

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



1999

Public hearing

held on Thursday, 11 March 1999, at 10.00 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

*(Saint Vincent and the Grenadines v. Guinea)*

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**Verbatim Record**

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

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*Saint Vincent and the Grenadines*  
*represented by*

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

*as Agent;*

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

*as Deputy Agent and Counsel;*

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

*and*

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

*as Counsel and Advocates.*

*Guinea*  
*represented by*

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

*as Agent and Counsel;*

Mr. Maurice Zogbélérou Togba, Minister of Justice and Attorney General of Guinea,

*and*

Mr. Namankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn, Germany,  
Mr. Rainer Lagoni, Professor at the University of Hamburg and Director of the Institute for Maritime Law and Law of the Sea, Hamburg, Germany,  
Mr. Mamadi Askia Camara, Director of the Division of Customs Legislation and Regulation, Conakry, Guinea,  
Mr. André Saféla Leno, Judge of the Court of Appeal, Conakry, Guinea,

*as Counsel.*

1 **THE PRESIDENT:** At the close of yesterday's sitting the situation was that Saint Vincent  
2 and the Grenadines had completed their submission of evidence by witness. We shall now  
3 listen to their submissions. Mr von Brevern?  
4

5 **MR VON BREVERN:** Mr President, may I introduce a new member of the delegation of  
6 Guinea, Mr André Saféla Leno, Judge of the Appeal Court of Guinea.  
7

8 **THE PRESIDENT:** Thank you very much. Maître Thiam?  
9

10 **MAITRE THIAM:** Mr President, Members of the Tribunal, as I said to you yesterday, it is  
11 a great honour for me to address you once more today. Although this is not my first  
12 intervention before the Tribunal, I feel the weight of the burden which an advocate assumes  
13 in front of this Court.  
14

15 I must say to you, however, that the day before yesterday, as my learned friends,  
16 representing Saint Vincent and the Grenadines and, as I am sure, the party of Guinea, I felt a  
17 deep sense of sadness when we were only talking about Guinea and the inadmissible  
18 practices which are current in certain administrations.  
19

20 One of the witnesses thought that he could generalise these comments to apply to the  
21 whole of Africa. Out of respect to the Tribunal we did not want to interrupt the cross-  
22 examination of this witness. But, as is undoubtedly the case also for the Guinean side, we  
23 were particularly gratified that the Tribunal so justly referred to this insult. These  
24 proceedings are not against the people of Africa, nor are they against the people of Guinea.  
25 We must not allow that Africa is given this negative image which is so often conveyed. Of  
26 course, we have had, unfortunately, to quote some terrible events here. But each one of us in  
27 our continent, the vast majority of Africans, live in the greatest dignity. This majority cannot  
28 let itself be insulted without saying anything about the fact that the small minority, unaware  
29 of its duties and limits of prerogatives, are forcing certain States to defend themselves in front  
30 of Courts like yours by citing, rather uneasily, texts which enable them, on the basis of  
31 national law, not to assume the consequences of certain illegal actions of their officials. I will  
32 come to this later and recall the duties in front of me today.  
33

34 On behalf of the State of Saint Vincent and the Grenadines I will address certain  
35 aspects of Guinean law which refer to the dispute which has been submitted to you. These  
36 proceedings stem from the application of the Republic of Guinea of its laws to a ship flying  
37 the flag of Saint Vincent and the Grenadines. The first contention of Saint Vincent and the  
38 Grenadines is that these Guinean laws, correctly interpreted, do not apply to the activity to  
39 which the *M/V SAIGA* was engaged, and nor to the place where these events took place. In  
40 other terms, the Republic of Guinea cannot prove that the *M/V SAIGA* contravened Guinean  
41 law unless this law is interpreted in a totally erroneous way.  
42

43 Secondly, we contend that if we were wrong and the Guinean law could be interpreted  
44 as prohibiting the bunkering of fuel from a foreign vessel to another beyond the territorial sea  
45 of Guinea, this law would not be in accordance with the Convention of the United Nations  
46 for the Law of the Sea and it would not, in this case, be applicable to Saint Vincent and the  
47 Grenadines. Consequently, such a law cannot be applied to deny the vessels flying the flag of  
48 Saint Vincent and the Grenadines their right of freedom of navigation and the other use of the  
49 sea in conformity with the international law in the exclusive economic zone of Guinea.  
50

1 The question of applicability of Guinean law must therefore be interpreted on the one  
2 hand in respect of national Guinean law and on the other hand in respect of international law.  
3 First of all let us look at the question with regard to Guinean and national law. As Dr Plender  
4 has already underlined, the charges were pressed against the Master of *The Saiga* in front of  
5 the national Guinean courts. Given that the charges were raised by the Minister of the  
6 Republic of Guinea and that these are based on acts which did not take place within the  
7 exclusive Guinean economic zone, one was fully right to expect that these charges related to  
8 the exclusive rights of Guinea in the exclusive economic zone which would be subjected to  
9 international law. But this was not the case. The charges raised against the Master did not  
10 refer to fishing or other violations of the sovereign rights of the international law applying to  
11 Guinea.

12  
13 The Guinean law, on which Guinea bases its case, is No. 9407CTRN of  
14 15 March 1994 which concerns the fight against fraud covering the import, purchase and sale  
15 of fuel in the Republic of Guinea. Article 1 states:

16  
17 "The import, transport, storage and distribution of fuel by any natural person or  
18 corporate body not legally authorised are prohibited in the Republic of Guinea".

19  
20 Article 4, on which Republic of Guinea bases its arguments, provides that:

21  
22 "Any owner of a fishing boat, holder of a fishing licence issued by the Guinean  
23 competent authority who refuels or attempts to be refuelled by means other than those  
24 legally authorised will be punished by 1 to 3 years' imprisonment and a fine equal to  
25 twice the value of the quantity of fuel purchased."

26  
27 Article 6, on which the Republic of Guinea continues to base its arguments provides:

28  
29 "Whoever illegally imports fuel into the national territory will be subject to 6 months  
30 to 2 years imprisonment, the confiscation of the means of transport, the confiscation  
31 of the items used to conceal the illegal importation and a joint and several fine equal  
32 to double the value of the subject of the illegal importation where this offence is  
33 committed by less than three individuals."

34  
35 Finally, Article 8 provides:

36  
37 "Where the misdemeanour referred to in Article 6 of this law has been committed by a  
38 group of more than 6 individuals, whether or not they were in possession of the  
39 subject of the illegal importation, the offenders will be subject to a sentence of  
40 imprisonment from 2 to 5 years, a fine equal to four times the value of the confiscated  
41 items in addition to the additional penalties provided for under Article 6 of this law."

42  
43 But, if you read articles 1, 6 and 8 of the law of 15 March 1994, also taking into account the  
44 title of this law, that shows what is prohibited; that is, the unauthorised importation of fuel  
45 intended to be imported "into the national territory."

46  
47 It is not contested that *The Saiga* did not import fuel into the national territory of Guinea. It  
48 is not contested either that it never entered the Guinean territorial waters. The only  
49 fundament on which the Court of Appeal in Guinea based the conviction of the Master of  
50 *The Saiga* was drawn from the fact that the Master of the vessel supplied the fuel to fishing

1 vessels within the exclusive economic zone of Guinea. However, it is difficult to reconcile  
2 this fact with articles 1, 6 and 8 of the law of 15 March 1994 which is not directed at the  
3 EEZ. It is strictly referring to criminal provisions expressly or implicitly referring to owners  
4 and/or masters of these bunkering vessels.

5  
6 The Republic of Guinea does not explain how the dispute against *The Saiga* is  
7 governed by article 4 of the law of 15 March 1994. This article established the offences  
8 which may be committed by the owner of a fishing boat, the holder of a fishing licence issued  
9 by the Guinean authorities. One cannot base an argument on suggesting that *GIUSEPPE I*,  
10 *KRITTI* or *ELENI G*, vessels bunkered by *The Saiga* were importing fuel to the Guinean  
11 territory or that the owners of these vessels for any reason were subject to court proceedings.

12  
13 The code des douanes of Guinea of 28 November 1990 states in article 1:

14  
15 "The customs territory includes the whole of the national territory, the islands located  
16 along the coastline and the Guinean territorial waters.

17  
18 The reference expressed to the Guinean territorial waters implies, on the contrary, that  
19 these customs territories do not exclude to other waters. But even if the prohibition of import  
20 of fuel to the national territory in accordance with the law of 15 March 1994 should be  
21 studied in the light of the code des douanes, to which the Republic of Guinea is also referring,  
22 there is no argument to maintain seriously that the Master of *The Saiga* has been guilty,  
23 according to Guinean law, of illegal importation. This is not the case and it has never been  
24 claimed that *The Saiga* entered the territorial waters of Guinea.

