishing trawlers which were fishing. At 8.30 I saw the
32 weather was fine, and I saw the appearance of two new boats and, on the radar the
33 distance was 11.5 miles. I observed these boats on the radar and during 50 minutes I
34 came to the conclusion that these were two not big boats which were following toward
35 us, and the distance was shorter and their direction was the same.
36
37 Q As the vessels approached did they convey any message to you?
38 A The first to come was a small cutter. It was moving at a greater speed. No message
39 by light, by flag, by order was given to us.
40
41 Q Did you hear any sound from the vessels?
42 A Initially this was about 9 o'clock, 10 past 9. I heard certain sounds and the radio
43 officer was also on the bridge together with me. At first I did not understand what it
44 was and then I looked through the binoculars and I saw the soldiers on a small boat
45 which was closer to us, and then I realized that our ship was shelled at.
46
47 Q We now show you photographs of *The Saiga*. The first is photograph no. 1. Do you
48 recognize the vessel?
49 A Yes, it is *Saiga*, on which I worked, anchored.

1
2 Q Is it loaded or unloaded in this photograph?
3 A At present it is empty because the board is above the water line.
4
5 Q On 27 October at the time of the attack that you have described was the vessel laden
6 or unladen?
7 A At the time of the attack we have unloaded about 500 tons of cargo and it was a small
8 amount and, practically speaking, the ship was fully loaded.
9
10 Q In that state where would the water line have come to measured against the rear of the
11 hull?
12 A In a loaded state the level of the main deck is very close to the water line.
13
14 Q What distance is the main deck or freeboard from the water line when fully laden?
15 A The general altitude from the bottom to the deck is 8 metres and when fully loaded the
16 ship is 6-7. One metre and 30 cm will be from the surface of the water to the deck
17 when the ship is fully loaded.
18
19 Q Will you now look at photograph 5. Does this show *The Saiga* laden?
20 A Yes. From this picture one can see that the cargo deck is on the level of the pier and
21 the ship is fully loaded and this photograph was taken before we left Dakar.
22
23 Q When the vessel is so laden is it possible for a person or persons to transfer to *The*
24 *Saiga* at sea while *The Saiga* is moving?
25 A Of course practically we have taken people from a cutter to the cargo deck when there
26 was a person to guide us in the coastal waters.
27
28 Q On 27 October did you see anybody alight to the freeboard of *The Saiga*
29 A Do you mean from the cutter? When I heard the shots and then I saw a cutter coming
30 nearby to the ship I went to the left side of the bridge to close - to lock the waterproof
31 door, and at this moment I saw how from the small cutter soldiers were boarding our
32 ship.
33
34 Q As they were boarding, was *The Saiga* stationary or was it moving?
35 A At this moment *The Saiga* was already moving. It was at the beginning and it was
36 turning to the right.
37
38 Q At approximately what speed was *The Saiga* moving at that moment?
39 A For a fully-loaded ship when there is such a course to change it is very hard to get full
40 speed and practically the speed was 4 or 5 knots.
41
42 Q What caused you to start *The Saiga's* engines?
43 A As I said, I went to the left part of the bridge and I saw the soldiers boarding our ship
44 and the shooting was going on. I locked the watertight door on the bridge and then
45 I saw how one glass on the bridge was broken and then the side porthole on the bridge
46 and there were cracks and holes in the glass. After that I raised the alarm, a general
47 alarm, on the ship and told everybody to go to the engine room, which was below the
48 waterline and then I started the autopilot and the ship was continuing to turn to the

1 south-west, in a south-westerly direction. At this moment the shooting was continuing
2 from submachine guns and from big machine guns.
3
4 Q Will you now look at photograph No. 3 and tell the court what you see?
5 A At the upper part, the orange part, of the hull you can see white spots. These are
6 exactly the traces from the shots.
7
8 Q Were you on the bridge immediately below those shots at the time when these shots
9 struck?
10 A I have already told you that I was there on the bridge and saw directly how the
11 portholes were hit.
12
13 Q Will you now look at photograph 4 and tell the Tribunal what you see?
14 A On this photograph one can see again the orange part or the upper part. This is a
15 signal bridge and one can see the white spots which are the traces from bullets and,
16 apart from that, on the left side at the front structure nearer the two left portholes one
17 can see also two white spots, and they are traces of bullets.
18
19 Q Can nothing special be seen from the tyres or fenders?
20 A What is the meaning of "fender"?
21
22 Q I am trying to use a nautical term. Can you deduce anything from the tyres that are
23 seen on the deck?
24 A This is exactly these fenders or (*krantsi*). We see two full fenders to the left from the
25 crane and on the right side it is obvious that it is deflated and it was also hit during the
26 attack.
27
28 Q What was it hit by?
29 A Most probably it was the bullet ricochet but perhaps they aimed directly at this thing.
30
31 Q Will you look at photograph 7 and tell the Tribunal what you see?
32 A On this picture one can see the upper signal bridge. There is a head of a microphone.
33 One can see the head of a microphone and below the head of the microphone there is
34 another trace from a bullet. This is already on the left side, on the left side of the ship,
35 on the signal bridge.
36
37 Q Did you see this damage occurring?
38 A I immediately, when they were shooting, did not see it because I was inside on the
39 bridge; later on, when we inspected the state of the ship, then I saw it.
40
41 Q Would you look at photograph 8 and tell the Tribunal what you see?
42 A Here already one can see quite well the fender. One is deflated and another is not
43 deflated.
44
45 Q Now look at photograph 11. Can you tell the Tribunal anything?
46 A This is again the signal bridge on top and it is the satellite antenna; on this antenna
47 there are seen three holes. The antenna was practically destroyed, out of order.
48
49 Q Did you see that damage occur?

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

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

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

Q How does it come to be flexed?

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

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

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

Q Were the injuries slight?

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

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

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

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

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

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

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

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

(Adjourned until 10 am, Tuesday 9 March 1999)