

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



1999

Public hearing

held on Friday, 19 March 1999, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Uncorrected
Non-corrigé

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

Saint Vincent and the Grenadines
represented by

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

as Agent;

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

as Deputy Agent and Counsel;

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

and

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

as Counsel and Advocates.

Guinea
represented by

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

as Agent and Counsel;

Mr. Maurice 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, I take it that you will continue with your submissions today?
2

3 **DR PLENDER:** Yes, Mr President. First, it is my pleasure and honour to present to the
4 Tribunal the Honourable Carlyle Dougan, Queen's Counsel, High Commissioner to the Court of
5 St James and Agent for Saint Vincent and the Grenadines in these proceedings. At the end of the
6 speeches today, or at such other point as the President may direct, Mr Dougan will formally
7 present the request made on behalf of the Applicant State for relief in this action.
8

9 **THE PRESIDENT:** Thank you. The Tribunal is pleased to welcome His Excellency, the Agent.
10 We look forward to hearing from him at the appropriate time.
11

12 **DR PLENDER:** Maître Thiam will now address the Tribunal on questions of evidence.
13

14 **MAITRE THIAM:** (*Interpretation from French*) Mr President, Honourable Judges of the
15 Tribunal, I shall be speaking to you about the testimony provided by Guinea. In doing so,
16 I should like to start by saying that the witnesses were not of the same quality and credibility as
17 the witnesses for the Applicant State.
18

19 First of all, with regard to the submissions produced by the witnesses of Guinea, you will
20 have noticed, as we did, the anomalies which mean that they are not credible. First and foremost I
21 should like to address mission order no 770 signed by the National Director of Customs at
22 Conakry. This mission order was not dated, but the Guinean party would like to make you
23 believe that it was drawn up on 26 October 1997 whereas it applies to a mission which was
24 supposed to start that very day. However, even if that were possible, one would be liable to
25 admit that it is not very probable, to the extent that it is quite clear that if you want to organise
26 a mission which implies the movements of different units, that is Customs and Navy, you have to
27 at least leave the units, or give them the time to co-ordinate their activities.
28

29 Furthermore, there was no particular and real urgency for the activities of these units to
30 commence because on 26 October 1997, *The Saiga* was not yet in the Guinean exclusive
31 economic zone. In any case, the date of the order of the mission cannot be considered as having
32 been established in a pertinent fashion.
33

34 The Guinean party would also like to make us believe that this order of mission had been
35 issued specifically with a view to searching for *The Saiga*. However, it was issued before the
36 vessel had entered Guinean waters, as I have just said. Above all, it was drawn up with the
37 following mention: "Search for and repression of fraud at sea and on land." If it really was a way
38 of defining a specific mission, one would then have had to wonder how, in Guinea, missions of
39 a general nature are defined. If it was just a case of finding *The Saiga*, which was definitely not
40 on land, we do not see how the editor of the order of mission would have taken the pains to ask,
41 furthermore, for "search for and repression of fraud on land" unless he thought that maybe this
42 vessel was moving on land.
43

44 I am sure that we all remember a song which was sung to us in our cradles and which
45 begins:
46

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

1 However, we all realize here that the National Director of Customs in Guinea left his
2 adolescence behind a long time ago. As a result, he was unable to give a specific order to find
3 *The Saiga*, aiming at fraud which is committed on land. Furthermore, evidence has been given
4 that it was not *The Saiga* which was specifically being searched for. This evidence was given by
5 Lieutenant Sow himself. At page 20 line 26 of the Verbatim Record, PV.99/13, we have a report
6 of the following dialogue between the lieutenant and myself concerning the landbased radar which
7 was following the vessel.

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

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

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

28
29 "When the order for mission was drawn up, only the agents who are involved in this
30 mission are told to go to a place x, y, z at such and such a time." (Verbatim Record
31 PV.99/11 page 16 p.23, lines 44-45)

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

35
36 "As far as details are concerned, it is only my authorities who can answer this question."
37 (Verbatim Record PV.99/12 no.12, p.14, lines 40-41)

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

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

49

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

7
8 "On a small launch we do not have a logbook. On the large patrol boat, each time we are
9 due to leave we are given slips of paper which we can use to put down notes which will
10 serve our memory." (Verbatim Record PV.99/12, page 4, lines 47-48)

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

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

15
16 He said later on that the small launch did have loose sheets. (Verbatim Record PV.99/13, p.15,
17 lines 8-12.)

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

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

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

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

49

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

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

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

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

29 "We cannot change what *The Saiga* wrote in its logbook." (Verbatim Record PV.99/13
30 no. 13, p.9, lines 14-15.
31

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

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

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

48 Another element of interest in this respect is the position at which *The Saiga* was detected,
49 supposedly by radar, at 3.50 on the morning of 27 October 1997. Lieutenant Sow mentions in his

1 report that from his position 0°900N and 15°00,W he had a view of *The Saiga*, he detected it, at
2 445 cables on a heading which was approximately 40° to port of his own; that is, at a heading of
3 about 205°.
4

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

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

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

30 I must add that the Verbatim Record PV.99/13 page 9, 10, 11, reports the following
31 exchange between Lieutenant Sow and myself on *The Saiga's* logbook:
32

33 "Q Was the logbook precise?

