

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



MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 8 TO 20 MARCH 1999

*The M/V "SAIGA" (No. 2) Case
(Saint Vincent and the Grenadines v. Guinea)*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DU 8 AU 20 MARS 1999

*Affaire du navire « SAIGA » (No. 2)
(Saint-Vincent-et-les-Grenadines c. Guinée)*

For ease of use, in addition to the normal continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the uncorrected verbatim records.



En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux non-corrigés.

Minutes of the Public Sitings held from 8 to 20 March 1999

Procès-verbal des audiences publiques du 8 au 20 mars 1999

Public sitting held on 8 March 1999, 10.00 a.m.

Tribunal:

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

Saint Vincent and the Grenadines is represented by:

Mr. Carlyle D. Dougan, Q.C.,
High Commissioner of Saint Vincent and the Grenadines to the United Kingdom,

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,
Advocate, President of the Senegalese Bar,
Dakar, Senegal,

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

as Counsel and Advocates.

Guinea is represented by:

Mr. Hartmut von Brevern,
Attorney at Law, Röhreke, Boye, Remé, von Werder,
Hamburg, Germany,

as Agent and Counsel;

Mr. Maurice Zogbélérou Togba,
Minister of Justice and *Garde des Sceaux* 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.

Audience publique du 8 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Saint-Vincent-et-les-Grenadines est représentée par :

M. Carlyle D. Dougan, Q.C.,
haut commissaire de Saint-Vincent-et-les-Grenadines au Royaume Uni,

comme agent;

M. Richard Plender, Q.C.,
avocat,
Londres, Royaume Uni,

comme agent adjoint et conseil;

M. Carl Joseph,
procureur général et Ministre de la justice de Saint-Vincent-et-les-Grenadines,

et

M. Yérim Thiam, avocat, bâtonnier de l'ordre des avocats du Sénégal,
Dakar, Sénégal,

M. Nicholas Howe,
Solicitor, Howe & Co,
Londres, Royaume Uni,

comme conseils et avocats.

La Guinée est représentée par :

M. Hartmut von Brevern,
avocat, Röhreke, Boye, Remé, von Werder,
Hambourg, Allemagne,

comme agent et conseil;

M. Maurice Zogbélé mou Togba,
Ministre de la justice et garde des sceaux de la Guinée,

et

M. Namankoumba Kouyate,
chargé d'affaires, ambassade de la Guinée,
Bonn, Allemagne,

M. Rainer Lagoni,
professeur à l'Université de Hambourg et directeur de l'Institut de droit maritime et du droit
de la mer,
Hambourg, Allemagne,

M. Mamadi Askia Camara,
directeur de la Division législation et réglementation douanières,
Conakry, Guinée,

M. André Saféla Leno,
magistrat de la cour d'appel,
Conakry, Guinée,

comme conseils.

Opening of the Oral Proceedings

[PV.99/1, E, p. 4–7]

The Registrar:

The Tribunal will today hear argument on the merits of the *M/V “SAIGA” (No. 2)* case, Saint Vincent and the Grenadines v. Guinea. The case has been entered on the Tribunal’s List of cases as Case No. 2.

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 of 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 the *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:

1. The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on 22 December 1997, ...;
 2. 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;
 3. The written and oral proceedings shall follow the timetable set out in the Annex hereto;
 4. 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 filling of the Counter-Memorial by four weeks to 16 October 1998. The Counter-Memorial of Guinea was duly filed on 16 October 1998.

By 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 for 8 March 1999.

In conformity with article 67, paragraph 2, of the Rules of the Tribunal, copies of the 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 proceedings were made accessible to the public on 23 February 1998, the date of opening of the oral proceedings on the request for the prescription 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 Zogbélemou Togba, Minister of Justice of the Republic of Guinea, and of Mr. Hartmut 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.

Mr. 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. Niasse, a member of the crew of the *Saiga*; fourth, Mr. Allan 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 Honourable Minister.

I now call upon the Agent for Guinea, Mr. Hartmut 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, Honourable Judges, the delegation of the Republic of Guinea will be composed, first of all, of the Minister of Justice, M. Maurice Zogbélérou Togba, who has not yet arrived. His flight is scheduled for tomorrow, I hope so. Next is the Chargé d'Affaires of the Republic of Guinea in Bonn, M. Namankoumba Kouyate, who is present. Next member of the delegation is Professor Rainer Lagoni, Professor at the Hamburg University and Director of the Institute for Maritime Law and Law of the Sea and finally 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 as to who will share the membership of the delegation and I will inform the Tribunal as soon as possible.

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 that transferred the dispute to this Tribunal.

Then I will address the question of the non-applicability of article 97, paragraph 1, of the Rules of the Tribunal. Next issue will be the registration of *M/V Saiga*, then Professor Lagoni will deal with the question of 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 the *M/V Saiga* within the contiguous zone and the exclusive economic zone of Guinea. Professor Lagoni will then deal with the laws of Guinea relating to customs, contraband and bunkering in the Guinean exclusive economic zone, and with the pursuit and arrest of the *M/V Saiga*. We will then hear Professor Lagoni or myself on the question of force used by the Guinean patrol boats when arresting the *M/V Saiga*. Thereafter I will deal with the *cédule de citation* and 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 the *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 who 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. Thank you very much.

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 Honourable Carl Joseph to commence the submissions on behalf of Saint Vincent and the Grenadines.

Argument of Saint Vincent and the Grenadines

STATEMENT OF MR. JOSEPH
COUNSEL OF SAINT VINCENT AND THE GRENADINES
[PV.99/1, E, p. 7–13]

Mr. Joseph:

Thank you, Mr. President, Members of the Tribunal.

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 by 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.

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 piece 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 made the point clearly and emphatically in the latest edition of *Oppenheim's International Law* (9th edition, Vol. 1, page 73[1], paragraph 287). This will be found, Mr. President, Members of the Tribunal, in Section 1, at 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 subjected 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 the *Mavrommatis* case (1924, *P.C.I.J., Series A, No. 2*) (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.

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 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 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 scrutinize the claim; and the respondent State will have the opportunity of putting questions about the claim to Mr. Allan 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.

We have been equally careful in advancing claims in respect of the Master and crew. Since awards of damages for personal injury 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 out 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 into account 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. Klyuyev, one of the two crew members who were most seriously injured. He sustained gunshot wounds, including one approximately eight centimetres long, requiring surgery under general

anaesthetic, as well as shrapnel wounds. The Tribunal will shortly hear from a second crew member, Djibril Niasse. 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. Niasse and his fellows of Senegalese nationality should receive no compensation at all, especially 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. Niasse 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.

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, traumatized 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.¹

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),

¹ Note by the Registry: Reference given in the written text of the statement: 82 *ILR*, p. 500 at p. 573.

p. 1609) and *Letelier and Moffitt* (88 *ILR*, p. 727 at p. 735) (Section 1, tabs 5 and 6) and that of the *Rainbow Warrior* (74 *ILR*, p. 241 at p. 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:

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:

... 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. Klyuyev, 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 claim for substantial moral damage.

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. Nicholas Howe to continue the submissions on behalf of Saint Vincent and the Grenadines.

STATEMENT OF MR. HOWE
COUNSEL OF SAINT VINCENT AND THE GRENADINES
[PV.99/1, E, p. 13–19]

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 of 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, paragraph 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 MV 'Saiga'". What else could this mean but that the 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 the Exchange of Letters, in their context and in the light of their object and purpose, is that the International Tribunal is authorized 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 of 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* ... [emphasis added]²

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*³. 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 merits. This is a definition that excludes any 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

² Note by the Registry: Reference given in the written text of the statement: Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, p. 448.

³ Note by the Registry: Reference given in the written text of the statement: *I.C.J. Reports 1952*, p. 28 (Section 2, tab 3).

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 4⁴. 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 its 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, subsection 4, of the 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 the 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, paragraph 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.

⁴ Note by the Registry: Reference given in the written text of the statement: 1953, p. 58 at p. 60.

We submit that the Republic of Guinea is precluded by article 97, paragraph 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 the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of 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 the 22 December 1997 ...

For any objections falling within article 97, paragraph 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 as 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, paragraph 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, paragraph 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 proceedings. 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, paragraph 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. Thank you.

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.

STATEMENT OF MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/1, E, p. 19–25]

Mr. 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 the allegation that the *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 Saint Vincent and the Grenadines.

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 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 by a Vincentian company formed in Saint Vincent, resident and established there.
- (ii) She is subject to the supervision of the Vincentian authorities to secure her compliance with the SOLAS Convention, the MARPOL Convention and other conventions of the International Maritime Organization to which Saint Vincent and the Grenadines are 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 have 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, at 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 upon the United Nations Convention on Conditions for Registration of Ships. 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 within 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 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 shipowner or operator in order to fulfil its obligations [in] 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.

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 on behalf of a foreign national. 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* (Section 5, tab 9, of our bundle)⁵ and Judge *ad hoc* Riphagen in the *Barcelona Traction* case (Section 4, tab 2)⁶. 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 armed forces, ... protection extends to everyone in the ship or in the forces”. Judge *ad hoc* 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 Judgement 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

⁵ Note by the Registry: Reference given in the written text of the statement: *I.C.J. Reports 1949*, p. 174 at p. 202 and pp. 206-207.

⁶ Note by the Registry: Reference given in the written text of the statement: *I.C.J. Reports 1970*, p. 3 at p. 346.

Worth v United States (Section 5, tab 1)⁷ 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 common law, does not know a doctrine of binding precedent. In a system based upon precedent, a quest for the *ratio decidendi* – 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 International Court, wrote:

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. (Section 4, tab 4)⁸

While Sir Robert himself favours a recognition of the distinction between *ratio decidendi* and *obiter dicta*, he recognizes 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 decidendi* applicable to a legal system based on the strict doctrine of precedent. (Section 4, tab 5)⁹.

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 statements of 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

⁷ Note by the Registry: Reference given in the written text of the statement: Moore’s *Digest of International Arbitration*, Vol. III (1898) p. 2350-2351.

⁸ Note by the Registry: Reference given in the written text of the statement: “The Judiciary, International and National, and the Development of International Law”, *ICLQ* (1996) p. 1, at p. 9.

⁹ Note by the Registry: Reference given in the written text of the statement: Lauterpacht, *The Development of International Law by the International Court*, 2nd edition, 1958, p. 61.

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. Thank you very much, Mr. Plender.

(The Tribunal adjourns at 11.45 a.m.)

Public sitting held on 8 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 8 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Mr. Plender, you may continue.

Argument of Saint Vincent and the Grenadines (continued)

STATEMENT OF MR. PLENDER (CONTINUED)
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/2, E, p. 4–9]

Mr. Plender:

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

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

Where a State acts in breach of international law, in relation to a person or property beyond its territorial jurisdiction, the State cannot demand that the individuals who have suffered damage should exhaust local remedies, for such a demand would reinforce that

State's wrongful assertion of jurisdiction. It would be plainly unjust to compel a person to submit to the jurisdiction of the courts of a State where his complaint is that the State has acted without jurisdiction. An individual is obliged by international law to exhaust local remedies only where he has put himself within the jurisdiction of the State by some voluntary act. In the expression commonly used by writers, the requirement of exhaustion of local remedies applies only where there is a jurisdictional connection between the State against which the claim is brought and the person in respect of whom it is advanced.

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

The International Court of Justice alluded to the requirement for a jurisdictional connection in the *Interhandel Case*, at Section 4, tab 6, of the authorities¹⁰. In that case, the Court stated that the local remedies rule

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

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

Reference was made to the requirement for a jurisdictional connection by counsel for Israel in oral argument in the *Aerial Incident* case at Section 4, tab 7¹¹. The passage has already been quoted by both parties in written pleadings, but with your indulgence I will quote the central part again. Counsel stated that

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

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

This rule, requiring a jurisdictional connection between the State and the wronged person as a prerequisite for the exhaustion of local remedies receives widespread support from the text writers. The principle applying to this case was expressed in a phrase, which has been much quoted in this litigation, by Professor Meron in his article "The Incidence of the Rule of Exhaustion of Local Remedies" in international law, which will be found at

¹⁰ Note by the Registry: Reference given in the written text of the statement: *I.C.J. Reports 1959*, at p. 27.

¹¹ Note by the Registry: Reference given in the written text of the statement: *I.C.J. Pleadings 1959*, p. 531-532.

Section 4, tab 8, of the authorities¹². He states that the local remedies rule applies only where there is a genuine link between the wrongdoing State and the wronged individual.

- The same principle is supported by Dr. Amerasinghe in his book *Local Remedies in International Law* at Section 4, tab 3¹³. He states:

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

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- He then goes on to give an example of absence of such a connection, using language which is particularly appropriate to this case. He asserts that the local remedies rule will not apply where "naval officers of State A improperly treat nationals of State B on a ship belonging to State C on the high seas." At that point the author contemplates circumstances as close to those of the present case as might ever be expected of any academic writer not possessed of divine prescience.

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

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

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

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- That is at Section 4, tab 3.

- Both in her Counter-Memorial and in her [Rejoinder], Guinea pleads that there was such a jurisdictional connection between the *Saiga* and the respondent State. She argues that "this connection has been duly established ... because the M/V 'SAIGA' had been voluntarily in the Guinean exclusive economic zone and was escorted into the Port of Conakry by Guinean authorities". It is our submission that presence in the exclusive economic zone is not sufficient to establish a jurisdictional connection for the purposes of exhaustion of local remedies. First of all, the Tribunal will recall that the arrest and injury to the crew occurred outside the exclusive economic zone of the Republic of Guinea. That is not disputed. It is expressly accepted by the Republic of Guinea. at paragraph 16 of her Counter-Memorial.

- It is of course alleged that the bunkering of fishing vessels took place within the Guinean exclusive economic zone. Further, it is said that the *Saiga* voluntarily entered that zone to perform those acts. Does that provide the necessary jurisdictional connection? The answer must be "No". Since a State's sovereignty does not extend to its exclusive economic zone, acts occurring there cannot be deemed to have occurred within the territory

¹² Note by the Registry: Reference given in the written text of the statement: 35 *British Yearbook of International Law*, 1959, at p. 95-96.

¹³ Note by the Registry: Reference given in the written text of the statement: 1990, at p. 138-147 (following quotes on p. 138 and 139).

of that State. The rule of international law requiring a jurisdictional connection is a consequence or reflection of the function of the local remedies rule. The rule is, in Dr. Amerasinghe's words "a recognition of, emphasis on and perhaps a concession to the sovereign character of a State." Or, as he put it elsewhere, "the rule results mainly from recognition of the Respondent State's sovereignty ..."

- To quote Judge Córdova in the *Interhandel Case*, respect for the sovereignty of States is achieved by granting priority to the jurisdiction of a State's domestic courts in cases where foreigners appeal against an act of its executive or legislative authorities. (Section 4, tab 6¹⁴)

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

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

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- The sovereignty of a coastal State extends, beyond its [land] territory and internal waters ... to an adjacent belt of sea, described as the territorial sea.

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- Within the territorial sea there is sovereignty.

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

For instance, in the words of Professor Orrego Vicuña, at page 47: the coastal State can (only) exercise the rights of sovereignty and jurisdiction in those matters to which the functionality of the concept confers ... Or, to quote Ambassador Jorge Castañeda, a person present at the Law of the Sea Conference:

In that zone, the coastal State exercised sovereign right over resources, for the purposes of exploration and exploitation, but did not exercise sovereignty over the zone itself, as in the case of the territorial sea. This was its main characteristic.

That appears in his essay in the book of *Essays in Honour of Judge Lachs* (Section 4, tab 10¹⁵). Statements to similar effect abound.

¹⁴ Note by the Registry: Reference given in the written text of the statement: *I.C.J. Reports 1957*, at p. 45.

¹⁵ Note by the Registry: Reference given in the written text of the statement: "Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea", 1984, p. 603 at p. 612-613.

It is, therefore, the submission of Saint Vincent and the Grenadines that the exclusive economic zone is not assimilated to the territory or subject to the sovereignty of the coastal State; and the local remedies rule applies only to wrongs which occur within the sovereignty of the State or where a foreigner brings himself within it by entering into a contract with the State.

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

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

As Dr. Amerasinghe has stated:

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

Quite so.

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

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

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

In the present case the *Saiga* was taken into port from a point beyond the territorial jurisdiction of the Republic of Guinea against her will. She cannot be deemed to have submitted voluntarily to the jurisdiction of that State and she cannot be required to have recourse to the system of justice there.

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

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

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

... most cases of direct injury contain, in a certain degree, also elements of diplomatic protection. It may well be that at the bottom of almost every international claim there is the motivating factor of interests of individuals [which] need protection.¹⁶

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

the classification of a case as one of direct injury or as one of diplomatic protection depends on the element or elements [which] are preponderant.

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

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

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

Mr. President, Members of the Tribunal, I have not canvassed in oral argument each and every one of the points made in our written observations on questions of jurisdiction and admissibility. This is not because I resile from anything we have written. On the contrary, I reiterate every submission on admissibility made in writing, particularly in the Reply; but I do not repeat by word of mouth all that has been said in writing. For I remember not only what Horace said about brevity but also that which is said in a more recent and binding source, article 75 of this court's Rules. This expressly forbids repetition of the written word, and I defer. I propose to say no more about admissibility at this stage and turn to the merits. I propose, Mr. President, with the court's leave, to turn to witnesses.

¹⁶ Note by the Registry: Reference given in the written text of the statement: "The Incidence of the Rule of Exhaustion of Local Remedies in International Law", 35 *British Yearbook of International Law*, 1959, p. 84-86.

The President:

Very well, you may proceed.

Examination of witnesses

INTRODUCTORY STATEMENT OF MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/2, E, p. 9–11]

Mr. Plender:

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

First, my introductory remarks. At the hearing on 27 November 1997 you heard the evidence of the Second Officer of the *Saiga*, Sergey Klyuyev, about the circumstances of the arrest of the vessel. You heard the evidence of the Regional Manager of the Addax Group, Marc Vervaet, about the circumstances of the detention of the vessel.

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

To this date the Republic of Guinea has not yet called a single witness, nor disclosed any witness statements. Mr. von Brevern informed the Tribunal this morning, and I quote: I am not in a position to say whom we will call as witnesses or experts.

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

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

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

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

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

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

The President:

Thank you very much. Mr. von Brevern?

Mr. von Brevern:

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

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

The President:

Thank you. We did inform the parties that the procedure of this court is intended to be expeditious and cost-effective. It was understood in the consultations that where a witness has produced a statement reasonably in advance of his appearance, Counsel and Agents would be able to refer to that statement and the witness need not read the statements word for word.

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

EXAMINATION OF MR. ORLOV
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/2, E, p. 11–22]

Mr. Plender:

My first witness is Captain Mikhaylo Alexandrovich Orlov.

The Registrar:

Mr. President, I will first call for the administration of the oath for Mr. Boris Dorofeev who will be the interpreter from the Russian language to the official language of the Tribunal, as required by paragraph 4 of article 85 of the Rules of the Tribunal.

The President:

Will the interpreter please now make the declaration required.

Interpreter, sworn in

Mr. Mikhaylo Alexandrovich Orlov, sworn in (in Russian)

Mr. Plender:

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

The President:

Yes, it is.

Mr. Plender:

May that be done, please? Can Captain Orlov be supplied with a copy of his statement and its annexes? (*Copy handed to witness*)

Captain Orlov, do you recognize the document before you?

Mr. Orlov:

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

Mr. Plender:

Do you understand the whole of that document?

Mr. Orlov:

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

Mr. Plender:

Is the whole of it true?

Mr. Orlov:

I approve that everything that is written there is true.

Mr. Plender:

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

Mr. Orlov:

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

Mr. Plender:

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

The President:

Mr. von Brevern?

Mr. von Brevern:

On which channel do we hear the Ukrainian language? I think that everything that is asked in English is translated into Ukrainian. Is that correct?

The President:

Yes, it is being interpreted into Russian. The English is on channel one and the Russian is on channel three.

Mr. Plender, you may continue now.

Mr. Plender:

Members of the Tribunal will find a copy of this map in black and white at Section 1, tab 1, should they find that convenient.

Captain Orlov, do you recognize the map or chart which is now being projected?

Mr. Orlov:

Yes, we moved in this region and we navigated by this map, by this chart.

Mr. Plender:

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

Mr. Orlov:

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

Mr. Plender:

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

Mr. Orlov:

The territorial waters are not specified on charts, on nautical charts.

Mr. Plender:

What do you understand the red line to indicate?

Mr. Orlov:

This is the territorial waters of Guinea which extend to the sea by 12 miles.

Mr. Plender:

On the same chart a green line and a blue line may be seen. These will be pointed out to you. Were those lines on the chart used at the time of the voyage of the *Saiga*?

Mr. Orlov:

Such lines are never on such charts, on the charts, because that is not customary. They were not there.

Mr. Plender:

What do you now understand those lines to signify?

Mr. Orlov:

This is a line which shows the territory of the exclusive economic zone of Guinea.

Mr. Plender:

Will you please look at the annexes to your statement. There is a receipt at page one. Will you please look at that? It may be convenient for me to pass it to the witness. (*Copy handed to witness*) It is at page one of the bundle.

For the assistance of the Members of the Tribunal, it bears a record of the vessel, the *Flipper*, together with a navigational point.

Captain Orlov, will you identify the document that I have just handed to you?