25  
26 The Republic of Guinea is basing its arguments on article 33 of the code des douanes  
27 which sets up a customs radius of 250 kilometres, but it omits to mention article 33(1) of the  
28 same code which makes a distinction between customs radius and customs territory. As  
29 article 33 of the French code des douanes, on which this is based - article 33 of the code des  
30 douanes of Guinea is included in the chapter concerning the department of customs services.  
31 It prescribes the inland zone and the seaward zone where the officials of the customs are  
32 authorised to intervene. That is the field of operation.

33  
34 As its French counterpart, article 33(2) does not claim to define the limits of the coast,  
35 the crossing of which would imply an import.

36  
37 Most of the other provisions of the code des douanes quoted by the Republic of  
38 Guinea authorise only the Customs services to intervene in a specific manner in a radius  
39 which is their own but it does not permit them and does not sustain the argument according to  
40 which in Guinean law the master of a vessel would commit a fault by bunkering other vessels  
41 in the exclusive economic zone. The Republic of Guinea, referring to article 54 ---

42  
43 **THE PRESIDENT:** I am sorry to interrupt, but the interpreters are finding it difficult to  
44 keep up with you.

45  
46 **MAITRE THIAM:** I present my apologies to the interpreters. The Republic of Guinea  
47 refers to article 54, which is included in the chapter of the code des douanes dealing with the  
48 import of goods to be cleared by Customs. This text, upon first demand, requires that masters  
49 of vessels in the maritime area of the Customs radius firstly must submit the original manifest

1 to the *ne varietur* endorsement by the Customs officials; secondly, to hand them a copy of  
2 this manifest upon first demand.

3  
4 The oil on board *The Saiga* did not consist of goods to be cleared by Customs because  
5 they were not goods which were imported nor goods which were about to be imported into  
6 the Customs territory. The Customs officials of Guinea never allege to have presented before  
7 the attack, the arrest or the ransacking of *The Saiga* any such demand for submission to the  
8 *ne varietur* endorsement of the manifest.

9  
10 There was no apparent reason, in fact or in law, for the master of *The Saiga* to feel  
11 obliged to present to the Guinean officials spontaneously, without any demand, requests to  
12 submit the manifest or subject the manifest to the *ne varietur* endorsement provided for by  
13 article 54 of the Guinean code des douanes.

14  
15 Without explaining the significance, the Republic of Guinea quotes article 300 of the  
16 code des douanes, according to which the Customs services are not responsible for its officers  
17 unless they are acting in the exercise of their duties. By arresting *The Saiga*, the Guinean  
18 Customs authorities were obviously acting in the exercise of their duties. We must underline  
19 that an international rule ascribes clearly to a state the actions of its officials, even in the case  
20 where these officials did not act in conformity with their duties within the framework of the  
21 law of the state.

22  
23 In the *Union Bridge Company* case, the tribunal maintained that:

24  
25 "The state, in accordance with international law, incurs international responsibility for  
26 all the acts of tort committed by its officials or its bodies, notwithstanding the fact that  
27 the official or the body has acted within the limits of its competence or exceeded these  
28 limits. It is necessary that they had acted, at least by appearances, as authorised  
29 officials or institutions or in practice that they had used the measures proper to their  
30 official mandate".

31  
32 Decisions to this effect were taken by the reclamations commission in the *Youman's* case in  
33 1926 and also in the *Caire Claim* case.

34  
35 However, we will not fail to note that the State of Guinea carefully refrained from  
36 claiming that they refused to receive the product which was particularly lucrative from the  
37 sale of the cargo of *The Saiga*, to which it contends to have rights. Neither have they  
38 maintained that they refused to distribute to the officers and soldiers participating in the  
39 attack their share due from the sale of the cargo. They did not explain that they should have  
40 compensated the cook of *The Saiga*, which they seem to have re-established in Guinea the  
41 *exécrables* law on forced labour. Moreover, they did not maintain having ordered the return  
42 of the product plundered from the ship by its officials, who seemed to have been neither  
43 prosecuted nor sanctioned for having acted beyond their functions.

44  
45 On the contrary, it seems that the competence of the person who led the attack on *The*  
46 *Saiga*, Master Leonard Bangoura, is appreciated so much in Guinea that his name appears in  
47 the list of experts which Guinea has asked the Tribunal to hear. That being the case, we do  
48 not see why Guinea is citing a provision of its code des douanes which enables it, in terms of  
49 national law, to be exonerated from any responsibilities from its officials who were acting  
50 beyond those powers. This is indeed a mystery. As the Tribunal does not like mysteries any

1 more than my client, this text should be dismissed. Saint Vincent and the Grenadines invites  
2 the International Tribunal to decide that the Republic of Guinea has failed quite obviously in  
3 identifying whichever Guinean law is alleged to be violated by *The Saiga*.

4  
5 The absence of national legislation giving to the Republic of Guinea competence to  
6 apply and reinforce its rights of customs in the exclusive economic zone is significant for at  
7 least three reasons:

8  
9 Firstly, the Republic of Guinea maintains that the actions against *The Saiga* were  
10 justified on the basis of article 58 of the Convention of the United Nations, which requires  
11 foreign vessels to comply with the laws and regulations adopted by the coastal State. *The*  
12 *Saiga* cannot be accused for having failed to comply with the Customs laws of Guinea in its  
13 exclusive economic zone, and, that being the case, these laws cannot be adopted for the  
14 exclusive economic zone of the Republic of Guinea.

15  
16 Secondly, this absence of national legislation is an important point in considering the  
17 right of hot pursuit of article 111 of the Convention of 1982, which affirms:

18  
19 "The hot pursuit of a foreign ship may be undertaken when the competent authorities  
20 of the coastal State have good reason to believe that the ship has violated the laws and  
21 regulations of that state".

22  
23 That being so, even if the hot pursuit had started in the exclusive economic zone of  
24 the Republic of Guinea, which is contested by Saint Vincent and the Grenadines, such hot  
25 pursuit would not be justified in this instance because it is certain that there are no laws and  
26 regulations of Guinea which *The Saiga* could have violated.

27  
28 Thirdly, if the Customs laws of the Republic of Guinea did not extend to its exclusive  
29 economic zone, then the alleged evidence which the courts and tribunals of the Republic of  
30 Guinea have compiled to establish that *The Saiga* contravened these laws were compiled  
31 subsequent to abuse of legal process. I do not want to fail to mention that this abuse is all the  
32 more flagrant since legal process was pursued in violation of the most elementary rights of  
33 defence and in violation of several fundamental rules of proceeding in force in front of the  
34 criminal courts, as Maître Bangoura records in his declaration. This abuse of process adds to  
35 the damage of the claimant state.

36  
37 In its recommendation of 2 March, the Tribunal has invited us to examine the  
38 question of the applicability of the Guinean law in the exclusive economic zone. In this  
39 perspective, I would like to say, Mr President and Members of the Tribunal, that even if you  
40 decide that Guinean law claims to prohibit the bunkering of fuel from one ship to another  
41 outside of the Guinean territorial sea, but in the exclusive economic zone, this would not do  
42 much to promote the arguments presented by Guinea. In fact, Saint Vincent and the  
43 Grenadines maintains that you must consider that such a law can have violated the rights  
44 which third states enjoy, to the extent that in the case in point there has been no suggestion  
45 that Guinean law has been imposed or put into force for the protection of the preservation of  
46 the marine environment or for other purposes in article 56 of the Convention of the United  
47 Nations.

48  
49 In other words, the determining question is not relative to an interpretation of Guinean  
50 law; it is relative to the applicability to states of foreign ships. Even if the Guinean law



1 includes the exclusive economic zone to a Customs radius of 250 miles starting from its  
2 territorial sea, it would not, according to international law, be able to prohibit foreign vessels  
3 to bunker other vessels in this zone or in the radius, because "*fiscal interest in regulating*  
4 *offshore bunkering would not apply*". According to the terms of the International Court of  
5 Justice, the delimitation of maritime zones has an international aspect and cannot simply  
6 depend on the will of coastal States as expressed in their national law. This is the Anglo-  
7 Norwegian Fisheries Case.

8  
9 Article 73 of the Convention does not authorise the boarding, inspection and arrest of  
10 foreign vessels in the exclusive economic zone unless there are specific reasons. There is no  
11 doubt that there is no general power of arrest in this zone.

12  
13 Saint Vincent and the Grenadines submits that there is little import whether the  
14 exclusive economic zone is described as being part of the high seas, to which specific articles  
15 apply. As the International Court of Justice said in the fisheries jurisdiction case, "It is a  
16 *tertium genus* between the territorial seas and the high seas". Manifestly, it cannot be  
17 assimilated to national territory.

18  
19 Furthermore, even if there are laws which preclude or regulate the bunkering of ships  
20 in the exclusive economic zone that should be considered as impossible against third parties  
21 by a coastal State, the articles on which the Republic of Guinea is based in the present case  
22 are not enforceable against this state and other third states, to the extent that the  
23 corresponding laws and charters have not been submitted to and deposited with the Secretary  
24 General of the United Nations according to the requirements of article 75(2) of the  
25 Convention.