34 A The logbook was precise."
35

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

43 There is no doubt that the pursuit of *The Saiga* could not have started before it crossed
44 the southernmost boundaries of the exclusive economic zone of Guinea, as laid down in its
45 logbook, but it is extremely remarkable that we arrive at exactly the same conclusion by two
46 different methods in fact.
47

48 The first method is the following. When Lieutenant Sow was requested to plot
49 course 205 in comparison to the position that he had 3.50 on 27 October, he did it. The line that

1 he plotted crosses the course of *The Saiga* at a point which is exactly on the southernmost
2 boundary of the exclusive economic zone of Guinea but below that. Of course he took time to
3 realise this. Finally we see in Verbatim Record pv.99/13, p.24, lines 7-8 the following dialogue:
4

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

7 MR SOW: I think so."
8

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

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

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

42 The second of the other methods which enable us to arrive at the conclusion that
43 *The Saiga* had not been detected until after it had crossed the southern limits of the exclusive
44 economic zone of Guinea is as follows: Professor Lagoni prefers to see God in the details. Be
45 that as it may, let us look together at what the other side of the Bar wishes to pass off as a detail.
46 I am talking about distances and measurements taken by Lieutenant Sow to localise *The Saiga* on
47 27 October 1997 at 03h50.
48

1 The lieutenant did this by talking about *encablures* in French. He said that the ship was in
2 a heading of 205 at a distance of 445 *encablures*. Today, obviously we have been told that
3 *encablures* in French does not necessarily represent a tenth of a nautical mile. But the cry came,
4 "How can you calculate distances in kilometres at sea when they are measured in nautical miles?"
5

6 However, we have noticed that the chart produced by the Guinean party itself was
7 graduated not in nautical miles but in kilometres, and I would like to beg your indulgence from
8 now on to say that I cannot accept that those who have reproduced these charts in kilometres can
9 reproach me for having asked the Tribunal to check their calculations and readings using the same
10 unit of measure.
11

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

20 The inconsistencies stem from the fact that Guinea would like us to believe that the vessel
21 had changed course so as to be at 03h50 on 27 October 1997 further to the north than the master
22 intended. These inconsistencies stem from the fact that the ship would have been detected at
23 a place which has not been able to be found on the route defined by the Guineans themselves.
24

25 There is nothing in the file that enables us to conclude that Master Orlov deliberately
26 changed his course, and there is nothing to lead us to think that he would have been a poor sailor
27 if he had changed course without knowing it. No affirmation based on these measurements of
28 speed and direction of the current at that time would have enabled us to conclude that the ship
29 had been taken off course by currents.
30

31 If we were to consider that the word *encablures* had been used by the Guinean lieutenant
32 to represent a tenth of a nautical mile, it would be perfectly incomprehensible that the calculations
33 could fix a geographic point where the vessel had never been, both in terms of its logbook and
34 according to the chart produced by Guinea itself.
35

36 It is absolutely remarkable that, on the other hand, if you retain the French definition of
37 the word *encablures* and the distance of 1994.88 metres which it implies, the statements of
38 Lieutenant Sow would be practically in conformity with the logbook of *The Saiga*.
39

40 Mr Howe very kindly submitted to the Tribunal and to me the proof that the *encablure*
41 does not represent a tenth of a nautical mile. If it represents 120 fathoms and if this measure
42 varies according to whether you are talking about a British fathom or a French fathom, it is
43 absolutely certain that it cannot represent a distance which is less than that indicated to the
44 Tribunal, that is 194.88 metres, because all the other measurements go beyond 200 metres,
45 including the measurements taken in Germany according to the encyclopaedia that I have been
46 able to consult there.
47

48 I have to add that, as was said when I was interrupted, the fathom is generally used to
49 measure depth. This is not the case for the *encablure*, although it represents 120 fathoms. In

1 fact, one says in current French that a vessel is at so many *encablures* from the shore, and this,
2 I think all of us agree, has nothing to do with the depth.

3
4 As far as I know, in the French speaking world only the Canadian Navy has been able to
5 establish two different lengths for the *encablure* according to whether it is a measure of depth or a
6 measure of distance over surface. However, the Guinean Navy does not, as far as I know, use the
7 methods of the Canadian Navy.

8
9 Of course, the word *encablure* can be translated literally into English by the word *cable*,
10 but it does not have the same meaning. Therefore, I would ask the interpreters at this Tribunal
11 from now on, those who have helped us and to whom I pay my respects for their work, to no
12 longer translate the word *encablure* by the word *cable* in English when they are translating my
13 comments. I would prefer them to retain the German translation *Kabel*, which is defined as a
14 measure of distance of 200 metres.

15
16 Having made these calculations, nothing beyond the scarcely viable declarations of
17 Lieutenant Sow enables us to conclude that he had the intention to refer to nautical miles when he
18 noted the measurements of distance in *encablures*. This leads us to believe, on the other hand, if
19 you use the language of Voltaire, that this officer wanted to refer very precisely to the French
20 definition of the word, although he was trained in the Soviet Union.

21
22 This is the only way to harmonise the entries in the logbook of *The Saiga* with the claimed
23 affirmations of the Guinean Navy on 27 October 1997 at 03h50. This enables me to conclude that
24 at that time the vessel *M/V SAIGA* was beyond the exclusive economic zone of Guinea.

25
26 To conclude with the documents produced by the defence witnesses, I must mention that,
27 when doing so, I wondered why Professor Lagoni was taking so many precautions to indicate to
28 the witness Sow that they had never met and had never spoken to each other before the arrival of
29 the witness in Hamburg, and to have him say that the documents brought by the witness had been
30 drawn up in Conakry. I very sincerely must reflect that a person enjoying the reputation of
31 Professor Lagoni certainly did not need to waste time by trying to convince the Tribunal of the
32 fact that he could never have been an accomplice to the fabrication of documents.