Mr. Orlov:

This is a receipt for bunkering which shows that *Saiga* gave 100 tonnes of bunker to fishing trawler number one.

Mr. Plender:

Is the point at which that bunker was supplied on the map which is projected or not?

Mr. Orlov:

(*No reply*)

Mr. Plender:

Captain Orlov, if you cannot remember, do you see the navigation points and particularly points of latitude shown on this document in the top right hand corner, highlighted?

Mr. Orlov:

This point I see. This point, it is not indicated on the chart. It was before the first point which is on the map, on the chart. This initial point is not indicated.

Mr. Plender:

Having bunkered the *Flipper* did you then proceed to the point marked one on the map, which will now be pointed out to you? Would you just look at the projected map, please?

Mr. Orlov:

Yes, we were heading to this point. This point we reached at eight o'clock on 25 October and usually at eight o'clock I pass over the information about the voyage, its speed, encountering ships and so on.

Mr. Plender:

Would you now look at the bundle of documents provided? At page two a telex will be found. Again, I may pass it to you. What do you see from that telex?

Mr. Orlov:

This is my information. At eight o'clock on 26 October the position of the ship, its co-ordinates and its first point, the course and the amount of load on board and bunker which is left on the tanker.

Mr. Plender:

Will you now look at the log book which you have before you. Can you confirm from the log book the accuracy of the telex message that you have just identified?

Mr. Orlov:

Yes. At eight o'clock, here, the co-ordinates of the ship: 11° and 0.2' northern latitude.

Mr. Plender:

That is the log for 26 October, the first two lines; is that correct?

Mr. Orlov:

Yes, it is an excerpt from the log book on 26 October.

Mr. Plender:

Can we then move to position 2, shown. Captain Orlov, did you reach position two?

Mr. Orlov:

Yes, it is the position of the ship at noon on 26 October.

Mr. Plender:

Will you now look at pages 3, 4 and 5 of the bundle of telexes, which I will now give to you, and say what you get from those three pages.

Mr. Orlov:

Yes, these are receipts for bunkering the three consecutive fishing trawlers.

Mr. Plender:

Will you then move to position 3 on the map.

Mr. Orlov:

This point is the point where we were bunkering the three ships.

Mr. Plender:

Do you find bunkering receipts at pages 6, 7 and 8 and a message at 9 in the bundle annexed to your statement?

Mr. Orlov:

Would you please repeat your question?

Mr. Plender:

Do you find in the telex messages evidence of bunkering at position 3 and, if so, in which telexes?

Mr. Orlov:

I have other receipts before me and I need the previous ones.

Mr. Plender:

Would you look at the ship's log for 26 October and indicate where on that log we find evidence of the position when the vessel was at point 3?

Mr. Orlov:

From the log book on 26 October, there is an entry at 1320 and the position is latitude 10° N and longitude is 16°2' W. The ship was anchored. This is exactly at point number 3, which is indicated on the chart, and we started the bunkering of the fishing trawler *Ittipesca*.

Mr. Plender:

In the final line of the same page you will find a new latitude position. Can you tell the court what that is?

Mr. Orlov:

This is the position of the ship and coordinates of the ship on 26 October 1997, at 24 hours, at midnight.

Mr. Plender:

Point 4 will be pointed to you. Does that correspond with the position of the coordinate that you have just identified?

Mr. Orlov:

Yes, this is the fourth point, the coordinates of the fourth point, latitude 10°30' northern direction and [longitude] 16°46' in western direction.

Mr. Plender:

We come to point 5. I will hand to you page 10 of the bundle, which contains references to the *Kriti* and the *Eleni G*. Is it correct that the *Saiga* bunkered vessels at point 5?

Mr. Orlov:

Yes, it is point number 5 where the last three fishing trawlers received their bunkering.

Mr. Plender:

Will you now look at the ship's log for 27 October under the heading "Remarks" in the seventh line. Does the ship's log confirm that the vessels were bunkered at that point?

Mr. Orlov:

Yes, in the log book on 27 October 1997 there is an entry. The time is 0420. The engine was stopped. The left anchor was off. The coordinates of the ship at the moment of anchoring: latitude 10°25' N, and [longitude] is 15°44' W.

Mr. Plender:

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

Mr. Orlov:

After bunkering the last trawlers, it was around 14 o'clock on 27 October. Initially, I proceeded towards south-west to point 9°50', and this is latitude, and longitude was 16°15'W.

Mr. Plender:

Did there come a time when you changed course?

Mr. Orlov:

Yes, at point number 6, when I followed in the south-western direction, I told the charterer about my course, about my destination.

Mr. Plender:

What caused you to change course?

Mr. Orlov:

It means that on 27 October at 1800 hours I got a telex from the charterer which advised me to follow to another point, at this point, 9°N and 15°W.

Mr. Plender:

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

Mr. Orlov:

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

Mr. Plender:

What did you understand when you received that message?

Mr. Orlov:

Literally to translate, this entry says that the port authorities in Conakry sent out patrol boats at night and the point to which we were proceeding was not any more safe for the tanker *Saiga*, and therefore it was advised immediately to proceed to the point 9°N and 15°W.

Mr. Plender:

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

Mr. Orlov:

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

Mr. Plender:

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

Mr. Orlov:

Yes, I have it about me.

Mr. Plender:

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

Mr. Orlov:

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

Mr. Plender:

Did you confirm to the charterers that you had changed course?

Mr. Orlov:

At point number 6, I changed the course of the ship and proceeded parallel to the seashore, so as in the future to follow to the 9° point north and 15° point [west].

Mr. Plender:

I now show you page 11 of the bundle annexed to your statement. Is this a telex confirming the change of course?

Mr. Orlov:

What is your question?

Mr. Plender:

Does this confirm the change of course of which you have spoken?

Mr. Orlov:

Yes, this is my message which I signed and it says that I understood the telex which I had received and that I was following to the point 9°N and 15°W.

Mr. Plender:

Now look at the ship's log for 27 October. Do the last two entries show the position of the vessel on its new course?

Mr. Orlov:

Yes, on 27 October, at 20 o'clock, the course was 132 to the south-[east] and the coordinates are here. The latitude is 9°50'N and the [longitude] is 15°51'W.

Mr. Plender:

Is that point 7 on the map?

Mr. Orlov:

Yes.

Mr. Plender:

Does the last entry on the page show point 8 on the map?

Mr. Orlov:

Yes, this is the ninth point at 24 hours, midnight, on 27 October: latitude 9° and longitude 15°26'W.

Mr. Plender:

Will you turn over to 28 October? The second entry shows a position at 9°27'N, I believe. Is that correct?

Mr. Orlov:

At what time?

Mr. Plender:

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

Mr. Orlov:

On 28 October at 4 o'clock, the coordinates of the ship were latitude 9°02'N and [longitude] 15°02'W.

Mr. Plender:

Is that point, the point now being shown to you, point 9?

Mr. Orlov:

This is approximately the point of crossing the southern border of the exclusive economic zone.

Mr. Plender:

Between point 6 and point 9, what was the approximate speed of the vessel?

Mr. Orlov:

The average speed was about 7 knots.

Mr. Plender:

Is it correct that at 04.24 the vessel stopped its engine?

Mr. Orlov:

In the log book on 28 October at 4.24, there is an entry that the engine was stopped and coordinates latitude 9°N and [longitude] 15°00'W.

Mr. Plender:

From what you said about the latitude and speed, is it possible to determine the time when the *Saiga* crossed out of the Guinean exclusive economic zone?

Mr. Orlov:

Of course one can count at the speed of 7 knots. We have made about five miles from the economic zone and I think that at 5 o'clock we have crossed the southern border of the exclusive economic zone.

Mr. Plender:

Would you now look to telex page 12. What activity does that describe the *Saiga* as engaging in?

Mr. Orlov:

This is again my message to the charterers at 8 o'clock in the morning on 28 October. The latitude 9°N and longitude 13 – 14°59'W. That is to say that the ship was adrift towards south and then there is an amount of cargo on board, the amount of bunker, and the consumption of bunker, the weather, the windforce and waves and the last message on 28. We have arrived to point 8 and are waiting for patrolling ships to come.

Mr. Plender:

How long was the *Saiga* drifting at that point?

Mr. Orlov:

Before the time of the arrest –

Mr. Plender:

Is it your evidence that the vessel was drifting from 4.24 when the engine was stopped and continuously thereafter until an arrest?

Mr. Orlov:

Yes, the ship was adrift and it was drifting southwards, perhaps one mile.

Mr. Plender:

Now I will show you the last item that I will show you from the bundle, which is page 13. What does that telex message show?

Mr. Orlov:

This telex was sent over by the radio officer according to my command, and it means the three words written here are "attack, attack, attack". We did not have more time to send a longer message.

Mr. Plender:

Thank you. Captain Orlov, I refer you now to paragraph 11 of your written statement. What was the first point at which you became aware of events leading to the "attack, attack, attack"?

Mr. Orlov:

This refers to an attack on a ship, when they started shelling at us.

Mr. Plender:

What is the first you knew, the first sign you saw of any attack?

Mr. Orlov:

At 8 o'clock in the morning on the 28 I took watch on the bridge. Not far from the ship there were two or three fishing trawlers which were fishing. At 8.30 I saw the weather was fine, and I saw the appearance of two new boats and, on the radar the distance was 11.5 miles. I observed these boats on the radar and during 50 minutes I came to the conclusion that these were two not big boats which were following toward us, and the distance was shorter and their direction was the same.

Mr. Plender:

As the vessels approached did they convey any message to you?

Mr. Orlov:

The first to come was a small cutter. It was moving at a greater speed. No message by light, by flag, by order was given to us.

Mr. Plender:

Did you hear any sound from the vessels?

Mr. Orlov:

Initially this was about 9 o'clock, 10 past 9. I heard certain sounds and the radio officer was also on the bridge together with me. At first I did not understand what it was and then I looked through the binoculars and I saw the soldiers on a small boat which was closer to us, and then I realized that our ship was shelled at.

Mr. Plender:

We now show you photographs of the *Saiga*. The first is photograph No. 1. Do you recognize the vessel?

Mr. Orlov:

Yes, it is *Saiga*, on which I worked, anchored.

Mr. Plender:

Is it loaded or unloaded in this photograph?

Mr. Orlov:

At present it is empty because the board is above the water line.

Mr. Plender:

On 27 October at the time of the attack that you have described was the vessel laden or unladen?

Mr. Orlov:

At the time of the attack we have unloaded about 500 tonnes of cargo and it was a small amount and, practically speaking, the ship was fully loaded.

Mr. Plender:

In that state where would the water line have come to measured against the rear of the hull?

Mr. Orlov:

In a loaded state the level of the main deck is very close to the water line.

Mr. Plender:

What distance is the main deck or freeboard from the water line when fully laden?

Mr. Orlov:

The general altitude from the bottom to the deck is 8 metres and when fully loaded the ship is 6 to 7. One metre and 30 cm will be from the surface of the water to the deck when the ship is fully loaded.

Mr. Plender:

Will you now look at photograph 5. Does this show the *Saiga* laden?

Mr. Orlov:

Yes. From this picture one can see that the cargo deck is on the level of the pier and the ship is fully loaded and this photograph was taken before we left Dakar.

Mr. Plender:

When the vessel is so laden is it possible for a person or persons to transfer to the *Saiga* at sea while the *Saiga* is moving?

Mr. Orlov:

Of course practically we have taken people from a cutter to the cargo deck when there was a person to guide us in the coastal waters.

Mr. Plender:

On 27 October did you see anybody alight to the freeboard of the *Saiga*

Mr. Orlov:

Do you mean from the cutter? When I heard the shots and then I saw a cutter coming nearby to the ship I went to the left side of the bridge to close – to lock the waterproof door, and at this moment I saw how from the small cutter soldiers were boarding our ship.

Mr. Plender:

As they were boarding, was the *Saiga* stationary or was it moving?

Mr. Orlov:

At this moment the *Saiga* was already moving. It was at the beginning and it was turning to the right.

Mr. Plender:

At approximately what speed was the *Saiga* moving at that moment?

Mr. Orlov:

For a fully-loaded ship when there is such a course to change it is very hard to get full speed and practically the speed was 4 or 5 knots.

Mr. Plender:

What caused you to start the *Saiga's* engines?

Mr. Orlov:

As I said, I went to the left part of the bridge and I saw the soldiers boarding our ship and the shooting was going on. I locked the watertight door on the bridge and then I saw how one glass on the bridge was broken and then the side porthole on the bridge and there were cracks and holes in the glass. After that I raised the alarm, a general alarm, on the ship and told everybody to go to the engine room, which was below the waterline and then I started the autopilot and the ship was continuing to turn to the south-west, in a south-westerly direction. At this moment the shooting was continuing from submachine guns and from big machine guns.

Mr. Plender:

Will you now look at photograph No. 3 and tell the court what you see?

Mr. Orlov:

At the upper part, the orange part, of the hull you can see white spots. These are exactly the traces from the shots.

Mr. Plender:

Were you on the bridge immediately below those shots at the time when these shots struck?

Mr. Orlov:

I have already told you that I was there on the bridge and saw directly how the portholes were hit.

Mr. Plender:

Will you now look at photograph 4 and tell the Tribunal what you see?

Mr. Orlov:

On this photograph one can see again the orange part or the upper part. This is a signal bridge and one can see the white spots which are the traces from bullets and, apart from that, on the left side at the front structure nearer the two left portholes one can see also two white spots, and they are traces of bullets.

Mr. Plender:

Can nothing special be seen from the tyres or fenders?

Mr. Orlov:

What is the meaning of "fender"?

Mr. Plender:

I am trying to use a nautical term. Can you deduce anything from the tyres that are seen on the deck?

Mr. Orlov:

This is exactly these fenders or [*krantsi*]. We see two full fenders to the left from the crane and on the right side it is obvious that it is deflated and it was also hit during the attack.

Mr. Plender:

What was it hit by?

Mr. Orlov:

Most probably it was the bullet ricochet but perhaps they aimed directly at this thing.

Mr. Plender:

Will you look at photograph 7 and tell the Tribunal what you see?

Mr. Orlov:

On this picture one can see the upper signal bridge. There is a head of a microphone. One can see the head of a microphone, a cable, and below the head of the microphone there is another trace from a bullet. This is already on the left side, on the left side of the ship, on the signal bridge.

Mr. Plender:

Did you see this damage occurring?

Mr. Orlov:

Immediately, when they were shooting, I did not see it because I was inside on the bridge; later on, when we inspected the state of the ship, then I saw it.

Mr. Plender:

Would you look at photograph 8 and tell the Tribunal what you see?

Mr. Orlov:

Here already one can see quite well the fender. One is deflated and another is not deflated.

Mr. Plender:

Now look at photograph 11 and tell the Tribunal what you see.

Mr. Orlov:

This is again the signal bridge on top and it is the satellite antenna; on this antenna there are seen three holes. The antenna was practically destroyed, out of order.

Mr. Plender:

Did you see that damage occur?

Mr. Orlov:

Exactly at the moment I did not see it but then later during the inspection I found it.

Mr. Plender:

Will you look at photograph 12 and tell the court what you see?

Mr. Orlov:

Here one can see the porthole, the port side of the ship, and the biggest hole was caused by a big calibre machine gun. The other traces, which are smaller, were caused by sub-machine gun fire and practically all penetrated or pierced the metal.

Mr. Plender:

How do you know that the larger hole was caused by a heavy machine gun?

Mr. Orlov:

I suggest that it was so because on the patrol boat on the bow part there was a big machine gun and they fired from that machine gun at us.

Mr. Plender:

How do you know they fired from the machine gun at you?

Mr. Orlov:

It is so only because this hole is bigger than others, and I am not a specialist; I cannot pass a reasonably good judgment.

Mr. Plender:

Will you look at photograph 13 and tell the Tribunal what you see?

Mr. Orlov:

Here one can see the port board and this is a fly of the bridge where I was, and a big hole which I believe was caused by fire from a high calibre or big calibre machine gun.

Mr. Plender:

Now will you look at photograph 23 and tell the court what you see?

Mr. Orlov:

This photograph was taken from inside the bridge and on the left side, the left porthole, the pane is broken. It is reinforced glass. It was not completely broken but it was all in cracks. The bullet hit the pane.

Mr. Plender:

Were you on the bridge at the time when the bullet hit the pane?

Mr. Orlov:

Yes. I saw this particular moment.

Mr. Plender:

Will you now look at photograph 27 and tell the Tribunal what it is?

Mr. Orlov:

This is the radio room and the desk of the radio officer, where he sits.

Mr. Plender:

Where would the radio officer sit in this picture, in relation to the picture?

Mr. Orlov:

Exactly closer to us, before us and on the right side there is a piece of intersatellite system and to the left, his desk.

Mr. Plender:

Now will you look at photograph 30 and tell the court what it shows?

Mr. Orlov:

This photograph was taken in the radio room, and the partition of the radio room. One can see a pillow and a sofa and also a hole pierced by a bullet.

Mr. Plender:

It is correct, is it not, that you were not there to see the bullet come through?

Mr. Orlov:

I was not there but the radio officer was there and he was passing on his message.

Mr. Plender:

Where would the radio officer have been in relation to this photograph had he been sending out his message at that time?

Mr. Orlov:

Just luckily he was more to the right and he was not hit by the bullet.

Mr. Plender:

Now look at photograph 29. What do you see there?

Mr. Orlov:

A door can be seen to a room of the crew, and where the handle is there are cracks. It is obvious that they were hitting it.

Mr. Plender:

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

Mr. Orlov:

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

Mr. Plender:

How does it come to be flexed?

Mr. Orlov:

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

Mr. Plender:

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

Mr. Orlov:

Yes, during the shooting the Second Officer was wounded two times in his left hand. He was in the engine room and a Senegalese sailor, Mr. Niasse, was injured in the eyes and neck and splinters of glass struck him in the neck and around the eyes.

Mr. Plender:

Were the injuries slight?

Mr. Orlov:

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

Mr. Plender:

At the time did you think the injuries were slight?

Mr. Orlov:

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

Mr. Plender:

Finally, did the soldiers treat you properly and well?

Mr. Orlov:

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

Mr. Plender:

Thank you, Captain Orlov. I have no further questions.

Mr. President, I have conducted the examination-in-chief in what I hope represents the spirit of your directions. I have not questioned the Captain upon each and every point for to do so would occupy a great deal of time, but I have taken him through the principal points. If that meets the spirit of your objection, I am happy now to offer him for cross-examination.

The President:

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

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

(The Tribunal rises.)

Public sitting held on 9 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 9 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Yesterday before we broke, Mr. Plender, you indicated that you had completed your examination-in-chief of the witness Captain Orlov. Is that still the position?

Mr. Plender:

Mr. President, it is. I have one formal question to put to the witness and, with your permission, I will simply put it before offering him for cross-examination.

The President:

Very well. May the witness Captain Orlov be produced in court, please.

Mr. von Brevern?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/3, E, p. 4]

Mr. von Brevern:

Mr. President, before Dr. Plender continues, may I tell you that I have the honour to present two more members of the delegation of the Republic of Guinea who you see on my left. They are M. Mamadi Askia Camara, *directeur de la Division législation et réglementation douanière*, and Commandant Mamadou Saliou Diallo, *officier de l'état-major de l'armée de mer*. Merci, Monsieur le Président.

The President:

Thank you very much, Mr. von Brevern. I welcome the two gentlemen to the Tribunal.
Could Captain Orlov please be called in?

Examination of witnesses (continued)

EXAMINATION OF MR. ORLOV (CONTINUED)
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/3, E, p. 4]

The President:

Captain Orlov, may I remind you that the declaration that you made yesterday as to the truth of the evidence you give still applies to the evidence that you give today.

Dr. Plender, you may continue.

Mr. Plender:

Captain Orlov, do you see before you a copy of a telex?

Mr. Orlov:

(Interpretation from Russian) Yes, I have this copy.

Mr. Plender:

Is that the telex dated 22 October warning of oil hunters that you described to the court yesterday?

Mr. Orlov:

Yes. I received this telex on 22 October. Its meaning was that the minimal distance to the shore where one could work in the area Guinea Conakry was not less than 100 miles because over there, as I mentioned already, there was a possibility of an attack on the tankers supplying fishing trawlers.

Mr. Plender:

Please stay where you are. You may now be cross-examined.

The President:

Thank you.

Mr. von Brevern, would you like to cross-examine the witness? If so, will you please do so now?

CROSS-EXAMINATION OF MR. ORLOV
BY MR. VON BREVERN (GUINEA)
[PV.99/3, E, p. 4–9]

Mr. von Brevern:

Mr. President, thank you very much.

Captain Orlov, you have prepared a statement which I have before me and you have before you. I would like to ask you whether, in preparing this statement, you had any papers, any documents, any diaries before you?

Mr. Orlov:

What papers do you have in mind? [...]

Mr. von Brevern:

My question is, did you write down this statement just out of your memory or did you look into some papers and, if so, in which papers?

Mr. Orlov:

Of course, I had about me the papers and when I left the ship I made copies of all statements which I sent, and also I prepared the copies of my correspondence. This statement was made on the basis of my papers which I took from the ship.

Mr. von Brevern:

Captain Orlov, when did you write this paper, and where?

Mr. Orlov:

This document I prepared beforehand when I was at home, because I knew that I will be called to the court of justice, and I arrived here already practically having my own paper, and I signed it yesterday.