26  
27 Mr President, Members of the Tribunal, please allow me now to come to the reasons  
28 for which under the angle of international law, the Republic of Guinea cannot apply its  
29 Customs laws in its exclusive economic zone.

30  
31 Saint Vincent and the Grenadines submit that bunkering is an aspect of freedom of  
32 navigation or an internationally legal use of the sea which results from it, and which all ships,  
33 including *The Saiga*, enjoy in the exclusive economic zone of the Republic of Guinea by  
34 virtue of article 58(1a) of the Convention. In its Memorial, as well as in its Reply, the  
35 Republic of Guinea has tried to attack this submission, this argument, by arguing that a  
36 difference should be established between navigation and commerce, and that bunkering was  
37 linked to commerce and not to navigation. It is also argued that bunkering is linked to fishing  
38 and not to navigation, and that the first reason for the presence of *The Saiga* in the exclusive  
39 economic zone of Guinea was commerce and not navigation.

40  
41 Saint Vincent and the Grenadines has already explained in its Reply why the  
42 difference that the Republic of Guinea is trying to establish between navigation and  
43 a commercial activity is not defensible.

44  
45 It has already remarked that, apart from warships and pleasure vessels, all navigation  
46 is a type of commercial activity because usually it is a case of transport of merchandise or  
47 passengers for profit, or in order to do exploration or to exploit the resources of the sea and  
48 the seabed. Furthermore, in the case of the transport of passengers, a large part of  
49 commercial activities takes place on ships which are in passage; for example, the sales of  
50 meals or tax-free good to passengers.

1  
2 No state will refuse the access of such ships to its exclusive economic zone or even its  
3 territorial seas simply because they are undertaking commercial activities. There is also no  
4 serious reason for a distinction to be made between a commercial activity which is taking  
5 place on a ship and another one which is taking place between two ships.  
6

7 The Republic of Guinea then tries to establish a difference between the bunkering  
8 ship and the ship which is receiving the bunker of fuel. It affirms that the fact of buying fuel  
9 is linked to the freedom of navigation but that that is not the same if you are selling fuel. It is  
10 only the bunkering of fuel which could be considered as a commercial activity, whereas the  
11 purchase of fuel is not a commercial activity.  
12

13 This distinction is completely untenable. The bunkering of fuel of a ship by another  
14 in the sea and in the oceans goes back over a lengthy history. As far as the research of Saint  
15 Vincent and the Grenadines went, the execution of this activity by vessels of one state in the  
16 exclusive economic zone of another state has never been contested by a state, other than by  
17 the Republic of Guinea. The practice of states demonstrates that this is a legal use of the seas  
18 or, to use the language of the Conventions of 1958 and 1982, it is freedom of the seas. The  
19 supplier as well as the beneficiary – the receiver of the fuel – must be able to enjoy this  
20 liberty. For both cases it is an aspect of the freedom of navigation or it is linked to this  
21 freedom of navigation. If, as Saint Vincent and the Grenadines submits, bunkering is an  
22 aspect of freedom of navigation or it is linked to this freedom, this freedom must certainly be  
23 exercised in accordance with article 58 (1) of the Convention in the exclusive economic zone,  
24 that is to say, in a way which is compatible with the other provisions of the Convention.  
25

26 Although the reasons for which it considers that it is in its interests to discourage the  
27 bunkering of fishing vessels which are in its exclusive economic zone are laid out in order to  
28 enhance its income from taxes, the Republic of Guinea has failed in identifying the articles of  
29 the Convention which prohibit such bunkering in the exclusive economic zone. Even if a  
30 coastal State could apply its Customs laws and rights to bunkering in the exclusive economic  
31 zone, as the Republic of Guinea submits and which is contested by Saint Vincent and the  
32 Grenadines, this could in no way mean that bunkering is incompatible with the articles of the  
33 Convention. Such laws could only regulate bunkering. Due to this fact, we could suppose  
34 that bunkering remains in principle something that is possible.  
35

36 Furthermore, as we should underscore, the Republic of Guinea has already conceded  
37 that the bunkering of vessels in transit in its exclusive economic zone is acceptable. By  
38 admitting this, bunkering as such is a compatible and legal activity.  
39

40 The true issue at stake between the parties is not the fact that bunkering as such is  
41 acceptable or not in the exclusive economic zone but the fact of knowing whether a coastal  
42 State can apply its Customs rights to the bunkering of fishing vessels in its exclusive  
43 economic zone. However, the Convention does not allow us to establish the dichotomy  
44 between the questions on which a coastal State has jurisdiction in its exclusive economic  
45 zone and the freedom of navigation which states enjoy. For example, the freedom of  
46 navigation of other states is subject to the jurisdiction of the coastal State and the freedom of  
47 navigation is subject to the jurisdiction of the coastal State as far as pollution is concerned, as  
48 stipulated in Part XII the Convention.  
49

1           Thus, even if it was allowed for the Republic of Guinea to regulate bunkering of ships  
2 in its exclusive economic zone in a different way to that explained and laid out in  
3 article 56 (1)(b) of the Convention, such a jurisdiction would not be in contradiction of the  
4 right of other States to undertake bunkering as an aspect of freedom of navigation. This is  
5 stipulated in a general way by the second half of article 58(3) of the Convention which says  
6 that in exercising their rights the other states must adhere to the laws and regulations adopted  
7 by the coastal States in conformity with the Convention.  
8

9           At this stage it would be useful to sum up the arguments of Saint Vincent and the  
10 Grenadines to support the submission according to which bunkering is an aspect of freedom  
11 of navigation or an international use of the seas which is legal and which is specific to this  
12 case and thus is tolerable in the exclusive economic zone under article 58(1) of the  
13 Convention,  
14

15           First of all, the practice of states shows that bunkering is a legal activity in the high  
16 seas. This must be considered as part of the freedom of the navigation in the high seas or  
17 linked to it. It follows, secondly, from article 58(1) of the Convention that bunkering must be  
18 a legal activity of other states in the exclusive economic zone if that is compatible with the  
19 other articles of the Convention. There is nothing that suggests the absence of such  
20 compatibility.  
21

22           Furthermore, the only example given of article 58(1) of a legal use of the sea linked to  
23 the freedom of navigation and the right to use this freedom is "the operation of ships". This  
24 phrase is broad enough to include bunkering. It is not sufficiently restrictive to exclude  
25 bunkering.  
26

27           Mr President, Members of the Tribunal, as far as the exclusive economic zone is  
28 concerned, Saint Vincent and the Grenadines submits that the rights and jurisdiction of  
29 Guinea as a coastal State are limited to those linked to the exploitation and management of  
30 natural resources within this zone.  
31

32           In its written Pleadings, the Republic of Guinea not only dwelt at length on the right  
33 to protect its public interests in its exclusive economic zone but also argued that *The Saiga*  
34 was in the contiguous zone when it bunkered *GUISEPPI I*, *KRITTI* and *ELENI G*.  
35

36           I am, first of all, going to study the submissions of Guinea with reference to the laws  
37 relating to the exclusive economic zone and then I am going to refer to those relating to the  
38 contiguous zone.  
39

40           In order for the Republic of Guinea to be able to apply its Customs legislation to  
41 foreign ships in its exclusive economic zone it must demonstrate that these laws are expressly  
42 authorised by the Convention. This is clearly stipulated in article 58(1) of the Convention,  
43 which states that third States exercising their rights in the exclusive economic zone of a  
44 coastal State are subject to the laws and regulations adopted by the coastal State but it goes  
45 on to say that such laws and regulations "must be adopted by the coastal State in conformity  
46 with the provisions of the Convention and in the measure that they are not incompatible with  
47 the present part and the rules of international law".  
48

49           From this aspect the case of Saint Vincent and the Grenadines is facilitated by the fact  
50 that the Republic of Guinea has conceded that the application of its Customs laws to its

1 exclusive economic zone was not founded on its sovereign rights to conserve and manage the  
2 living resources in this zone. It was not founded on its sovereign rights with a link to other  
3 activities for the economic exploitation of the zone. It tried to found the exercise of its  
4 Customs rights in its exclusive economic zone on the need to protect its public interest.  
5 Nevertheless, it submits that, having done this in conformity with the other rules of  
6 international law in article 58(3) aforementioned, the laws are in conformity with these same  
7 rules. It is probable that the protection of public interest which is invoked is a type of  
8 self-defence or necessity. However, the doctrine of necessity cannot serve the Republic of  
9 Guinea in this case.

10  
11 The International Court of Justice recently underscored that such a process, in order to  
12 exclude the illegality of the action of a state, cannot be accepted, except in exceptional cases:  
13 the case concerning the project Gab Ikovo – Hungary/Slovakia. In this case the International  
14 Court submitted that the conditions that must be fulfilled in order that the international  
15 custom of necessity can be invoked are those laid out in article 33 of the articles on the  
16 responsibility of the state drawn up by the International Law Commission according to which  
17 a State can only justify an act if: "(a) the act was the only means to safeguard the essential  
18 interest of a State against a grave and imminent peril; (b) the act was not a serious threat to  
19 an essential interest of the other State".

