

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



1999

Public hearing

held on Monday, 15 March 1999, at 14.00 p.m.

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

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Uncorrected
Non-corrigé

<i>Present:</i>	President	Thomas A. Mensah
	Vice-President	Rüdiger Wolfrum
	Judges	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Budislav Vukas
		Joseph Sinde Warioba
		Edward Arthur Laing
		Tullio Treves
		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		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 **LIEUTENANT AHMADOU SOW, recalled**
2 **Cross-examined by MAITRE THIAM, continued**

3
4 **MAITRE THIAM (Interpretation from French):** I would like to ask the witness to plot on
5 this chart the course of 205.

6
7 *(The witness marked the chart)*

8
9 **MR VON BREVERN:** Mr President we thought that for all the Honourable Judges it
10 would be convenient to demonstrate at this stand here. I do not know why that should be
11 over there. It is too far away for us.

12
13 **MAITRE THIAM:** Mr President, perhaps we could move this forwards, but I would like the
14 two charts to be visible at the same time. Maybe we will be able to turn it around so that it
15 becomes more visible to the others.

16
17 *(The stand with charts was moved)*

18
19 **MAITRE THIAM:** Mr President, the witness has asked whether the chart could be put on
20 the table first and I see no drawback to doing that. It would be possible to put the chart on
21 the table.

22
23 *(Chart placed on table)*

24
25 **MAITRE THIAM:** Could you show the Tribunal the line that you have just plotted?

26 A (Interpretation from French) It is this line that I have just plotted.

27
28 Q Which corresponds to a heading of 205?

29 A 205.

30
31 Q Mr President, I would like to present excuses to the Tribunal and to the witness. This
32 morning I made an error in the calculations that I gave you concerning the cables: 445
33 cables is equal to 86 kilometres and not 71. I would, therefore, like to ask the witness
34 whether he can measure a distance of about 86 kilometres on the chart on the table and
35 then to put this point on the chart which is being projected.

36 A The distance that you are asking for, please?

37
38 Q 86 kilometre.

39 A *(The witness did so)*

40
41 Q Mr President, as you have seen, I did not have a microphone, so I am saying this now.
42 With the aid of the protractor of the witness I have traced an arc which on the other
43 chart is the point called 10, which has a radius of 86 kilometres. I would like to ask
44 the witness to explain to the Tribunal where this arc of a circle crosses the route of *The*
45 *Saiga*, where the intersection point is.

46 A This arc intersects the route of *The Saiga* outside of the southern boundary line.

47
48 Q But more precisely exactly where does it intersect?

49 A It practically does not intersect here. *(Indicating)*

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Q Could you show on the projected chart this position here, the point under which the arc passes?

A It is this point here.

THE PRESIDENT: You could ask the witness to give us some more information on the co-ordinates because all that the people who are writing the précis hear from the witness is "here". They cannot indicate where it is. Perhaps you could do it by way of the co-ordinates.

A The position of the arrest of *The Saiga* or the stopping of *The Saiga* is something degrees 58 -- I will have to look -- and 14°50. I would have to refer to my notes.

MAITRE THIAM: Mr Sow, can you see the arc of the circle here? Could you look over here?

A I see the arc of the circle. It goes here and here.

Q Could you please show these two positions to the Tribunal and then give the coordinates of these positions, as the President has requested?

A The arc of the circle passes under *this* first blue dot, and the second red dot.

Q As a result, M. Sow, if *The Saiga* was on a heading of 205 at a distance of 86km 445 cables, it must be lower than the blue dot that you have just indicated?

A *The Saiga* was at a distance of 44.5 cables. A measurement in kilometres at sea is not one that we use. For the measurement of distances, we use either nautical miles or cables, but not kilometres.

Q M. Sow, you said in your report that *The Saiga* was at 445 cables. Is it 44.5 or 445? 445, cables, we have just determined, is just lower than this blue dot?

A For the measurement that we have just done in order to do this circle of an arc, we did not use 44.5 cables, we used a measurement in kilometres.

Q I converted, M. Sow, the cables to kilometres.

A I have no idea of the conversion between these two units of measure.

Q According to you, can you ---

MR VON BREVERN: Mr President, I would like to make the following comment in order to avoid a possible misunderstanding. We have asked a photocopy shop to produce two copies of the original chart. We are not sure whether they are absolutely identical with the original chart. In order to do, as Maître Thiam did, any calculation or drawing on the chart, we would in this case ask the witness to check it on the original chart and not on the photocopy. Again, we think that it is absolutely unusual to measure in and make use of kilometres, so could we perhaps ask Maître Thiam to put his questions relating distances in miles? Thank you.

THE PRESIDENT: Thank you very much. As far as the second point is concerned, I think that is in order. With regard to the first point about the map not being the original, it is, of course, the responsibility of Guinea to ensure that we have the original one here. If you use something other than the original one for the evidence, quite clearly that is the one that we are going to rely on.

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MR VON BREVERN: The original is the only real chart, whereas we cannot be sure about the distances on photocopies and we have also told the other party of that.

THE PRESIDENT: Very well. Maître Thiam, you may continue and if at any point the difference between the maps becomes significant to you, you should, of course, please let us know.

MR VON BREVERN: May I add, Mr President, that the photocopies which we have produced are just for demonstration, not for the evidence. The evidence concerns only the original, which is here and which can be handed over to the Tribunal.

THE PRESIDENT: Thank you. Please proceed.

MAITRE THIAM: Mr President, I would like to observe that this morning Mr von Brevern and Professor Lagoni did not want us to make any perforations on the original chart. If he would like us to do this now, I see no drawback. As far as the second observation of Mr von Brevern is concerned, the witness furnished documents on which he made measurements not in nautical miles but in cables. I would have liked us to be allowed to make calculations in cables. If there are other means of converting cables to nautical miles on this chart, I see no drawback to the witness making these calculations on the basis of cables which are converted into nautical miles. I will therefore ask the witness to calculate 445 cables in miles.

MR VON BREVERN: Mr President, we would ask for, hopefully, a final clarification. How did Maître Thiam come to a figure of 86km? To what would that correspond? How did he come to that figure? We do not understand that.

THE PRESIDENT: Maître Thiam, I think that what Mr von Brevern is saying is similar to what the witness is saying. He is saying that he does not know how to reach the figure of 86km. Maybe you could explain how you got to that figure.

MAITRE THIAM: It would give me great pleasure to do this for the Tribunal. I said this morning that a fathom is 1.624 metres. I said that 1 cable was 120 fathoms, that is 440 cables equals ---

MR VON BREVERN: Mr President, I think it was too fast for the interpreters. It seems to me that this is rather important, so perhaps Maître Thiam could not go so fast.

MAITRE THIAM: Before Mr von Brevern interrupted me, I was just going to say that I would repeat it. 1 fathom equals 1.624 metres and 1 cable equals 1.624 metres, which, if my calculation is right, leads to 194.88 metres. 445 cables, therefore, equals 86 miles (721.6m), which leads me to 86km. Maybe there is an error.

THE PRESIDENT: Mr von Brevern, have you followed the calculation?