33
34 Continuing in my reflections on this point, I would terminate by concluding that, like all of
35 us, the professor was particularly disturbed and concerned by the extraordinary appearance during
36 the proceedings of documents drawn up in Conakry. This last reflection concludes the analysis of
37 the evidence produced by the witnesses for the defendant.

38
39 I would now like to analyse the other aspects of the various testimony. First of all, let us
40 look at the testimony of Mr Bangoura, the expert who became the witness. The fact that I am
41 examining this testimony first of all is not because it is the most interesting aspect for the Tribunal
42 but because he was the first witness called by Guinea. It is edifying to maintain that in the closing
43 submissions of the first part of the hearings Professor Lagoni could not rely once on such a
44 testimony, and how could it be otherwise for a witness who has not seen the impact of the bullets
45 on *The Saiga*?

46
47 How could it have been otherwise for a witness who himself recognised implicitly that he
48 had been guilty of falsifying an official State document, recognising, as he mentioned in his
49 *procès-verbal*, that *The Saiga* had tried to capsized the two launches of the Navy, although he

1 finished by admitting that one of the launches had arrived at the place only after the other launch
2 had arrested *The Saiga* and the other launch had not been perturbed except by the movement of
3 waves? He said, "The waves caused by the ship tried to act upon the small vessel." How could it
4 be otherwise for a witness who refused to recognise holes shown to him on the photographs in
5 front of the Tribunal? How could it be otherwise for a witness who refused to recognise that he
6 kept the crew of *The Saiga* prisoner on board the vessel but who says, "Yes, we put guards on
7 board for the security of the members of the crew and the ship itself", as if it were possible,
8 gentlemen, to imagine that the crew was in need of being protected?
9

10 How is it possible to believe a witness who confirms that the small launch was not armed,
11 when this was denied by the person who was commanding the launch? How can we believe a
12 person who, having said that there was only one warning shot, concluded by saying "I do not
13 know how many men were firing. They fired two or three warning shots"? How can we believe a
14 person who affirms that goods must necessarily – and this is the term that he used – be declared
15 as soon as they enter into the maritime Customs radius? How can we believe a person who
16 refused to recognise something that even children know, that is that a tanker cannot travel faster
17 than a high speed launch of the National Navy?
18

19 It would be too fastidious to highlight all the inconsistencies and imprecisions of the
20 testimony of Mr Bangoura. The Tribunal therefore cannot rely any more than Professor Lagoni
21 on this testimony.
22

23 Turning now to the testimony of Mr Camara, I will be more extensive. Professor Lagoni
24 did not cite him only once, and I understand this. This is a witness who said, without batting an
25 eyelid, that he was not afraid of anyone. I think that we must not confound my comment that he
26 was not afraid of anyone. He said, "We felt threatened because we encircled the vessel twice.
27 We saw no-one. We issued a warning by firing in the air. We saw no-one". (Verbatim Report
28 PV.99/11, p.12 lines 25-26, French version). Is it not strange, gentlemen, to claim that you feel
29 threatened although you have not seen anyone?
30

31 We should look again, without comment, at this strange reflection of the witness: "I do
32 not want to say here that when one fires in the air this can be precise." This is not a comment but
33 a question. On what precise target can one fire when one is firing in the air?
34

35 This witness confirmed that he signed the *procès-verbal* of the Customs without having
36 read it and that he could not say anything as to its contents. He admitted having signed a
37 *procès-verbal* which contained references to facts which he personally did not witness. This says
38 it all!
39

40 Let us moan together in silence for poor Africa and let us not add any further comments to
41 this. This testimony cannot be retained any more by the Tribunal than the other one. However,
42 let us come back. There was a question by Professor Lagoni relative to the free passage of the
43 vessels through the Customs radius. The witness responded, and I quote: "There is no
44 inspection", which contradicts the false affirmations of his superior, who claimed to have
45 exercised general obligation for declaration of any merchandise entering into the Customs radius
46 by sea.
47

48 Let us underline also that questioned on the point of knowing at what time *The Saiga* was
49 targeted, the witness replied: "I do not know what time". This is the *Procès-Verbal* no. 11, p.22

1 line 10. I refuse to believe that the person who from the beginning, because he was on the smaller
2 launch at the time when it was heading for the Isle of Sorro at the beginning of the mission, and
3 was assigned to lead a boarding crew, an arresting crew for the vessel, was not kept informed of
4 the time when the vessel was targeted.
5

6 Let us now return to the testimony of Lieutenant Sow. This testimony is interesting on
7 one point, because it confirms that in this case Guinea never intended to act in virtue of its laws
8 on the protection of the marine environment and fishing. In fact, the witness said that he had not
9 been commissioned by the Department of the Environment of Fisheries, but the Customs
10 Departments. I think there is no serious discussion on this question. The declaration of the
11 witness is also interesting, because on several occasions he confirmed that the launch of P35 did
12 indeed have ammunition for its machine guns. This is in the *Procès-Verbal* no. 12, p.11, lines
13 13 and 14. For the remainder, the declaration of this witness is not any more coherent than the
14 others.
15

16 Let us note first of all for the beginning of the mission that the witness confirmed that he
17 did not know that he had to search for *The Saiga* until he was at sea, after having left the port of
18 Conakry. In fact, in reply to a question put by Professor Lagoni regarding the moment when he
19 had mention of *The Saiga* for the first time, he said: "Personally I heard about *The Saiga* when
20 I was at sea. This is in the *Procès-Verbal* no. 12, p. 17, nos. 24 and 25 in the French version.
21