Mr. von Brevern:

Did you write the paper in English?

Mr. Orlov:

Yes.

Mr. von Brevern:

There is no Russian original of this paper?

Mr. Orlov:

The Russian original is not at all here because I did not make it up.

Mr. von Brevern:

Captain Orlov, I understand that your employer is a company, Seascot, in Glasgow and you have signed on the *M/V Saiga* on 3 August 1997. Is that correct?

Mr. Orlov:

What was exactly the date in August?

Mr. von Brevern:

3 August.

Mr. Orlov:

Yes, I signed my contract and arrived to the ship on 3 August in [Dakar].

Mr. von Brevern:

When you boarded the *Saiga*, did you receive any instructions on the coming employment of the *Saiga*, and by whom?

Mr. Orlov:

I did not get concrete instructions. I talked with the Captain who passed the ship to me and I talked with him about the position of the ship, for where, and about the cargo. In other words, the Captain who was leaving the ship gave me full information about the ship, its hullages

and cargo. He gave me certain data of the charterer with whom I would be in contact, and also an operator who would be guiding the ship. Further on, I held correspondence and talked with my operator and sent messages to him, and I later on knew more from him about whereabouts the ship and its operations; so I got the full and complete information.

Mr. von Brevern:

You refer to the charterer on the one side and to the operator on the other side. Can you tell us who was the charterer and who was the operator?

Mr. Orlov:

The ship worked on time charter and was chartered for two years. The charterer is up till now Addax Bunkering Service, which is located in Geneva, and directly operates the work of the ship. The shipowner officially is Tabona Shipping Company, and I was employed, and the technical management of the ship was done, by the company Seascot Ship Management Ltd.

Mr. von Brevern:

Have you seen the charter party to which you have just referred, the two years charter party?

Mr. Orlov:

At Dakar there is an affiliation of the charterer and I met many a time with Mr. Marc Vervet, and naturally I talked with him about the work of the ship and the plans of work and prospects and the details which were available before my entering into the – taking this job.

Mr. von Brevern:

So you have not seen a charter party?

Mr. Orlov:

Perhaps this is a charter.

Mr. von Brevern:

Well my direct question is, have you seen who is the charterer according to the charter party?

Mr. Orlov:

This is charterer. When I worked on the ship and was there I did not see the representative of a charterer, he did not visit the ship.

Mr. von Brevern:

My last question to this subject, I am sorry that I insist a little bit; do you know that the company from which you received the instructions, I think that was ABS Geneva, might not be the same company as the charterer of the vessel? Do you know that? Can you inform about who was the charterer?

Mr. Orlov:

Addax Bunkering Service and the ship was chartered by the Lemania company.

Mr. von Brevern:

Okay, thank you. Then, is it correct that the instructions you received came from ABS Geneva and did not come from the charterers but from the cargo owners. ABS Geneva, as you know, was the cargo owner. So you received instructions not from the charterer but from the cargo owner, is that correct?

Mr. Orlov:

Would you please repeat?

Mr. von Brevern:

As you just told us, the charterer is Lemania Shipping Group and as you also told us, you received instructions from ABS Geneva. Would you agree that you received your instructions from ABS Geneva being the cargo owner?

Mr. Orlov:

Yes, all instructions were coming to me from the operator in Geneva, who worked for the company ABS in Geneva.

Mr. von Brevern:

As to another subject, when you boarded the vessel did you check any documents, certificates of the vessel?

Mr. Orlov:

Naturally, this is an accepted practice. When I take a ship from another captain I check up all the documents on board, the terms being in force, the reports from the officers about the condition of the ship and the cargo and equipment etc.

Mr. von Brevern:

Did you also inspect, or have you seen, the Certificate of Registration of the vessel?

Mr. Orlov:

Yes, I saw it. It was together with other ship's papers.

Mr. von Brevern:

Did you realize when inspecting this Certificate that the date of expiry was already some days or some weeks later, namely on 12 September 1997?

Mr. Orlov:

I did not understand. Do you mean that when I was entering the ship as commander the Certificate was not valid any more, it has expired?

Mr. von Brevern:

No. You boarded the vessel on 3 August and my question was if you have realized that the Certificate, the Provisional Certificate of Registration, went out of force on 12 September 1997 and if you notified anybody of that?

Mr. Orlov:

I do not remember at present when was the date of expiry of that document and I am not sure that it was expiring on 12 September 1997.

Mr. von Brevern:

Okay. I have to accept that you do not remember the exact date, but normally when you inspect the certificate of registration, do you look at the date until when such a certificate is valid?

Mr. Orlov:

Of course when I take the documents I watch all the dates and if the certificate expires or certificates expire in the near future, I notify the charterer.

Mr. von Brevern:

But in this case you do not remember that the expiry date was rather near?

Mr. Orlov:

I do not think it was expiring on 12 September 1997, and if it were so that it expired, I do not remember at the moment, perhaps I spoke with the ship's owner about this Certificate and perhaps he had an intention to bring you this document. I cannot say, but definitely I can say that when I take the ship from another captain, if in the near months a certain document is expiring I notify, obligatory and without doubt, I notify the ship's owner and all the people concerned.

Mr. von Brevern:

Coming back to the question of the charterer, please. In your statement, you mention in various points the charterer, for example "I received by charterers", and so on. Who did you mean by mentioning "charterers"; is it correct that you meant ABS Geneva?

Mr. Orlov:

Yes, I told you already that directly I was under the command or in contact with an operator from Geneva.

Mr. von Brevern:

Another subject, Captain Orlov. You left the port of Dakar on 24 October and you explained that when you were on the open sea you normally did not fly a flag. Did you fly a flag when you left the port of Dakar, and what were your orders with respect to the flag when leaving Dakar?

Mr. Orlov:

Usually, as a rule, it was a rule on the former Soviet ships we hoisted the national flag of the ship when we entered the port of the country, and leaving the territorial waters, naturally afterwards we lowered the flag of the host country. At sea we do not show our flag and we are not supposed to show our flag at the open sea.

Mr. von Brevern:

You mention that this was your normal practice in the Soviet marine. Now you are employed with a Scottish company, Seascot. Does there exist a company rule not to show the flag on the open sea, or was it your own decision?

Mr. Orlov:

Such an entry from the company or instruction I did not have, and also one cannot find such an entry, such a statement in any book, and I could not see such an entry in the papers of the ship which made it obligatory for us to raise the flag.

Mr. von Brevern:

In your former employment with Seascot, did you do the same thing with the flag when you were on board other vessels?

Mr. Orlov:

The Seascot company was my first contract and it was my first ship. If you have in mind my work on other ships of other companies, I did the same thing there.

Mr. von Brevern:

Captain Orlov, another issue: how was your bridge organized at days and at night and who was on the bridge, which persons, which degrees?

Mr. Orlov:

We navigation officers on board were: the Captain, First Officer, Second Officer and a cadet, a man who at that moment was a cadet at a sea academy. The watch was carried on from 0 hours to 4 hours and from 12 to 16 hours. (*Interpreter: I asked him to repeat the time schedules.*) The First Officer was on watch from 4 to 8 and from 16 hours to 20 hours. The Second Officer was on watch from 0 till 4 and from 12 to 16 hours. The cadet, under my control, was on watch from 8 till 12 hours and from 20 till 24 hours, but mainly he was on watch from 20 to 24 and the morning watch he was mainly working on the deck of the ship. If I needed him, I just called him.

Mr. von Brevern:

So I understand that you yourself were also on watch, as you have just mentioned, from 8 to 12 and from 20 to 24?

Mr. Orlov:

Yes, practically. One cannot say that it was always the whole time from 8 to 12 that I was on the bridge, but, if the situation was normal, I could attend to my own businesses and the cadet was on the bridge and he was fully instructed, and if something was not clear to him, he immediately phoned, called me up.

Mr. von Brevern:

I understand that. The entries in the log book: is it correct that normally they have been done by the respective officer at the end of a watch and, in case you and the cadet were on watch, who then has made the entry?

Mr. Orlov:

Mainly the entries were made by the cadet and he signed. When I was there, I signed but in any case I always checked up the log book and signed it.

Mr. von Brevern:

Captain Orlov, could you please tell us whether in the three days between 26 and 28 October, you remember 28 October 1997 there was the arrest, you have the log book before you, for these three days, is there any entry from yourself and, if so, at which date and at what time?

Mr. Orlov:

Here is a signature by the cadet and the First Officer. On the last three pages there is not my own signature. I can explain it by the fact that at that time there was a lot of fishing trawlers and we were always moving and bunkering and boarding and then passing over the cargo.

Mr. von Brevern:

Can you explain the 28 October? We find on the right side at 4 o'clock a signature from the officer of the watch. Who was that at 4 o'clock on 28 October, in the morning? The lookout is Mr. Stanislaus and the officer on watch?

Mr. Orlov:

From 0 till 4 the Second Officer was on watch.

Mr. von Brevern:

Zero to 4: so he signed at 4 o'clock. He made the position at 4 o'clock?

Mr. Orlov:

Yes, at 4 o'clock it is the signature of the Second Officer.

Mr. von Brevern:

Then the next entry is at 8 o'clock. Who has signed that?

Mr. Orlov:

This is the signature of the First Officer.

Mr. von Brevern:

That was the watch which has then been signed by the First Officer, and it was, according to your regular schedule, your own watch. You told us that you took the watch normally from 8 to 12 and this time you changed it?

Mr. Orlov:

Perhaps. I told you that I was on watch from 8 to 12 and from 16 to 20.

Mr. von Brevern:

No, 20 to 24. To which day do you refer?

Mr. Orlov:

I was normally on watch on these hours.

Mr. von Brevern:

Okay. Let us come back to 28 October and the watch from midnight to 4 o'clock. You mentioned that the Second Officer was on watch. It was the first four hours in the morning. Where have you been at that time? Were you asleep?

Mr. Orlov:

I was in my cabin at this time and I was resting. I slept.

Mr. von Brevern:

Do you remember when you got up, the normal time for breakfast?

Mr. Orlov:

As a rule I got up at 6.30 or at the latest at 7 o'clock.

Mr. von Brevern:

Would you agree that all the entries which have been signed at 4 o'clock on 28 October by the Second Officer have been made by the Second Officer?

Mr. Orlov:

Yes. The Second Officer was on watch and it is his signature.

Mr. von Brevern:

Now, Captain Orlov, my last question. How have you communicated from your vessel to other vessels? I understand you have had communications with fishing boats. Which communication media did you use?

Mr. Orlov:

I want to understand the question. Is it in relation only to the fishing trawlers or with other objects?

Mr. von Brevern:

No, with all objects.

Mr. Orlov:

On the bridge when we have navigation equipment, we have had two stations, short frequency, and one was always switched on on this extension and the second was switched on additionally on certain channels. We knew from our own experience the channels of Chinese or other fishermen and we used their channels. Apart from that, the radio officer used the short-wave radio for long-distance connections with fishermen in that region.

Mr. von Brevern:

You explained that you were sometimes otherwise engaged on your and the cadet's watch and that the watch has then been done by the cadet. Was he then the only person to make use of these channels? Did he hear channel 16 and did he communicate at the same time with fishing boats or did you have, besides the officer on watch, someone else to do this and to hear, for example, channel 16?

Mr. Orlov:

As a rule, I gave him instructions and when somebody called us on this extension he called for me. I went to the bridge and I myself was engaged in negotiations.

Mr. von Brevern:

Thank you, Captain Orlov.

Mr. President, these were my questions to the witness. Now my colleague, Professor Lagoni, would like to continue with further questions, if you would allow that.

Mr. Lagoni:

Mr. President, distinguished Members of the Tribunal, this is the first time that I appear before this Tribunal. Please allow me to assure you that I feel honoured and delighted to have this opportunity in this case which is so important for the country of which I am Counsel, and which is also so important for the further development of the new law of the sea.

Mr. President, Members of the Tribunal, I proceed with the questioning of Captain Orlov.

CROSS-EXAMINATION OF MR. ORLOV (CONTINUED)
BY MR. LAGONI (GUINEA)
[PV.99/3, E, p. 9–19]

Mr. Lagoni:

Captain Orlov, I refer you to your statement you handed in. In point 6 of your statement you mentioned that it might not be safe to supply fishing vessels off the Guinean coast. What did that mean, "not safe"?

Mr. Orlov:

As I have already mentioned, I had had information from the charterer, telexes, concerning the area of Guinea, Conakry, that it was not safe and I heard also that an accident took place where the *Alfa 1* tanker was also shot at.

Mr. Lagoni:

From whom did you learn about the *Alfa 1* incident?

Mr. Orlov:

Mr. Li, an interpreter. He was sailing with the *Alfa 1* tanker and helped to have communications with the Chinese fishermen and the Captain of *Alfa 1*.

Mr. Lagoni:

Did your charterer, or ABS, the operator, inform you about enforcement actions by Guinean authorities against offshore bunkering tankers?

Mr. Orlov:

I received only a telex communication message and, if you like, I can read it out for you – about the position of the ship in that area and how far from the shoreline it should be.

Mr. Lagoni:

Dr. Plender yesterday showed you the telex of 27 October 1997 at 1842 hours. This is in the Memorial at Annex 16, page 251. This telex says: "Understand port authorities from Conakry are sending out patrol boats" – I repeat, patrol boats – "tonight and we advise you that the above position is not safe, not safe." It proceeds, later on: "check any vessel which could approach (normally fast navy speed boat)". So, did you expect that you would be attacked by official navy boats or authorities from Guinea?

Mr. Orlov:

Can I have a look at the telex? I remember the general content of the telex message, but can I see it right now? (*Copy handed to witness*) In this telex there is mention about the navy boats and also about the port boat. As it was stated by Mr. Li, when the *Alfa 1* had been fired at, he told that it was possible that official Guinean representatives took part in the attack.

Mr. Lagoni:

So do I understand you right when you mean that the area is not safe, it is not safe because of patrol boats, navy boats, authorities of Guinea?

Mr. Orlov:

No, it is not that. I had in mind that the area of West Africa, the coastal area altogether, was not safe in terms both of piracy and, as it was stated by Mr. Li, that it was possible that *Alfa 1* was attacked with the representatives of Guinea on board. In this case I was afraid of both possibilities, of being attacked by the pirates or by some official representatives.

Mr. Lagoni:

But, Captain Orlov, referring again to this telex, at no place does it talk about pirates. It talks about patrol boats, normally navy speed boats. Did you have any experience with pirates in West African waters?

Mr. Orlov:

There is guidance where it says concerning the unsafe regions of the piracy and, in particular, mention is made of West Africa, Brazil and the south east. Cases are known that pirates attacked in those regions. It is more often that it happens in these regions.

Mr. Lagoni:

Would you consider measures taken by military craft against foreign ships as piracy?

Mr. Orlov:

I cannot qualify. In this particular case, there was no warning. There was no signal. There was no call to us, on the part of these boats. I have experience and I worked with ships and I was on course by Italy, and we were called by navy channels, aircraft, on the 16th channel and we gave them information about our ship and about its cargo. In this particular case there was no call, there was no warning, there was nothing. I actually understood that it was the naval force of Guinea only by the time when I met with them personally.

Mr. Lagoni:

So do I understand you right that you would say that you had no personal encounters, no experience with pirate attacks during the time that you worked in West African waters?

Mr. Orlov:

I did not have such an experience.

Mr. Lagoni:

What is, in your view, a pirate boat?

Mr. Orlov:

A pirate boat – it can be any kind of boat, any kind of cutter, which attacks a ship without warning, without being in contact, without notification.

Mr. Lagoni:

So you would include the possibility that a naval ship could be a pirate boat as well?

Mr. Orlov:

In those areas it is not excluded. I mean, in the regions which I mentioned, West Africa, Brazil and the south east.

Mr. Lagoni:

Captain Orlov, we received this morning, from Mr. Plender, the telex of 22 October 1997 sent at 1658 hours. You saw that. Is that right?

Mr. Orlov:

This telex was sent on 22 October. I received it before we left Dakar.

Mr. Lagoni:

There is mentioned: "We have been advised there are gasoil suppliers hunters". What are gas oil suppliers hunters? Can you explain this?

Mr. Orlov:

Assuming on the basis from this text, I thought that possibly an attack by pirates was not to be excluded.

Mr. Lagoni:

Do pirates hunt gas oil? How could they do that?

Mr. Orlov:

Would you please repeat once again your question?

Mr. Lagoni:

Do pirates hunt for gas oil? How can they do that? How can they manage that? What are they doing with the gas oil?

Mr. Orlov:

I cannot say that it is a systematic practice of hunting for the tanker. I just had gotten information, and it was a concrete case, that a possible attack was pending and when I heard about the oil supplier hunters, I thought that possibly such people can be pirates.

Mr. Lagoni:

But you would not conclude that gas oil supplier hunters could be authorities from the coastal State as well?

Mr. Orlov:

I cannot qualify. I made a statement on the basis of the information which I had, based on the experience about work and based on what I heard in Dakar.

Mr. Lagoni:

The information came from ABS, the operator in Geneva?

Mr. Orlov:

Yes, this information was sent by these people.

Mr. Lagoni:

Let me turn to another topic. Did you have any other contacts with fishing boats for bunkering purposes within the Guinean exclusive economic zone after you had supplied *Giuseppe Primo*, *Kriti* and *Eleni G*, the Greek vessels?

Mr. Orlov:

What exactly is your question?

Mr. Lagoni:

Did you have contacts with *Poseidon 1*, *Panormitis*, *Trebba*, *Salvatore Prima*, *Poseidon 2*, *Poseidon 3*? Do you remember these names of ships, fishing vessels?

Mr. Orlov:

I do not remember all the names. The fishing boat *Trebba* was, and perhaps there were other ships, but I cannot say at the moment because I do not remember.

Mr. Lagoni:

Do you remember a conversation on radio with *Poseidon 1*? May I read it to you:

Poseidon One, Poseidon One, Saiga. Saiga, this is Poseidon One. Well please contact again tomorrow, tomorrow at eight o'clock, zero eight, zero zero. Tomorrow, tomorrow, I call you again at eight o'clock, eight o'clock, zero eight, zero zero tomorrow I call again. ... OK, OK and please note that I will not proceed one hundred leagues from the shore, one hundred leagues from the shore. So in that case you should proceed at this point at the position 9°50N, repeat 9.50 north and longitude 16°15, 16.15 west, because I have orders from my charters, don't come closer than one hundred miles from the here country.

Is it possible that this is a conversation between *Saiga* and *Poseidon 1*?

Mr. Orlov:

Possibly. I say I do not remember at the moment, but it is quite possible that I was talking with *Poseidon* and perhaps it was my talk with them and, working in this area and bunkering the fishing trawlers, it was quite often that we handled a ship, and then after the end of our work the charterer gives us an order to go to another place and wait there for the following orders.

Mr. Lagoni:

This is a transcript of a radio conversation which is in Annex number 9 to the Reply. Mr. President, may I request Dr. Plender to have the map again which we saw yesterday?

Can you indicate on the map roughly where the positions 9°50'N and 16°15'W are? Can you indicate on the lighted map where it is roughly 9°50'N and 16°15'W? The question is, is this within the Guinean exclusive economic zone?

Mr. Orlov:

Yes, this position is in the exclusive economic zone.

Mr. Lagoni:

The new meeting point where you got orders to go to is at 9°00'N and 15°00'W. This is slightly beyond the boundary to Sierra Leone. Could you indicate it on the map? Who were you waiting for there, Captain Orlov, when you were at this new position south of the boundary line to Sierra Leone?

Mr. Orlov:

We were waiting, as I have already said, we were drifting and we were waiting for the orders from our charterer.

Mr. Lagoni:

So you did not supply *Poseidon 1*, did you?

Mr. Orlov:

I cannot tell you exactly, because I do not remember, but most probably we did not bunker *Poseidon 1*.

Mr. Lagoni:

From where should the vessels come which you were supposed to supply with fuel?

Mr. Orlov:

What ships do you have in mind?

Mr. Lagoni:

I have ships in mind such as other fishing vessels under the Greek or Italian flags, such as *Salvatore Prima*, *Trebbia*, *Poseidon 1*, with whom you had contacts and you were waiting south of the boundary.

Mr. Orlov:

It is possible that I was in contact with those ships, but in any case I obtained the order from my charterer to work in this area not closer than 100 miles from shore, and later on got a message to go to 9°N, 15°W, and there I was adrift and waited for the following orders, and where the fishing trawlers were at that time I cannot tell you, because it was possible that they could be anywhere.

Mr. Lagoni:

The new meeting point south of the boundary was considered to be safe, was it?

Mr. Orlov:

Perhaps based on the order from the charterer to go to that point and work there, perhaps it was so, and if the telexes which I received, in these telexes it is stated that as a rule there are Greek ships working there and they also make bunkering of the fishing trawlers.

Mr. Lagoni:

They also possibly come from the Guinean exclusive economic zone, do they?

Mr. Orlov:

Who do you mean – the fishing trawlers?

Mr. Lagoni:

Yes.

Mr. Orlov:

I do not know where they were working and, quite naturally, they could approach us from any side.

Mr. Lagoni:

Let us come to another point. You see points 7, 8 and 9 on the map. I may give you the map. (*Map handed to witness*) This is exactly the map which is up there. Could you indicate 7, 8 and 9 on the map? Seven is the uppermost. Are these points correct on the map?