MR VON BREVERN: I have heard the figures but I have not been able so far to check whether they are correct. We are still working on it. Will you give us one minute, please? *(pause)* Mr President, can I ask for permission for my colleague and counsel for the

1 delegation, Mr Diallo, to explain our view as to the figures which we have just heard from
2 Maître Thiam?

3
4 **THE PRESIDENT:** Yes, he may.

5
6 **MR DIALLO:** Thank you, Mr President. We did not use fathoms. We use fathoms to
7 measure the depth of water. If we want to convert fathoms into kilometres, we have to
8 multiply the distance by 1.852. If I am not mistaken, you arrive at a figure of 82 instead of 86,
9 so there is an error somewhere. 44.5 nautical miles is the distance. 44.5 nautical miles
10 multiplied by 1.852km should give us the distance in kilometres, and any other methods can
11 lead to an error. Thank you.

12
13 **THE PRESIDENT:** Thank you very much. Maître Thiam, does that makes sense to you?

14
15 **MAITRE THIAM:** Mr President, I work on the basis of documents which have been
16 provided by Guinea. Guinea gave us documents in which the distances are measured in cables.
17 I am glad to see that they, as I do, make a distinction between cables and nautical miles. If the
18 documents which were provided to the Tribunal had mentioned distances calculated in nautical
19 miles, I would have done exactly the same as Mr Diallo and would have multiplied 1.852
20 metres by 44.5, and maybe I would have arrived at the figure that he arrived at, but the
21 Guinean party cannot reproach us for calculating distances, as they themselves in their
22 documents are speaking of cables. I am very sorry for those amongst you who are English
23 speaking because, although I am not certain about this, this measurement does not mean much
24 in English, but in French a fathom is 1.624 metres, 1 cable is 120 fathoms, and therefore
25 194.88 metres, and 445 cables gives us a figure of 86.7km. I am sorry that Guinea does not
26 want to work on the basis of the figures that they themselves have indicated, but that is what
27 we are doing in the interim. If we measure in cables, we arrive at a distance of 86km. (*To the*
28 *witness*) If we take the arc of a circle, M. Sow, and apply it to the heading of 205, is the
29 exclusive economic zone of Guinea before or after the boundary? Which of these is it?

30 A It is afterwards.

31
32 Q Mr Sow, can you please explain to us why, having indicated in your documents that
33 you took measurements in cables, you now want to make us believe that we must
34 calculate in nautical miles?

35 A As I told you before, at sea we use two types of units of measurement, nautical miles
36 and cables. 1 nautical mile is 1.852 metres, and a cable is a tenth of a nautical mile.
37 This is the unit of measure that we normally use to define a distance between us and
38 our targets.

39
40 Q Mr Sow, you wrote in your notes after 3.50, or at 3.50, "The only target among the
41 seven we had in our sights on our radar screen is going towards this direction at
42 445 cables from us and approximately 40° port." When you say 445 in cables, you
43 were thinking in terms of miles or cables?

44 A When you say 445 in cables, we mean immediately 44.50 nautical miles.

45
46 Q Mr Sow, if you multiply 445 by 1852 metres, what do you obtain, or do you have to
47 multiply by 44.5?

48 A I do not understand your question.

1 Q I am going to explain this to you, Mr Sow, that I am obliged to work here with the
2 documents that you have supplied to us. If you have used the term "in cables", I will
3 measure in cables. In cables, 445 represents exactly 86 kilometres. It is 86 kilometres.
4 On heading 205, this would take us beyond the zone of Guinea for the exclusive
5 economic zone. Do we agree on this, 86 kilometres?

6 A I cannot agree with this measurement in kilometres over this distance. I cannot agree
7 with you.
8

9 Q I am talking about the supposition that it is 86 kilometres, and it is only a supposition.
10 I am not asking you to approve or disapprove of this. It is an affirmation. I am talking
11 of this 86 and I am asking you if this 86 kilometres takes us beyond the limit of
12 Guinea, outside its EEZ.

13 A With this position, this would take us beyond the limits.
14

15 Q And if, by chance, it takes us exactly to point G that I have indicated on the chart,
16 which is the position where the vessel was –

17 A This is a matter of chance.
18

19 Q Would you explain to the Tribunal that it is by chance that by following the heading
20 you have indicated, measuring in the cables that you have indicated, that you arrive
21 almost exactly at point G where the vessel was located? Do you want to explain to the
22 Tribunal that this was a chance?

23 A We never work on the basis of chance.
24

25 Q In any case, taking your measurements, not only for the heading but also for the
26 distance, we arrive, as if by chance, exactly at point G where the vessel was located at
27 3.50.

28 A I think that the first plot we did on this map, and it is not chance that took us there --
29

30 **MR VON BREVERN** Mr President, again for the sake of clarification, of course
31 Maître Thiam could continue asking the consequences of a distance of 86 kilometres. We
32 could go with this forever, but this is not the figure which is the equivalent to 44.5 miles.
33 I follow it now, because I wrote it down Maître Thiam said, "How much is a cable?" He did
34 not say, and did not calculate, that it is one-tenth of a mile. He said that one cable is
35 120 fathoms. He came up with an amount of 194.88, and this he multiplied with 44.5 miles;
36 one-tenth of a mile, corresponding to one cable, is less than that and is only 1852. Therefore,
37 the figure corresponding to 44.5 miles is 82.414 in kilometres and not 86 kilometres.
38 Therefore, I think that all further questions should be based on the figure of 82 kilometres, if
39 we continue in kilometres.
40

41 **THE PRESIDENT:** Thank you. I think that the issue is fairly complicated but we could
42 make it simpler. Maître Thiam states that on his calculations he comes to 86 kilometres. On
43 the calculation that you have suggested, which is also the calculation that has been given to me
44 by Members of the Tribunal, the figure is less than 86 kilometres. But the question Maître
45 Thiam has asked now is this assuming that the distance is 86 kilometres, where would the ship
46 be. The witness is requested to indicate what the position of the ship would be on that
47 assumption. However, if the Tribunal comes to the conclusion, on the basis of objective facts,
48 and these facts are objective, they are not the opinion of anybody – that the distance should be
49 less than 86, kilometres, we will draw our own conclusion. But the question that Maître Thiam

1 is asking now, regardless of whether the witness agrees with him or not, is if, in fact, it was 86
2 kilometres, where would that point be?

3
4 **MR VON BREVERN** Mr President, for the relevance of such a question, does
5 Maître Thiam still calculate the corresponding of 44.5 miles in kilometres to be 86 and
6 something kilometres?

7
8 **THE PRESIDENT:** That is what he said.

9
10 **MR VON BREVERN** Then I accept that his question may be relevant. Otherwise, it would
11 not be relevant. Perhaps we could obtain a clarification from Maître Thiam about his question.

12
13 **THE PRESIDENT:** Maître Thiam?

14
15 **MAITRE THIAM:** Mr President, I am sorry to have to say this. It seems to me that the
16 Guinean party is trying to create incidents where, in fact, things are perfectly clear. I explained
17 that there is a method of calculation which can be done in miles or nautical miles. The French
18 dictionaries are very clear concerning cables. One cable is not one nautical mile. A cable is
19 194.88 metres whereas one nautical mile is 1,852 metres. If the Guinean party produces
20 documents to us where the calculations are done in French using the term "cables", we have
21 no reason to suppose that this party does not know French.