22 We have all understood that he had already left the port of Conakry at that time, because
23 Professor Lagoni himself made this remark: "You have just indicated that you heard about
24 *The Saiga* after left the port of Conakry". *Procès-Verbal* no. 12, p.18, lines 15-16 in the French
25 version.
26

27 However, further on the witness declared precisely the contrary to one of my questions.
28 This is the dialogue:
29

30 "MR SOW: I say that before leaving the port, I did not know that we were leaving to
31 look for *The Saiga*. It is when the launch was prepared we were about to cast off, and the
32 transmission officer came to say 'Here is the frequency; set this on the radio. You are
33 going to search for a vessel which is broadcasting on this frequency'.
34

35 MAITRE THIAM: And you were told its name?
36

37 MR SOW: Of course".
38

39 This is in the *Procès-Verbal* no. 13, p.25, lines nos 27 and 28 and *Procès-Verbal* p.26 lines 1-4 in
40 the French version. Therefore, the Lieutenant has perjured himself.
41

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

1 of the naval crew on the mission had been informed of the name of the vessel they were looking
2 for. Then he said that the person piloting the smaller of the launches was informed nonetheless.
3

4 The witness perjured himself again. He confirmed that the small launch had been sent at
5 13.14 towards the island of Alcatraz, where the Customs only affirmed in their PV that they had
6 left in reconnaissance towards the Isle of Sorro. Because the mission was a joint mission between
7 them and the Navy, the Navy was to help them by transporting them. I do not see how
8 Lieutenant Sow could claim that he had sent the small launch to Alcatraz, whereas the Customs
9 officers directing the mission wanted to stop at the island of Sorro.
10

11 Lieutenant Sow claims that they recalled the small launch for the following reasons: "We
12 cannot leave it to go out in such deep waters on its own. If it is in sight of land, we think it is
13 more secure than on the high sea." This is in *Procés-Verbal* no.13, p.20 lines 1-3.
14

15 But the island of Alcatraz is more than 48 nautical miles from the coast. Furthermore, the
16 launch had just completed a route to and fro of more than 100 nautical miles, and was more than
17 21 nautical miles from the coast, and from the point of view of security, there is absolutely
18 nothing which changes for the vessel according to whether it is 21 nautical miles from the coast or
19 further.
20

21 Lieutenant Sow therefore did not tell the truth to the Tribunal on the true motives of the
22 sortie to sea of vessel P35 at 13.14 hours on 27 October.
23

24 Lieutenant Sow recognises that he does not understand Greek, but he confirmed that he
25 can understand a warning given in Greek, and when he thinks that a tanker has been warned, and
26 that it is going to try to escape towards the south, it is precisely this moment that he chooses to
27 head north. Lieutenant Sow claims that when he targeted *The Saiga* at 3.50 on 20 October he
28 could not increase his speed to beyond 7.5 knots in view of the state of the sea. But we have
29 produced weather reports at these hearings proving that the weather was calm at that time.
30

31 Lieutenant Sow claims that at the same time he called *The Saiga* on the radio, and so there
32 would have been no further reason to camouflage himself. But talking about the reason why he
33 changed the towing system to take the small vessel aft, he did not say that there was no further
34 necessity to camouflage, and he justifies his decision completely differently. He says: "From that
35 point we changed our system of towing because we could not really increase the speed of the
36 vessel towing at the side." This is in the *Procés-Verbal* no. 12, p.29.
37

38 In your soul and conscience, Mr President, Members of the Tribunal, you cannot retain
39 a testimony, given indeed with such skill, but with a skill which has not enabled the witness to
40 avoid contradicting himself and perjuring himself. You will consider that *The Saiga* was not
41 pursued until after it had left the exclusive economic zone of Guinea. You will consider that it
42 was the subject of an attack which was carried out with an unjustifiable brutality, when all the
43 members of the crew were hidden, and that they represented absolutely no threat to the Guinean
44 agents.
45

46 I am going to conclude by invoking a conversation which I had in Guinea at a higher level,
47 because a witness thought that he could refer to this contact. Indeed, I was received by a very
48 high person, and I would like to emphasise that he received me with extreme courtesy, and I had
49 the opportunity to thank him for his solicitude, and he listened to me attentively. When I said that

1 *The Saiga* had been the victim of brutality, he replied: "What do you want me to tell you, Maître,
2 because we ourselves have been savagely bombarded?"
3

4 It is high time that in Africa our states and our peoples cease to be the hostages of their
5 officials. This is why we are waiting and expecting from you, the Tribunal, that when you look at
6 this closely, you will render a greater service to Guinea than you now believe.
7

8 I would like to conclude by thanking you Mr President and Members of the Tribunal. The
9 hearings have been of very high quality, and it has been a real pleasure for me to make your
10 acquaintance, since my father has often spoken to me of most of you in terms which I think would
11 offend your sense of modesty. I pray to Almighty God to render you the best decision, and I pray
12 to Him that He gives us all the possibility of living for a long time in a world of justice and law.
13

14 I would like to pay my respects to the Guinean delegation, which is going to return to its
15 country, a country which is also part of myself, because three of my children have half of their
16 ancestors there. May they return to their native country with a light heart, knowing that
17 everything that has been said here was said only to advance the cause of justice and law.
18

19 Having paid my respects yesterday to Professor Lagoni, I would also like to pay my
20 respects to Mr Von Breven, who has given his best for a file where certainly he did not have the
21 easiest of tasks. His country is hospitable and friendly. I will return to this country with great
22 pleasure.
23

24 This case has given me the opportunity also of meeting two British men, Mr Howe and Dr
25 Plender. What a pleasure it was for me to work with them and to benefit from their experience.
26 Dr Plender, Excellency, I can never thank you enough for having given me the opportunity to
27 listen to your submissions which are just as brilliant and powerful before this Tribunal
28