Mr. Orlov:

They are indicated correctly, and there is an entry in the log book making a statement.

Mr. Lagoni:

It is 20 hours on 27 October, point 7. Point 8 is zero hours or 24 hours on 27 October, and 9 is 4 o'clock in the morning of the 28th. This is correct, is it not?

Mr. Orlov:

Would you please once again repeat point 7, 8, 9?

Mr. Lagoni:

Points 7, 8 and 9, these are the geographical positions of the *Saiga* on the 27th at 20 hours. Point 8 is at 24 hours and point 9 is at 4 o'clock in the morning of the 28th?

Mr. Orlov:

The seventh was at 20 hours on the 27 October. Point 9 is at 24 hours on the 27th.

Mr. Lagoni:

This data is taken by you from your log book?

Mr. Orlov:

Point No. 9 at 24 hours on the 27th and coordinates 9 ... on 27 October at 24 hours our coordinates were 9.27 and 15. In other words, these coordinates were above the point 9.

Mr. Lagoni:

Could you indicate that on this map, please?

Mr. Orlov:

At 24 hours according to the log book the ship was at point No. 8.

Mr. Lagoni:

Could you indicate it again, point No. 8, please? Yes, 24 hours. And 4 o'clock?

Mr. Orlov:

On the map, this point is on the map, and the coordinates are 9.27 and 15.26.

Mr. Lagoni:

This is point 8. And 4 o'clock?

Mr. Orlov:

And point No. 9 was at 4 o'clock on 28 October.

Mr. Lagoni:

Could you indicate 9 again please, thank you? So Captain Orlov, if you have these three geographical positions at those times given, 20 hours, 24 hours, 4 o'clock, can you figure out the speed of the *Saiga* over the ground?

Mr. Orlov:

By measuring the distance on a map we can determine the speed of the ship on a given stretch.

Mr. Lagoni:

The speed of the ship over the ground is the real, the actual speed, you will agree that?

Mr. Orlov:

Would you please repeat your question?

Mr. Lagoni:

The speed of the ship over the ground is the real, the actual speed of the ship? It includes possible currents?

Mr. Orlov:

Naturally in this area there are currents and the general speed relating to the ground will be together.

Mr. Lagoni:

Thank you. How did you take the geographical positions on the *Saiga*? By which means?

Mr. Orlov:

In this case, in this area far from the shore, we used GPS.

Mr. Lagoni:

You can confirm that GPS is very precise?

Mr. Orlov:

It has its own faults, but it is quite sufficient to determine the geographical position of the ship at sea.

Mr. Lagoni:

In point 8 of your statement you have noted that you crossed the borderline between Guinea and Sierra Leone at about 3.45 in the morning of the 28th. Do you know where this borderline is drawn? Do you know the position of this borderline?

Mr. Orlov:

The boundary was not indicated on the map and I did not know ... Concerning the boundary, I came to know about it when I was shown this boundary at the first trial, when there were meetings with Customs officials at Conakry and the naval officers told me the map, and showed me the boundary, and of course based on this I approximately determined the point when we crossed the southern border.

Mr. Lagoni:

So you did not check the time when you crossed the borderline, but you were counting later on that you might have crossed the boundary line at approximately that time?

Mr. Orlov:

Yes. This line point was not stated in the log book and I could not at the moment of the crossing this line, it was not possible to mark it on the map, and it was done only later on.

Mr. Lagoni:

Thank you. Can you explain to me the entries in your log book relating to the geographical situations behind the minutes. They say they indicate the degrees, they indicate the minutes and then they have a comma, so it is 9 degrees, 2 minutes, comma 7. What does this mean, is the "7" seven seconds, or is that seven tenth, seven comma 7?

Mr. Orlov:

What is of interest to you, the coordinates, speed or the place?

Mr. Lagoni:

The way you figure out the entries of the geographical coordinates, the coordinates are usually in degrees, minutes and seconds. Your entries are in degrees, minutes, comma 7, or 6. What does this comma mean, are these seconds or parts of tenth?

Mr. Orlov:

For example, on 27 October 10°32', ten, thirty-two and one, this means 10 degrees, 32 minutes and after the comma there are the tenths of a minute.

Mr. Lagoni:

Thank you very much. I just wanted to know this. To come to another topic, in point 11 of your statement, you mention that you remembered a "funny sound" when the patrol boats approached you. Can you explain what a funny sound is?

Mr. Orlov:

There were claps. Initially I could not understand what this clapping meant.

Mr. Lagoni:

There were claps on the *Saiga* or sounds from the patrol boats?

Mr. Orlov:

I think that the translation of the claps, or the word "claps", is not quite adequate. I heard claps and initially I could not understand their origin, what was the nature of this sound.

Mr. Lagoni:

Had you been, during this time when you heard the claps or knocks, alone on the bridge?

Mr. Orlov:

I was together with the radio officer.

Mr. Lagoni:

Since when was the radio officer with you?

Mr. Orlov:

I cannot tell you the exact time, but at that precise moment he was present on the bridge.

Mr. Lagoni:

Did the two patrol boats bear marks or numbers on their hull?

Mr. Orlov:

I do not remember.

Mr. Lagoni:

Did you see whether or not the patrol boats had a flag hoisted?

Mr. Orlov:

I cannot tell you exactly concerning the flags, I do not remember, I did not take notice because my ship was fired at.

Mr. Lagoni:

But you cannot exclude that they had a flag hoisted?

Mr. Orlov:

Of course. Perhaps it is most probable that they had flags hoisted.

Mr. Lagoni:

Which colours did the patrol boats have?

Mr. Orlov:

I do not remember about the flags themselves and what kind of flags they were. I cannot say.

Mr. Lagoni:

Which colours did the hull of the boats have, not the flag?

Mr. Orlov:

When they approached and we could see them they were grey coloured on the hull.

Mr. Lagoni:

You mentioned also in your statement that you saw soldiers on board the patrol boats. How did you discover that they were soldiers?

Mr. Orlov:

When the boats approached one to two miles one could see through the binoculars the armed people with submachine guns.

Mr. Lagoni:

Did they wear uniforms?

Mr. Orlov:

Yes, they were in military uniform.

Mr. Lagoni:

You mentioned at point 10 of your statement that you located two targets by radar at a distance of about 11.5 miles. What kind of radar did you use?

Mr. Orlov:

Should I explain what the distance should be on our radar? I do not understand the question.

Mr. Lagoni:

Was that the usual navigation radar you used on board the *Saiga*?

Mr. Orlov:

Yes. It was a common type of navigational radar.

Mr. Lagoni:

How far is the reach of this radar?

Mr. Orlov:

The maximum on this radar was 48 miles. This data is taken from its technical passport.

Mr. Lagoni:

How come that you discovered the approaching targets only when they were about 11.5 miles away from you?

Mr. Orlov:

During the night from 27th to 28th in the near distance there were a few fishing trawlers. The officers were watching whether they were approaching us or not. In the morning when I took up my watch I saw two new objects on the radar screen.

Mr. Lagoni:

Who was in charge before you came on the bridge: who was on the watch?

Mr. Orlov:

The First Officer from 4 to 8 o'clock.

Mr. Lagoni:

He apparently did not watch the radar, otherwise he would have seen the approaching objects much earlier. Do you agree with this?

Mr. Orlov:

No. I do not agree. At that moment most probably the radar was fixed at a scale of 12 miles and the maximum distance was 12 miles. Most probably he did not switch over to another distance.

Mr. Lagoni:

So you have different distances on the radar into which you can switch. Can you say anything about these distances?

Mr. Orlov:

Of course the radar has different scales of distance and the maximum is 48, 24 and 12 miles. These are 2 miles and there are also lesser degrees on the scale.

Mr. Lagoni:

You mentioned that you assume that the approaching vessels were a pirate attack. How come that you had the idea this was a pirate attack?

Mr. Orlov:

I suggested, I supposed that, because the regions were not safe concerning the pirate attacks and from information which I had.

Mr. Lagoni:

But from the information you had you could not exclude that it could also be officials from a coastal State?

Mr. Orlov:

Of course I cannot exclude this possibility.

Mr. Lagoni:

Why did you try to escape when the patrol boats approached you? Did you have any chance to escape?

Mr. Orlov:

I suggested that it was a pirate attack and naturally tried to run away and I gave an order to switch on the engine and go to open sea.

Mr. Lagoni:

Did you have any real chance, with your speed, to escape from the patrol boats if they had wanted to take you over?

Mr. Orlov:

At that particular point I could not tell exactly because I did not know the technical data of both boats and up till now I do not know how speedy they are, how much fuel they have on board, and therefore I cannot assess whether we could go away from these chasing boats.

Mr. Lagoni:

But you had seen before that there were soldiers on board, had you?

Mr. Orlov:

I saw people wearing uniform and I cannot exclude that a uniform can be worn by any person and any ship can be painted in grey colour.

Mr. Lagoni:

Is it usual in international shipping that a merchant vessel which is approached by naval or government vessels does not show its flag and does not stop?

Mr. Orlov:

I understand in the case of a naval ship and on duty it should have its flag raised.

Mr. Lagoni:

Who should have its flag raised – the naval ship or the merchant ship, or both?

Mr. Orlov:

Depending on the circumstances, the naval boat should show the colours when on duty and arresting another ship, but a merchant ship is not obliged to show its colours.

Mr. Lagoni:

Do you mean a merchant ship which is approached on the high seas by a naval ship or a government ship must not identify itself by showing its flag? Is that what you mean?

Mr. Orlov:

Depending on the region of the floating of a ship, there is no order for a merchant ship being at sea to show its colours when approached by a naval boat.

Mr. Lagoni:

Now, let us come to the question of the alleged force. You allege that the patrol boats fired at the *Saiga*. From which side did they shoot?

Mr. Orlov:

The boats were approaching the *Saiga* on the port side.

Mr. Lagoni:

And so they shot from the port side: is that right?

Mr. Orlov:

Yes. There was an angle. It was not a 90-degree angle. Perhaps the angle was 45 degrees from the bow side and mainly the bullets hit the port side and also the front side of the ship, the hull, the bow.

Mr. Lagoni:

Which parts of the ship were hit by bullets; can you explain, roughly: the upper parts or the lower parts?

Mr. Orlov:

One can see once again, on the pictures shown yesterday, in particular the upper part was damaged and the left side was hit from the bridge, one deck and then the second deck where the third officer lives and where the safe boats are – the third officer, or third mechanic, in his cabin. The bulkhead was pierced by bullets and it was already stated that the bullets could also change their direction.

Mr. Lagoni:

What do you mean by "change their direction"? Do you mean ricochet or what?

Mr. Orlov:

Yes, I mean exactly ricochet, that the bullets ricocheted.

Mr. Lagoni:

Yesterday, it was mentioned that there was a machine gun and a submachine gun on the patrol boats – machine guns on the boats and submachine guns carried by the soldiers. Did you see that the machine gun was used on the patrol boats?

Mr. Orlov:

I saw a man who stood by a machine gun. He was wearing a uniform. I saw the soldiers with submachine guns who fired at us and when I went to the portside of the ship I did not scrutinize the thing. I only had a brief glance and then I locked the door or closed the door to the bridge.

Mr. Lagoni:

So you did not actually see that the machine gun was used against the *Saiga*?

Mr. Orlov:

I cannot say because I was out only a couple of seconds, and whether the fact is that the machine gun fired at us, I cannot say, but that it was aimed at our ship and that it was manned by a man in a uniform, that is definite – definitely.

Mr. Lagoni:

Captain Orlov, under which circumstances would you have stopped and cooperated with the soldiers?

Mr. Orlov:

Please, your question once again?

Mr. Lagoni:

Captain Orlov, what should the soldiers do in your view to stop you and to cooperate with you?

Mr. Orlov:

I do not know what the soldiers should do in order to stop my ship, but I gave an order to stop our ship. I was there in the engine room and saw that the second officer was wounded, and needed help and they fired below at the engine room. The oil was leaking and therefore the engine could be spoiled and the further movement was senseless. Therefore, I ordered to stop the machine.

The President:

Professor Lagoni, we are only ten minutes from the normal break. Are you sure that you will be able to complete before then?

Mr. Lagoni:

I shall be able to complete by then.

So you stopped the engine of the *Saiga* after the force was used? That is correct?

Mr. Orlov:

Yes, after we were fired at, directly at the machine room from above, and when the second officer was wounded, then the engine was stopped.

Mr. Lagoni:

You would not have stopped the engine without the force used?

Mr. Orlov:

I cannot say what would be the outcome because at that moment I still thought it was a pirate attack and what would happen later on, it is difficult for me to say.

Mr. Lagoni:

When the soldiers came on board, were the doors locked to the engine room?

Mr. Orlov:

I do not know exactly. At the moment when they were boarding us and further on, when part of the people went down to the engine room, on the port side of the door, we did not have time to lock the door to the engine room from the port side.

Mr. Lagoni:

Were the crew's cabins locked?

Mr. Orlov:

I do not know whether they were locked or just closed. Concretely speaking about my cabin, the door was just closed. It was not locked, but for some reason they tried to break it.

Mr. Lagoni:

Do you usually lock the cabin doors on the *Saiga*?

Mr. Orlov:

As a rule, I do not lock the door of my cabin. Moreover, at sea I do not do that.

Mr. Lagoni:

Not all of the crew members were in the engine room. Where were the rest of the crew members: the Second Officer, the cook and the radio officer?

Mr. Orlov:

I do not know exactly where they were. As far as the cook is concerned, he was in his kitchen and perhaps he did not hear the alarm. The radio officer was at the engine room. The Second Officer was also there. Approximately 15, 16 people gathered together in the engine room.

Mr. Lagoni:

It is alleged that two crew members were injured. Were you present when this took place? Did you see it?

Mr. Orlov:

I saw with my own eyes – I saw how the Second Officer was wounded. Concerning the other member, he was not there. I saw him later on when the crew was gathered at the deck, then I saw the second crew member.

Mr. Lagoni:

Was the second officer directly shot or was he injured by a ricochet?

Mr. Orlov:

I believe that it was most probably a ricochet. I could not see whether it was a direct shot. I did not see the people who were shooting because all our people, all our crew members, they tried to hide, just to find a position not to be seen by the attackers.

Mr. Lagoni:

You said yesterday that you considered the injuries sustained as serious. Why did you not mention these injuries in your memoranda of 29 October and 9 November 1997, the memoranda to ABS, the operator?

Mr. Orlov:

I do not know the memoranda mentioned by you, but in those which I sent over to ABS, it was mentioned that the Second Officer was wounded. ... Here is my memorandum of 29 October. Here it is stated that the second officer was injured twice in his left hand and therefore I mentioned it.

Mr. Lagoni:

When did Mr. Niasse receive first aid?

Mr. Orlov:

I cannot tell you exactly, but most probably when he already was on a boat. So we had taken from a medical bag, and I gave to the first officer this case, so when that member of the crew was on the boat.

Mr. Lagoni:

Thank you, Captain Orlov.

Mr. President, Members of the Tribunal, that ends my cross-questioning. I expect that Mr. von Brevern will proceed with his in the afternoon. Thank you.

Mr. von Brevern:

Mr. President, would you allow me to just do that now? I think that I do not need more than five minutes.

The President:

No, it is one minute to our closing time. In any event, I would like to meet the Agents. For logistical reasons I suggest that two from each side meet me as soon as possible after the suspension of the sitting in my room on the 5th floor. The sitting will be suspended and we will resume at 2 o'clock, as normal.

(The Tribunal adjourns at 12.00 noon.)

Public sitting held on 9 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 9 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Mr. von Brevern, I understand that you wish to continue the cross-examination of Captain Orlov.

May Captain Orlov please be asked to come to the witness stand?

Examination of witnesses (continued)

CROSS-EXAMINATION OF MR. ORLOV (CONTINUED)
BY MR. VON BREVERN (GUINEA)
[PV.99/4, E, p. 4–7]

Mr. von Brevern:

Captain Orlov, I have some final questions with respect to the photos that we have seen yesterday and which you have commented upon. I wonder whether we have these photographs still available to be put on the screen. Perhaps we can also go along without it. My first question is, do you know who made the photos, when they were made and where, and have you been present?

Mr. Orlov:

(Interpretation from Russian) These photographs were taken upon the arrival of our ship to Dakar, when the representative of the shipowning company, to be exact, the chief manager of Seascot, and these photographs were taken in my presence.

Mr. von Brevern:

I would like to refer to pictures 3 and 4. I would be grateful, Captain Orlov, if you could describe where you see damages to the vessel on pictures 3 and 4, where we can see the vessel is rather big? Can you perhaps demonstrate this to the court?

Mr. Orlov:

Probably these white spots mean the place where the bullet hit at the upper part of the ... On the fourth photograph, one can see the bumper and here to the left another bumper.

Mr. von Brevern:

I refer to pictures 12 and 13 and I would like you to show us on photograph number 3 where you think these damages were located?

Mr. Orlov:

These damages were on the port side, in the upper part on the level of the bulkhead.

Mr. von Brevern:

In any particular room?

Mr. Orlov:

These bullet holes were made and they penetrated to the left side of the bridge, so to say free space.

Mr. von Brevern:

Could you also please demonstrate where what you see on photo number 13 is located on picture number 3?

Mr. Orlov:

On this photograph you cannot see because it is the port side, and the radio room is on the same level with the bridge, that is the left side of the bridge.

Mr. von Brevern:

Finally, on picture number 29 you can see the door. You will remember that. I would like to ask you again, do you think that this was damage by a gun, a bullet, or would you not agree that it seems to be damaged by a hammer or something like that?

Mr. Orlov:

This crack around the handle, we think that something heavy was used to strike it, with a submachine gun perhaps. This is not bullet damage.

Mr. von Brevern:

It is not bullet damage, not machine gun damage? Is that what you said?

Mr. Orlov:

Speaking in concrete terms, on the picture and in general, it is obvious that something heavy was used to strike the doors.

Mr. von Brevern:

Captain Orlov, under number 14 of your statement, the last sentence, where you say "It was clear that they had used their guns to open the doors on the *M/V Saiga* breaking 15 of them", you would agree that this could also be a hammer, for example?

Mr. Orlov:

When I was speaking, I meant it was only one door, which is a waterproof door and which is used to close the navigation room. There, on the left side, they used a bullet, but the other doors were opened with the help of some heavy instruments or things.

Mr. von Brevern:

Is it correct that, in this bundle of photos, there is not a photo with a door damaged by a gun?

Mr. Orlov:

The door which was opened or pierced with a bullet is not present on these photographs.

Mr. von Brevern:

Captain Orlov, could we ask the lady to show us picture 3, 4, 12 and 13, and I would like you to tell us the diameter of the holes that you may see on these pictures?

Mr. Orlov:

In relation to the diameter of the holes, I can tell you nothing. I see only the traces of the paint which was off. What is the diameter of the holes is hard to say, judging on the basis of this photograph.

Mr. von Brevern:

Can we have 4?

Mr. Orlov:

This is the same which we saw before. Therefore, I cannot tell you about the diameter in these two places. This is a big hole, I think 4-6 mm in diameter. The smaller holes are perhaps 2-3 mm in diameter. This is also a big hole, average 4-6 mm in diameter.

Mr. von Brevern:

My question, Captain Orlov, just for clarification, your estimation of 4-6 mm refers to the reality on board of the vessel, or to the diameter you see on the picture?

Mr. Orlov:

I think this is an actual diameter which I saw directly on the ship, because on the photograph it is impossible to determine the diameter.

Mr. von Brevern:

Thank you. I have still one more question. Do you remember that during your time in Conakry, rather soon after you had arrived there, that you were together, that you had a meeting with an official person from the Guinean Government, speaking Russian? And do

you remember whether in this meeting, in this discussion, you complained about any damages to the vessel?

Mr. Orlov:

Do you mean the first visit when we were moored, or do you mean the visits which followed afterwards?

Mr. von Brevern:

I mean both, if you had meetings with Guinean officials.

Mr. Orlov:

During the first meeting I naturally said that the ship was damaged, and I said it orally, in oral form, but in concrete terms I worked out a list of damages and sent it out later on.

Mr. von Brevern:

To whom, to the Government of Guinea?

Mr. Orlov:

No, this list was sent over to the shipowner and a copy was sent over to the charterer through the Ukrainian Consulate.

Mr. von Brevern:

Do you remember the names of the persons of the Guinean Government who you met, to whom you, as you now say, mentioned and referred to the damages to the vessel?

Mr. Orlov:

I do not remember names but the faces, the persons, one of the persons was representing the Customs. I do not know his rank or position. When he came on board on 29 October accompanied by officers I told him of the damages and also about the fact that the personal belongings of the crew members were missing.

Mr. von Brevern:

Do you remember the reaction of this Guinean official?

Mr. Orlov:

They paid no attention to my statement.

Mr. von Brevern:

And did you insist?

Mr. Orlov:

In that particular case I could not insist in front of the armed people, on some rights, I could not insist on these.

Mr. von Brevern:

Then I have a question in respect of No. 24 of your statement. You said it was not until 17 November that further crew members were allowed to leave the vessel. Did any of the crew members ask you or someone else to leave the vessel, and if so, where did they want to go?

Mr. Orlov:

Do you mean I personally, or members of the crew?

Mr. von Brevern:

Of the crew.