22
23 Starting from the hypothesis that Lieutenant Sow knows perfectly well the language in
24 which he is expressing himself today, we have deduced that the calculations have been done in
25 cables. The calculations having been done in cables, Mr von Brevern cannot prevent me today
26 from making my own calculations in cables. When I translate the 445 in cables and metres, I
27 arrive precisely at 86.7 kilometres. Now perhaps Guinea, in the questioning they have done so
28 far, can explain to me how a cable in French can be assimilated to a nautical mile. For the
29 moment I am working on the basis of the knowledge which I have of the French language and
30 this knowledge prevents me, Mr President, and formally prevents me, from confusing a cable
31 and a nautical mile.

32
33 **THE PRESIDENT:** Thank you very much. I do not think this issue is one of language.
34 There is a disagreement. The disagreement is how you move from 445 cables to kilometres.
35 You have used a particular method and they are saying that a particular method is the right
36 one. It is not possible within the confines of this Tribunal at this time to resolve this
37 disagreement. I suggest that you proceed on the basis of your calculation. You must then
38 accept that the witness does not necessarily have to accept your calculation but it does not
39 affect the thesis that you are drawing, that assuming your calculation is correct, where would
40 the ship be. I think that once we get that information, if it turns out that your calculation is
41 correct, the effect of the answer you get will stand. If it turns out that your calculation is not
42 correct, the effect of the answer will be significantly affected or not. Otherwise, I do not think
43 we can resolve the issue as to how you move from 445 cables to kilometres because there is a
44 disagreement as to the formula to be used. You asked the question, "Assuming that it was 86
45 kilometres, where would the ship be?" Let us find out what the answer would be please.

46
47 **MAITRE THIAM:** This is precisely what I was doing, Mr President, when Mr von Brevern
48 interrupted me. I am talking hypothetically and Mr von Brevern considered that my
49 calculations were wrong. He does not rest, as you do, at saying that we can take afterwards

1 the distance I indicated as being that of cable; this can be checked. He wanted to impose on
2 me a calculation in nautical miles. I replied to him, as I reply to you, Mr President, that we are
3 doing our calculations on the basis of cables. This demonstrates that one cable does not
4 correspond to -- I no longer have the paper in front of me but it is, I think, 194.88 metres.
5 Until he has proved to the contrary, I consider that 445 cables brings us to 86.7 kilometres.
6 I would like to ask the witness when he submitted his chart to the naval command.

7
8 **THE WITNESS:** After the mission we submitted the chart to the command.

9
10 Q How can you explain then that having a copy which contains the movements of your
11 launch, some days have passed before you gave your testimony?

12 A Could you repeat your question, please?

13
14 Q How can you explain that the Guinean Government was not in a position until you
15 arrived here as a witness, to supply a chart which includes all the details you have
16 indicated?

17 A I cannot reply to this question.

18
19 Q But you are absolutely sure that you submitted your chart to the command, that is
20 when you arrived on 28 October in Conakry?

21 A We arrived in Conakry on 29 October.

22
23 Q So from 29 October?

24 A Since the end of the mission 29 October, we submitted the report with the necessary
25 documents.

26
27 Q So we are talking about the year 1997?

28 A Yes.

29
30 Q This case is important for Guinea.

31 A It is very important.

32
33 Q It was the naval command who said that you had to come here to testify as a witness?

34 A Yes.

35
36 Q So the command thought it was important for you to come here to testify but retained
37 this chart in the command until you came to give your testimony?

38 A I do not really understand what you are getting at.

39
40 Q You did not see this chart before you arrived so why did not the commander submit
41 this to the Government of the Republic of Guinea to submit to the Tribunal before you
42 came to testify?

43 A I cannot reply to this question, I do not know.

44
45 Q I would like to conclude by analysing the chart. Looking again at the speed of
46 *The Saiga*, could you divide the section between point B and E. The section between
47 B and C into four equal parts.

48 A If I can do so, yes I can .

1 Q Could you do it and then we will transfer this to the other chart.
2 A But I do not have point E on my chart. Perhaps you could point out this point. I do
3 not have it on my chart.
4
5 Q On your chart you have point E, which is the precise position where *The Saiga*
6 changed the heading? I will give you the coordinates, the precise coordinates of
7 point E. Mr Sow we are going to give you the precise coordinates of point C, but you
8 do have the coordinates of point E. So could you calculate this starting from point B
9 and then to point E.
10 A Perhaps if you allow me I can do this on my small machine.
11
12 Q Go on. Excuse me Mr Sow, perhaps I can give you the exact position of *The Saiga*.
13 That is 09° 50 north, 15° 51 west. This is point E. (Witness draws on chart)
14 A I am sorry, excuse me. Where is point C?
15
16 Q Point C is 09°50north, 15° 51 west.
17
18 **MR PLENDER:** Mr President, it may shorten matters if I remind the witness that according
19 to the logbook the position was 10° 17.8 north, 15° 49.5 west. Mr President, the evidence
20 that the court has seen from the logbook was 10° 17.8 north; 15° 49.5 west. Those are the
21 coordinates measured in the logbook shown in previous evidence at 2000 hours.
22 A That is not the position that you gave me.
23
24 Q Take the position from the logbook please.
25 A Could you repeat please.
26
27 **MR PLENDER:** The figure that I gave was 10° 17.8 north, 15° 49.5 west.
28
29 **MAITRE THIAM:** That is at what time?
30
31 **MR PLENDER:** Mr President, that is my mistake. I was reading from one line above from
32 where I should have been reading, and I do apologise. It is 15° 51.6 west, that is clearly
33 legible; 9° 53.7 north at 2000 hours.
34
35 A I do not understand what coordinates are. These are the ones I have given you.
36
37 **MR PLENDER:** I repeat for the witness, I was wrong the first time. I was reading the
38 wrong line. 9°53.7 north; 15° 51.6 west. That was position 7 of the positions that I gave to
39 the Tribunal earlier. (*pause*) (Witness draws on chart)
40 A This is the position. The position 9°57.7 north, 15° 51.6 west.
41
42 **MAITRE THIAM:** Could you indicate this on the chart which is on the board? Could you
43 stand aside please so that the members of the Tribunal can see?
44 A This position is approximately *there*.
45
46 Q Is this on the route that you indicated?
47 A No.
48
49 Q You said to the Tribunal however that you made this route using the logbook?