29 Doctor, I hand over to you, thank you.
30

31 **THE PRESIDENT:** Thank you very much, Maître Thiam. Dr Plender, please.
32

33 **DR PLENDER:** Mr President, Members of the Tribunal. When he opened the case for Saint
34 Vincent and the Grenadines, the Attorney General explained why we seek an award of damages.
35 We do so to secure reparation for the losses that Saint Vincent and the Grenadines have suffered.
36 Those losses are both tangible and intangible. Some were suffered directly by Saint Vincent and
37 the Grenadines itself. Some were suffered indirectly in the person of those individuals and
38 corporations for whose protection the Applicant State is responsible.
39

40 It now falls to me, in my closing speech, to deal with the quantum of damage and with
41 costs and to respond to some points made on those subjects by the Agent of Guinea. In the
42 course of his address on 16 March, Mr von Brevern raised a common objection to several distinct
43 claims for damages; this was the assertion that Guinea had acted lawfully. For instance, at page
44 23, line 2 he argued that there should be no damages for violation of the rules of hot pursuit
45 because there was no such violation. At page 23 line 6 he argued that there should be no
46 damages for violation of Vincentian jurisdiction over *The Saiga* because the Guinean arrest was
47 lawful, and so forth.
48

1 Let me reassure him. Saint Vincent and the Grenadines does not seek damages on the
2 premise that Guinean authorities acted lawfully; she claims damages on the premise that they
3 acted unlawfully. If, therefore, the Tribunal should find that there was no violation of
4 international law, the issue of damages would not arise. It is only if the Tribunal finds a violation
5 that it will need to consider the question. For this reason, the plea that the Guinean acts were
6 lawful has no place in the consideration of damages. We address the question of damages on the
7 premise that Guinea is found to have violated the rights of Saint Vincent and the Grenadines.
8

9 At page 23, line 23, the Agent of Guinea advanced a related argument, that the award of
10 damages should be mitigated or reduced on the premise that the Captain of *The Saiga* was guilty
11 of contributory negligence. His negligence was said to be his act of entering the Guinean
12 exclusive economic zone knowing that he would run a risk of being pursued and arrested there.
13 I do not challenge the proposition that where there is contributory negligence damages may be
14 reduced. I must, and do most vigorously, contest the proposition that a person who suffers
15 interference with a right protected by international law is to suffer a reduction in damages if, at
16 the time when he sought to exercise that right, he knew or had reason to believe that the agents of
17 a foreign State might interfere with his rights unlawfully. Such a proposition would be a recipe
18 for oppression. A State which had repeatedly violated its international obligations would be able
19 to rely upon its own wrongful acts so as to reduce its liability to future victims. That could not be
20 right.
21

22 The Agent of Guinea made another preliminary point. He observed that we have not yet
23 responded to the argument advanced in the Rejoinder on the basis of article 106 of the United
24 Nations Convention. I confess, we had taken the view that consideration of article 106 did not
25 illuminate the present case, but since the Respondent State persevered with the argument, I shall
26 address it.
27

28 Article 106 deals with the liability of a State for the wrongful seizure of a vessel on
29 suspicion of piracy. Since *The Saiga* was not seized on suspicion of piracy, the article has no
30 direct relevance. The Agent for Guinea points out, however, that article 106 speaks of the duty
31 to compensate the flag State whereas article 111, paragraph 8, speaks of the duty to compensate
32 the ship in the event of the wrongful exercise of hot pursuit. This, as the philosophers say, is "true
33 but not interesting". Since the ship can be represented only by the flag State, no significance is
34 attached to the fact that article 111, paragraph 8, says that "it", meaning the ship, "shall be
35 compensated for any loss or damage." The result is the same: the flag State claims the
36 compensation.
37

38 Guinea contends, of course, that the only damages payable under article 111 paragraph 8
39 are damages "sustained by the unjustified exercise of hot pursuit". (Rejoinder, paragraph 129.)
40 On that premise, there would be no basis in the Convention for awarding damages for the
41 subsequent Guinean actions including the seizure of the cargo, the detention of the Master and
42 crew and the attack on the vessel dated 30 January 1998. To test that argument one has to revert
43 to the words of article 111, paragraph 8. This envisages compensation for "any loss or damage
44 that may have been thereby sustained". The word "thereby" refers to the stopping or arresting of
45 a vessel outside the territorial sea in circumstances which do not justify the exercise of the right of
46 hot pursuit."
47

48 I accept that it is, in each case, a question of fact and degree to determine whether a
49 particular loss has been occasioned by the unlawful stopping of a vessel. In the circumstances of

1 the present case it will be absurd to maintain that the removal of the cargo was not effected by the
2 stopping of *The Saiga*. The Guinean Customs officers could not take 5000 tonnes of gasoil
3 aboard their patrol boats. In order to seize the oil, they had to stop *The Saiga* and take her into
4 Conakry. The owners suffered the loss of the cargo by the stopping of the vessel. Similar
5 arguments apply *mutatis mutandis* to the detention of the crew and the attack on the vessel dated
6 30 January 1998. Had the vessel not been stopped, these losses would not have been suffered.
7 The losses were the consequence of the arrest.

8
9 The Agent for Guinea next stated that it was to be inferred that Saint Vincent and the
10 Grenadines had abandoned the claim to be compensated for those losses that arose from the
11 devotion of governmental time and resources to the case. We know of no reason for drawing such
12 an inference unless it be that this aspect of the case was not specifically reiterated in the Attorney
13 General's opening speech. For the avoidance of doubt, therefore, I must state that Saint Vincent
14 and the Grenadines has not abandoned any aspect of the claim. If we fail to repeat orally what we
15 have already said in writing, we must not be taken to have resiled from the written submission.

