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

1999

Public hearing
held on Monday, 8 March 1999, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record
Present: 
President  Thomas A. Mensah 
Vice-President  Rüdiger Wolfrum 
Judges  Lihai Zhao 
Hugo Caminos 
Vicente Marotta Rangel 
Alexander Yankov 
Soji Yamamoto 
Choon-Ho Park 
Paul Bamela Engo 
L. Dolliver M. Nelson 
P. Chandrasekhar Rao 
Joseph Akl 
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 is represented by:

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

as Agent;

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

as Counsel;

Mr. Richard Plender Q.C., Barrister, London, United Kingdom,
Mr. Yérim Thiam, Barrister, President of the Senegalese Bar, Dakar, Senegal,

Mr. Nicholas Howe, Solicitor, Howe & Co., London, United Kingdom,

as Advocates.

Guinea is represented by:

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

as Agent;

Mr. Maurice Zogbélémom Togba, Minister of Justice, of Guinea,
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. Nemankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn, Germany.

as Counsel.
THE CLERK OF THE TRIBUNAL: The International Tribunal for the Law of the Sea is now in session.

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

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

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

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

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

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

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

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

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

By Order of 23 February 1998, the Tribunal fixed the time limits for the pleadings in the case.
Saint Vincent and the Grenadines filed its Memorial on 19 June 1998.

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

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

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

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

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

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

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

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

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

Then Dr Plender will speak. He will explain why, in our submission, the Guinean objections to jurisdiction and admissibility are without substance. He will submit that if the Court were to entertain the objections at all, it should dismiss them. Dr Plender will then call our witnesses in the following order: first, Captain Orlov,
Captain of *The Saiga*; second, Mr Laszlo Merenyi, of the ship's managing agent; third, Mr Naisse, a member of the crew of *The Saiga*; fourth, Mr Alan Stewart, of the ship's managing agents, who will give evidence about the damage sustained by the vessel and the extent of the financial loss.

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

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

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

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

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

With respect to the schedule of submissions to be made on behalf of the Republic of Guinea, I will start with an outline of facts, then continue with questions of admissibility: first, admissibility of objections under the 1998 agreement, the agreement between the two parties. Then I will address the question of the non-application of article 97 (paragraph 1) of the Rules of the Tribunal. The following issue will be the registration of *M/V SAIGA*, then Professor Lagoni will deal with the question of the genuine link, followed by the question of nationality of the claims, and finally the question of exhaustion of local remedies.

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

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

THE PRESIDENT: I thank the Agent of Guinea.

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

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

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

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

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

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

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

In one sense, the damage sustained by Saint Vincent and the Grenadines is the conclusion, the end of these proceedings. When the Tribunal comes to consider the sum to be awarded, it may find it convenient to address this issue last of all. But in another sense, the damage sustained by Saint Vincent and the Grenadines is our point of departure. It is the grievance that causes us to come to the Tribunal. It is to secure reparation for its losses, tangible and intangible, that my government advances its claim.

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

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

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

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

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

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

Article 111(8) of the Convention

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

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

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

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

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

It would be preposterous to assert that a separate claim must be advanced by
each of the states of nationality of the owners, charterers and members of the crew. If
that were the rule, this Tribunal could expect to be confronted, in this case, with
applications from the Ukraine, Senegal, Cyprus, the United Kingdom and Switzerland
as well as Saint Vincent and the Grenadines. Most of all, we assert the right to
advance a claim in respect of the vessel and foreign crew because justice so requires.
In registering the vessel in Saint Vincent and the Grenadines the owners subjected her

to our jurisdiction and placed her under our protection. In serving aboard the vessel

that flies our flag, the crew placed themselves under our jurisdiction and protection.
By doing so, the owners and crew undertook obligations towards Saint Vincent and

the Grenadines, which they have fulfilled. In the case of the crew, they have done so

with outstanding loyalty. We intend to protect them in return and are not to be denied

the right to do so.