1 A Yes. But on the basis of knowing a point. This is the point of departure and the point
2 we arrived at zero hours. That is, we traced directly. Since the vessel changed
3 heading, we took positions at very precise moments.
4

5 Q Can you explain to the Tribunal now that you did not draw up this chart only on the
6 basis of the logbook, but you also used these positions?
7 A I traced this course on the basis of the coordinates from the logbook of *The Saiga*.
8

9 Q So why is this point that I asked you to fix at 2000 hours, the supposed position of the
10 vessel at 2000 hours, does not appear on your chart? If you used the logbook why
11 does this point not appear on your chart?
12 A Because we did not include it.
13

14 Q Do you recognise that you did not include into this chart things that you did want to
15 include in it?
16 A We only applied to this chart things we were interested in and things that we took out
17 of the logbook of *The Saiga*.
18

19 Q The line representing the course of *The Saiga* therefore is not exact in relation to the
20 logbook?
21 A It is exact in relation to the logbook.
22

23 Q But the point where the vessel was at 2000 hours is not on this line?
24 A But nevertheless this point is not on the line, but the line was drawn on the basis of the
25 logbook of *The Saiga*.
26

27 Q Lieutenant Sow, if you were to inform objectively your command, were you not
28 obliged to trace a line between point B up here on the chart, going up to this point
29 where *The Saiga* indicated in the logbook that it was located.
30 A We did not find it necessary to report all of the positions of *The Saiga* on this route.
31 We only noted the position of detection and the point of arrest of *The Saiga* and the
32 point where *The Saiga* was bunkering vessels.
33

34 Q So you are saying in front of the Tribunal that your chart does not faithfully reflect the
35 truth as you noted from the logbook?
36 A My chart does reflect the reality of the course of *The Saiga*.
37

38 Q So why are these points we are talking about not on this chart?
39 A Because these are points that we did not think were important enough to include on
40 the chart.
41

42 Q The Tribunal will judge this. Do you see effectively that the logbook included an
43 error?
44 A I cannot say that. Which logbook?
45

46 Q The logbook which Dr Plender showed that showed the position of the vessel at
47 2000 hours. I want you to tell us now how you knew this was an error. Apparently
48 you did not know because you said that you neglected this point because it did not
49 seem to you to be important on the route of *The Saiga*?

1 A I cannot say that the logbook of *The Saiga* contains an error because I cannot judge
2 here the position of *The Saiga*. I can confirm from the time that I detected *The Saiga*
3 and started the pursuit of *The Saiga*, these are points I can confirm, but the rest has to
4 do with the competence of the Master of *The Saiga* who filled in this logbook.
5
6 Q You said, Mr Sow, that the position of the vessel at 2000 hours was not so important
7 but if the vessel left at this point – and this is a supposition on my part –and it had to
8 sail up to here, that is at 2000 hours, the point you indicated, to come back to this
9 point and do all this, of course a lot of time would have been needed to arrive at
10 point G. Do you agree with me?
11 A I cannot confirm this because I do not know what speed the vessel was moving.
12
13 Q But supposing it was the same speed, still supposing? If it travels from there to there,
14 before returning here and then continues its line up until the point G, do you agree with
15 me that it would have taken a great deal of time to arrive at point G because it would
16 have done this additional route and that would have taken more time?
17 A More time in relation to what time?
18
19 Q To arrive from this point to that point? Yes or no? Did it return to arrive here and
20 then continue its line? If it had done this, it would have lost some time, I suppose.
21 A If it was necessary, yes.
22
23 Q If it had lost time, then it would have arrived here much later than we have confirmed.
24 We confirm that it arrived here at 3.35 and you are saying that it had arrived later. If
25 the vessel had made a detour, according to your theory, this would have been an
26 important point and, if it was an important point, why did you not note it,
27 Lieutenant Sow?
28 A Could you please repeat your questions?
29
30 Q I think, M. Sow, that you have understood. If you do not want to answer, I will take
31 this actively and I will not repeat my question. I will not repeat my question because
32 I do not want to waste the Tribunal's time. I have finished as far as the examination of
33 the chart is concerned, except that maybe you have not defined sections that might
34 represent the distance covered by *The Saiga* in one hour. Can you do this?
35 A No.
36
37 Q Then the Tribunal will perhaps be content with the document that we showed which
38 showed that, if you apply equal sections, *The Saiga* crossed the line maybe even before
39 3 o'clock. I will finish with you, M. Sow, by turning to questions concerning the arrest
40 of *The Saiga*. You said that the small launch left you at point 11. You have put down
41 the route, the dotted line which is the route taken by the smaller patrol boat, and then
42 there is another line at the bottom which is the route of *The Saiga*. How did you
43 decide on this because it does not result from your notes?
44 A It was the movement that *The Saiga* made until it was arrested, together with the small
45 patrol boat.
46
47 Q On the basis of what was this line established?
48 A That was the observation that we made from the large patrol boat.
49

1 Q From point 11 where you were, were you able to see the small patrol boat and make
2 observations?
3 A Yes.
4
5 Q How big is the distance in nautical miles in this case?
6 A 10 to 11 nautical miles.
7
8 Q For 10 to 11 nautical miles you were able to observe the movement of the small
9 launch?
10 A Yes, of course, on the radar.
11
12 Q And it is on the basis of the observations of the radar that you plotted these lines, but
13 your observations on the radar are not jotted down in your document in what you call
14 your logbook, your board notes, but no matter. The small patrol boat left with its
15 lights on. You said that there was no bell on board?
16 A The small patrol boat does not have a bell. The big one does.
17
18 Q And you think that the direction of the wind could have carried the sound of your bell
19 from the large patrol boat all the way to *The Saiga*?
20 A I did not speak about signalling with the bell from the big launch.
21
22 Q Yes, I know you did not speak about this, M. Sow.
23 A The bells are not made to give signals to a vessel that we want to alert. We have other
24 means of signalling which are much more powerful. There is the rotating blue light,
25 there is the siren and we also have the loud hailer.
26
27 Q You sent the smaller patrol boat with the siren and there were sailors on board but also
28 the Customs officials. Did they explain to you how the actual arrest or the stopping of
29 the vessel went?
30 A When we let the small patrol boat go it headed for *The Saiga*. It arrived close to
31 *The Saiga* which had stopped and which immediately had started its engines and
32 started moving. The captain of the patrol boat told me that the vessel had stopped, but
33 it had then started its engine when the patrol boat arrived and it started to move.
34
35 Q Did they tell you that they had shot?
36 A Yes, they did.
37
38 Q Where?
39 A They shot into the air as a warning shot.
40
41 Q How many times?
42 A They did not say how many times exactly. They said that they used their arms in order
43 to summon the vessel.
44
45 Q And did they say that the vessel tried to capsize them?
46 A This is what they said afterwards.
47
48 Q How did they explain the manoeuvre that *The Saiga* made in order to try and capsize
49 them?

1 A When they arrived alongside *The Saiga* which had already started its engines,
2 *The Saiga* started to move the very moment when the patrol boat was circling it.
3 Maybe with the movement of the water and with the size of the patrol boat they
4 thought that *The Saiga* was trying to capsize them.
5

6 Q What do you think about this today? Do you think that *The Saiga* tried to undertake
7 a manoeuvre in order to capsize the small patrol boat on purpose?

8 A I reported this in my report to the authorities. I cannot deny this because I was not in
9 the smaller patrol boat. I do not know whether it is true or false because I was not
10 there.
11

12 Q M. Sow, you produced a written declaration to the Tribunal and I would like to read
13 a passage from this from page 3, fourth paragraph, at the end. You wrote:
14

15 "The *Saiga* remained indifferent to the signals and to the various manoeuvres
16 by the patrol boat which was circling it after having escaped on two occasions
17 from a collision with *The Saiga*".
18

19 This is according to the report that was given to me.
20

21 Q M. Sow, earlier on Mr von Brevern said that he did not want me to interrupt you, so
22 could you, please, yourself wait until I have finished formulating my questions? You
23 are under oath. You were asked to swear an oath to the Tribunal to speak the truth.
24 It is under these circumstances that you confirm to the Tribunal that the patrol boat
25 encircled *The Saiga* after having escaped on two occasions from a collision with *The*
26 *Saiga*. Because you are testifying to the Tribunal, I would put the question to you to
27 learn how *The Saiga* tried to create a collision twice with the patrol boat?