20  
21 Now the action taken against *The Saiga* can rigorously not be considered as the only  
22 means of safeguarding an essential interest of the Republic of Guinea against a grave and  
23 imminent peril. To this extent the Tribunal will bear in mind the poignant deposition of the  
24 witness Djibril Niasse concerning the declarations that were made to him by a Guinean  
25 official about the arrangements that would have been possible if Captain Orlov had stopped  
26 the vessel to negotiate.

27  
28 If the Tribunal maintains this testimony as we ask it will not admit an inadmissible  
29 amalgamation be made between an imminent and grave peril against the state and something  
30 which might be considered an urgent need of some of its agents. The Tribunal will keep  
31 within its memory the suspect determination with which the Guinean party tried, without  
32 having found a reason before its own national jurisdiction as well as international jurisdiction,  
33 to invoke article 300 of its Code of Customs which allows it to exonerate its officials of all  
34 responsibility for certain acts.

35  
36 In any case, however the Tribunal decides concerning the intentions of the Guinean  
37 officials we will maintain that the loss of revenues of the Guinean authorities due to the fact  
38 that there was bunkering of *The Saiga*, that this might have been an essential interest, it was  
39 unable to show that the arrest of the vessel was the only means to safeguard this interest.  
40 There is an alternative solution which is more acceptable, and that would be that the Republic  
41 of Guinea would include in its bilateral agreements that it excludes the possibility that  
42 shipping vessels in its area are allowed to take on bunkers, but that they must take on board  
43 fuel in ports. Secondly, it cannot say that this is a grave and imminent peril. In order for a  
44 situation to be perilous it must be dangerous. For it to be an imminent and grave peril it must  
45 constitute an immediate and serious and dangerous situation. However, it is difficult to prove  
46 that here there was an immediate and serious danger which was a threat to the Republic of  
47 Guinea.

48  
49 In paragraphs 97-99 of its Reply the Republic of Guinea identified certain interests  
50 which could have been a threat if it was going to allow bunkering off its shores. It affirms

1 that its financial as well as environmental interests might be threatened. It submits, for  
2 example, that the risks of a spillage are higher in the case of bunkering on the high seas than  
3 taking fuel on board in a port. But as the International Tribunal has submitted, and I quote,  
4 "The International Court has affirmed the simple apprehension of a peril is not sufficient in  
5 this case", and this pertains to the case that I quoted above. It must be established that there  
6 is an immediate and close danger. St Vincent and the Grenadines therefore concludes that  
7 there is no rule in international law which would allow the Republic of Guinea to protect  
8 itself against unjustified economic activities in its exclusive economic zone which will affect  
9 its public interests. Knowing this, the Republic of Guinea is trying to establish universal  
10 jurisdiction in its exclusive economic zone which is contrary to the Convention. Since a  
11 coastal state only has enforcement jurisdiction and not legislative jurisdiction as far as its  
12 contiguous zone is concerned, it is unusual that a coastal State can claim enforcement  
13 jurisdiction and legislative jurisdiction in its exclusive economic zone, which would be the  
14 consequence if the arguments of the Republic of Guinea were correct. Therefore there is no  
15 legal basis in international law upon which the Republic of Guinea can support its arguments  
16 in order to apply its customs laws in its exclusive economic zone and now the contiguous  
17 zone.

18  
19 Allow me now please to turn to the claim of the Republic of Guinea to apply its  
20 custom laws in its contiguous zone. It is difficult to see which conclusion the Republic of  
21 Guinea is trying to draw from this claim, because it declared that the exercise of its right of  
22 hot pursuit was not founded on acts committed in its contiguous zone. In article 33 of the  
23 Convention, a coastal State can exercise necessary control in its contiguous zone in order to  
24 first of all prevent infringement of its customs and other laws and regulations within its  
25 territory or territorial sea. Secondly, punish infringement of the above laws and regulations  
26 committed within its territory or territorial sea. As a result, Mr President, Members of the  
27 Tribunal, in order to be able to exercise control of *The Saiga* in its contiguous zone, the  
28 Republic of Guinea must be able to prove that it was either necessary to do it in order to  
29 avoid the violation of its customs laws in its territorial sea, or that it was necessary to do it in  
30 order to punish the infringement of its customs laws in its territorial sea. However, from the  
31 declaration of two parties, it results that *The Saiga* never violated the territorial sea of the  
32 Republic of Guinea. There is therefore no possibility for the Republic of Guinea to have  
33 really tried to punish an infringement of its customs laws in its territorial sea. Can Guinea  
34 then try to prevent an infraction of its laws which was about to be committed in its customs  
35 territory? In order to do this it would have to bring proof that it had a reason to believe that a  
36 violation of its customs laws was about to be committed in its territorial sea. However, no  
37 proof of this type has been produced. Knowing this, the Republic of Guinea is taking refuge  
38 behind an argument according to which a coastal state has legislative jurisdiction in its  
39 contiguous zone.

40  
41 The Republic of Guinea in fact has submitted in its written claims that the jurisdiction  
42 of coastal States in the contiguous zone is broader in international customs law and includes  
43 legislative jurisdiction. If this were the case the Republic of Guinea would have to show that  
44 its submission is in conformity with the practice and the doctrine of international law and  
45 then that such a rule would be applicable to the Convention of the United Nations. We  
46 submit Mr President that Guinea has failed to demonstrate these points and as we, the  
47 Tribunal will wait in vain the demonstration of the contrary.

48  
49 Mr President, members of the Tribunal, I have shown that a correct and non-partisan  
50 interpretation of Guinean laws which are said to have been infringed by *The Saiga*, even if

1 the conclusion that it does not cover bunkering in waters outside the territorial sea of Guinea,  
2 and that even if the Guinean law could be interpreted as prohibiting bunkering outside of the  
3 territorial sea, such a law would not be in conformity with the Convention of the United  
4 Nations on the Law of the Sea. It would not be enforceable against St Vincent and the  
5 Grenadines. As a result such a law cannot be applied in order to refuse ships flying the flag  
6 of St Vincent and the Grenadines, to deny them their right to freedom of navigation and other  
7 international legal uses of the sea in the exclusive economic zone and in the contiguous zone  
8 of Guinea.

9  
10 I have shown that *The Saiga* exercised a legal activity in connection with the freedom  
11 of navigation, and finally I have shown that the Republic of Guinea did not have the right to  
12 interfere in this activity in applying the rules applicable to the exclusive economic zone or the  
13 contiguous zone. This concludes my pleadings Mr President, Members of the Tribunal. I  
14 would like to thank you for your kind attention, and I would like to pass the floor to Dr  
15 Plender.

16  
17 **THE PRESIDENT:** Thank you very much Maître Thiam. Dr Plender?

18  
19 **DR PLENDER:** Mr President, Members of the Tribunal. The case for St Vincent and the  
20 Grenadines is that the arrest of *The Saiga* entailed two breaches of the United Nations  
21 Convention on the Law of the Sea. First it involved interference with freedom of navigation:  
22 the unlawful exercise of the right of hot pursuit, contrary to article 111(8) of the Convention.  
23 Second, it amounted to a violation of articles 292 and 296, since the Guinean authorities  
24 failed to release the vessel and her crew promptly after the posting of the guarantee of  
25 US\$400,000 on 10 December 1997. On these two questions the Tribunal has now received  
26 ample written evidence. It has heard two witnesses at the prompt relief stage and four at the  
27 present stage. In this speech I shall set out briefly our reasons for contending that the  
28 evidence supports our case on the issue arising under article 11. Mr Howe will then deal with  
29 the evidence supporting the claim based on articles 292 and 296.

30  
31 In the case of the four witnesses heard this week, I invite you to conclude that three  
32 were impressive and the fourth is to be believed on all issues that are of importance in this  
33 case.

34  
35 The first was Captain Orlov. He was clear and consistent in stating that throughout  
36 the relevant voyage he understood and believed that he was acting entirely lawfully and in  
37 accordance with a trade, which is widely practised by vessels other than his own. He was  
38 adamant on the point that his vessel came under attack without any prior warning; that  
39 members of his crew suffered injuries; that the vessel was damaged; that he and the vessel  
40 were detained for the periods specified in the Vincentian Memorial. Not upon any one of  
41 those points was he shaken or deflected in any respect in the course of lengthy and persistent  
42 cross-examination from Mr Von Brevern and Professor Lagoni.

43  
44 Captain Laszlo gave evidence about the state in which he found *The Saiga* in Conakry  
45 and the conditions suffered by the crew in that port. His evidence on the state of the vessel is  
46 consistent with Captain Orlov's account. It is also consistent with the photographs of the  
47 vessel subsequently taken in Dakar and with the reports and invoices collated by Allan  
48 Stewart. His evidence about the conditions of detention of the crew is again consistent with  
49 the account given by Captain Orlov. It is consistent also with the evidence given in the  
50 prompt release proceedings by Mr Vervaet.