Mr. Orlov:

Some members of the crew immediately after the fire wanted to leave for home, and I told this already in the presence of the officials that the people were scared and some of them wanted to go home, and I also asked that the representative of the shipowner or ambassador, the representative of the embassy, that they would be allowed to visit the ship, and I was denied in my request.

Mr. von Brevern:

Do you remember whether the passports or any other documents of the crew members were taken away by the Government of Guinea?

Mr. Orlov:

Yes, the Customs representative immediately before the arrival to the port of Conakry, they took all the passports and counted them, and log book and other documents, they were immediately expropriated as soon as they boarded the ship, and the passports were taken away immediately before we came to the port of Conakry.

Mr. von Brevern:

And when did they return the passports to you and the crew?

Mr. Orlov:

The passports practically were returned, they were returned not to me, the first part of the crew left on 17 November and they got their passports ashore. Nobody gave me their passports.

Mr. von Brevern:

Now, Captain Orlov, finally the last question, under No. 30 of your statement, you refer to the agreement to release the vessel. Do you remember when such agreement was presented the first time? It has been signed by you, as you write, at the end of February, but when was it was presented to you the first time?

Mr. Orlov:

The first time we discussed the contents of such a document in the presence of the superintendent of the company who came in November, and who secondly visited in December, and in December this document was discussed, but it was not signed, it was not to be signed at that time, and I signed it only at the end of February.

Mr. von Brevern:

But could you confirm that on 13 February you have been asked to sign the agreement in the presence of your lawyers, but that it was your decision not to sign it because you wanted to ask the authority of your employer or anybody else; could you confirm that?

Mr. Orlov:

I do not remember when it was, but there was such a moment when first of all I was offered to sign this document, which was written in French, and I asked to work it out in the English language, and there was such a time when I said, before I put my signature to it, I should consult with my employer or send him a copy – either send him a copy or another way to get his approval and confirmation.

Mr. von Brevern:

And you understand that finally you got the approval of – was it your employer?

Mr. Orlov:

The superintendent, he was the second person to come, and when he left he told me that I could sign this document if no alterations were made to it.

Mr. von Brevern:

The very last question. Why did you or your superintendent not insist that a reservation be made with respect to the damages to the vessel?

Mr. Orlov:

This was so because at the initial moment it was not the main thing. The main thing was the morale of the crew, and it was necessary to calm them down, and those who wanted to go home should be sent home. Therefore at the beginning the matter was not so important concerning the damages.

Mr. von Brevern:

Did you try to bring any reservation into the deed of release, or your lawyers?

Mr. Orlov:

I cannot say for the lawyers, and I made only oral statements, and as I already mentioned, I sent a written suggestion through the embassy to the charterer of the ship.

Mr. von Brevern:

Captain Orlov, thank you very much. This was the end of our cross-examination.
Thank you, Mr. President.

The President:

Thank you very much.

Mr. Plender, do you wish to re-examine?

RE-EXAMINATION OF MR. ORLOV
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/4, E, p. 7–11]

Mr. Plender:

Captain Orlov, will you kindly take your headset off. Do you speak any English?

Mr. Orlov:

(Interpretation from Russian) Yes, of course.

Mr. Plender:

Please answer my questions in English, do you understand?

Mr. Orlov:

{*Responding in English*} Yes, I understand.

Mr. Plender:

Is your English fluent?

Mr. Orlov:

Well, my English is not perfect, but it is enough to my work as a captain to the vessel.

Mr. Plender:

Do you find that when you had to deal with lawyers in the English language it is more difficult than speaking through an interpreter?

Mr. Orlov:

Well, sometimes I have to be sure about the question, I mean exactly the question that a lawyer asked me.

Mr. Plender:

Can you tell me what is the difference between a "petrol" boat and a "patrol" boat?

Mr. Orlov:

The difference between a "petrol" boat and a "patrol" boat?

Mr. Plender:

Just one more question of that kind, Captain Orlov. At Annex 1, tab 16, the following words were made by somebody talking about you. Do you understand what I have just said?

Mr. Orlov:

Yes.

Mr. Plender:

He said – I hope you will forgive me – "This guy is out of his mind, Daniella, he's really lost his marbles". Do you understand what that means?

Mr. Orlov:

Can you repeat?

Mr. Plender:

I have made my point, Captain Orlov. Please put your headset back on. Was your statement prepared in English?

Mr. Orlov:

Yes, I have prepared my statement in English.

Mr. Plender:

Before you arrived, did you have a draft ready?

Mr. Orlov:

Yes, I got my draft at home and arrived with my draft here.

Mr. Plender:

When preparing your draft did you rely upon recollection alone or also on records?

Mr. Orlov:

Well, while preparing my statement, my draft statement, I used the paper, the memorandum, and some correspondence which I took from the vessel before signing off.

Mr. Plender:

Captain Orlov, you now have the benefit of an interpreter again. If you would prefer to speak in Russian, you may. Did you arrive in Hamburg on Monday?

Mr. Orlov:

(Interpretation from Russian) Yes, I came to Hamburg on Monday evening.

Mr. Plender:

When you arrived, did you bring your draft with you?

Mr. Orlov:

Yes, it was about me. I took it with me.

Mr. Plender:

Were you then asked questions about your draft?

Mr. Orlov:

Yes. I met with the lawyers and they asked me questions concerning my statement.

Mr. Plender:

In the light of those questions, was your draft expanded?

Mr. Orlov:

Some paragraphs were given in greater detail.

Mr. Plender:

Was all this done in English?

Mr. Orlov:

Yes.

Mr. Plender:

Did it take a long while?

Mr. Orlov:

I was preparing the final version somewhat by 4 o'clock in the morning.

Mr. Plender:

By the time you had finished at 4 o'clock in the morning – by the time we had finished – did you understand the statement?

Mr. Orlov:

Yes, I was completely understanding the document and I wrote it in my own words.

Mr. Plender:

Now, Captain Orlov, to use a nautical expression, I am about to change tack. I have to ask you questions about the Provisional Certificate. Have you any knowledge of the law of Saint Vincent and the Grenadines?

Mr. Orlov:

Concerning the law of that country, practically I knew nothing.

Mr. Plender:

Have you any reason to believe that a vessel ceases to be registered under the law of Saint Vincent when a provisional certificate expires?

Mr. Orlov:

Of course the shipowner shall get a permanent certificate and I think they were elaborating in that direction and were sending some documents to Saint Vincent and the Grenadines.

Mr. Plender:

Now, I am going to ask you about flying the flag on the high seas. In your experience, is it normal to fly one's flag on the high seas?

Mr. Orlov:

On the high seas I have already said it was not necessary, and we lowered our flag just to avoid its getting shabby.

Mr. Plender:

Do other vessels in your experience do the same?

Mr. Orlov:

Practically all, yes.

Mr. Plender:

Now, I have to ask you about the log book entries. Is it the case that some entries are made at the end of the watch?

Mr. Orlov:

It is not just right to say at the end of the watch. The entries can be done during the watch but immediately after an event happened, for example, you first stopped the ship and then made a relevant entry.

Mr. Plender:

When you read an entry that says "04.24 engine stopped", when would you ordinarily expect such an entry to be made in the log book?

Mr. Orlov:

I think that such an entry was done by the person on watch immediately after the completion of the order.

Mr. Plender:

My next question is about the telexes. When you received the telex of 22 October warning of gas oil supplies hunters, who did you imagine might be the hunters?

Mr. Orlov:

This telex was received on 22 October a bit earlier and at that moment I believed, I thought, that it could be pirates and, assuming from the information received from Mr. Li, I also thought that it could be the officials of Guinea.

Mr. Plender:

When you received the telex of 27 October warning of a risk from normally fast navy boats, did you understand this to be warning you of ordinary police action?

Mr. Orlov:

I was tending to think that these were the pirates.

Mr. Plender:

When the patrol boats first came into sight, did you understand them to be exercising normal police action?

Mr. Orlov:

At the beginning it was difficult to see what they were doing because in the same region there were a few fishing boats and I just saw two targets on a radar screen which were moving toward us.

Mr. Plender:

I now have to ask you about the instructions sent to you to change course. When you received instructions to go to a point 9.50N 16.15W, did anything in your charts indicate whether that was within or outside a zone claimed by any State as an exclusive economic zone?

Mr. Orlov:

I have already said that on my maps and on the navigation charts the exclusive economic zone is not indicated. I was moving towards this point to be outside the 100-mile distance from the shore.

Mr. Plender:

When you were then told to go to 9°N, 15°W did you understand that it was the effects of the instructions to take you outside the area that Guinea claims as its exclusive economic zone?

Mr. Orlov:

At that moment I did not think. It was just that the telex said that as a rule Greek tankers worked in that area and that meant that the operator knew that this was a safe area.

Mr. Plender:

On 27 October were you paying attention to the question whether you were in or out of any area claimed as an exclusive economic zone?

Mr. Orlov:

Concerning this and other questions I know that there is an economic zone for each coastal country or State, and that it reaches out to 200 miles and at that moment I just did not think whether we were in or not in the zone. Anyway, being 100 miles away from the shore, we should have been in this zone, and prior to that our ship had already worked in that zone for four months from Morocco to Mauritania and practically the ship was always working within the so-called exclusive economic zone.

Mr. Plender:

What do you understand to be the significance of an exclusive economic zone?

Mr. Orlov:

The basic difference between the economic zone and territorial waters is that the economic zone is not covered by the customs, sanitary and other rules. The exclusive economic zone exists to enable the coastal States, or a coastal State, to extract minerals from the shelf, or fish, or collect seaweed. It is along these lines.

Mr. Plender:

Do you know of other vessels than the *Saiga* engaging in bunkering of vessels within economic zones of States?

Mr. Orlov:

Quite a few. Quite a few such ships work within the zone and, if you need, I can name these ships.

Mr. Plender:

Have you ever heard of any State prohibiting bunkering in its exclusive economic zone?

Mr. Orlov:

I never came across any documents that somebody was prohibited to supply fuel to the fishing boats in any economic zone of any particular State.

Mr. Plender:

Captain Orlov, while at sea have you ever, in the course of your career, received a communication from a coastguard or armed force of a State?

Mr. Orlov:

Not always. I cannot say that always, but I can say that there were cases when a ship was asked, either from an airforce craft or from a ship, and being in the Caribbean, for example, a naval vessel of the United States asked us. The same happened in the Adriatic Sea when we were questioned by an aircraft. It was many a time.

Mr. Plender:

How did they communicate with you?

Mr. Orlov:

They called. If an aircraft was circling around us, and he saw, the pilot saw, the name and they called us by our name, or they used the 16th channel, or they said the ship and named the coordinates and asked us to establish a radio communication.

Mr. Plender:

Did you establish radio communication?

Mr. Orlov:

Of course, in every concrete case the crew member who was on watch called me to the bridge and I just negotiated with a ship or an aircraft.

Mr. Plender:

If the Guinean authorities had communicated with you by radio, how would you have behaved?

Mr. Orlov:

I think that if they called me by radio, and told me who they are and told me about their intentions, most probably I would have stayed, and the engine would be off.

Mr. Plender:

If they had sent a visual signal to you, would you have behaved in the same way?

Mr. Orlov:

Visual signals, one has to know the visual signals. They exist, for example, just to attract attention. It is one thing, but in any case they should have come into contact with me by radio.

Mr. Plender:

When dealing with Guinean Government officials on your arrival in Conakry, did you complain about the treatment of the vessel, its contents and its crew?

Mr. Orlov:

At the first meeting I started talking. I talked about the crew, and at that moment it was the most important thing, the morale of the crew. Quite naturally I talked about the damages done to the ship and also about the personal belongings which were missing from the crew members.

Mr. Plender:

At the time when you spoke about these matters, were there armed personnel present?

Mr. Orlov:

On the first stage, before the ship was unloaded, there were always about 15 armed people on board. They were permanently there.

Mr. Plender:

Was any threat at any time made to you?

Mr. Orlov:

I was told that if I won't do unloading of the cargo, then I will have problems and I will be imprisoned.

Mr. Plender:

When did the Guinean authorities first ask you to sign a document?

Mr. Orlov:

I do not remember the exact date but it was in December when the representative of Seascot, Captain Laszlo Merenyi, arrived. At that time negotiations were carried out concerning this document, but it was not a question of signing this document; it was just a question of formulating it.

Mr. Plender:

Why did you not sign it at once?

Mr. Orlov:

I cannot sign a document being blind. I represent the shipowner. I should have his agreement and, moreover, because it was written in a language which I did not understand.

Mr. Plender:

Did you eventually sign a document?

Mr. Orlov:

Yes, in February I signed this document.

Mr. Plender:

Is the document that you signed in February identical to the document supplied to you earlier or is it different?

Mr. Orlov:

The initial variant had differences because it was in French, but the last – the one before the last – was practically the same as the final document.

Mr. Plender:

When you were bunkering vessels on 27 October, did you believe that you were acting in breach of any law?

Mr. Orlov:

No.

Mr. Plender:

To the best of your knowledge, did you at any time throughout the voyage act in breach of any law?

Mr. Orlov:

I think that the ship worked legally and did not make any breach of any legislation of any country.

Mr. Plender:

Thank you, Captain Orlov. I have no further questions.

The President:

Dr. Plender, I refer to the telex of 22 October 1997. Could you kindly make it available to the Registrar so that it can be marked for the record?

Mr. Plender:

Certainly, Mr. President. That was done this morning, but we shall ensure that it is communicated to you.

The President:

Thank you very much.

Mr. Plender:

Captain Orlov, subject to the President's leave, your evidence is completed.

The President:

Mr. von Brevern, would you like, at this stage, to put any further questions to the witness? In the absence of that, I propose to release him.

Mr. von Brevern:

No, we have not the intention to put any further questions.

The President:

Captain Orlov, we thank you very much indeed. You are released. You may stay if you wish, but you may leave.

EXAMINATION OF MR. MERENYI
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/4, E, p. 12–19]

Mr. Plender:

Mr. President, with your leave, my next witness is Captain Laszlo Merenyi.

Captain Merenyi, you will in a moment be asked to swear an oath.

The Registrar:

Mr. President, I shall ask that the oath be administered to Captain Merenyi.

Mr. Laszlo Merenyi, sworn in (in English)

Mr. Plender:

Captain Merenyi, have you prepared a written statement of evidence?

Mr. Merenyi:

Yes.

Mr. Plender:

Do you have a copy with you?

Mr. Merenyi:

No.

Mr. Plender:

May a copy be presented to the witness?

Mr. Merenyi:

If I do not have one, there is no problem. (*Copy handed to witness*) Thank you very much.

Mr. Plender:

Is this your statement?

Mr. Merenyi:

Yes, it is my statement.

Mr. Plender:

Do you fully understand the whole of it?

Mr. Merenyi:

Yes, sir.

Mr. Plender:

Is it all true?

Mr. Merenyi:

That is true.

Mr. Plender:

Captain Merenyi, I shall take you through only the principal parts of your statement. What is your current occupation?

Mr. Merenyi:

I am the superintendent of Seascot, and I am working with several other vessels, and somewhere in this case I have a connection with the *Saiga* as well.

Mr. Plender:

Have you experience of commanding vessels?

Mr. Merenyi:

Yes, I started in navigation in 1963. Later I became an officer and from 1982 I hold a first class master's. Just five years ago I stopped navigation, and during this period I commanded several vessels with different companies.

Mr. Plender:

Does it ever happen in the course of a vessel's voyage that instructions are given to a captain other than by a charterer?

Mr. Merenyi:

Yes, it can happen several times, because actually the charterparty several times is made between the charterers and between the owners, and later somebody can act on behalf of the charterers and on behalf of the owners as well. Like in our case, we are dealing with several vessels, the *Seascot*, and several times we are acting on behalf of the owner as well.

Mr. Plender:

Do you know the company ABS?

Mr. Merenyi:

Yes.

Mr. Plender:

Is there anything unusual about instructions being sent by ABS?

Mr. Merenyi:

No, because in this case ABS could act or in this time had been acting on behalf of the charterers, *Lemania*, and like we on the other side at *Seascot*, we have been acting on behalf of *Tabona Shipping*, the owner.

Mr. Plender:

Are *Lemania* and ABS associated companies?

Mr. Merenyi:

No, they are not associated companies, because ABS was acting on behalf of *Lemania*.

Mr. Plender:

When did you first become involved with the *Saiga*?

Mr. Merenyi:

I had two vessels in North Europe when my boss, Mr. Allan Stewart, was calling me by phone that what happened and what was the last news relating to the *Saiga*. I was just in Belgium and in that time I was informed, and at the same time I was instructed to go down to Conakry, but before I have not had any deal, what I mean, in the management of this vessel.

Mr. Plender:

What was the purpose of going down to Conakry?

Mr. Merenyi:

First of all, the information was almost nothing, because the last information was from the vessel which arrived, a short telex, that the vessel was attacked by gunfire down in Conakry and escorted into the port. That was the first request to go down to find out what –

Mr. Plender:

Would you please take pauses between sentences for the interpreter?

Mr. Merenyi:

That's okay.

Mr. Plender:

What did you hope to do in Conakry?

Mr. Merenyi:

That was a request from the company to go down and to find out actually what had happened with the vessel, later, what was the reason why the vessel was detained, and what was the accusation against the vessel; then later to give all possible assistance to the owner, to the crew, to the charterers, and also to try to find out what was the damage on the vessel.

Mr. Plender:

Why was this information not simply conveyed by telex or radio?

Mr. Merenyi:

It was impossible because whenever they took the vessel and escorted the vessel into the port, part of the radio station was destroyed, and on the other hand they locked the radio station and they made all communication between any parties involved prohibited. They locked the doors and they confiscated keys.

Mr. Plender:

When you got to Conakry, were you able to communicate with the vessel?

Mr. Merenyi:

I arrived to Conakry on 1 November, late evening, and in the time that was Mr. Marc Vervaeet in the hotel and calling me immediately. By the time when I went to the room, I found the P&I representative, Mr. Gerald Collins, then the agent, Mr. Ketmar, and I wanted to find out what it could be the way to communicate with the vessel. In the time, Mr. Marc Vervaeet told me that he was allowed to communicate with the vessel with hand sign and shouting from the shore, but it is ended a couple of minutes later because the armed guards push the Master into the accommodation. So that was all the information what I had in the time, and the

information that the vessel was accused smuggling, or territorial water – no, the economic zone of Guinea – which the Guinean authorities considered as 200 miles from the coast.

Mr. Plender:

Until you arrived, had anybody been allowed to board the *Saiga* to obtain information?

Mr. Merenyi:

No, that was definitely prohibited. Before my arrival, the Ukrainian Ambassador wanted to board, attend the vessel, and he had permission from the Customs, written permission, but because on the shore the coastguard person that guarded the vessel, they did not recognize this permission, and his attempt failed.

Mr. Plender:

Had anybody been allowed to leave the vessel?

Mr. Merenyi:

No, definitely not. They told me at the very beginning that the vessel was under arrest.

Mr. Plender:

Did there come a time when two people were removed from the vessel?

Mr. Merenyi:

Yes, I was informed, because by the time I arrived over there, there are two people they already left. I was informed during the attack that two seamen had been injured, were taken to the military hospital, having been attended medical attention, then later because of both resistance they were really requesting to go in another place because they were not satisfied with the condition of the military hospital; finally they were allowed to get repatriated and to have medical attendance in Dakar.

Mr. Plender:

Did there come a time when you were able to get aboard the vessel?

Mr. Merenyi:

Knowing the fact what happened with the Ukrainian Ambassador, the next day I tried to get permission to get on board.

Mr. Plender:

Did you get that permission?

Mr. Merenyi:

The first day not, because the first day when we went to the Head of the Customs, who was actually let's say declared to be responsible for that, he directed me down to Mr. Bangoura, the Commander of the Mobile Brigade. By the time, knowing the fact what happened with the Ukrainian Ambassador, I tried to get a helping hand from another side, and finally the second day I got the permission to come on board, escorted by Customs armed guard, which escort I was requested personally.

Mr. Plender:

How long were you allowed to be on the vessel?

Mr. Merenyi:

It was really restricted for about 30 minutes and, of course, my movement on the vessel was fully restricted, but the main reason or the main aim of my visit was just really to talk to the Captain and to assure him that we try our best, we are here, and we try to give all assistance to the vessel and to release as soon as possible. So actually I was able to talk freely, honestly speaking, freely, because everybody was speaking French and we were able to talk with the Master for 15 minutes in English.

Mr. Plender:

Did you see any damage on the vessel?

Mr. Merenyi:

As I was able to see when I was escorted and directed to the master's cabin, the front wall of the accommodation, several trace of bullets, then the bulwark of the monkey island, then the navigation bridge with broken windows, and the port side of the navigation lamp, the radio station with broken windows. I was not allowed to move all over that, but what I was able to see in the time from about 15 metres, the deflected Yokohama fenders, which that got bullet as well.

Mr. Plender:

What was the morale like among the crew at the time?

Mr. Merenyi:

Unfortunately, the morale among the crew members, it was really very, very low, and the crew wanted to leave the vessel and they emphasized and they underlined to me that they signed a contract not for get a war zone and not just to get fired, so most of the crew wanted to leave the vessel.

Mr. Plender:

Were the crew free to leave?