The Claim in Respect of the Vessel

The claim that we advance in respect of the damage to the vessel has been
calculated with care. Following representations from the Guinean Agent, the

Vincentian delegation prepared a detailed account, explaining the basis for each cent

of the claim. The Tribunal is at liberty to scrutinise the claim; and the respondent

State will have the opportunity of putting questions about the claim to

Mr Alan Stewart, who has had oversight of the preparation of the accounts. We are

confident that the Tribunal will find the claim to be fully justified in general and in
detail.

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

The Claim in Respect of the Master and Crew

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

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

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

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

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

The Claim for Moral Damages

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

At paragraph 170 of her Rejoinder, the Republic of Guinea contends that no moral damages should be awarded at all, claiming that there is no firm precedent for such an award. It is fair to say that precedents are few. Violations of the kind of which we now complain are uncommon. The arbitral tribunal in the second Rainbow Warrior case (Section 1, tab 4) observed that there are not many recorded awards of moral damages, because the circumstances giving rise to them occur infrequently. In the arbitral tribunal's words:

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

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

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

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

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

In language equally appropriate to this case, Professor Brownlie states (in his new edition of Principles of Public International Law, 1998, at page 461) (Section 1, tab 9):
"Compensation is paid for a breach of duty which is actionable, without proof of particular items of financial loss, for example ... illegal arrest of a vessel on the high seas".

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

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

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

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

Conclusion

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

THE PRESIDENT: I thank the Honourable Carl Joseph and I invite Mr. Nicolas Howe to continue the submissions on behalf of Saint Vincent and the Grenadines.

MR HOWE: Mr President, Members of the Tribunal, it is my pleasure to appear before you again. My task today is to explain why it is not open to the Republic of Guinea to raise objections to the jurisdiction of the Tribunal or the admissibility of the case.
Your jurisdiction in this case is based on the exchange of letters dated 20 February 1998. For convenience, a copy of the Guinean letter of that date is included in the file of authorities accompanying my speech. By that exchange of letters, and you will find this at Section 2 tab 1, the parties agreed that the Tribunal shall deal in a single phase "with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement in response dated 30 January 1998."

It appears that the Republic of Guinea no longer objects to the jurisdiction of the Tribunal. However, she does object to the admissibility of the various claims that form the basis of this case. It is my submission that the Republic of Guinea is precluded from doing so.

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

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

The effect of the Exchange of Letters is to Exclude the Possibility of Advancing Objections to the Admissibility of the Action or to the Tribunal's Jurisdiction

Mr President, Members of the Tribunal, let me first turn to the effect of the agreement between the parties. By entering into that agreement the parties submitted all aspects of the merits for the decision of the Tribunal. This is clear from the wording of the exchange of letters and from their context. In that agreement, the parties "agreed to submit to the International Tribunal the dispute between the two States relating to the M/V Saiga". What else could this mean but that parties intended that the Tribunal would be competent to adjudicate on the dispute between them? Indeed, the parties went further to provide that the Tribunal will deal with "all aspects of the merits". The language used does not therefore contemplate that one of the parties will later be able to raise arguments so as to preclude the Tribunal from exercising the jurisdiction so conferred. As a matter of fact, the parties were careful to include within their agreement, the one situation in which they contemplated that a party, that party being the Republic of Guinea, might wish to exclude the Court from adjudicating on the dispute. Suffice it to say that the objections subsequently advanced by the Republic of Guinea are not the same as the objection to jurisdiction specifically permitted by the exchange of letters. The objections advanced should therefore be rejected.
Where parties enter into a special agreement by which they submit a dispute to an international tribunal, it must be presumed that unless they provide otherwise, the parties intend that the Tribunal will adjudicate over the whole of the dispute as submitted to it. Evidently, such an intention usually constitutes the object and purpose of such an agreement. It cannot be lightly presumed that the parties seek to take back with one hand what they have given to the Tribunal with the other. Where the parties seek to leave themselves free to subsequently challenge the jurisdiction of the Tribunal or the admissibility of the claim, they have usually incorporated that right into their original agreement. In fact, Saint Vincent and the Grenadines cannot find any case in which the parties have entered into a special agreement by which they agree to refer a matter of dispute to an international tribunal and where one of the parties has subsequently been allowed to raise an objection to the jurisdiction or admissibility in relation to matters covered within that special agreement.