1  
2 It is true that particularly in the course of cross-examination by Mr Von Brevern,  
3 Captain Merenyi made allegations against Guinean officials, coupled with a sweeping  
4 generalization about the vast continent of Africa, which are irrelevant to this case, and as the  
5 President observed, inappropriate to this Tribunal. In retrospect, I regret that I did not  
6 interrupt the cross-examination to curtail the witness' evidence at the time. It is precisely  
7 because they are irrelevant, because they form no part of our claim, and because they are  
8 unsuitable to this Tribunal that I invite the Tribunal simply to ignore them. What matters is  
9 that *The Saiga* was found in a damaged condition in Conakry, and that the crew were not at  
10 first free to leave, but were forced to stay aboard the vessel for some time.

11  
12 Although in the course of cross-examination of Captain Merenyi it was put to him that  
13 the crew were free to leave at once, the Guinean written observations are themselves to the  
14 contrary. The Guinean written observations confirm Captain Merenyi's account. At  
15 paragraph 179 of the Counter-Memorial, we read "Other crew members were allowed to  
16 leave the vessel in due course." Quite so. What Captain Merenyi says and what the Guinean  
17 government says on that point is consistent.

18  
19 The third witness was Mr Niasse, one of the injured members of the crew. I feared  
20 that after all his experiences he would be overawed by the prospect of giving an account of  
21 his events to this Tribunal. My fears proved to be displaced. He was a good deal less  
22 intimidated than I am. I invite the Tribunal to conclude that he was a cogent and careful  
23 witness with an accurate recollection of the events.

24  
25 I invite you to pay particular attention to his evidence that the vessel was drifting for  
26 hours before the attack; that he saw no signal and heard no warning from the Guinean patrol  
27 boats before they opened fire. In that context I remind you of where he was standing at the  
28 time, and invite you to conclude that if there had been a siren or blank shot or other loud  
29 warning, a sailor standing amidships upon open deck could scarcely have failed to hear it.

30  
31 Further, I rely upon his evidence that the vessel was moving only slowly at the time of  
32 the attack and that he detected no violent movements of the vessel or any other indication that  
33 it was attempting to run the patrol boats down.

34  
35 In the case of the final witness, his written calculations are more important than his  
36 presentation in this Tribunal in person. I submit, however, that in this tribunal room, he  
37 showed himself to be a careful, well-informed and experienced man. His cross-examination  
38 by Mr von Brevern and Professor Lagoni did not reveal a single error in any of his extensive  
39 calculations.

40  
41 I now propose to take the Tribunal through the evidence in a chronological order, by  
42 which I mean following the events as they occurred. I invite the Tribunal to pay particular  
43 attention to detail, to small points which are often the most revealing. The Irish writer,  
44 Sir Arthur Conan Doyle, best known for his character. Sherlock Holmes, wrote:

45  
46 "It has long been an axiom of mine that little things are infinitely the most important."

47  
48 In the present case, little things, the details, often assume special significance in confirming  
49 the account given to the Tribunal by the four witnesses for the applicant state and intending to  
50 disprove the account to be given by the crew of the Guinean patrol boats.

1  
2 According to Captain Orlov, *The Saiga* had been engaged for some four to five  
3 months in supplying offshore bunkers to fishing boats and other vessels off West Africa when  
4 he joined her as her Master in August 1997. He encountered no problems with the authorities  
5 of any of those States in all that time. The Captain confirmed in evidence on Tuesday  
6 afternoon that *The Saiga* was one of several vessels engaged in offshore bunkering. He even  
7 offered to give their names, although I did not trouble him with that point. He said he had  
8 never known of any case in which any vessel in any exclusive economic zone had been  
9 subject to a prohibition from a coastal State. He said that on the basis of several years  
10 experience as a Master of merchant vessels.

11  
12 In answer to my closing questions in re-examination he confirmed that at no time in  
13 his voyage did he consider that he was acting in breach of any law. He was exercising the  
14 right of peaceful navigation. Indeed, for the reasons that have just been given by  
15 Maître Thiam, it is our contention that even now, with the benefit of retrospect and months of  
16 legal research, it has proved impossible to detect any Guinean law which purports to prohibit  
17 bunkering in her exclusive economic zone. Still less is it possible to detect any such law  
18 which is opposable against another State and its vessels.

19  
20 The Captain's evidence on that point is corroborated by the unchallenged testimony of  
21 the second mate, Mr Kluyev, given on 27 November 1997. He said that the vessel had been  
22 bunkering off the coasts of Morocco, Mauritania and Guinea-Bissau without encountering  
23 any difficulty.

24  
25 Both the Captain and second mate testified that on 24 October 1997 the vessel left  
26 Dakar laden with some 5,400 metric tonnes of gasoil, intending to supply vessels off the  
27 coasts of Senegal, Guinea-Bissau, Guinea, Sierra Leone and Liberia. The vessels to be  
28 supplied were mainly fishing boats but also a tug. The Captain's evidence was that *The Saiga*  
29 supplied six named fishing vessels before entering the Guinean exclusive economic zone.

30  
31 He gave evidence that the charterers had warned him that it might not be safe to  
32 bunker vessels off Guinea. He referred, quite spontaneously, to a telex of 22 October and  
33 was able to produce a copy of it. The Tribunal will find in the telex a warning about the  
34 danger of "oil supplies hunters" off the Guinean coast. You have also heard Captain Orlov's  
35 evidence that he had a conversation with one Mr Lee, a translator aboard the *ALFA I* who had  
36 spoken to him about an attack on that vessel in the Guinean exclusive economic zone by what  
37 appeared to be navy vessels. There is before the Tribunal written evidence of an attack on  
38 that vessel conducted by a navy vessel in the Guinean exclusive economic zone lasting about  
39 half an hour, with the use of hundreds of rounds of machine gun fire. The written evidence is  
40 to the effect that the ship was left burning and the crew were lucky to escape with their lives.  
41 The Guinean authorities denied then - and in written pleadings to this Tribunal they continue  
42 to deny - that they were responsible for the attack upon the *ALFA I*. I do not invite the  
43 Tribunal to reach any decision as to whether the Guinean authorities had any responsibility  
44 for that attack at all; it is not in issue. What is important is that on 27 October the Master had  
45 reason to fear that in those waters he might be subjected to an unlawful attack by what  
46 appears to be a navy vessel.

47  
48 The Captain's evidence on that point is corroborated by the statements of  
49 Vincent Kanu and Captain Wyse describing an attack on a Sierra Leonean vessel in Sierra  
50 Leonean waters acknowledged to be the responsibility of the Guinean authorities. Of that



1 attack there can be no dispute. The Tribunal has before it written evidence together with a  
2 copy of a letter of protest from the Sierra Leone authorities and the Guinean response.  
3 I refer, for example, to the letter dated 12 December 1996 from the Guinean Foreign Minister  
4 to the President of Sierra Leone refusing to return the cargo seized from that vessel.  
5 (Page 205 of the bundle of annexes to our Memorial, tab 11).

6  
7 Indeed, in their written observations the Guinean side appears to accept that the  
8 Captain had reason to fear an attack because of the experiences of the *ALFA I* and the  
9 *NAPETCO*. They refer to this at the end of paragraph 15 of their Counter-Memorial where  
10 they rely upon the fact that the Captain of *The Saiga* was, in their words,

11 "well aware of the arrest of two other vessels."  
12

13  
14 According to the Master's evidence he was paying no attention to the question of whether he  
15 was within or beyond the Guinean exclusive economic zone. This was not, he said, a matter  
16 which concerned him for, as he understood it, the purpose of the exclusive economic zone is  
17 to confer on the coastal State rights in respect of the exploration and exploitation of natural  
18 resources. Such a zone is important for those exploring and exploiting the natural resources,  
19 such as fishing boats. It is not significant for other vessels engaged in navigation and  
20 associated activities, like *The Saiga*. His charts bore no reference to any exclusive economic  
21 zone.

22  
23 The Master's evidence was that he was able subsequently to work out that *The Saiga*  
24 entered the Guinean exclusive economic zone on the morning of 27 October 1997. On the  
25 map (a copy of which is at tab 1 of the blue file supplied with summaries of our speeches) the  
26 north-eastern limit of the Guinean exclusive economic zone is indicated by two different  
27 lines. The more northerly line designates the outer limit of the Guinean zone on the premise  
28 that it follows the latitude 10.20 north. That was the zone claimed by Guinea. The more  
29 southerly line shows the limit of the Guinean exclusive economic zone as determined by the  
30 Court of Arbitration in the *Guinea - Guinea-Bissau* award, copied at tab 9 of the annexes of  
31 our Memorial.

32  
33 *The Saiga* crossed the two lines in succession, the northern one first. It is agreed, and  
34 there is ample evidence, that *The Saiga* then bunkered three vessels: *GIUSEPPE I*, *KRITTI*  
35 and *ELENI G* at 10° 25 north and 15° 42 west. The Captain points out that there is no  
36 indication in his charts that Guinea claimed any contiguous zone, let alone that there was an  
37 assertion of a contiguous zone embracing the point where the vessels were supplied. Only  
38 later has it been asserted that Guinea has a contiguous zone measured from the uninhabited  
39 rock known as Alcatraz.