16
17 A similar comment was made on behalf of the Respondent State when the Agent for
18 Guinea considered the evidence of Allan Stewart. Referring to my observation that Mr Stewart's
19 report had not been challenged for its accuracy, even to the extent of one cent, the Agent for
20 Guinea informed the Tribunal that he took this as an acknowledgement that there were no other
21 claims against the Republic of Guinea. As the Tribunal will see, the report drawn up by Allan
22 Stewart is designed to quantify and prove those claims that are capable of quantification. It
23 provides precise evidence of the nature and extent of the damage done to the vessel and the cost
24 of effecting repairs. It is not, of course, a substitute for the exercise of this Tribunal's judgment
25 when assessing claims which cannot be quantified precisely, such as the sum to be awarded by
26 way of compensation for injured members of the crew.

27
28 It is the Guinean case that the claim for damages on behalf of the injured crew is
29 excessive. The Agent for Guinea did not appear to advance that argument on the premise that we
30 had applied an incorrect scale when assessing the sum to be awarded in respect of an identified
31 injury, but rather on the premise that the extent of the injuries was unproven. Thus, in the case of
32 Mr Niasse, he expressed scepticism about the provenance of the x-rays presented to the Tribunal
33 suggesting that these might not record injuries actually suffered by that witness. We invite the
34 Tribunal to conclude that the x-rays were certainly those of Mr Niasse's injuries, as he confirmed
35 and as appears from the medical reports. We further invite the Tribunal to conclude that Mr
36 Niasse suffered severe physical and psychological injuries which demand substantial reparation.
37 In reaching its conclusion on that point, the Tribunal should bear in mind Mr Niasse's own
38 account; that of the Captain and the second mate; two medical reports; the photograph taken in
39 Dakar; the x-rays and the visible evidence of his condition when he appeared as a witness.

40
41 In the case of Mr Kluyev, the Tribunal should make an assessment on the basis of the
42 witness's own evidence, that of the Captain and the photograph. In the light of that evidence the
43 Tribunal is invited to apply a scale similar to that established for the United Nations Compensation
44 Commission when assessing claims arising from the invasion of Kuwait. The same scale provides
45 a convenient measure for the assessment of the sums to be awarded in respect of the detention of
46 the Captain and the detention of members of the crew, *de jure* or *de facto*.

47
48 The assessment of damages to be paid in respect of the vessel should not, in my
49 submission, present the Tribunal with difficulties. There is now in evidence an accurate record of

1 the sums paid by way of repair and the revenue lost when the vessel was off hire. The record has
2 not been challenged.

3
4 There has been a challenge to the claim that the damage quantified by Allan Stewart was
5 the product of Guinean action. The Tribunal should dismiss it without difficulty. The
6 photographic evidence alone is compelling and there has not been so much as speculation from
7 the Guinean side as to how the obvious signs of gunfire could have come to be on the vessel had
8 the damage not been inflicted by armed Guinean personnel.

9
10 More difficult issues are raised by the claim for moral damages, on which the parties
11 continue to be divided. The Agent for Guinea observed correctly that in his opening speech the
12 Attorney General for Saint Vincent and the Grenadines drew no distinction between any moral
13 damages that might be awarded to compensate the Claimant State for damage that it had suffered
14 directly and any moral damages that might be awarded to compensate it for losses suffered
15 indirectly in consequence of a physical injury to an individual. He drew no such distinction
16 because there is no basis for it in the case law.

17
18 Where awards of moral damages have been made, they have sometimes covered both the
19 injury suffered by the State directly and the injury suffered indirectly in the person of a private
20 individual. The second *Rainbow Warrior* award is an example of moral damages calculated to
21 cover both the violation of New Zealand's sovereignty and the injuries suffered by those aboard
22 the vessel. The relevant passage from the award is cited in our reply at paragraph 197.

23
24 The International Law Commission, furthermore, has expressed the view that moral
25 damages may be awarded to compensate the State for gross infringement of its rights irrespective
26 of losses to private individuals. The relevant passage from the report is identified in our Memorial
27 at page 78.

28
29 When responding to the speech by the Attorney General and Minister of Justice, the Agent
30 for Guinea complained that the former had failed to answer the Guinean argument that there is a
31 continuing doctrinal dispute about the availability of moral damages. He complained further that
32 the Attorney General had not dealt with the Respondent's State's authorities other than by
33 drawing attention to their antiquity. He then cited a relatively old authority himself,
34 Schwarzenberger's *General Principles of International Law*.

35
36 I trust that if the Tribunal reads the Attorney General's speech, it will receive a different
37 impression. He did indeed acknowledge the point that some writers have doubted the availability
38 of moral damages, exactly as was pleaded by the Republic of Guinea. His response was that the
39 great majority of modern writers now accept that such damages are available. Reference to the
40 relevant literature set out more extensively than in the Attorney General's speech will be found at
41 paragraphs 192-198 of our Reply. On this point public international law has developed rapidly in
42 recent years, particularly under the influence of three modern decisions: the two *Rainbow*
43 *Warrior* awards and *Letelier and Muffitt*.

44
45 As the Attorney General showed, however, the view held by modern writers has
46 a respectable pedigree, which may be traced at least to *The I'm Alone*. That is why the Attorney
47 General considered it appropriate to cite an older publication by Schwarzenberger, as well as
48 a modern one by Brownlie, the latest edition of his *Principles of International Law* published in
49 1998.