28 A I said that as far as this collision story is concerned I am unable to give you details
29 because I was not in the patrol boat. It is a report that was given to me which
30 I included in my general report.
31

32 Q But, Lieutenant Sow, on board there were Customs officials?

33 A Yes.
34

35 Q Who were in hot pursuit of the Captain of *The Saiga* for certain Customs
36 infringements. But you were responsible for your men. If somebody was attempting
37 to take the lives of your men would you not have wanted the person to be arrested,
38 somebody who was threatening the lives of your men?

39 A If the -----
40

41 **THE PRESIDENT:** I think the points that you are putting to the witness do not actually
42 come out of the statement because he did not say that it was *The Saiga* that was trying to do
43 that. He said that the *vedette* went round twice and escaped a collision but he did not say that
44 *The Saiga* was trying to do so.
45

46 **MAITRE THIAM:** Your reflection is pertinent, Mr President.
47

48 Q Your men reported to you that *The Saiga* attempted to collide with the patrol boat?

49 A This is what they said.

1
2 Q This is what they told you?
3 A Yes, voluntary or involuntary, this is what they said. They said that *The Saiga* was
4 doing this, whether on purpose or not, but this is what they said.
5
6 Q So they told you that they escaped twice from a collision with *The Saiga*. Did they tell
7 you that *The Saiga* tried to create a collision with the patrol boat?
8 A No. They said that they were able to escape twice from a collision with *The Saiga*.
9 They did not say that *The Saiga* on purpose tried to create a collision with them to
10 capsize them. They said that they escaped from a collision with *The Saiga* twice.
11
12 Q If in any document it is written that *The Saiga* tried twice to capsize the small patrol
13 boat and even yours, this document would therefore contain false information?
14 A I cannot say that the information is false because, as I have already said, it is a report
15 that was made to me. I was not present there. If I had been present there in the small
16 patrol boat, I would be able to confirm this or not, but I was not in the small launch.
17 I was told something and this is what I put in my report.
18
19 Q Please try and understand that I merely want to know whether you were told that
20 *The Saiga* tried to undertake a manoeuvre in order to capsize the small launch on
21 purpose, or was this not reported to you?
22 A The Master of the launch told me ---
23
24 Q I am sorry for having interrupted you. What exactly were you told?
25 A The Captain of the launch told me that twice they escaped a collision with *The Saiga*.
26
27 Q They never told you, therefore, that it was a manoeuvre on purpose by the Master of
28 *The Saiga* in order to capsize the launch?
29 A They did not say this.
30
31 Q As a result, if in a document it were stated that *The Saiga* tried to do a manoeuvre in
32 order on purpose to capsize the launch, this document would contain false information
33 on this point?
34 A I cannot confirm this.
35
36 Q Why can you not confirm it? Because nobody told you?
37 A It is those who can confirm it who gave me their report.
38
39 Q Did your men go on board *The Saiga*?
40 A The sailors? No.
41
42 Q Your men did not go on board?
43 A No.
44
45 Q Were they able to see a bit of what was happening?
46 A Yes.
47
48 Q What did they say? Did they ascertain that shots were fired on board *The Saiga*?
49 A I do not know.

1
2 Q There is nobody from amongst these men who were there. None of these men told
3 you that they heard shots being fired aboard *The Saiga*?
4 A I said that upon my arrival I was given a report from the Captain of the launch who
5 told me that shots were fired into the air in order to summon *The Saiga*.
6
7 Q You do not know whether the warning shots with the use of arms was done on board
8 *The Saiga* or before? You did not ask your men for any explanation on this point?
9 A I did not ask for any positions on this.
10
11 Q But you saw wounded people?
12 A Yes.
13
14 Q Did you ask how they were wounded?
15 A Yes.
16
17 Q You say in your declaration to the Tribunal that they were light injuries. Can you
18 confirm this?
19 A Yes.
20
21 Q Why in your report, which is for you a logbook, did you not mention that they were
22 only slightly injured?
23 A I did put this in it, and I spoke about accompanying them to the hospital.
24
25 Q Have you got your notes? Can you read the passage where you mentioned that there
26 were some slightly wounded persons or that the injuries were slight injuries?
27 A In the *journal de bord* I mention that there were two wounded, one Senegalese and
28 a first mate, who was a Russian, as a result of broken glass, according to the
29 information that I was given.
30
31 Q Therefore, there is no place in this document from which you can ascertain that the
32 injuries were slight. You drew up this document on the basis of your notes. Why did
33 you say after that, if it was not mentioned in your notes, that it was a case of minor
34 injuries?
35 A It is not mentioned in this *journal* because, first of all, we had to have confirmation of
36 how serious the injuries were, and our foremost intention was to send the wounded to
37 the hospital, and it was after that that we heard that they were not seriously wounded.
38
39 Q So you added something to your document which was not contained in your logbook –
40 excuse me for using this term – your notes from on board?
41 A I did not include something which did not exist.
42
43 Q You gleaned information about the state of the wounded to find out that the wounds
44 and the injuries were slight. When you were on your way back to Conakry with these
45 injured persons, did you give them any help or aid?
46 A We gave them first aid. The first mate was given first aid on board *The Saiga* before
47 we moved.
48
49 Q Did you look at the injury?

1 A No. His hand was bandaged. I did not look at it.
2
3 Q I am going to show you a photograph of the two injured persons.
4 (*photograph displayed on screen*) Do you recognize them, M. Sow?
5 A Yes, I recognise them.
6
7 Q Were they in this state?
8 A Yes.
9
10 Q Did it seem to you as if these were light injuries?
11 A For me, these are light injuries. I heard that weapons were used, and if I see these type
12 of injuries, these are light injuries in view of the fact that weapons were used. When
13 weapons are used and I speak about injured persons, I thought that they could be more
14 seriously injured than this.
15
16 Q You thought that it might be more serious, but do you think, in the light of what you
17 see, that these are light injuries?
18 A This is what I thought.
19
20 Q From what you can see and ascertain here, do you think that these are light injuries?
21 A I am unable to answer because I have not seen the injured persons here.
22
23 Q Look carefully at the eyes of the Senegalese. Do you consider that he has light injuries
24 to his eyes? (*pause*) Please answer the question, Mr Sow.
25 A I see that these are light injuries.
26
27 Q Even seeing these photographs?
28 A Yes.
29
30 **MR VON BREVERN:** Mr President, can we ask Maître Thiam whether we will be provided
31 with this photograph? I do not think it is in the bundle of pictures relating to the vessel. We
32 would like to have the picture.
33
34 **THE PRESIDENT:** Can that be arranged?
35
36 **MAITRE THIAM:** Yes, definitely, we will do this, Mr President.
37
38 **THE PRESIDENT:** Thank you, Maître Thiam.
39
40 **MAITRE THIAM:** Now something else. In your declaration on page 2 which was
41 submitted to the Tribunal, the seventh paragraph, you wrote:
42
43 "At 2019, from our position 09°19.5N 14°03.8W we again heard a radio
44 conversation between the same gentlemen, but this time with the trawler
45 *SALVATORE PRIMO* and the *M/V SAIGA* ".
46
47 In your notes, you did not write that it was the same gentleman. If you wrote your
48 document on the basis of your memory of your notes, how were you able to add that it
49 was the same gentleman?