40  
41 Of the three vessels, one was sailing under the Italian flag. None was sailing under  
42 the Guinean flag. According to the Guinean Counter-Memorial, the other two flew the Greek  
43 flag. The Republic of Guinea has been invited to supply copies of the fishing licences which,  
44 on the Guinean case, would have restricted the point at which the fishing boats might obtain  
45 their supplies. Despite the invitation of the Tribunal, those licences have not yet been  
46 produced. There is literally no evidence to suggest that the captain had any means of  
47 knowing what was in those licences. If, after all these months and all this inquiry, we still do  
48 not know what was in the licences, it is manifest that Captain Orlov could not have been  
49 expected to have known that in October 1997.

1 I occupied much of the Tribunal's precious time in questioning the captain so as to  
2 demonstrate from telexes, logbooks and bunkering receipts the precise whereabouts of the  
3 vessel at all material times from the time of the bunkering until the time of the attack. We  
4 now know, from ample objective evidence, as well as from the captain's testimony and the  
5 testimony of Sergei Kluynev, that *The Saiga* completed the bunkering of the last of the  
6 vessels at 1400 hrs on 27 October. As may be seen from the exchange of telexes between the  
7 vessel and the charterers, the vessel remained at that point until 16.26 hours, when the master  
8 telexed that he would sail to a new position 09° 50 North, 16°15 West. That was for a  
9 rendezvous with some Greek vessels. He expected to arrive at 20.00 hours. The master said  
10 that he would not proceed closer than 100 miles of Guinea. At 18.42 hours, he received  
11 instructions that the proposed rendezvous was not safe and that he should proceed to 09°  
12 North, 15° West, and the telex said "which is the usual position where all Greeks are  
13 supplied".  
14

15 I pause there. Those words appear on the telex at page 251, tab 16 of the Annexes to  
16 our Memorial. They are contemporaneous, something said at the time, with no knowledge of  
17 what may happen in the future and no prescience of what others may make of it. It is a detail  
18 carrying particular weight. The reason given to move to that point is that it is "the usual  
19 position where all Greeks are supplied". There is no suggestion here that the consideration  
20 was to be within or outside the Guinean exclusive economic zone or to engage in any form of  
21 subterfuge, for no form of subterfuge was involved. As the telexes again show, the master  
22 confirmed at 19.25 hours that he was complying with those instructions.  
23

24 On the Guinean side, much has been said in cross-examination to suggest that on  
25 receiving the second telex the captain ought to have known that he was the subject of some  
26 lawful enquiry from the Guinean authorities. I submit that the evidence is strongly to the  
27 opposite effect. In view of all that he had heard about *ALFA I* and in view of the warning  
28 about "oil supplies hunters", the captain was amply justified in fearing an attack of an illegal  
29 character. His evidence was that he did not understand that he had to fear lawful police  
30 action. On that point, he is to be credited.  
31

32 In his statement to this Tribunal on Tuesday, the captain explained that he changed  
33 position at about 1900 hours. That is consistent with the verifiable and verified time of the  
34 telex. He said that he proceeded at about 7 knots. Questioned by Professor Lagoni, he  
35 accepted that his speed over the seabed (which Professor Lagoni called his "real speed")  
36 could be determined objectively by reference to the fixed positions measured from the ship's  
37 satellite equipment. We invite the Tribunal to do the calculation for itself. It is simply and  
38 readily verified, and we have done it. It shows that his speed was some 6.5 knots, a little  
39 slower than the estimate that he gave in court. Indeed, if the captain's estimate showed a  
40 margin of error, the Tribunal may think it significant that he erred on the side of caution. It is  
41 perhaps one of Sir Arthur Conan Doyle's "little details". A witness who is determined to  
42 embroider or improve his case might have estimated that the vessel was going more slowly  
43 than it was. It would have been to his advantage to do so. On the contrary, the captain's  
44 estimate was very slightly against the interests of those who I represent. In any event,  
45 whether it be 7 knots or 6.5 knots, it is certainly not the speed of a vessel racing in some hot  
46 pursuit, dashing to escape from a pursuer. Indeed, you have heard no evidence that there was  
47 any pursuit of any kind occurring at that point.  
48

49 The captain's evidence, given consistently in his two statements and in his oral  
50 testimony, is that the vessel crossed the border out of the Guinean exclusive economic zone at

1 about 03.45 on 28 October. That estimate is given on the basis of the vessel's course, which  
2 is known, and the captain's estimate of a speed of 7 knots. An entry in the logbook shows  
3 that the engines were stopped at about 04.24 hours, some five miles south of the Guinean  
4 exclusive economic zone. If the ship had been travelling at 6.5 miles per hour – and from the  
5 calculations we can show that it was – it follows that it would have taken about 50 minutes to  
6 travel those five miles, so the vessel would have crossed the southernmost limit of the  
7 Guinean exclusive economic zone a little before 03.45.

8  
9 This evidence is also consistent with the statement of the second mate and with the  
10 ship's logbook. I place particular emphasis upon the logbook because at the time when the  
11 captain and the second mate gave their evidence (in the case of the captain for the Guinean  
12 proceedings) the logbook was in the possession of the Guinean authorities. The captain and  
13 second mate were unable to consult the logbook to refresh their memories. Now that the  
14 logbook is available, it shows that their recollections were exceptionally accurate; their  
15 evidence is confirmed in all respects by the logbook.

16  
17 Professor Lagoni went to some pains in cross-examination of the captain to establish  
18 that the captain did not make the relevant entries in the logbook personally. Far from  
19 assisting the Guinean case, the point established by Professor Lagoni strengthens ours. If the  
20 captain had had to rely upon his own entries, it might perhaps be said that these were self-  
21 serving. It might have been said that he had made false entries to support the false account  
22 now given. No such claim can possibly be made when the entries are not those of the captain  
23 but of other officers. The entries, made by several individuals other than the captain, support  
24 his account.

25  
26 The consistent evidence of the logbook, the captain and the second mate is that  
27 *The Saiga* stopped engines and drifted in the exclusive economic zone of Sierra Leone at  
28 approximately 09° 03'18 North, 15° 02 West. She drifted there until about 08.30 in the  
29 morning. Mr Niasse confirmed that evidence. He said that the vessel was drifting all night.  
30 At about 08.30 the master located on his radar two vessels approaching rapidly. At the point  
31 when he detected them, they were about 11.5 miles away, towards the limit of the radar reach  
32 of the equipment as it had then been set. He watched them for 6-10 minutes. At about 08.45,  
33 he gave the orders to start the engine. Obviously it would have taken some time to start an  
34 engine. It is also obvious that once an engine is started, it would have taken a laden oil tanker  
35 some time to reach her maximum speed. The captain says that this was the case. He  
36 estimated her speed at about 4 knots. His account is confirmed independently by Mr Niasse,  
37 who said that the vessel was moving slowly. The Tribunal is invited to conclude that the  
38 vessel was moving only slowly when the two Guinean patrol boats came in sight between  
39 9.10 and 9.15 in the morning.

40  
41 The captain, the second mate and Mr Niasse are unanimous and consistent in their  
42 evidence that the Guinean vessels did not at any stage try to contact *The Saiga* by sound or  
43 light signal or radio. I now take the opportunity to quote Mr Kluynev's words from the  
44 Tribunal's transcript of 27 October, since this will be less fresh in your Lordships' minds than  
45 the evidence that has been heard this week. I quote the words as they appear from the  
46 transcript, beginning at page 19, line 10. He said:

47  
48 "The vessel was drifting and, as I know, in such a position the engine is 30 minutes'  
49 readiness. For preparing the vessel for movement it is necessary about 30 minutes,

1 but may be in the case of emergencies this time can be reduced to 20 minutes but not  
2 less."

3  
4 He was asked if there were audible or visual signals from the Guinean authorities and he  
5 replied:

6  
7 "No. As I know, there was no announcement from the Guinean authorities."  
8

9 In his evidence at this hearing, the captain stated that the first attempt made to contact  
10 *The Saiga* by the Guinean patrol boats was when it started firing machine guns from a  
11 distance of 1-2 miles. His evidence, you may think, had the ring of truth. There was again  
12 one of those telling points of detail which often signify veracity. He said that the sound of  
13 the guns was like clapping; he did not realize at first what it was. The evidence of  
14 Mr Klyuyev contains a similar characteristic detail. He describes the sound of the bullets  
15 hitting the hull as resembling the sound of nuts. He heard no warning. Mr Niasse is equally  
16 clear on the point. He was working in the middle of the deck in the open air. He heard no  
17 siren, no bell or other warning. He stated as follows, and I quote his words as they appear in  
18 the English translation:

19  
20 "I did not hear anything. If I had heard a siren I would have thought I was in harbour.  
21 If you hear a siren or bell in port, I know that I must flee because there is a danger.  
22 Above all, if there is a siren which starts to sound, there is a danger. You must not  
23 stay where you are. You must flee. But we did not hear anything."  
24

25 That is at page 6 lines 15-18 of yesterday's transcript.

26  
27 The Guinean case is that there were several warnings, by radio, siren and bell. If that  
28 were the case, you may think Mr Niasse cannot have failed to hear the warnings; nor could  
29 the Captain or the Second Mate. We invite you to conclude that those witnesses were telling  
30 the truth: there was no warning.