1
2 The important question for this Tribunal is not whether moral damages are available as
3 a matter of principle, but whether this is a suitable case for their awarded and, if so, how the
4 award should be quantified. On that question, the Agent for Guinea draws attention to the sum
5 attributed in the second *Rainbow Warrior* case and points to some aggravating features which
6 were present in that case but absent in this. Against that, I have to point to the features of the
7 Guinean conduct in the present case which, in my submission, merit not only an award of moral
8 damages but the assessment of a greater sum than in the second *Rainbow Warrior* case.
9

10 On the evidence that the Tribunal has heard and in the light of the sub missions made on
11 that evidence by Maître Thiam this morning, I invite the Tribunal to draw the following
12 conclusions as to the facts. The *M/V SAIGA* was an unarmed merchant vessel. It carried
13 a valuable cargo. It was engaged in lawful activity well beyond Guinea's territorial waters. By the
14 use of radar and by interception of her radio messages, Guinean authorities discovered that she
15 was about to approach a point within range of Guinean patrol boats. An armed patrol boat was
16 dispatched to seize her. When the *M/V SAIGA* announced a change of direction by radio, the
17 Guinean patrol boat changed course. The *M/V SAIGA* announced by radio a rendezvous point
18 well beyond Guinea's territorial waters, and even beyond her exclusive economic zone. She sailed
19 to that point, stopped and drifted for some hours. She was then attacked by an armed Guinean
20 boat. The Guinean agents on that boat had seen men on the deck of *The Saiga*. They were very
21 well aware of the danger in which they were putting them. They gave no warning. They raked
22 *The Saiga* with machine guns, certainly with light machine guns and probably with heavy
23 machineguns, too. They boarded the vessel and injured, handcuffed, threatened and insulted
24 members of the crew. They pillaged the ship, stealing money and bonded goods. They took the
25 vessel to Conakry where the cargo was seized and sold. Two members of the crew, who had
26 been seriously wounded in the attack, were not given adequate medical attention. One was
27 refused attention on the grounds that he was a foreigner, despite the obvious severity of his
28 wounds. The passports of the remaining crew members were seized, although returned to some
29 of them later on. Armed guards were put on the vessel. Conditions for the crew were harsh.
30 Two of them were subsequently beaten by Guinean armed personnel.
31

32 In order to justify their actions, and to support a monetary claim, the Guinean authorities
33 drew up and presented a *procès-verbal*; it was seriously flawed. The principal witness, on whom
34 the Guinean authorities relied for the account of the central facts in the *procès-verbal*, confirmed
35 to this Tribunal that he signed it without reading it. The head of the Customs mission, who also
36 signed the *procès-verbal*, was eventually driven to acknowledge in this Tribunal the falseness of
37 important allegations in the document. It was on the basis of that document that a Guinean court
38 authorised the seizure of the cargo, the imposition of a massive fine and a penalty on the Captain.
39

40 This Tribunal was seized of the case. It ordered the prompt release of the vessel. The
41 vessel was not promptly released. It was attacked again in the port of Conakry. The Agent of the
42 flag State was denied access to the vessel and crew. The representatives of the P&I Club also
43 failed to gain access. The Ambassador of the State of nationality of the Captain and some of the
44 crew gained access to them only with difficulty and after a delay. Eventually, with diplomatic
45 effort and the intervention of this Court, the vessel was released and was able to limp to Dakar for
46 repairs.
47

48 This was not an isolated incident. There has been a course of such attacks previously and
49 subsequently. These are not undertaken to defend national security or to protect life. They are

1 undertaken for economic reasons. In the present case, the seizure yielded revenue in excess of
2 \$3 million. The Republic of Guinea does not apologize. She does not undertake to refrain from
3 similar attacks in the future. On the contrary, she proclaims before this Tribunal her
4 determination to persist in such conduct.
5

6 The Agent of Guinea said of the second *Rainbow Warrior* case that it provoked outrage.
7 The Tribunal would be misled if it imagined that that is not also true of this case. From Saint
8 Vincent to Ukraine, from Scotland to Senegal, these events are regarded with the gravest
9 concern. The feature that is most disturbing is the current attitude of the Guinean Government.
10

11 The most charitable construction that can be placed upon Guinea's conduct is that the
12 episode began with a genuine misunderstanding. It would be possible to approach the case on the
13 premise that initially M. Bangoura, M. Camara and Lieutenant Sow were labouring under the
14 misapprehension that *The Saiga* was breaking some law. If that were so, the time must certainly
15 have come when they must have appreciated that it was not breaking a law. At the latest, that
16 point must have been reached at the hearing of the application for Provisional Measures.
17

18 If at that stage an apology had been offered with an offer of amends, it might have been
19 right to make only a modest award of moral damages, as was done in the second
20 *Rainbow Warrior* case. There has been no apology. There has been no offer of amends.
21

22 Guinea's conduct, I submit, has added insult to injury. Indeed, in the case of Mr Niasse,
23 that is literally true. For this reason, substantial moral damages are warranted.
24

25 All that remains is that I should deal with the question of costs. The agreement of
26 20 February envisages that the Tribunal will adjudicate on that question. We request the Tribunal
27 to do so. It is our submission that the Tribunal should make an award of costs in favour of the
28 successful party and that it should quantify the costs by stating a precise sum in a denominated
29 currency.
30