1 A It is written down in my notes on board.
2
3 Q Could you read to the Tribunal from your notes on board where you say that it is the
4 same gentleman?
5 A "1920 position 09°220N, 13°56W. We are listening to a conversation on the radio in a
6 foreign language between a monsieur in Conakry whose voice is familiar to us and
7 a trawler which is at sea." At 2019, another conversation on the radio between the
8 monsieur, *SALVATOR PRIMO* and the tanker *SINGH*.
9
10 Q Do you seem the term "the same", "*même*"?
11 A I spoke about a *monsieur* once and if I speak about a *monsieur* further down, it is the
12 same one who I mention further up.
13
14 Q If you say "*a monsieur, SALVATORE PRIMO*", maybe in the copy that I have I cannot
15 see the comma, so "le monsieur" for you is the same *monsieur*, the same gentleman?
16 A The *SALVATORE PRIMO* is the name of the trawler with which the *monsieur*...
17
18 Q Yes, thank you. I want to finish by asking you whether you have very frequently
19 proceeded with the arrest of a vessel for Customs also?
20 A Yes, once for the Customs and many times for the fisheries authorities.
21
22 Q Only once for the Customs authorities. Was it a tanker?
23 A Yes.
24
25 Q What was it doing?
26 A It was the same case.
27
28 Q What was its name?
29 A *AFRICA*.
30
31 Q Was it before or after *The Saiga*?
32 A It was before *The Saiga*.
33
34 Q Does the name *NAPETCO* mean anything to you?
35 A I have heard of the arrest of this vessel but it was not me who did it. It was somebody
36 else on another patrol boat.
37
38 Q Systematically tankers are arrested which are bunkering fishing vessels?
39 A Could you repeat the question, please?
40
41 Q Do you or your colleagues go out regularly to arrest tankers which are bunkering
42 fishing trawlers?
43 A Yes. If the law tells us to do this, we do it.
44
45 Q I am asking whether you do it regularly?
46 A We are often out in our waters regularly. We are regularly out in our waters.
47

1 Q I am going to repeat my question. Apart from *NAPETCO*, to which you have heard
2 reference, and *AFRICA*, which is a mission that you participated in, and *The Saiga*,
3 have other tankers been arrested, to your knowledge?

4 A I have heard of the arrest of some vessels once after the arrest of *NAPETCO*. I was
5 not there. I was in hospital. It was P-300 who did this mission, and also others. It is
6 not the first vessel that we have arrested in Guinea, to my knowledge.

7
8 Q For reasons of bunkering?

9 A Yes.

10

11 Q Other vessels have been arrested?

12 A I think so, yes.

13

14 Q But you do not know anything about it, any examples?

15 A No.

16

17 **MAITRE THIAM:** This is very unfortunate. Mr President, that brings me to the end of my
18 cross-examination of this witness. Thank you very much.

19

20 **THE PRESIDENT:** Thank you very much, Maître Thiam. Before you re-examine, I would
21 like to put a couple of questions to the witness on behalf of the Tribunal:

22

23 Q Lieutenant Sow, you said that on the patrol boats you were communicating with *The*
24 *Saiga* by radio. Are your radio communications recorded on board the vessel?

25 A No. On board the vessels, we do not have the means of recording. These recordings
26 are done at the base.

27

28 Q To your knowledge, are your messages to the base recorded at the base?

29 A I cannot reply precisely to this question. The only thing that I can be sure of is that for
30 the conversations between vessels at sea this recording is done at the base, but not on
31 board the unit that is on board the launches at sea.

32

33 Q When you went back, did you at any time check to find out whether in fact your radio
34 messages had been recorded?

35 A No, I did not verify that. I returned from the mission, I submitted my report, and I do
36 not know any more.

37

38 **THE PRESIDENT:** Mr von Brevern, Professor Lagoni, do you have any re-examination?

39

40 **PROFESSOR LAGONI:** Mr President, Members of the Tribunal, looking at the time, I shall
41 be brief.

42

43 **Re-examined by PROFESSOR LAGONI**

44

45 Q Coming back to one question which was put to you at the end by Maître Thiam, you
46 were present when the tanker *AFRICA* was arrested. Is that right?

47 A Could you repeat the question, please?

48

1 Q If I understood you correctly, you said that you were participating in the arrest of the
2 tanker, *AFRICA*?

3 A Yes.

4

5 Q Did the *AFRICA* refuse to stop when you called it to stop?

6 A No.

7

8 Q Was there any use of force against the *AFRICA*?

9 A No.

10

11 Q Do ships usually refuse to stop if you call to them to stop and show your signs?

12 A Often there are vessels which refuse to comply but for this special case of *AFRICA*, the
13 commander saw our signals and stopped. We boarded it and then we carried on.

14

15 Q Lieutenant Sow, I do not ask whether they replied when you called them; I ask simply
16 that when you came close to the ship and showed the police signals – you mentioned
17 the blue light and the siren – do they refuse often to stop?

18 A No.

19

20 Q Maître Thiam examined you about navigational measures used for the measuring of
21 distances. You answered that you used, in the Guinean Navy, nautical miles and
22 cables.

23 A Yes.

24

25 Q Can you tell me how many cables are in one mile?

26 A As I explained, one cable is a tenth of a mile so that a nautical mile will have 10 cables.

27

28 Q So one cable is 185.2 metres?

29 A Yes.

30

31 Q Do you still have your calculator with you?

32 A No, it is over there.

33

34 Q Would you please get it? (*Witness left witness stand and returned*) Could you please
35 calculate 445 cables – 44.5 miles -- times 185.2 metres. How many kilometres do you
36 get?

37 A 82.324.

38

39 Q Thank you. My calculator says the same. Lieutenant Sow, the speed of *The Saiga* is
40 indicated in the logbook. I will show you the logbook. (*Same handed*) Can you tell
41 me the entries in the logbook according to the average speed of *The Saiga* on
42 26 October?

43 A On 26 October the speed mentioned here is 7.4 knots.

44

45 Q On the 26th?

46 A On the 26th the speed was 8.12 knots.

47

48 Q Then it goes on to say, below that, "bc", "bc". Can you explain that? What does it
49 mean? Have I read it correctly?