Mr. Merenyi:

No, the crew was absolutely restricted to stay on board, and the crew movement was also some way restricted because the armed guards' headquarters was their mess room, which is actually the biggest place of the vessel, and that was a place when it was a television. In the time the air-conditioning broke down, so I do not need to explain the condition of the crew when they were really requested to stay in their own cabin without air-conditioning system, and they could not gather and let's say to relax in the mess room or even to watch TV or just to have a chat together.

Mr. Plender:

Is it the case that you were able to visit again?

Mr. Merenyi:

Yes, it became, I would say the custom authorities they became so flexible with me and Ukrainian Ambassador actually later I have an access every time whenever I wanted, but

unfortunately nobody else. I felt that the crew is counting on the Ukrainian Ambassador and counting on me as well, and when I wanted let's say the third party to come on board, as the P&I, you know, with cargo dimension, with crew matter, when P&I is on board, there is always the feeling there is something special, but to obtain permission for the P&I was impossible and the gentlemen could not have any chance until the last moment, so the vessel left so many months later without any P&I attendance.

Mr. Plender:

Did there come a time when two others left the vessel?

Mr. Merenyi:

Yes, on my second visit, if I am not mistaken, on 4 November the Master reported me that he had two crew members injured and they need medical attendance. One was said hit by the rifle with the armed guard, and the other had hit on his knee, said also by the armed guard.

Mr. Plender:

Did you see those two members of the crew?

Mr. Merenyi:

Yes.

Mr. Plender:

What was their condition when you saw them?

Mr. Merenyi:

One of the crew member who had a knock on his head, he was really serious, psychologically serious condition, depressed, and almost very difficult to contact to him, and the other that was with a smaller knee, coloured blue and grey. I had permission from both of the Customs, Commander Bangoura, and personally I took these two gentlemen to the Russian hospital. They had medical treatment and that was also a good sign for the morale when they felt that, okay, somehow they are under care and under some kind of management.

Mr. Plender:

Were there further contacts between your team and the Guinean authorities early in November?

Mr. Merenyi:

During this period we were running or moving on a different way. On one side Maître Thiam, dealing with the high level authorities, and on the other side on the spot and on the ground I was dealing with the different authorities, mostly with the Customs, because it became clear that everything was belonging to the Customs.

Mr. Plender:

Your statement at paragraph 12 says that you were able to gain access because you would pay the appropriate people.

Mr. Merenyi:

Yes, definitely, because that was the only way to make everything easier, you have to find a way to get a helping hand, and it was the way, and for this movement I would say that most of the doors, they became open.

Mr. Plender:

Were you asked to make payment, or invited to make payment?

Mr. Merenyi:

Very shortly at the beginning, I had a feeling that would be the easiest way, and I did not need to tempt so somehow I understood, and nobody refused that.

Mr. Plender:

And did the payment of money bring about a change in the reactions of the persons involved?

Mr. Merenyi:

Definitely it made a lot of things easier, and made so many things quite better. First of all we were able to arrange immediately the free ship's chandler movement, whatever the Master asked, because at the beginning, by the time I arrived I changed 10,000 times the paper giving to the agent and somehow the agent could not find a ship's chandler, somehow the ship's chandler could not supply, somehow it was a misunderstanding in the least, but later everything was so smooth, ship's chandler was prompt, fresh water supply was prompt, so later the service was much, much better.

Mr. Plender:

Did there come a time when the cargo was discharged from the vessel?

Mr. Merenyi:

Yes, a couple of days since my arrival, that was a different negotiation, and we arrived on 10 November, then I had the usual permission morning and evening escorting by helping hand, and being on board when Mr. Bangoura arrived, if I remember there were four or five armed Customs officials. Then they gave orders straight to the Master to start to discharge the cargo, and the poor Master was absolutely shocked, and he did not understand what is happening, and he asked some written order that Mr. Bangoura emphasized that you have about ten minutes to start the cargo, the vessel is under arrest and you have to comply with the order, and the Master was looking at me really with begging eyes, and I asked Mr. Bangoura, and I explained to Mr. Bangoura that according to any kind of law it should be local or international, there must be somehow responsible for the cargo and for the safety of the cargo, and therefore when he asks some kind of written order, he is absolutely right. The answer was that Captain Laszlo, it is not your affair, you should be really happy that you have contact with the crew, and the Master has five minutes to start to discharge the cargo, otherwise as I understood we could find ourselves in prison very soon. That was when I told the Captain do not take any risk, I am the representative of the owner, so start discharge the cargo and do not put into danger the vessel, crew or whatever.

Mr. Plender:

Was a decision then taken to bring legal proceedings?

Mr. Merenyi:

The legal proceedings, it was – I will tell you it was a threat every day. What I mean, the local legal procedure. They emphasized to the Master every day that you should be in front of the local court and you can have in five years prison, and somehow this feeling was always on the shoulder of the crew as well.

Mr. Plender:

On the other side, was any consideration given to bringing matters to this court?

Mr. Merenyi:

When we started to discharge the cargo and the cargo was under discharging, Maître Thiam and Mr. Marc Vervaele left Conakry, and they went back to Dakar, and it was already decided in the time to put the case in front of the International Tribunal. Then first of all it was the first question mark for the local authorities, what happened with Maître Thiam and Mr. Vervaele and when we started, because they disappeared without any negotiation, then they became aware that they left the country, because they could not see any progress, and the cargo was confiscated, and they had no other choice just to ask the International Tribunal. They became a little bit more and more aggressive or repressive against the vessel, and they wanted to make us understand that everything was legal, confiscation of the cargo and arrest of the vessel, and they already lined up about 15 milliard Guinean franc should be the fine to release the vessel.

Mr. Plender:

What do you mean by saying that they became more aggressive?

Mr. Merenyi:

Actually when it was the discharging, the authorities, what I mean the Customs, they promised the Captain that after discharging everything will be better and the crew will be free, because they have local legal right to take their cargo, and later everything will be sorted out by local court, there is no harm against the crew, and the crew can move freely. Nothing happened, even the first a little bit the armed guards on board, and the crew was absolutely restricted, they could not go ashore, they could not call their families, they could not send information. As a further negotiation again really on spot with the local Customs officials, of course the extension a couple of days later it became smoother, and sometimes we were dreaming about release of the vessel. My feeling was that some kind of amicable agreement should have solved the problem.

Mr. Plender:

What was the reaction of the Guinean authorities to the prospects of proceedings in this Tribunal?

Mr. Merenyi:

Several times I visited the Director of Customs, who was – I would not say that is really frankly against the vessel, and he declared that they are not afraid of anybody, this is the local law, and they are going to give good evidence and a good example to the world that nobody can break the Guinean law, so that was some kind of wall in the negotiation. On one side that was the higher level.

Mr. Plender:

Did this decision have any effect upon the treatment of the crew?

Mr. Merenyi:

Actually this is a really good question because one side when we were able to manage everything in a certain way, I already managed in this way, everything was smooth and let us say manageable, but on the other hand then the question came in front of the higher level officials that became hard again. The Director of the Customs decided that because the owner and the charterers, they went to the International Tribunal, that should be the solution to remove the crew from the vessel to put in a hotel under armed guard and put a padlock on board, and we shall see what will be the decision of the International Tribunal. Of course knowing the fact, let us say as a seaman minded calculation, what does it mean to put padlock on board and remove the crew? I do not talk about the condition of the crew under armed guard in a hotel, just talking about the vessel, the property of the vessel. The deterioration or abandoned, so actually that would have been the last hour of the vessel. But for the fact that Mr. Bangoura, or Commander Bangoura, had order from the boss, the Director of Customs to do that, later with several negotiations we were able to achieve to keep the crew on board and the vessel remained for another couple of days in the port, and later disembarking a few crew members then moved the vessel to the anchorage.

Mr. Plender:

How many members of the crew were you able to release?

Mr. Merenyi:

Eight crew members had been repatriated in that time. For the rest of the crew of course we had to offer a special bonus because quite understandably most of the crew wanted to leave the vessel.

Mr. Plender:

Why was it necessary for the remainder to stay with the vessel?

Mr. Merenyi:

Okay, you cannot leave the vessel without crew because of deterioration, because of pilferage, because abandon, and we decided that the minimum crew should be around, 14 persons, and really I was down to decide who would be the 14 persons, and I tried to make them understand, so more or less is 14 crew members that were volunteered to stay on board, except for the Master, who was officially detained.

Mr. Plender:

Is it right that you left Guinea at the end of November?

Mr. Merenyi:

End of November I had to leave because in that time that was the process of the International Tribunal and we decided to wait for the decision for the International Tribunal and I went back to Glasgow to report everything what happened during this period.

Mr. Plender:

Following the decision of this Tribunal, did you return to Conakry?

Mr. Merenyi:

Yes, just a couple of days before Christmas on 20 December I took a plane again and I went to Conakry with a brilliant dream that we should be able to relieve the vessel from Guinea in a couple of days, maybe in the New Year or something for the crew and everybody will be okay. But at the same time, on one side there was also the feeling that we were not sure what would be the reaction. So on 20th I went down to Guinea again.

Mr. Plender:

Did you have discussions with the Guinean authorities?

Mr. Merenyi:

Yes. After my arrival I felt immediately a certain animosity against the vessel, not exactly against the vessel because the poor vessel was riding at anchorage, against Seascot and against Addax. At the same time, having a certain connection with the Customs, my feeling was that the authorities, okay, they took a long time, it was about almost two weeks; they were absolutely split in this matter. The Customs, led by Mr. Bangoura, were working in every respect really to release the vessel – I do not know exactly – just to comply with the International Tribunal decision or just their own decision. But, on the other hand, the higher authorities, the Justice and the Finance Ministers, and especially the boss or the Head of Customs stopped any movement when we reached some kind of level. At that time really the Head of Customs could not stop emphasizing that they would make a good example to all countries if necessary to the International Tribunal. This is their own law and they are not going to release the vessel. On the other hand, the Customs really started to make several documents to release the vessel in their own way. That was a big dispute with all parties involved in this matter. They considered the \$400,000 as not a bond but a cash payment or some kind of agreement fee when they take that one. Later the confiscated cargo was legal and we have to sign such a kind of agreement that we pay \$400,000 and sign that we will not take any action against the Guinean Government and that this is an amicable agreement and the vessel gets sailing permission immediately.

Mr. Plender:

Up until the time when you left Guinea, was the vessel free to leave?

Mr. Merenyi:

No, because it took me about ten days dealing with even local lawyers, with different authorities, and later my feeling was that my staying there would not be helpful any more because it should be the case for the lawyers to really find out the way that complies with the decision of the International Tribunal.

Mr. Plender:

Thank you, Captain Merenyi. I have no further questions. You may face cross-examination.

The President:

Thank you very much.

Mr. von Brevern, would you like to cross-examine the witness? We have 22 minutes before the end of the sitting.

CROSS-EXAMINATION OF MR. MERENYI
BY MR. VON BREVERN (GUINEA)
[PV.99/4, E, p. 19–24]

Mr. von Brevern:

Thank you, Mr. President.

Captain Merenyi, I have some questions. In one of your first statements today you were asked about the relationship between a charterer and someone else acting for the charterer. Would you not agree that normally a time charterer directs the command of the vessel in relation to port and crew and gives the vessel perhaps navigational instructions? Would you agree that these are the normal instructions of a charterer to a vessel?

Mr. Merenyi:

It can be.

Mr. von Brevern:

You said you would at least sometimes have made the experience that someone else acted for the charterer. Do you mean that this is the case when the charterparty expressly refers to "charterer X" and states that the instructions for the ship's command come from "company Y"?

Mr. Merenyi:

But this company should be well known by the master. I can give you some examples. For example, being an owner of a vessel under the charter, for example a multinational oil company, actually the agreement is between a multinational oil company and the owner and later this multinational oil company will give an order and let the owner know: Okay, from now on Shell is my partner who is acting on behalf of me and Shell is going to send the order to the vessel. That is well known by the master because the master is informed as well and the owner agrees.

Mr. von Brevern:

Do you refer to particularities in the tanker business or do you also mean that this happens in the normal charter business?

Mr. Merenyi:

It can happen in a normal charter business. I know honestly because I spent half of my life at sea. When the charterers and the owners write a charterparty, as a poor master at the end of the story you receive an extract from the charterparty, even if you do not know who he is, with whom you have the order, the condition of the charterparty, and they let you know from the owners side, "Okay, your commander or managing organization, for example, is now Addax".

Mr. von Brevern:

We do not want to exchange theoretical ideas. My question is: do you know – of course you know – what the position of ABS Geneva was in connection to this vessel? Can you explain that?

Mr. Merenyi:

Yes. Addax gave the order to the vessel, where they go, where they discharge, where they load. Actually, that was in the management of Addax.

Mr. von Brevern:

Was there not a little closer connection between the vessel and Addax? I refer to ABS: is it the same company? Is ABS Geneva the same company as Addax?

Mr. Merenyi:

It is a different company.

Mr. von Brevern:

You referred to Addax – Addax would have given the instructions to the Captain –

Mr. Merenyi:

Or to ABS. I do not like to mix up this question of who gave the straight order, whether it was Addax or ABS, that these orders were fully approved by the owner and the original charterers.

Mr. von Brevern:

Okay, Captain Merenyi. Now, there are several companies involved. I would imagine that if I was a captain I would not agree that I just got an extract of the charterparty but that may be your experience. The captain gets the charterparty and he sees who the charterer is, in our case –well, you know who the charterer is. It was not ABS and it was not Addax, according to the charterparty. Now, the instructions to the captain come from quite a different company. What would you think you as Captain of the *Saiga* would have to do? Would you have to follow these instructions?

Mr. Merenyi:

Whenever the charterers made agreement with an owner and they chartered a vessel – actually they sent the contact persons to the master – if they do not drop down the complete charterparty, they send a message to the captain, "Okay, these gentlemen or ladies, they are dealing with the vessel and you are on that charter."

Mr. von Brevern:

So I understand you, there were oral instructions from a representative of the charterer to the Captain to follow the instructions of Addax or ABS?

Mr. Merenyi:

I think we have the two mixed here.

Mr. von Brevern:

Do you know whether there is, or there has been, an agreement between the charterer and either Addax or ABS Geneva?

Mr. Merenyi:

They have to have an agreement but this is out of my hands because I was not dealing with this matter, actually. That was not my mission.

Mr. von Brevern:

Yes, I agree. I think this subject, indeed, was not put down by you in writing.

Mr. Merenyi:

Definitely not.

Mr. von Brevern:

Thank you very much for these answers. I understand that you were not aware of all these relationships because you were the representative of the owner and employer, or one of the company?

Mr. Merenyi:

Yes, I am an instrument and an agent of the owner.

Mr. von Brevern:

So my understanding is that Seascot is the representative of the owner –

Mr. Merenyi:

And an agent of the owner, and at the same time, I am an instrument, fully responsible for the crew matters and all technicalities.

Mr. von Brevern:

You referred to your experience in Conakry. I am not quite aware, I think your paper said you arrived in Conakry on 3 November. Is that correct?

Mr. Merenyi:

1 November.

Mr. von Brevern:

The first?

Mr. Merenyi:

The first.

Mr. von Brevern:

You said that you were not allowed to board the vessel. My question is, to whom did you direct yourself and ask for permission?

Mr. Merenyi:

At first we wanted to follow the officialy¹⁷. We asked the agent to obtain some permission. At the end of a complete day, the agent, Mr. Ketmar, came back. Then the next morning we had to go to ask permission from the Head of the Customs. In that time the Head of Customs, it was just, for certain reason, replaced. The old director was still acting but the new director was either coming, or nobody knew, and the director asked the so-called lady Olga, who was the second person of the Customs. I say "Olga" because I do not remember her name. She gave an answer to go to Mr. Bangoura. So that was the circle. In the same time, in Africa, if you are moving and you have an appointment at four o'clock, you are still waiting until the

¹⁷ Note by the Registry: This should read "the official way". See also the remark made by Mr Plender on 10 March 1999, a.m.

next morning at six o'clock and there is nobody else there. It was absolutely clear, okay, find a way to get the door open to Mr. Bangoura. And when the door was open, I had the permission needed.

Mr. von Brevern:

Thank you. I understand that this was a normal procedure in Africa?

Mr. Merenyi:

Yes. I am not against that. It is well known.

Mr. von Brevern:

You said, "I did not get permission", but you got permission?

Mr. Merenyi:

I got permission.

Mr. von Brevern:

And it was not a long time that you got permission?

Mr. Merenyi:

It was one Second, Sergey, was aboard.

Mr. von Brevern:

You then found, or at least you told us, that nobody could leave the vessel?

Mr. Merenyi:

Yes.

Mr. von Brevern:

That was at least only until 17 November because on 17 November the first eight crew members could leave?

Mr. Merenyi:

On a special variant because they refused to give their passport to the Customs, to the agent, who arranged all the travelling, and I had to step in. Somehow I got the passport, so that is a certain variant.

Mr. von Brevern:

If you had perhaps given a little more, perhaps they could have gone earlier? Might that have been possible?

Mr. Merenyi:

But earlier we did not like to remove the crew from the vessel.

Mr. von Brevern:

So eight crew members could leave on 17 November?

Mr. Merenyi:

Yes.

Mr. von Brevern:

And the other 14? Is my understanding of what you have said correct, that they stayed on board voluntarily because you offered them a certain bonus on behalf of the employer?

Mr. Merenyi:

Correct.

Mr. von Brevern:

Then you explained that the ship, later on, at the end of February, left without prior P&I assistance? Is my understanding correct?

Mr. Merenyi:

No. What happened at 28 February, that I could not tell you, but when I left on 4 January, until that time, P&I could not have any access to attend. But, as I was informed, he did not visit the vessel until the last moment.

Mr. von Brevern:

Because he did not want to?

Mr. Merenyi:

No, he requested several times permission and, as I told you, that is a circle.

Mr. von Brevern:

But the P&I representative, is he from Conakry? Is he situated there?

Mr. Merenyi:

Yes.

Mr. von Brevern:

Is it Mr. Ketmar?

Mr. Merenyi:

No, no. It is Mr. Collins, actually.

Mr. von Brevern:

Is he Guinean?

Mr. Merenyi:

No, he is a Frenchman. He is living with his family down in Conakry. It is a certain time. It is a contract, let us say. Gerald Collins.

Mr. von Brevern:

He lives there but he did not know the ways, unlike yourself?

Mr. Merenyi:

Yes.

Mr. von Brevern:

Did you talk to him?

Mr. Merenyi:

You force me to tell something which I do not like to mention.

Mr. von Brevern:

If you do not want to mention it –

Mr. Merenyi:

I can tell it to make it clear. This gentleman obeying, or let us say complying, a couple of years ago, with a local court decision, which was for another vessel to release a vessel – he was really acting to comply with the local court decision. Later he had a lot of enemies down from a high level. Of course, when he found the door shut, he did not force it open.

Mr. von Brevern:

Another subject is when you said it was decided not to go to court in Conakry. I do not quite remember the question put to you, but your answer was that. Who do you mean by, "It was decided"? Did you decide? Who decided? Did you contact Seascot or Tabona on whether any court measures should be taken in Conakry?

Mr. Merenyi:

The court measures taken in Conakry are always out of our hands because local Customs, they put the case on at Conakry Tribunal and they make a usual decision, which is, according to the local regulation, five times the value of the cargo, which is confiscated, and the value of the vessel. But this is requested always by the Customs and, at the same time, if it is the question of criminal life that they were threatening the master for five years, that is so. For that, we have no choice, just to defend.

Mr. von Brevern:

I understand that, but what you just referred to is the criminal proceedings.

Mr. Merenyi:

Yes.

Mr. von Brevern:

That is my understanding. I thought the question was put, but may I put the question to you: Have you ever thought about or discussed with anybody, and if yes with whom, to go to court against, for example, the discharge of the cargo?

Mr. Merenyi:

Locally?

Mr. von Brevern:

Yes.

Mr. Merenyi:

No.

Mr. von Brevern:

You did not speak about it with anyone?

Mr. Merenyi:

No.

Mr. von Brevern:

Did you ever think to go to a local court with respect to the poor people on board the vessel?

Mr. Merenyi:

Honestly speaking, no.

Mr. von Brevern:

Perhaps there was a misunderstanding about the question. Last question. You gave the impression that you knew the ways and that at your level it worked quite well, but, that it did not work on the higher level. From whom did you get that impression? Did you talk to persons on the higher level?

Mr. Merenyi:

Yes.

Mr. von Brevern:

To the Minister of Finance?

Mr. Merenyi:

Yes, to the Minister of Finance, to the Minister of Justice and I even reached the adviser of the President, together with a lawyer of Addax, a local lawyer. We were talking, and that was an honest discussion. When I told them okay, even in my impression and my opinion that Guinea do not need this reputation, that they do not follow orders, they do not comply with the decision of the International Tribunal, the adviser of the President told me that if it is necessary – and you can get the local lawyer any time as a witness – "Captain Laszlo, the President has already given order to release the vessel" and nothing happened. That was the President.

Mr. von Brevern:

The very final question. If it had come to the solution you thought of, would you have had to pay? Were you prepared to? What were you prepared to give to the other side? Did you think about that?

Mr. Merenyi:

Honestly speaking, we are deviating a little bit, but I will tell you. It is the local practice there, when they arrest a vessel, later they do not proceed. They sit down, they start to negotiate. They have a fixed amount given to them. Later the vessel is released. This amount taken by certain authorities follows the *procès-verbal* which is declared: "We found the vessel guilty. Therefore, the fine is a certain amount." And now there is an amicable agreement, there is nothing to do on their side, and they set us free. In my opinion, a door was absolutely open for this kind of negotiation, but I do not think it would have been in the interests of either the owner or the charterers.