31 In this context, I must, however, draw attention to a typographical error, which, alas,
32 appears in both the Memorial and the Reply. Application is made there for the costs of the
33 "arbitral proceedings". This should of course be a reference to the costs of the proceedings
34 before this Tribunal. I apologize for the error and for the failure to detect it at an early stage, but
35 I trust that the meaning has at all stages been plain.
36

37 When assessing costs, the Tribunal will, no doubt, take account of the extent to which
38 each party has succeeded and the extent to which it has failed. It will not, however, apportion
39 costs on that basis in a simple mathematical way. It will take account of the fact that the principal
40 element of costs is likely to be incurred when a party decides to institute proceedings so that, if
41 that party is successful in part, it should receive a substantial proportion of the total costs
42 incurred.
43

44 Subject to the President's direction, we understand that the Tribunal expects the two sides
45 to present a written account of the costs arising from this litigation, which are to be the subject of
46 this claim. That will be done within such time and in such form as the President may direct in due
47 course.
48

1 Mr President, Members of the Tribunal, the first case of a new international court could
2 not fail to be a significant event. The acerbity of the present dispute invests this case with special
3 significance.
4

5 The case also presents special difficulties. These lie not in the law, nor in the assessment
6 of evidence, but in the sensitivity that the litigation has provoked on both sides of the Atlantic
7 Ocean. We know that your judgment will be judicious and measured. At the same time, we
8 expect that the Tribunal will demonstrate its authority and will make an award in proportion to
9 the gravity of the breaches of which we complain.
10

11 As I began with Horace, so may I end with him? *Grammatici certant et adhuc subjudice*
12 *lis est*. The scholars have had their disputation; it is now for the Court to give its judgment.
13 Saint Vincent and the Grenadines is confident that it may rely upon the wisdom and, most of all,
14 the authority of this Tribunal.
15

16 I now call upon His Excellency, the Honourable Carlyle Dougan, one of Her Majesty's
17 Counsel, High Commissioner for Saint Vincent and the Grenadines to The Court of St. James's
18 and Agent to this Tribunal, to present the Applicant's formal submission.
19

20 **THE PRESIDENT:** Thank you.
21

22 **MR DOUGAN:** Mr President, Members of the Tribunal, my Lords, for the reasons given in
23 writing and in oral argument, or any of them, or for any other reason that the International
24 Tribunal deems to be relevant, the Government of Saint Vincent and the Grenadines asks the
25 International Tribunal to adjudge and declare that:
26

- 27 (1) the actions of Guinea (*inter alia* the attack on the *M/V SAIGA* and her crew in the
28 exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and
29 the removal of cargo of gasoil, its filing of charges against Saint Vincent and the
30 Grenadines and its subsequent issuing of a judgment against them) violate the right
31 of Saint Vincent and the Grenadines and vessels flying its flag to enjoy freedom of
32 navigation and/or other internationally lawful uses of the sea related to the freedom
33 of navigation, as set forth in articles 56(2) and related provisions of the
34 Convention;
35
- 36 (2) subject to the limited exceptions as to enforcement provided by article 33(1) of the
37 Convention, the customs and contraband laws of Guinea, namely *inter alia* articles
38 1 and 8 of Law 94/007/CTRN of 15 March 1994, articles 316 and 317 of the *Code*
39 *des Douanes*, and articles 361 and 363 of the Penal Code, may in no circumstances
40 be applied or enforced in the exclusive economic zone of Guinea;
41
- 42 (3) Guinea did not lawfully exercise the right of hot pursuit under article 111 of the
43 Convention in respect of the *M/V SAIGA* and is liable to compensate the
44 *M/V SAIGA* pursuant to article 111(8) of the Convention;
45
- 46 (4) Guinea has violated articles 292(4) and 296 of the Convention in not releasing the
47 *M/V SAIGA* and her crew immediately upon the posting of the guarantee of
48 US\$400,000 on 10 December 1997 or the subsequent clarification from Credit
49 Suisse on 11 December;

- 1
2 (5) the citing of Saint Vincent and the Grenadines as the Flag State of the *M/V SAIGA*
3 in the criminal courts and proceedings instituted by Guinea violates the rights of
4 Saint Vincent and the Grenadines under the 1982 Convention;
5
6 (6) Guinea immediately return the equivalent in United States Dollars of the
7 discharged gasoil;
8
9 (7) Guinea is liable for damages as a result of the aforesaid violations with interest
10 thereon; and
11
12 (8) Guinea shall pay the costs of the proceedings before this Tribunal and the costs
13 incurred by Saint Vincent and the Grenadines.
14

15 My Lords, we shall so for ever pray. Thank you.
16

17 **THE PRESIDENT:** Thank you very much, Your Excellency. Dr Plender, I take it that that
18 brings you to the conclusion of all your submissions?
19

20 **DR PLENDER:** Yes, Mr President, that concludes the submissions on behalf of the Applicant
21 State.
22

23 **THE PRESIDENT:** Thank you. It has been agreed by the Tribunal, in consultation with the
24 parties, that there will be no sitting this afternoon. The sitting will be resumed tomorrow morning
25 at 10 o'clock, when Guinea will have the opportunity to make its final submissions. We are
26 operating on a pragmatic schedule. If it becomes possible for Guinea to complete its submissions
27 in three hours, the Tribunal will sit until 1 o'clock. If it becomes clear that this will not be
28 possible, the sitting will close at 12 o'clock and resume at 2 o'clock until 4 o'clock. This has been
29 agreed in consultation with the parties. The sitting will now be closed and we will resume
30 tomorrow morning at 10 o'clock on the basis that I have indicated. The sitting is suspended.
31

32 **(Adjourned at 1137 hrs until 1000 hrs on Saturday, 20 March 1999)**
33