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

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

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

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

One of the writers the Republic of Guinea refers to is Sir Gerald Fitzmaurice. I have just quoted the definition Sir Gerald gives to the merits. This is a definition that excludes jurisdictional or admissibility points from the merits. The work of Sir Gerald Fitzmaurice to which the Republic of Guinea refers at paragraph 37 of her Rejoinder is the very same work as that from which I have just read. In fact, the Guinean quotation is extracted from the page immediately following the one in which Sir Gerald offers his definition of the merits. It cannot be supposed that Sir Gerald Fitzmaurice intended to contradict himself, by encompassing issues of admissibility within the definition of merits, in the very page following the one in which he excluded such issues from the definition.
What then was Sir Gerald referring to in relation to the *Ambatielos* case? The Tribunal will recall that the issue before the International Court in that case was whether the United Kingdom had an obligation to submit a dispute with Greece to arbitration. The Court had first to determine whether it had jurisdiction to determine whether or not the United Kingdom had such an obligation. It decided that issue in the first phase: the jurisdictional phase. Having concluded that it had jurisdiction, the Court turned to the merits. The point at issue on the merits was whether the United Kingdom had to submit the dispute to arbitration. The point being made by Sir Gerald Fitzmaurice was that the International Court's function at the merits phase did not involve a decision on the underlying dispute, which could only be a matter for determination by an arbitral tribunal. Of the two other writers cited by the Republic of Guinea one was making the same point. That is Professor Verzijl (writing in the Netherlands Yearbook of International Law), which you will find in Section 2 tab 4. He points out that Greece did not ask the Court to decide on the underlying dispute between the parties: Greece asked the Court only to determine whether there was an obligation to arbitrate. The other author cited was Professor Brownlie. The Respondents refer to a superseded edition of his textbook, *Principles of Public International Law*, which you will find at Section 2 tab 5, where he makes the observation that subsequent practice is an aid to treaty interpretation. That is neither controversial nor relevant.

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

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

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

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

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

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

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

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

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

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

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

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

"it is for her to decide whether or not objections to the admissibility of the claims should be raised as formal preliminary objections in accordance with article 97 (1) of the Rules."
She goes on to argue that she has not made objections to the admissibility of the application as a whole but only to the admissibility of certain claims. She argues that it is up to her to choose whether she will seek a decision before any further proceedings on the merits or not. The assumption is that if a decision on the objection is not sought before further proceedings on the merits, the 90-day period is inapplicable.

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

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

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

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

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

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

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

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

The Republic of Guinea has contended, in paragraph 32, of the Rejoinder, that she did advance at least certain objections within the 90-day period. She alleges that during the oral hearings in the provisional measure phase she raised the objection of non-exhaustion of local remedies. Members of the Tribunal may indeed recall Mr von Brevern raising this issue briefly towards the end of those oral hearings. Mr Sands, then appearing as one of the Counsel for Saint Vincent and the Grenadines, objected that Mr von Brevern was raising an issue that had not been raised in the written pleadings. That objection was sustained by the President and Mr von Brevern did not persist with his point. The cursory raising of an issue in this way does not satisfy the provisions of article 97(1) of the Rules, the terms of which are explicit, that the article requires the submission in writing of any of the objections listed therein. Oral objections will not suffice. Brief and elliptical oral comments, made without prior warning and against an objection, sustained by the President, will certainly not suffice.