31  
32 In all the written observations from the Guinean Government and in all the  
33 communications to the Tribunal, including all the summaries of evidence, there is not a single  
34 acknowledgement that the Guinean forces used gunfire, save for the following passage  
35 written, it seems, in terms of studied ambiguity.

36  
37 "The ship did not obey upon the blank shots, being the customary signal to show the  
38 flag at sea ... Small calibre gunfire was a necessary means of instruction indicating  
39 the order to stop and show the flag. Small calibre solid gun shots without using  
40 explosive shells would not even then endanger the tanker when they hit the ship."  
41

42 That is at pages 52-53 of the Counter-Memorial.

43  
44 The suggestion that blank shots were fired is inconsistent with the evidence of the  
45 Captain, Mr Niasse and Sergei Klyuyev, who were unanimous that there was no warning.  
46 The suggestion that only small calibre guns were used is inconsistent with the visual  
47 evidence -- that you have seen -- showing large as well as small gun holes. The suggestion  
48 that the gunfire was a "necessary form of instruction" is not consistent with the fact that  
49 scores of rounds hit the vessel; these were not shots across the bows. The vessel was riddled  
50 with gunfire from the highest point of the antenna down to the engine room. The whole of

1 this evidence is inconsistent with the fact that *The Saiga's* freeboard was only 1 metre  
2 30 centimetres above the sea level, a point confirmed by the Captain, by Allan Stewart and by  
3 the photographs. It was an easy matter for the Guinean personnel to board the vessel, by  
4 stepping on to it from their own patrol boats. This is in fact what they did. They had no need  
5 to use gunfire, least of all on a laden and unarmed tanker.  
6

7 A summary of the Guinean case on the evidence (supplied to the Tribunal on 5 March  
8 and to us on the evening of 9 March) contains a denial of indiscriminate firing. The Tribunal  
9 has now seen the photographs of other vessel. They show clear signs of gunfire on the  
10 bridge, monkey island, Yokohama fenders, port hull, engine room, satellite antenna,  
11 ventilator to the accommodation structure, accommodation structure itself, several windows,  
12 several portholes, lifeboats, rubber boat (the *Zodiac*), radio room and equipment including  
13 a telephone, fax system, electric generator and a 400 kg fender, among other points. The  
14 holes show clearly that guns of two calibre were used. We are told, and indeed we know  
15 from recent evidence, that the Guinean patrol boats had mounted machine guns of large  
16 calibre and that the troops aboard carried submachine guns of smaller calibre.  
17

18 When considering the photographic evidence, the Tribunal will contrast this with the  
19 Guinean contention, advanced at paragraph 176 of the Counter-Memorial. At that point  
20 Guinea states:  
21

22 "there is no proof of any damage to the vessel".  
23

24 We submit, on the contrary, that there is clear, overwhelming and objective evidence  
25 that there was damage that much of it was caused by gunfire; that the shots were not blank;  
26 and that they were very numerous and widespread. In a word, they were indiscriminate.  
27

28 On this point the evidence of the photographs is confirmed by the evidence of  
29 Allan Stewart, who took some of the photographs and who measured the extent of the  
30 damage, together with technical experts. The size of the gun holes and the thickness of the  
31 metal plate penetrated by them is consistent with the Captain's account that heavy  
32 machinegun fire was directed at the vessel.  
33

34 The Master's evidence is that he then announced that there was a piracy attack and  
35 told everyone to go into the engine room. He put the engine on autopilot in a westward  
36 direction. That is consistent with the evidence given by Mr Niasse who said that from the  
37 Captain's gestures he understood perfectly well that there was a warning to hide. It is  
38 common ground that the vessels that the Master had seen approaching were Guinean  
39 launches, *F-328* and *P-35*. They put armed men aboard, who immobilized the *M/V SAIGA* at  
40 08 °50 North and 14 °50 West, in the words used by Guinea "within the exclusive economic  
41 zone of Sierra Leone".  
42

43 May I now remind the Tribunal of the evidence at this stage given by Sergei Klyuyev  
44 on 27 November? He was asked how the Guineans behaved aboard the vessel and he said:  
45

46 "There was firing inside from automatic machine, from the light automatic gun  
47 machine, and then it was a long shouting, maybe five or six shouting. We did not  
48 know what that meant. Then at approximately five or ten minutes later our Captain  
49 proceeded upstairs and returned with handcuffs and all the crew was taken to the boat  
50 by the armed forces. They have treated some people, the cook, and asked him to get

1 something to eat and drink. They take guns and put them at his head and said, 'If you  
2 don't give us what we want to eat, we will kill you'.

3  
4 "I received two fragments of bullet, at the left hand ..."

5  
6 There ends the quotation for the moment. You have seen a photograph confirming  
7 this fact.

8  
9 When asked about the wounds to Mr Niasse, he said:

10  
11 "As I know he has received glass at his throat and something happened to his eyes ...  
12 They said that the reason why they started shooting was that they saw three black  
13 men, Senegalese ... Then they said that if they had known that the other crew is  
14 white and there is a Ukrainian citizen or one of the former Soviet Union, they will  
15 never fire ... They said that if they had known there were white people on the boat  
16 they would never fire."

17  
18 That evidence was not challenged. The present significance is this. The Guineans  
19 knew that there were people on board the vessel. They had seen Mr Niasse and his fellow  
20 Senegalese working in a visible position in the middle of the deck. In view of Mr Niasse's  
21 evidence, that is to be expected. They fired many rounds of live ammunition in the full  
22 knowledge of the fact that this was endangering those whom they had seen on the vessel.

23  
24 During that period, some members of the crew of the *M/V SAIGA* suffered injuries.  
25 Medical reports show that Sergei Klyuyev sustained gunshot, including one approximately  
26 8 centimetres long requiring surgery under general anaesthetic as well as shrapnel wounds.  
27 You have seen medical reports showing that Djibril Niasse suffered gunshot wounds to the  
28 chest, haemorrhaging in both eyes -- he described how blood was pouring from his  
29 eyes -- severe contusion of the chest and severe psychological injuries; that one projectile  
30 was removed from his chest under general anaesthetic; and that a second, situated behind the  
31 collar bone, was left in place because of the serious operating risk involved in a thoractomy.  
32 The most recent medical reports show that Djibril Niasse's severe psychological injuries have  
33 persisted.

34  
35 You have been able to see photographs of Mr Niasse as he was in Dakar several days  
36 after the event and after he had received treatment and you have seen X-rays of some of the  
37 projectiles within his body.

38  
39 Members of the Tribunal, I invite you to conclude that it was entirely obvious from  
40 the photographs alone that this was a man who was seriously injured. That is obvious even  
41 after the treatment and after a delay of several days. The commandant of the launch,  
42 however, described his injuries as "slight".

43  
44 The evidence of the Captain, of Mr Klyuyev and of Mr Niasse was that, once aboard,  
45 the Guinean armed personnel ransacked the cabins of members of the crew, stealing money  
46 and personal possessions and took articles from the ship's stores. These are all itemized at  
47 Annex 41 to the Memorial.