1 A "bc" is an abbreviation in Russian which means "the same thing".
2
3 Q So they just make the entries, "the same" "the same" "the same", going on at the same
4 speed?
5 A Yes.
6
7 Q Do you measure the in fathoms or brasses in the Guinean Navy?
8 A No.
9
10 Q You certainly will not measure in fathoms because it is a measure for the depth. How
11 do you take the depth in the Guinean Navy?
12 A We measure in the Navy – all of our vessels are fitted with echo-sounders to indicate
13 the depth and for the measurements with numbered cables, we do not use them.
14
15 Q So you measure the depth in metres with the echo-sounders?
16 A Yes.
17
18 Q You do not use brasses or fathoms?
19 A No.
20
21 Q The date of the mission: Maître Thiam showed you the mission. Indicated there is
22 "*date de départ*" on the 26th. Does it mean that the patrol boats were supposed to
23 leave on the 26th?
24 A Yes. We had to leave on the 26th and this is why the signature always corresponds to
25 the date of departure of the mission, but for technical reasons we were not able to
26 move on that day.
27
28 Q Could you explain briefly what a goniometer is? You were referring in the discussion
29 to radio direction finder. Could you explain this to the Tribunal, please?
30 A A radio direction finder is a type of radio we have on board our vessels which enables
31 us, on the basis of radio signals from other ships, to know their direction so that we
32 can tell on what side these vessels are.
33
34 Q Could you please, for the last time, go again to the map. Could we have the map on
35 folio again, please? (*Map projected on screen*) Can you generally explain where the
36 shipping routes are in that area? Just explain to the Tribunal the usual shipping routes
37 for international shipping and coastal shipping.
38 A For the northern zone, Kamsar, is a larger port. We often have the movement of large
39 vessels. The recommended route is seen here. This is for the port of Kamsar. The
40 port of Conakry, the exit of the ships – the vessels would come down *here* and then go
41 up *here* and follow this international route. Apart from that there is very often
42 movement of fishing vessels in this area.
43
44 Q Are there permanent currents, stable currents, in this area?
45 A The current is marked *here*. Up *here*, on the border with Guinea-Bissau, the currents
46 are very strong, but in other parts they are not.
47
48 Q Outside, in the exclusive economic zone, are there permanent north-south currents or
49 something like that?

1 A No, not very much.

2

3 Q Thank you very much.

4

5 **PROFESSOR LAGONI:** Thank you very much, Mr President. That brings me to the end of
6 the re-examination. May I hand to the court the map, which is the original map drawn by
7 Lieutenant Sow, with the explanation that the others are copies which may not be perfectly
8 identical.

9

10 **THE PRESIDENT:** Thank you very much, Professor Lagoni. You have 20 minutes.
11 Mr von Brevern, do you believe that you will be able to commence your submission?

12

13 **MR VON BREVERN** Mr President, I think we would like to make use of these 20 minutes.
14 Professor Lagoni will start with submissions on articles 56 and 58 of the Convention.

15

16 **THE PRESIDENT:** Very well. If you are going to be able to do that, the witness, Lieutenant
17 Sow, is released. The Tribunal is grateful to you for assisting it. You may leave but if you
18 wish to stay in the courtroom, you may take a seat. Thank you very much.

19

20 **(The witness withdrew)**

21

22 **PROFESSOR LAGONI:** Mr President, Members of the Tribunal, I start my presentation
23 this afternoon a little late. I shall try to do my best without overstretching the interpreters.

24

25 I will talk first on the topic of whether or not bunkering is navigation. On the morning
26 of 28 October 1997, Guinean patrol boats stopped and searched the *M/V SAIGA* in the
27 exclusive economic zone, the EEZ, of Sierra Leone. *The Saiga*, which claims to fly the flag of
28 Saint Vincent and the Grenadines, was arrested and escorted to Conakry. The Republic of
29 Guinea justifies its measures against *The Saiga* with its right of hot pursuit. It submits that
30 *The Saiga* violated its Customs laws which apply in the Customs radius by supplying fishing
31 vessels with gasoil as bunkers within the exclusive economic zone.

32

33 Contrary to this view, Saint Vincent and the Grenadines submits - and Maître Thiam
34 confirmed this before the Tribunal on Thursday 11 March - that such offshore bunkering, "is
35 an aspect of freedom of navigation or an internationally lawful use of the sea related thereto,
36 and therefore permissible in the EEZ under article 58(1) of the Convention."

37

38 The Republic of Guinea has submitted in the pleadings many arguments relating to this
39 issue. They are maintained but they shall not be repeated here. Instead, I will focus on certain
40 additional points in order to develop our arguments along the lines set forth in the pleadings.

41

42 Whether bunkering is an aspect of the freedom of navigation or another internationally
43 lawful use of the sea, as it is submitted by Saint Vincent and the Grenadines, is essentially a
44 question of an interpretation of Article 58(1) of the Convention. According to the customary
45 rules of interpretation, and I must not recall this before this Tribunal, Article 58(1) "shall be
46 interpreted in good faith in accordance with the ordinary meaning to be given to the terms of
47 the treaty in their context and in the light of its object and purpose." So it is said in Article
48 31(1) of the Vienna Convention on the Law of Treaties of 1969, where these rules of
49 interpretation are codified. I should stress that they do apply to this situation. I will follow

1 them by addressing six points which are relevant for the interpretation of Article 58(1) of the
2 Convention.

3
4 My first point relates to the textual interpretation of the provision. According to the
5 first alternative of Article 58(1) of the Law of the Sea Convention, all States enjoy in the EEZ
6 the freedom of navigation referred to in Article 87 of the Convention.

7
8 The term "freedom of navigation" is, however, not defined in the LOS Convention.
9 The word "navigation" derives from the Latin word "*navigare*", which again stems from Latin
10 "*navis agere*", which means to move a ship. Accordingly the ordinary meaning of the term
11 "navigation" is to sail a ship, as it is also made clear in Article 90 of the Convention. Thus the
12 ordinary meaning of navigation does not encompass off-shore bunkering, that means supplying
13 ships at sea with the necessary fuel, in this case with gasoil, for their operation.

14
15 Moreover, if one would consider bunkering as an aspect of navigation, as it is
16 submitted by Saint Vincent and the Grenadines, one would confuse the sailing of a ship with
17 the particular activities for the purpose of which this ship is being operated. The Law of the
18 Sea Convention itself provides ample evidence for the distinction between the sailing of a ship
19 and other activities related to its particular purpose – and I venture to say that the Applicant
20 State had this distinction in view when he conceded that supplying fishing vessels with fishing
21 gear in the EEZ might affect the jurisdiction of the coastal State.

22
23 It cannot surprise that we find examples for this distinction in the law of the EEZ.
24 A fishing vessel is enjoying the freedom of navigation in the EEZ, unless it is fishing.
25 A research vessel is enjoying the same freedom in the zone, unless it is conducting
26 unauthorized marine scientific research. Fishing or marine scientific research are not simply
27 aspects of the freedom of navigation. They are fundamentally different activities which have
28 to be distinguished from navigation.

29
30 The situation is exactly the same in the case of offshore bunkering in the EEZ. There
31 is no doubt that *The Saiga* enjoys freedom of navigation in the Guinean exclusive economic
32 zone. But the sailing of the ship must not be confused with its operation as a floating
33 bunkering station in that zone. The freedom comes to an end, when the ship is taking up
34 offshore bunkering. This is a separate and independent commercial activity which grossly
35 affects the public interests of the coastal State.

36
37 In this context Maître Thiam has advanced again the arguments that merchant vessels
38 transport goods and passengers and that commercial activities, such as the sale of tax free
39 goods to the passengers, takes place on ships during the passage. We do not deny that.
40 Suffice to say that such commercial activities do not affect the interests of the coastal State.
41 Transportation of goods may even be in their interests.

42
43 **THE PRESIDENT:** Mr Lagoni, could you go a little slower.