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

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

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

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

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

The first objection to the admissibility of this action is that the allegation that *M/V SAIGA* did not have a genuine link with Saint Vincent and the Grenadines at the material time. That objection is expressed in two ways. At paragraphs 56 –71 of the Counter-Memorial, Guinea argues that we cannot advance a claim based on freedom of navigation since the freedom is that of the vessel which was not genuinely linked with the claimant state.
Then, from paragraph 72, Guinea argues that we cannot advance a claim in respect of the damage to *The Saiga* because the vessel was insufficiently linked to the claimant state.

If the Tribunal considers it right to consider the objections to admissibility, notwithstanding the points raised by Mr Howe, the claimant State will be content for the Tribunal to dispose of the objections on the evidence. You have now had an opportunity of examining the certificate of registration of the vessel for the relevant period, together with the certificate of inspection of the classification society. You have been supplied with a copy of the Vincentian Merchant Shipping Act. You have been given an account of the regulatory and administrative and regulatory steps taken in Saint Vincent and the Grenadines to secure compliance with the numerous international conventions on merchant shipping to which she is a party. You may ask the Attorney General to answer any questions that you may consider appropriate about the administrative arrangements taken in Saint Vincent and the Grenadines to supervise compliance with her international obligations and her domestic laws. You will also have, this afternoon, an opportunity to question the master of the vessel about those matters.

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

(i) *The Saiga* is represented in Saint Vincent and the Grenadines by a Vincentian company formed in Saint Vincent and the Grenadines, resident and established there.

(ii) She is subject to the supervision of the Vincentian authorities to secure compliance with the SOLAS Convention, the MARPOL Convention and other conventions of the International Maritime Organisation to which Saint Vincent and the Grenadines is party.

(iii) Regular supervision of the vessel's seaworthiness is secured by surveys on at least an annual basis conducted by reputable classification societies.

(iv) Preference is given to Vincentian nationals in respect of her manning.

(v) Saint Vincent and the Grenadines has been vigorous in attempting to secure her protection at the international level both before and throughout this litigation. Before the matter was brought before this Tribunal, the Vincentian authorities were placed at a disadvantage by the failure of the Guinean authorities to notify them of the action which the Guinean authorities had taken in respect of the Vincentian vessel, and the failure of the Guinean authorities to respond to the intervention of Mr Dabinovic, then Commissioner for Maritime Affairs. The action that he took is described in an article published in the *International Ship Registry Review* which is included among the authorities accompanying this speech (section 4, tab 1 of the blue bundle).
It is, therefore, unnecessary to consider the hypothetical question, raised by
the Guinean agent, as to whether a State is precluded from advancing a claim
for violation of freedom of navigation or for damage to a vessel, in the
absence of an effective link between the relevant vessel and the claimant
State.

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

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

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

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

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

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

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

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

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

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

Claims by a flag State on behalf of crew members who do not hold the nationality of Saint Vincent and the Grenadines are admissible under International Law.

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

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

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

Judge Hackworth said:

"Alien seamen are assimilated to nationals"

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

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

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

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

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

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

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

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

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

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

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

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

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

While Sir Robert Jennings himself favours a recognition of the distinction between *ratio deciden
di* and *obiter dicta*, he recognises that "an obiter opinion can of course be valuable and important even though not part of the precedent." Sir Hersch Lauterpacht (who, as you will know, shared with Sir Robert the two distinctions of being a Judge of the International Court of Justice and Whewell Professor of International Law at Cambridge University) wrote:

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

*(Lauterpacht, The Development of International Law by the International Court (2nd edition, 1958, p.6, Section 4, tab 5).*

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

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

In conclusion, Saint Vincent and the Grenadines submits that she does have a right under international law to bring a claim before this Tribunal on behalf of crew members of the *M/V SAIGA* not of the nationality of that State.
Mr President, I am in the Court's hands. The next issue with which I propose to deal is Exhaustion of Local Remedies. You may consider that it would be convenient to adjourn at this point and for me to be invited to deal with that separate issue this afternoon.

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

(Adjournment 11:45 a.m)