48  
49 Guinea, at paragraph 183 of its Counter-Memorial, "contests such theft". You have  
50 heard the evidence of Captain Orlov whose statement records that "soldiers when through the

1 vessel searching the cabins and stores for anything of interest to them" and you have heard  
2 confirmation of this from Mr Niasse. I invite you to give credit to their evidence.  
3

4 After the arrest the vessel was taken to the port at Conakry where the Guinean  
5 authorities required that the Master and some members of the crew remain aboard the  
6 detained vessel. You have heard evidence from the Captain and from Captain Merenyi that  
7 there were about 15 soldiers on board, all armed. It was suggested by Professor Lagoni in  
8 cross-examination that they were there to protect the vessel. That may be contrasted with the  
9 evidence of Captain Merenyi, who reported that the soldiers caused injuries to two further  
10 members of the crew by striking none on the head with a gun and kicking another in the knee,  
11 in each case with sufficient severity to require their evacuation for treatment in a hospital.  
12

13 I also invite the Tribunal to conclude from various items of evidence that the Guinean  
14 authorities did not permit the Captain and crew to have normal access to legal and diplomatic  
15 representatives. Mr Dabinovic, who alas cannot be present in the Tribunal, wrote an article  
16 included in the blue folder, confirming that he made representations to the Guinean  
17 authorities and was rebuffed. He never succeeded in seeing the vessel and crew.  
18

19 The Tribunal has heard the evidence of Mr Varvaet that he tried in vain to speak to  
20 the crew. He was able to communicate only by hand signals from a pier. There is also the  
21 evidence of Captain Merenyi setting out in detail the difficulties encountered by the  
22 representatives of the P&I Club and others who were not permitted to see the vessel and  
23 crew.  
24

25 It appears to be accepted that whilst at anchorage the Guinean authorities seized  
26 *The Saiga's* cargo of oil. The Master was ordered to commence discharge of the vessel's  
27 cargo. He initially refused to do so and was warned by Mr Bangoura that he would be taken  
28 ashore to jail and that the crew would be required to discharge the cargo under force of arms.  
29 That evidence was confirmed by Captain Merenyi. Neither was even challenged on the point.  
30

31 The discharge was effected on shore between 10<sup>th</sup> and 12<sup>th</sup> November. The cargo was  
32 confiscated and sold to oil companies in Conakry upon the orders of the local authorities.  
33 The applicants have been led to believe, and have stated in their Memorial, and again in their  
34 Reply, that the Guinean authorities realized from the sale a sum in excess of US\$3 million.  
35 At no stage in any of the proceedings has that been denied.  
36

37 The damage to the vessel and the costs entailed by the Guinean action have been  
38 carefully recorded and calculated by Allan Stewart. The Tribunal has his report, it descends  
39 to very great detail, amply supported by documentation. None of this was challenged, let  
40 alone disproved in the course of cross-examination.  
41

42 Mr President, Members of the Tribunal, in the light of this evidence, we submit that St  
43 Vincent and the Grenadines has made good the factual part of her claim that she has suffered  
44 a breach of her right to freedom of navigation and a violation of article 111 of the United  
45 Nations Convention (the rules governing hot pursuit). I now leave it to Mr Howe to remind  
46 the Tribunal of the evidence, both oral and written, on which we rely when submitting that  
47 Guinea failed to comply with her obligation to release the vessel promptly following the  
48 order of this Tribunal of 11<sup>th</sup> March last.  
49

1 **THE PRESIDENT:** Thank you very much Mr Plender. Mr Howe, you may please  
2 proceed.

3  
4 **MR HOWE:** Mr President, Members of the Tribunal. As the Tribunal knows, we instituted  
5 proceedings for the prompt release of the vessel on 13th November 1997. You have the  
6 evidence that the Guinean reaction, at first, was to propose to remove the entire crew, lock  
7 the vessel and allow her to perish. That course was averted, thankfully. By judgment dated  
8 4<sup>th</sup> December 1997 this International Tribunal ordered the Republic of Guinea to release the  
9 *M/V SAIGA* and her crew promptly and decided that that release should be upon the posting  
10 of a reasonable bond or security, consisting of the quantity of gasoil discharged from the  
11 vessel and US \$400,000 to be posted in the absence of an agreement in the form of a letter of  
12 credit or bank guarantee. You have Captain Merenyi's evidence that the Guinean authorities  
13 were divided in their reaction. Some, at least, considered that the vessel should not be  
14 released until the sum had been paid in cash.

15  
16 On Wednesday 10<sup>th</sup> December 1997 St Vincent and the Grenadines posted bank  
17 guarantee no. 30537/97 issued by *Crédit Suisse* in the amount of US\$400,000 with the Agent  
18 of the Republic of Guinea, Mr Hartmut von Brevern. A copy of that will be found at tab 38  
19 of the Annexes to the Memorial. Copies were sent to the Ministry of Foreign Affairs in  
20 Guinea and to the Registrar of the International Tribunal. On the same day, as you know, the  
21 Guinean authorities issued proceedings against the Master of the *M/V SAIGA* charging him  
22 with offences against Guinean customs law and joining St Vincent and the Grenadines as a  
23 party having civil liability in the matter. That will be found at page 405 tab 27 to the  
24 Annexes to the Memorial.

25  
26 On or about the same day the Guinean customs authorities served on the lawyer acting  
27 for the Master of the vessel, Maître Bangoura, submissions dated 14<sup>th</sup> November 1997  
28 inviting the Guinean court to convict the Master of customs offences and to order the  
29 confiscation of the gasoil and the imposition of a fine approximately equal to US\$15 million.  
30 Proceedings began before the Court of First Instance at Conakry on Friday 12 December  
31 1997. On the following Wednesday, 17 December 1997, that court orally gave its judgment.  
32 By that judgment the court convicted the Master and made the orders requested by the  
33 Guinean customs authorities. It also ordered confiscation of the vessel and her cargo as a  
34 guarantee of payment. That oral judgment was subsequently recorded in written form and a  
35 copy of that can be found at tab 29 to the Annexes to the Memorial.

36  
37 Throughout this time the vessel and her Master continued to be detained. It was at  
38 this stage that St Vincent and the Grenadines instituted arbitral proceedings against the  
39 Republic of Guinea under Annex VII of the United Nations Convention and requested the  
40 prescription of Provisional Measures. By response dated 30 January 1998 the Republic of  
41 Guinea requested the International Tribunal to reject the application for Provisional  
42 Measures.

43  
44 At an oral hearing on 3 February 1998 the Court of Appeal at Conakry dismissed the  
45 Master's appeal, stating that the *M/V SAIGA* had "been engaged in smuggling activity by  
46 illegally refuelling ships...flying the Guinean flag". It added a suspended prison sentence to  
47 the penalties imposed. On 16<sup>th</sup> and 18<sup>th</sup> February the Guinean Minister of the Economy and  
48 Agent wrote to *Crédit Suisse* requesting payment of US \$400,000 on the premise that final  
49 judgment had been entered. The bank replied on 19 February that the claim had not been  
50 submitted in accordance with the terms of the guarantee.



1  
2 By exchange of letters dated 20 February 1998, full copies of those letters are at tab 2  
3 of the Annexes to the Memorial, the parties agreed to transfer the arbitral proceedings to this  
4 International Tribunal. A copy of the letter from the Guinea Agent will be found among the  
5 authorities accompanying my first speech, the second item in our bundle.  
6

7 As members of the Tribunal know, the hearing of the application for prescription of  
8 Provisional measures took place on 23 and 24 February 1998. However, on 28 February  
9 1998 the Guinean authorities executed a deed of release whereby the *M/V SAIGA* and her  
10 Master were permitted to leave Conakry. They departed with the remaining crew at 1700  
11 hours.  
12

13 By Order dated 11 March 1998 this Tribunal unanimously prescribed Provisional  
14 Measures, *inter alia* requiring Guinea to refrain from taking or enforcing any judicial or  
15 administrative measure against the *M/V SAIGA*, her Master and the other members of the  
16 crew, in connection with the events of 28 October 1997 and the prosecution and conviction of  
17 the Master. The Tribunal also recommended that the two States should ensure that no action  
18 is taken which might aggravate the dispute. The Government of St Vincent and the  
19 Grenadines wrote to the Agent of the Republic of Guinea on 7 April 1998 proposing an  
20 interim agreement. There was no response. The Government of Saint Vincent and the  
21 Grenadines has endeavoured to ensure that vessels flying her flag shall bunker outside the  
22 Guinean exclusive economic zone pending final resolution of the present dispute.  
23

24 Since that time Saint Vincent and the Grenadines has discovered and drawn to the  
25 attention of the International Tribunal an undated letter from the National Director of  
26 Customs of the Republic of Guinea to the Minister of the Economy, and that appears at tab 17  
27 to the Annexes to the Reply, together with an accompanying draft decree appearing at tab 16  
28 to the Annexes to the Reply, and a statement of purpose, tab 18 to the Annexes to the Reply,  
29 which states that the draft decree is "intended to close the current loophole in the refuelling of  
30 ships". Saint Vincent and the Grenadines has informed the President that she:  
31

32 "is firmly of the view that the enactment of the Proposed Joint Decree (or any  
33 legislation with the same purpose) would be quite contrary to the rights of freedom of  
34 navigation of vessels flying the flag of Saint Vincent and the Grenadines and other  
35 States that my wish to supply bunkers to fishing and other vessels outside the  
36 Territorial Waters of Guinea but within their exclusive economic zone."  
37

38 The Republic of Guinea has yet to respond.  
39

40 In the light of this evidence, I invite the Tribunal to conclude that the Vincentian case  
41 is amply made. We shall respond to the Guinean evidence, and develop our submissions on  
42 the law, at an appropriate juncture next week.  
43

44 Mr President, that concludes the first round of oral argument on behalf of Saint  
45 Vincent and the Grenadines. I thank the Tribunal.  
46

1 **THE PRESIDENT:** Thank you very much Mr Howe, and thank you very much gentlemen  
2 for managing to keep almost to a minute within the time that we arranged. We will at this  
3 point interrupt the sitting and as agreed in consultations Guinea will commence the first part  
4 of its representations at 2 o'clock when we resume. The sitting is closed.

5

6 **(Adjournment 1200 hours)**

7