44
45 **PROFESSOR LAGONI:** I am sorry, I apologize. That bunkering is by its very nature a
46 commercial activity, whereas navigation is a means of communication, has been explained in
47 our pleadings. Therefore it seems to be sufficient at this stage of the dispute to recall briefly
48 some organizational details which characterize offshore bunkering as a commercial activity.
49 They are contained as documentary evidence in the logbook of *The Saiga* and in the telex

1 communication between the Master of the ship and its operational centre ABS in Geneva.
2 They have also been confirmed by the witnesses presented by both parties to this Tribunal.

3
4 There we learn that *The Saiga* left Dakar on its 12th bunkering voyage on 24 October
5 1997 with a cargo of 6.391,435 metric tons gas oil and supplied one fishing vessel off Senegal,
6 five fishing vessels off Guinea Bissau, and the three fishing vessels *GUILVERMO PRIMO*,
7 *KRITTI* and *ELENI G* in the contiguous zone of Guinea before it was arrested on 28 October
8 1997. We can read the overall amount of gasoil and occasionally also of fresh water supplied
9 to fishing vessels on this voyage was 458,203 metric tons of gasoil. And we take notice of
10 other meetings which were planned for the coming days and the scheduled meeting points.

11
12 All these details are not in dispute. I refer to them here only because they illustrate the
13 scope and genuinely commercial nature of *The Saiga's* bunkering business in the exclusive
14 economic zone off West African States.

15
16 In concluding this point I submit that the ordinary meaning of the term "navigation" in
17 Article 58 does not include the commercial activity of offshore bunkering in the EEZ.

18 My second point of interpretation relates to the context of the freedom of navigation in
19 Article 58(1) of the Convention.

20 Saint Vincent and the Grenadines submits that bunkering in the EEZ is admissible,
21 because it is also admissible on the high seas under Article 87 of the Convention to which
22 Article 58(1) refers.

23 This legal view suffers from two misconceptions. First, it is confusing the freedom of
24 navigation with other freedoms of the high seas that are not expressly mentioned in Article 87.
25 Being a comparatively recent activity, commercial bunkering on the high seas is not specified
26 in Article 87 of the Convention, whereas Article 58(1) refers only to freedoms which are
27 specified in Article 87. In this case it refers to the freedom of navigation which, however,
28 does not include offshore bunkering.

29 Second, the Applicant's view that offshore bunkering is permissible in the EEZ,
30 because it is permissible on the high seas, is confusing the issues which are at dispute here.
31 Offshore bunkering on the high seas is not in dispute before this Tribunal. The real issue is
32 whether or not bunkering of fishing vessels in the EEZ is permissible under the particular legal
33 regime of this zone. This regime constitutes a balance between the interests of the coastal
34 States and those of other States relating to the zone. It requires that commercial offshore
35 bunkering in the EEZ comes under the jurisdiction of the coastal State. I will come at a later
36 stage to this again.

37 In concluding my second point, I submit that the view according to which bunkering is
38 free in the EEZ, because it is free on the high seas, is legally not tenable.

39 My third point on the interpretation of Article 58(1) relates to the object and purpose
40 of this provision. Article 58(1) of the Convention shall make sure that third States enjoy the
41 so-called communication freedoms in the EEZ. These are freedoms of navigation and
42 overflight and the laying of submarine cables and pipelines. This object and purpose does on
43 its face not require that offshore bunkering in the EEZ is included in these communication

1 freedoms. The flag State of *The Saiga* would not be affected in its communication freedoms if
2 offshore bunkering is prohibited in the Guinean EEZ.

3 As my fourth point I turn to the interpretation of the second alternative of Article
4 58(1). According to this alternative all States enjoy in the EEZ also "other internationally
5 lawful uses of the sea related to these freedoms, such as those associated with the operation of
6 ships". Here the question arises which "other internationally lawful uses" does this alternative
7 of Article 58(1) refer to? The text of the provision means only such uses, which are "related
8 to" the communication freedoms.

9 As motor vessels cannot sail without fuel, receiving bunkers for navigation is certainly
10 a necessary requirement for and associated with the operation of a ship. Therefore the coastal
11 State cannot prohibit the bunkering of ships in transit through its EEZ under Article 58(1) as
12 long as this activity is in conformity with its environmental provisions. But receiving bunkers
13 is not in dispute in this case. In accordance with the general practice of States, the Republic of
14 Guinea does not charge customs duties on fuel in the fuel tanks of merchant ships calling at its
15 ports if this fuel is used for the operation of the ship. In dispute here is the admissibility of
16 offshore bunkering of fishing vessels in the Guinean EEZ. This means, of supplying oil to the
17 fishing vessels. And this on its face a separate and independent commercial activity which is
18 not related to the freedom of navigation.

19 Therefore I conclude my fourth point of interpretation that the second alternative of
20 Article 58(1) does not apply here. Offshore bunkering by *The Saiga* in the Guinean EEZ was
21 not an internationally lawful use of the Sea related to the freedom of navigation and associated
22 with the operation of ships.

23 In my fifth point of interpretation I turn briefly to the preparatory work of the 1982
24 Convention and the circumstances of the conclusion of Article 58(1), although the meaning of
25 the provision is unequivocal and clear.

26 The *travaux préparatoires* illustrate that coastal States in East Africa were well aware
27 of the problem of the "control and regulation of customs and fiscal matters related to
28 economic activities" in the EEZ, as the proposal of 18 States at the second session of the LOS
29 Conference and an earlier proposal by Nigeria demonstrate. Although they have not expressly
30 been included in the Convention, it would be misleading to conclude from this, as Saint
31 Vincent and the Grenadines does, that the coastal States do not have jurisdiction to control and
32 regulate customs and fiscal matters related to economic activities in its EEZ.

33 There are three reasons that such conclusion is in my view not tenable. First, the
34 jurisdiction on customs and fiscal matters in its EEZ is already partly implied in the sovereign
35 rights of the coastal State. The coastal State has in fact jurisdiction to control and regulate
36 customs and fiscal matters relating, for example, to the exploration and exploitation of oil and
37 gas in the EEZ or to other activities on artificial islands and installations within the zone. In
38 this respect, a general regulation of the matter in the Convention is not necessary.

39 Second, there was obviously no actual need to regulate comprehensively the customs
40 and fiscal jurisdiction within the EEZ at that early stage of development, before most EEZs
41 had been established.
42

1 Third, when the regime of the EEZ was emerging as part of an overall compromise
2 between coastal States and shipping nations, there was little room at UNCLOS III for further
3 discussion about details. Discussions on such marginal details as the question of the control
4 and regulation of Customs and fiscal matters could easily have jeopardized the consensus of
5 the regime of the EEZ.

6
7 This does not mean, however, that the coastal States are prevented once and forever
8 from regulating Customs and fiscal matters related to economic activities in their EEZ.
9 Whether or not they may do this depends obviously upon the circumstances of each case.

10
11 Mr President, I ask for your permission to end here because my time has run out.

12
13 **THE PRESIDENT:** Thank you. The Tribunal's time has also run out. We will break at this
14 point and resume tomorrow at 10 o'clock when you will continue with your submission.

15
16 **(Adjourned at 1605 hrs until 1000 hrs on Tuesday, 16 March 1999)**