Mr. von Brevern:

So I understand that, if it had only been the ship and crew, and you on the one side, and the Guineans on the other side, you would have come to an agreement rather sooner?

Mr. Merenyi:

I would not be the first person.

Mr. von Brevern:

Thank you very much.

Mr. President, I have to say that I did not have enough time to go through the whole statement, but I just concentrated on the points that Mr. Plender has brought up. That is all I wanted to say, so I will not go on.

The President:

Thank you very much.

Mr. von Brevern:

Excuse me, my colleague, Professor Lagoni, has still some questions, if you would allow.

The President:

If you want to continue the cross-examination, it will have to be tomorrow because it just so happens that we are one minute from the time of closing the session.

The understanding is, Captain Merenyi, that you will be available tomorrow for the continuation of the cross-examination and, if Mr. Plender so chooses, for re-examination. You are now released but please be available tomorrow morning at 10 o'clock.

The sitting will now be closed.

(The Tribunal rises at 4 p.m.)

Public sitting held on 10 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 10 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

Examination of witnesses (continued)

CROSS-EXAMINATION OF MR. MERENYI (CONTINUED)
BY MR. LAGONI (GUINEA)
[PV.99/5, E, p. 4-7]

The President:

Mr. von Brevern, I take it that you wish to continue with the cross-examination.

Mr. von Brevern:

Yes, Mr. President, my colleague Professor Lagoni will continue.

The President:

Could the witness Mr. Merenyi be invited to the witness stand.

Professor Lagoni, before you commence I would like to state that yesterday during the giving of testimony by the witnesses certain remarks were made which, in the view of the Tribunal, do not meet the standard of decorum and diplomatic etiquette expected of an international tribunal of this kind, where matters involving the rights of sovereign States are at stake. I do not want to go into details because I am quite sure that both Counsel and

witness are fully aware of this. I hope that in future proceedings Counsel will call the attention of witnesses to any remarks that do not meet the standard that we normally expect in these matters. Thank you very much. You may proceed now.

Mr. Lagoni:

Thank you, Mr. President. May I say that I am most glad that you refer to these remarks, because otherwise I would have questioned the witness on these topics again. I will avoid that now. Otherwise I understand that the Guinean delegation would have a statement on these things again, but I understand that they are settled with your statement now. Thank you. Nevertheless, I have very few additional questions for the witness.

Captain Merenyi, you mentioned in point 8 of your statement, and I assume you have it, "What I did see was evidence of shots of a fairly large calibre, about 20 mm, at the top of the bridge, the forward side of the bridge", etc. etc. It goes on. Do you know the greatest calibre of the machine guns on board of the patrol boats, and I hope this expression meets the standards of British English this morning, was 12.7 mm?

Mr. Merenyi:

That I do not know. Just visually the trace of the bullets seems to me to be 20 mm.

Mr. Lagoni:

So it was a rough –

Mr. Merenyi:

Estimation.

Mr. Lagoni:

Estimation.

Mr. Merenyi:

Yes, the trace of the bullets.

Mr. Lagoni:

In point 9 you stated, and I quote, Mr. President: "In effect the crew were in a floating prison". How can you be sure that the armed guards on board the *Saiga* were not for the protection of the vessel and the crew?

Mr. Merenyi:

I did not like to point this question. My, let us say, word "floating prison", because the crew were not allowed to go to shore and they were not allowed to communicate with their families. That was the point.

Mr. Lagoni:

But you would not exclude that the guards on board were also for the protection of the vessel and the crew?

Mr. Merenyi:

They could be.

Mr. Lagoni:

I do not want to change tack here, but rather jibe an order to sail in perhaps more peaceful waters with my following questions. Captain Merenyi, you are acting as a marine superintendent of the ship management company which managed the *Saiga*, I understood?

Mr. Merenyi:

Yes.

Mr. Lagoni:

From the point of view of the management company, could Captain Orlov have left the *Saiga* in Conakry without replacement?

Mr. Merenyi:

No, because what the officers said was that the Master must stay on board until the end of the process.

Mr. Lagoni:

Could the crew have left the *Saiga* in Conakry without replacement?

Mr. Merenyi:

Yes, at the end of negotiation with the Customs and the Head of Customs – if he was really understanding the tension of the crew, and then I requested to disembark the crew in their own [...]. He agreed and gave back the passports for this paper.

Mr. Lagoni:

Excuse me, my question was: could the whole crew have left the ship behind without replacement?

Mr. Merenyi:

No, because it should be abandoned, the vessel, and according the local rule it was a high risk to confiscate the vessel.

Mr. Lagoni:

Is it a matter of a local rule or can you leave a ship in a foreign port without any crew at all?

Mr. Merenyi:

No.

Mr. Lagoni:

So it is required by the owner –

Mr. Merenyi:

By international law.

Mr. Lagoni:

That you have at least. So did the Master and crew get their pay during the time in Conakry?

Mr. Merenyi:

Yes.

Mr. Lagoni:

You mentioned in your statement, in your cross-examination, yesterday that you paid a bonus to the crew for these 14 remaining crew members.

Mr. Merenyi:

Yes.

Mr. Lagoni:

How high was this bonus?

Mr. Merenyi:

If I remember, 30 per cent of the basic salary.

Mr. Lagoni:

So I understand that the 14 remaining members remained deliberately on the boat?

Mr. Merenyi:

No, not deliberately actually because, when we reduce the number of the crew, in this case they have more jobs to carry out, some maintenance, so therefore we have to give them some compensation.

Mr. Lagoni:

So you, by your standards, and you say also by international law, required at least a rump crew, a minimum crew on board?

Mr. Merenyi:

Yes.

Mr. Lagoni:

And you paid additional money that they felt better?

Mr. Merenyi:

Yes.

Mr. Lagoni:

I see. Could crew members have otherwise have signed off in Conakry without such payment do you think?

Mr. Merenyi:

I am sorry, I do not understand.

Mr. Lagoni:

Could they cancel there and leave, could they sign off from the ship, or can they sign off from the ship only at the end of the voyage?

Mr. Merenyi:

No, after 17th they could leave, they were requested, yes.

Mr. Lagoni:

Could they sign off the contract with the employer as a seaman?

Mr. Merenyi:

Yes.

Mr. Lagoni:

If they wanted, they could have?

Mr. Merenyi:

Yes, that was just the cook who had been on board just for one month.

Mr. Lagoni:

Do I understand you correctly that you could have managed, that crew members who wanted to leave the vessel could have left earlier if you would have liked it. I had understood if you would have liked it you were interested that the crew remains on board. Page 21, line 42, of yesterday's cross-examination. I do not know whether you have the cross-examination now.

Mr. Merenyi:

No.

Mr. Lagoni:

But I can show you what you said. This is line 42, "but earlier we did not like." Could you please read out what you said and explain it, just briefly?

Mr. Merenyi:

"Earlier we did not request the crew".

Mr. Lagoni:

They did not. But you allude that if they would have requested, you could have managed that they could go.

Mr. Merenyi:

Yes, but here there is something which I do not remember. "If you had perhaps given a little more ...". I did not give.

Mr. Lagoni:

No, it is only the potential situation. If you would have given more, they could have left. This is what you said.

Mr. Merenyi:

Here in this matter we would have been able, but here in this matter I would like to make something clear, that no Guinean official received a single dollar from me. Then I failed the helping hand of the P&I, we just employed a local adviser who helped me at a meeting when I asked Mr. Bangoura to release this crew because of tension, and nobody knows what his ... and he agreed and he gave me the passport.

Mr. Lagoni:

Thank you. I understand that you have long experience in managing ships.

Mr. Merenyi:

In managing ships no, because I stopped navigation five years ago.

Mr. Lagoni:

But as a ship's manager, superintendent?

Mr. Merenyi:

Yes, if five years is a long experience, we can say that, but normally not.

Mr. Lagoni:

Did you gain experience in Africa as well?

Mr. Merenyi:

Yes.

Mr. Lagoni:

Have you gained particular experience in Guinea?

Mr. Merenyi:

No, that was for the first time.

Mr. Lagoni:

The first case in Guinea?

Mr. Merenyi:

Yes.

Mr. Lagoni:

Have you any idea of Guinean customs law?

Mr. Merenyi:

We saw the customs law over there and we had a copy as well.

Mr. Lagoni:

If I refer to article 251 of the Guinean Customs Code, and I will show it to you, have you seen that before? This is Annex 23, page 357, in the English version. It says: "The customs authorities shall be authorised to negotiate settlements with persons proceeded against for customs offences."

Mr. Merenyi:

That is right.

Mr. Lagoni:

You were referring to these proceedings yesterday in your references to Mr. Bangoura, I think?

Mr. Merenyi:

Yes.

Mr. Lagoni:

Thank you. But otherwise this was your first experience in Guinea?

Mr. Merenyi:

Yes.

Mr. Lagoni:

So I must not ask that you had any experience and information about Guinean courts?

Mr. Merenyi:

No.

Mr. Lagoni:

Thank you very much.

Mr. President, that ends my cross-examination.

The President:

Thank you very much, Professor Lagoni.

Dr. Plender, would you like to re-examine?

RE-EXAMINATION OF MR. MERENYI
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/5, E, p. 7–10]

Mr. Plender:

Mr. President, my re-examination will be short. Before I turn to it, may I correct two small points on the transcript, one of which is relevant to my re-examination. The one which is relevant to my re-examination is in the English version at page 21, line 10. The English version reads: "At first we wanted to follow the officialry". My recollection, which may be tested against the tape if necessary, is that the witness said: "At first we wanted to follow the official way".

(Continuant en français) Le deuxième point concerne le compte rendu dans sa version française, à la page 20, le témoin parlant en anglais mentionna des déchets à ce qu'il appelait des « *monkey islands* ». La traduction simultanée en français a été « l'île ». Après quelques consultations avec la service de traduction le soir, on a substitué « la passerelle de navigation ». Mais je suis informé que ce n'est pas exact, le « *monkey island* » est *une partie* du toit de la passerelle de navigation, qu'on verra dans quelques instants dans une des photographies.

(Continuing in English) Mr. President, with your permission I now turn to the examination of witnesses.

Captain Merenyi, I remind you that in examination yesterday you stated: "At first we wanted to follow the official way". What did you understand the official way to be?

Mr. Merenyi:

The official way normally should be when such a kind of situation happens we ask the P&I to come on board to make investigation, and actually the P&I is acting on behalf of the owner. Then the same time relating to the crew matters the local agent to be charged to sort it out and settle the problems.

Mr. Plender:

Did your attempt to use the P&I Club and the agent succeed?

Mr. Merenyi:

Yes, I asked him and unfortunately they could not succeed.

Mr. Plender:

You state "At the end of a complete day he came back". What was said when the agent came back?

Mr. Merenyi:

He said that tomorrow we have to try again and he had no result of all the paper requesting.

Mr. Plender:

Was it then that you went to see the lady that you called Olga?

Mr. Merenyi:

The next morning.

Mr. Plender:

What advice did she give you?

Mr. Merenyi:

When we had no chance to deal with the P&I and the agent, I found a local adviser there who advised me to go to Madam Olga.

Mr. Plender:

And did you then use that local agent?

Mr. Merenyi:

Actually, I used this local agent all the time by the time when I was down in Conakry.

Mr. Plender:

Did the local agent put you in touch with Mr. Bangoura?

Mr. Merenyi:

Yes.

Mr. Plender:

What was the position of the Guinean authorities with respect to the release of the crew before 17 November? Do you know?

Mr. Merenyi:

Because all the passports were in the hands of Mr. Bangoura, actually, and the crew had no shore pass – actually the crew were retained on board.

Mr. Plender:

What event, if any, on 17 November led to the release of the crew?

Mr. Merenyi:

That was the same situation. They requested crew members their passport, they went home, signed off, but the remaining crew still remained on board because, the same reason, no shore pass and no passport in their hand.

Mr. Plender:

Was it your impression that the crew could have left, had they wished?

Mr. Merenyi:

Actually, we could have arranged that because Mr. Bangoura had some kind of sympathy with the crew and when I asked, he gave permission, but not to go ashore, and not to move free.

Mr. Plender:

Mr. President, before I proceed to the next question, I bear very much in mind your comments this morning which we, on our side, warmly welcome. I want to repeat some words used by Mr. von Brevern. If it is your instruction that I shall not put the question, I will not ask the witness to answer. Mr. von Brevern used the following words from the transcript: "... if it had only bene the ship and crew, and you on the one side, and the Guineans on the other side, you would have come to an agreement rather sooner?" The witness answered: "I would not be the first person."

May I proceed with that question?

The President:

Yes.

Mr. Plender:

You will remember that Mr. von Brevern said to you yesterday "... if it had only been the ship and crew, and you on the one side, and the Guineans on the other side, you would have come to an agreement rather sooner?" You replied: "I would not be the first person." What type of agreement were you then contemplating?

Mr. Merenyi:

It is according to the local custom regulation, it is allowed to negotiate to release the vessel. Both parties are allowed, taking into consideration the seriousness of the defence, the value of the vessel, the value of the cargo. And it is legally allowed negotiation.

Mr. Plender:

You stated that the owners and charterers were not in favour of following that course. Is that correct?

Mr. Merenyi:

That is correct, and that was the reason why I had to stop negotiation, because the owners, the charterers and the State requested the legal channel, and using the International Tribunal.

Mr. Plender:

At the material time, was the vessel damaged?

Mr. Merenyi:

Yes.

Mr. Plender:

Was there a claim for damage?

Mr. Merenyi:

Yes.

Mr. Plender:

Was the cargo still aboard the vessel?

Mr. Merenyi:

No.

Mr. Plender:

Was there a claim in respect of the cargo?

Mr. Merenyi:

No – from our side, no.

Mr. Plender:

Do you know whether the owners, charterers and the State of Saint Vincent were, at that time, formulating a claim?

Mr. Merenyi:

That's at the end of December – no, the end of November, and that was the reason why I left Conakry.

Mr. Plender:

Was anything said to you to lead you to believe that the owners, charterers and State had wider concerns about navigation in the area?

Mr. Merenyi:

I was not aware of that.

Mr. Plender:

Captain Merenyi, I have no further questions.

The President:

Thank you very much. I take it that that concludes Captain Merenyi's evidence, unless, Mr. von Brevern, you want to raise a new point?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/5, E, p. 10–12]

Mr. von Brevern:

No, just a question to the witness for clarification. When Mr. Plender just asked him, "Were there claims from the vessel for damages", Mr. Merenyi said, "Yes." I would like to know what was meant by "claims". Have there been taken court measures? Have there been taken any demands to the Government of the Republic of Guinea? My recollection from yesterday's statement of the witness was of a negative answer to that question.

The President:

I think that I shall ask Mr. Plender, perhaps in the light of this remark, to put the question again.

Mr. Plender:

Mr. President, I am happy to do that. The fault, no doubt, is mine in the formulation of the question.

Captain Merenyi, we are speaking of the time when the owners and agents were not inclined to come to an arrangement with the Guinean authorities. At that time, was the vessel damaged?

Mr. Merenyi:

Yes.

Mr. Plender:

Do you know whether it was in the contemplation of the owners, charterers and State to seek reparation for the damage?

Mr. Merenyi:

Can you repeat the question again, please.

Mr. Plender:

Do you know whether the owners, charterers and State were thinking about demanding compensation for the damage?

Mr. Merenyi:

They were thinking about demanding compensation of the damage because in that time, the damage occurred on board.

Mr. Plender:

Do you know whether at that date a claim had yet formally been lodged in this Tribunal?

Mr. Merenyi:

That, I do not know.

Mr. Plender:

I hope that clarifies the point, Mr. President.

The President:

Thank you very much. I think that that should be adequate for the moment.
Mr. von Brevern?

Mr. von Brevern:

I did not understand as to which period, or time or date Mr. Plender referred to in his question.

Mr. Plender:

I am referring back to the time put by Mr. von Brevern in his own question. Mr. von Brevern was questioning the witness yesterday afternoon, I believe, about the events at the end of November 1997, before the departure of Mr. Merenyi early in January of the following year. Mr. President, I do not think it is possible for me to put a date since Mr. von Brevern's question was that if it was only you, you would have come to an agreement rather sooner. The expression, "rather sooner" is Mr. von Brevern's. I do not think that it is an expression which permits me to put a date to it.

The President:

Mr. von Brevern, what is the objection that you have to this question? Can you please explain?

Mr. von Brevern:

No, I do not have any objection to this question, but I should like to re-examine, just two questions to the witness, if you would allow.

The President:

We normally do not allow re-examination after cross-examination, but you may think that it was a new point. You have suggested that your question was not clear. Mr. Plender, who is technically still re-examining, has put the question again and referred to the time that you mentioned. Quite clearly you knew the time that you mentioned. He says that he is referring to that time. I think that as far as the issue goes, it is not new because you mentioned a time, you asked a question of the witness and Mr. Plender is referring to that particular time. The answer relates to the time that you referred to in your question to him.

Mr. von Brevern:

Mr. President, I fully agree, but in my recollection, the answer of the witness to this question today was quite different from the answer I received yesterday. Therefore, I thought that I may, for the sake of clarification, put the same question again to the witness.

The President:

I think that we have had enough explanation. If, as you say, the witness has contradicted himself in the records, the Tribunal will take due account of that, but I think that the point has been clarified sufficiently.

I suggest, in the circumstances, Mr. Merenyi, that you are released from your duties. You may stay if you wish but the court does not need your services any longer. I wish to thank you for giving us the benefit of your information and advice.

Mr. Plender:

Mr. President, Members of the Tribunal, our next witness will be Mr. Niassé. His evidence will be taken by Maître Thiam. Before he is called, may I remind the Tribunal that it does

have medical certificates before it which show that this witness suffered, along with physical injuries, serious psychological trauma for which he is continuing to receive attention. Mr. President, it is entirely within your discretion to direct any particular treatment of the witness that may be appropriate. I know that I can rely upon the Tribunal and Mr. von Brevern to treat appropriately a witness in this condition.

The President:
Thank you.

Mr. von Brevern:
Mr. President, I have just been informed that a new member of the delegation of the Republic of Guinea has just arrived. He is M. Leno. I would like to have him here before Maître Thiam starts his statement. It will take half a minute.

The President:
Maître Thiam is not going to make a statement now. We are going to have a witness.

Mr. von Brevern:
I am sorry.

The President:
Would you like the new member to come now?

Mr. von Brevern:
No, MR. President, then it is not necessary. I do not want to hurry him.

The President:
Let him take his time.
Will the witness Monsieur Djibril Niasse be invited to the witness stand.

INTERROGATOIRE DE M. NIASSE
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/5, F, p. 13–21]

M. Djibril Niasse prête serment (en wolof).

M. Thiam :

Monsieur le Président, Messieurs les Juges du Tribunal, j'aurais l'occasion plus tard de vous redire quel plaisir et quel honneur je ressens de me retrouver devant votre juridiction. Pour l'instant, j'ai la charge d'interroger M. Niasse qui, en plus des traumatismes invoqués tout à l'heure par Me Plender, subit l'émotion d'être pour la première fois sur le sol européen. Je vais donc essayer de le ménager.

Monsieur Niasse, est-ce que vous m'entendez ?

M. Niasse :

(Interprétation du wolof) Oui.

M. Thiam :

Je vais vous remettre une copie du document que vous avez signé, de votre témoignage et vous direz à la cour si c'est bien vous qui l'avez signée.

M. Niasse :

(Pas d'interprétation)

M. Thiam :

Est-ce que ce document reflète exactement votre pensée ?

M. Niasse :

Ce qui est écrit dans ce document, c'est effectivement ce que je pense moi-même et je l'ai signé en conséquence.

M. Thiam :

Vous avez également pris connaissance des annexes ?

M. Niasse :

Effectivement, j'ai pris connaissance de ces annexes. J'ai vu cela quand j'ai vu ce qui est dit dans ces annexes, effectivement tout ce qui est dit dans ces annexes correspond à mon état de santé, à mon état physique. Tout ce qui est dit là, ce sont des faits réels.

M. Thiam :

Je vais vous faire montrer maintenant une photographie de deux personnes et vous direz au Tribunal si vous les reconnaissez.

M. Niasse :

Oui, vous pouvez me montrer les photos, s'il vous plaît.

M. Thiam :

Est-ce que vous reconnaissez ces deux personnes ?

M. Niasse :

Celle de mon côté, à droite, c'est moi-même, là vous voyez la blessure, vous voyez également les yeux de même que le thorax, c'est moi, Djibril Niasse. L'autre personne, c'est l'officier en second. Nous étions tous membres de l'équipage et nous avons été ensemble à l'hôpital et à la clinique. Lui aussi a été touché par des balles au bras. Je le reconnais parfaitement.

M. Thiam :

En ce qui concerne votre photographie, à quel moment a-t-elle été prise ?

M. Niasse :

Cette photo a été prise à la clinique, quand j'étais à la clinique, c'est à ce moment-là que la photo a été prise. On m'a trouvé là-bas et on a fait cette photo.

M. Thiam :

Et pourquoi vous étiez à la clinique ? Qu'est-ce qui vous était arrivé ?

M. Niasse :

Ma poitrine ... que vous voyez ... le médecin ... quand j'ai quitté la Guinée, on m'a envoyé directement à la clinique Pasteur. J'ai été hospitalisé à la clinique Pasteur, j'y suis resté un mois et quelques jours. Quand je suis arrivé, la nuit, on m'a fait une piqûre. A ce moment-là, je ressentais des douleurs aiguës dans tout le corps et au thorax, j'ai été donc admis. On m'a fait une piqûre, cela m'a calmé, j'ai pu dormir. Tout mon corps me faisait mal : mon thorax, le dos, la clavicule, les yeux, tout cela me faisait mal.

M. Thiam :

Vous étiez à bord du *Saiga*, le 28 octobre 1997 ?

M. Niasse :

Effectivement, j'étais sur le *Saiga*.

M. Thiam :

Que s'est-il passé vers 9 heures, le matin ?

M. Niasse :

Vers 9 heures, ce qui s'est passé c'était vraiment extraordinaire. Nous étions sur le pont, occupés à des travaux de peinture, des travaux de picotage également. Nous étions en train de travailler. Le chef nous a appelé et nous a dit : « Fuyez, allez-vous mettre à l'abri ». Tout le monde a fui. Moi, j'ai fui, je suis rentré dans ma cabine. Je suis donc retourné dans ma cabine. J'ai fui et je suis retourné dans ma cabine. Je suis resté quelque 5 minutes. J'ai alors entendu des impacts de balles sur la coque du navire pendant très longtemps, des rafales et, à un moment donné, j'ai dit : « Il faut que je vois quand même par le hublot ce qui se passe. »

M. Thiam :

Vous avez dit que vous aviez entendu des impacts de balles. Est-ce qu'il y en avait beaucoup ?

M. Niasse :

Oui, il y avait vraiment beaucoup, beaucoup de balles, j'ai entendu le bruit, les impacts de beaucoup, beaucoup de balles.

M. Thiam :

Vous avez expliqué dans votre déposition que vous avez reçu un projectile. Dans quelles circonstances vous l'avez reçu ?

M. Niasse :

Le projectile qui m'a atteint, je vais vous raconter aujourd'hui comment cela s'est passé. Le projectile qui m'a atteint, c'est quand je me suis mis à regarder à travers le hublot pour voir ce qui se passait à l'extérieur.

Quand je me suis mis à regarder à l'extérieur, quand je me suis mis debout donc pour regarder, le projectile est arrivé, est entré par le thorax, ici. Ensuite, des débris de verre du hublot me sont entrés dans les yeux, je ne voyais plus, je suis tombé, j'ai rampé pour entrer dans le placard. Je saignais abondamment, il y avait une forte hémorragie, dans les yeux je ressentais des débris de verre et des contusions sur un peu tout le corps. Je me suis précipité dans le placard, je me suis caché dans le placard. Je me suis caché là, la porte, je l'avais évidemment refermé à clef derrière moi. Je me suis caché dans le placard, j'ai continué à entendre les impacts de balles sur la coque du navire et beaucoup de balles, donc je me suis fais tout petit dans le placard pour me cacher.

M. Thiam :

Vous avez dit ensuite au point 14 de votre déposition que vous vous êtes rendu aux assaillants. Est-ce que vous pouvez expliquer au Tribunal si vous avez reçu un coup à ce moment-là et si vous avez été injurié ?

M. Niasse :

Quand je suis sorti à l'extérieur de ma cabine – parce que quand j'étais à l'intérieur je suis resté quelque temps, je n'entendais plus de bruit, il y avait un silence absolu –, j'ai cru entendre des personnes, des soldats qui enfonçaient les portes des cabines, qui semblaient avoir des marteaux, qui semblaient avoir des armes avec lesquelles ils enfonçaient les portes.

Quand je suis sorti, j'ai levé les deux bras en l'air, j'ai ouvert la porte de ma cabine, je suis sorti lentement. Dès que je suis sorti, il y a une personne ... quand je suis sorti j'ai donc levé les bras et à ce moment-là un des membres, un des agents guinéens, m'a frappé *ici* avec la crosse de son fusil. Je suis tombé. Immédiatement, j'ai été menotté et on m'a amené là où se trouvaient les autres et je me suis assis comme tout le monde.

M. Thiam :

Est-ce que vous avez été injurié, Monsieur Niasse ?

M. Niasse :

Oui, il m'a insulté. La même personne a proféré des injures. Quand il m'a asséné le coup, quand je suis tombé et quand je me suis relevé, tout cela était abreuvé d'injures. Evidemment, je n'osais pas répliquer parce que je me disais que si je répliquai je risquais ma vie. Parce que, là, vous n'avez rien à dire. Si vous dites quelque chose qui ne plaît pas aux assaillants, c'est à vos risques et périls.

M. Thiam :

Monsieur le Président, je suis obligé de mentionner que la traduction en français dit que la même personne aurait frappé et injurié le témoin. Or, dans la déclaration en wolof de M. Niasse rien ne permet de le présupposer. Je voudrais lui poser cette question.

Est-ce que c'est la même personne qui l'a frappé et qui l'a injurié ?

M. Niasse :

Oui, celui qui m'a frappé, c'est celui qui m'a insulté parce que nous étions les deux seules personnes dans le couloir. Nous étions tous seuls dans le couloir. Les autres étaient à l'avant du bateau.

M. Thiam :

Vous avez été ensuite transféré sur la vedette des Guinéens.

M. Niasse :

Affirmatif.

M. Thiam :

Vous vous êtes entretenu avec un officier ?

M. Niasse :

Il y avait un officier.

M. Thiam :

Cet officier était le chef ?

M. Niasse :

Oui, je pense que oui, parce que quand nous avons commencé à discuter, c'est moi qui lui ai posé la question. Je lui ai dit : « Pourquoi vous me posez ces questions ? » Et il m'a dit : « Oui, je suis le chef. » Je lui ai dit : « Ah, vous êtes le chef ? » Il m'a dit : « Oui. »

Quand il parlait avec moi, à ce moment-là, évidemment son haleine exhalait une odeur d'alcool, forte d'ailleurs. Il me disait : « Vous autres Sénégalais, vous êtes bizarres. » J'ai dit : « Comment sommes-nous bizarres ? » Et il a ajouté : « Si votre commandant s'était arrêté, nous serions montés à bord, nous vous aurions tout de suite demandé ce que nous voulions lui demander et s'il nous avait donné cela, on aurait pu vous laisser partir. » Je lui ai dit : « Comment cela ? » C'est lui-même qui le disait, je le cite, il a dit : « Parce que, ici, on s'arrange. » Je lui ai dit : « Ah, moi, ces affaires d'arrangement, cela ne me concerne pas, cela ne m'intéresse pas, je suis blessé, je souffre dans ma chair et ce n'est pas le moment pour moi de parler de ces choses-là. Pour cela, allez voir le commandant pour en discuter avec lui. »

M. Thiam :

Monsieur Niasse, vous avez évoqué dans votre déposition écrite M. Lat Soukabé Fall. Que vous a-t-il dit ? Il s'agissait d'un marin comme vous à bord du *Saiga*.

M. Niasse :

Oui. Nous étions dans la même situation, nous étions des journaliers. Nous avions le même statut sur le *Saiga*.

M. Thiam :

Qu'est-ce qu'il vous a dit que les assaillants, les Guinéens faisaient sur le navire ?

M. Niasse :

Il est venu, il m'a dit : « Ils ont enfoncé les portes de toutes les cabines, et tout ce qu'il y avait comme bagage sur le navire, ils sont en train de tout emporter. » Il m'a dit qu'ils sont en train de prendre tous les bagages et moi, je lui ai dit : « Est-ce que tu peux m'amener mon sac ? » Parce que, dans mon sac, j'avais de l'argent.

A l'époque, à ce moment-là, je ne voyais plus avec ma blessure, mais quand on me parlait, j'entendais distinctement. Quand il m'a apporté le sac, je l'ai ouvert, j'ai tâté à l'intérieur, j'ai essayé de retrouver mon porte-monnaie. Il n'y était pas, mon argent avait disparu. J'ai dit : « Je ne sais pas où est parti mon argent, mais cet argent, il faudra qu'ils me le restituent. » Je lui ai remis le sac. Je lui ai dit : « Remettez le sac à la place où vous l'avez pris. »

M. Thiam :

Je vous remercie, Monsieur Niasse. Est-ce qu'il est possible que les blessures que vous avez subies aient été par le fait que vous avez tenté de vous échapper par une fenêtre ?

M. Niasse :

Non, je n'ai pas voulu fuir et sortir par la fenêtre parce que ma cabine ne comportait pas de fenêtre. L'ouverture qu'il y avait, c'est un petit hublot, une personne ne peut pas passer à travers le hublot. La tête pourrait passer, éventuellement, mais le reste du corps ne pourrait pas passer. Donc, je n'avais pas d'issue pour moi pour fuir. En fait, je m'étais dit : « Cache-toi dans cette cabine, fais-toi petit quelque part pour avoir la vie sauve. » Mais je n'ai jamais pensé à fuir par une fenêtre ou à faire quelque effort que ce soit dans ce sens.

M. Thiam :

A votre arrivée à Conakry, est-ce que vous avez été soigné ?

M. Niasse :

Quand je suis arrivé à Conakry, je suis arrivé vers 23 heures 30. A l'arrivée, je n'ai pas été immédiatement soigné. Je me trouvais dans les bureaux de la douane. On m'a sorti de là. J'ai été pendant quelques temps dans les bureaux de douane, ensuite, on m'a fait sortir, je me suis assis à l'extérieur, et la personne qui était là est venue me voir et m'a dit : « Bon, on a envoyé chercher un médecin qui va venir vous examiner. » Moi, je n'ai rien dit, j'étais là, j'étais assis, j'attendais.

Quand le médecin est arrivée, c'était donc la nuit, il est arrivé, il m'a pris le visage, a regardé et a dit : « Moi, je ne touche pas au corps d'un étranger, à un ressortissant d'un autre pays. » Il est parti et il a dit aux personnes présentes : « Emmener le à l'hôpital. » On m'a amené à l'hôpital. Avant de partir à l'hôpital, d'abord, je suis resté près de 15 minutes avant que je n'aille à l'hôpital. On est arrivé à l'hôpital, et, là, beaucoup de temps a été perdu. C'est là vraiment où il y a eu perte de temps.

Quand nous sommes arrivés à l'hôpital, j'ai rencontré le médecin. Quand il est venu il m'a dit : « Etends-toi sur cette table, dans la salle. » J'étais évidemment sous escorte militaire qui m'encerclait. Lorsque j'étais là, allongé, le médecin est venu m'examiner le corps, la poitrine, les yeux, et après il leur a dit : « Cette personne, moi, je ne peux rien pour elle, actuellement ». Il y avait deux médecins, un médecin femme et un médecin homme. Ils m'ont examiné. En tout cas, ils n'ont rien fait comme acte médical. Ils m'ont laissé étalé là. Je suis resté longtemps là. Cela a duré longtemps.

Après, j'ai dû descendre de la table parce que la station allongée me faisait mal, mon thorax, les yeux. Donc, je suis descendu de la table et j'ai dit à la personne présente : « Tout mon corps me fait mal. » Après cela, il est allé parler avec les médecins. Ils sont revenus, ils sont restés encore longtemps et, après, il m'a dit : « Ecoutez, venez, on va retourner au port. » Nous sommes retournés au port.

Quand nous sommes retournés au port, je suis resté longtemps là-bas, parce que quand nous sommes rentrés, j'ai entendu l'appel à la prière, la première prière chez les Musulmans, je suis resté donc jusqu'à 10 heures dans la rue. Il y avait d'ailleurs un marchand

qui m'a offert gracieusement du pain en y mettant une omelette, il a eu pitié de moi au vu de mon visage, mon comportement, le sang qui tâchait tout mon corps. Tous ceux qui me voyez me prenaient en pitié.

M. Thiam :

Monsieur Niasse, est-ce que vous avez pu voir des médecins pour les yeux ? Des ophtalmologues ?

M. Niasse :

Oui, deux ophtalmologues m'ont examiné. Le premier était une dame. Elle m'a examiné les yeux, elle a dit qu'elle n'y a rien décelé, et ensuite nous sommes retournés voir le chef. Le chef m'a dit : « Allez voir un autre médecin, un autre ophtalmologue pour qu'il voit ce qu'il y a dans les yeux. » Je lui ai dit : « Je ne veux même pas que l'on touche à mes yeux. » Je ne voulais pas que cela soit traité en Guinée parce que j'avais peur que je perde la vue si cela avait été le cas. Le Chef m'a harcelé et m'a dit : « Non, il faut que vous alliez vous faire soigner. »

Donc, un militaire m'a amené dans un véhicule et nous sommes allés voir l'ophtalmologue en question. Quand nous sommes arrivés chez l'ophtalmologue, ce n'était pas un Guinéen, c'est un immigré en Guinée. Ce médecin m'a fait allonger sur une table, a pris les appareils, a ausculté mes yeux et a extrait des débris de verre, beaucoup de débris de verre. Quand il a fait cela, sur-le-champ, je n'ai rien vu, mais il a mis un produit sur les yeux. Dans un premier temps, cela m'a assombri la vue. Il a mis un bandage sur les yeux, je suis sorti de l'hôpital. Après avoir un peu dormi, j'ai enlevé petit à petit le bandage et j'ai commencé à voir un peu, mais ma vue était encore floue. En tout cas, voilà ce qui s'est passé avec ce médecin.

M. Thiam :

Je vous remercie, Monsieur Niasse. Vous êtes ensuite rentré à Dakar. Est-ce que vous avez subi des radiographies ?

M. Niasse :

Oui, quand j'ai quitté la Guinée. Quand nous sommes arrivés à Dakar, nous sommes arrivés à Dakar la nuit, on m'a amené à la clinique Pasteur. Quand on m'a amené à la clinique Pasteur, dans le courant de la nuit, on m'a fait une piqûre. Les médecins ont fait vraiment le maximum pour moi, de même que les personnes qui sont venues me chercher à l'aéroport, qui m'ont conduit directement à l'aéroport. J'avais dit que je voulais voir mes parents avant d'aller à l'hôpital. Et j'ai subi plusieurs radiographies : avant l'opération on m'a fait des radios, et après l'opération, j'ai également eu des radios.

M. Thiam :

D'accord. Et qu'est-ce qu'on a découvert ?

M. Niasse :

Les radios ... Le médecin m'a dit : « Dans votre poitrine il y avait un projectile. » J'ai dit : « Donc, c'est le projectile qui est entré par le dessus de la clavicule. » Il m'a dit : « Il y a deux éclats métalliques. On a extrait un, mais l'autre se trouve logé en un endroit trop profond. Si on va à sa recherche, vous risquez votre vie. » Donc je lui ai dit : « Vous êtes mon médecin, ce que vous avez trouvé, je dois y ajouter fois. » Donc, j'ai continué à suivre le traitement en acceptant cet état de fait.

M. Thiam :

Est-ce que les radiographies sont celles que l'on projette maintenant ?

M. Niasse :

Effectivement, il s'agit des radiographies qui ont été ... Cette radio, c'est d'ailleurs la radio post-opératoire. Vous avez un point-là bas qui indique le projectile qui se trouve logé dans ma clavicule.

M. Thiam :

Nous devrions pouvoir voir sur la radiographie le nom de la personne qui est radiographiée. D'ici, je n'arrive pas à lire, mais j'espère que le Tribunal pourra constater qu'il s'agit effectivement de M. Niasse et lire la date qui figure sur cette radiographie.

Peut-être, pouvez-vous montrer une autre radiographie à M. Niasse. Je lui demanderais si c'est également une radiographie qui le concerne.

M. Niasse :

Effectivement, il s'agit d'une radio de mon corps.

M. Thiam :

Est-ce qu'on y voit des traces de projectile ?

M. Niasse :

Il y a un cliché où l'on voit exactement l'endroit où le projectile est logé, mais vous avez un point blanc au-dessus, c'est le projectile logé sous la clavicule.

M. Thiam :

Donc, Monsieur Niasse, si j'ai bien compris, maintenant, il vous reste quelques débris de projectile dans la poitrine.

M. Niasse :

Oui, il y a encore des éclats de projectile dans mon corps. Au moment où je parle devant vous, j'ai encore des éclats dans le corps.

M. Thiam :

Est-ce que vous suivez toujours un traitement avec le docteur Vilane qui est un médecin psychiatre ?

M. Niasse :

Oui, je poursuis mon traitement avec lui. J'ai rendez-vous avec lui à l'hôpital, au mois de mai prochain, à l'hôpital principal, un des deux grands hôpitaux de Dakar.

M. Thiam :

Excusez-moi, Monsieur Niasse. Est-ce que vous avez amené à Hambourg des médicaments qui vous ont été prescrits par le docteur Vilane ?

M. Niasse :

Oui. J'ai amené un seul médicament avec moi, parce que les autres je les ai oubliés. Mais, je l'ai laissé là où je suis logé.

M. Thiam :

Ma dernière question sera pour vous demander d'expliquer au Tribunal l'état de votre vue. D'abord est-ce que vous portiez des lunettes avant ?

M. Niasse :

Oui. Je suis obligé de porter des verres tout le temps, des lunettes, parce que, autrement, je ne verrais pas correctement. Les lunettes, si je ne les porte pas, j'ai la vue assombrie. Même quand je regarde la télévision, il faut que je porte des lunettes. Si le soleil est fort, je dois porter des lunettes parce qu'autrement ma vue est assombrie. Quand je lis, il faut que je porte des lunettes.

M. Thiam :

Mais avant l'accident sur le *Saiga*, est-ce que vous portiez des lunettes ?

M. Niasse :

Non, pas du tout. Je ne portais pas de lunettes, ma vue était tout à fait bonne, je n'avais aucun problème particulier de vision.

M. Thiam :

Monsieur le Président, je vous remercie. Je laisse le témoin pour la contre-interrogation.

The President:

Thank you very much, Maître Thiam.

Mr. von Brevern?

CROSS-EXAMINATION OF MR. NIASSE
BY MR. VON BREVERN (GUINEA)
[PV.99/5, E, p. 17–20; F, p. 22–26]

Mr. von Brevern:

Thank you, Mr. President.

Mr. Niasse, I am greatly concerned, it is not only myself, but also my colleagues of the delegation of Guinea, about the pains you have suffered. We are sorry about that. I have some questions to put. Where do you live, Mr. Niasse?

M. Niasse :

(*Interprétation du wolof*) Je suis Sénégalais, j'habite au Sénégal. J'habite la ville de Dakar, le quartier que j'habite s'appelle « le quartier Usine Niari Talli », à Dakar, mon adresse exacte pour être précis : 1210.

Mr. von Brevern:

Okay. Thank you very much. At the time you referred to, who was the company that employed you?

M. Niasse :

La compagnie qui m'employait était la société Oryx.

Mr. von Brevern:

And what was the purpose of the contract with your employer? What kind of work should you perform?

M. Niasse :

Le travail que l'on m'avait offert, c'était de servir sur le *Saiga* en qualité de peintre. C'est cela qui m'a été offert comme contrat. C'est le travail que j'accomplissais avec ceux qui avaient été recrutés pour la même raison.

Mr. von Brevern:

Did you have a contract just for the work on board the *M/V Saiga*, or have you been employed with Oryx before also to do other work outside the vessel?

M. Niasse :

Oui, j'avais d'autres tâches que j'accomplissais pour Oryx, pas nécessairement sur le *Saiga*. J'étais journalier à Oryx : Lorsque j'arrivais et qu'il y avait de l'embauche, on m'embauchait.

Mr. von Brevern:

Did you have a written contract with Oryx?

M. Niasse :

Oui, on m'avait embauché comme journalier. Avant le départ, celui qui embauchait les journaliers avait mis par écrit tout ce qui devait être mis par écrit.

Mr. von Brevern:

Can you provide the Tribunal with a copy of that contract?

M. Niasse :

Non, je n'ai pas sur moi une copie de ce contrat.

Mr. von Brevern:

Where is the contract?

M. Niasse :

On ne nous l'avait pas remis en main propre. On a mis par écrit les conditions de notre emploi, c'est le chef qui s'occupait de cela, qui avait mis cela par écrit et nous, nous avons embarqué par la suite.

Mr. von Brevern:

Mr. Niasse, my question is where is the contract; do you have at home perhaps still a copy of it, or where is the contract?

M. Niasse :

Non, je n'ai pas copie de ce contrat chez moi.

Mr. von Brevern:

Did you receive a copy of the contract before you boarded the *Saiga*.

M. Niasse :

Non, je n'ai pas reçu copie de ce contrat en main propre.

Mr. von Brevern:

Do you know what was stated in that contract?

M. Niasse :

Non, je dois dire que non. Je n'ai pas pris connaissance de ce qui est écrit dans le contrat. Donc, je ne peux pas dire que je connais intégralement ce qui est dedans.

Mr. von Brevern:

Mr. Niasse, I did not understand you so far. Have you been employed with Oryx? Did you perform any other work before you boarded the *Saiga*?

M. Niasse :

Oui, j'ai accompli d'autres tâches. C'est ce que j'expliquais tout à l'heure. Je me rends là-bas quand il y a de l'embauche pour des tâches, ceci, cela, du nettoyage, du balayage. Nous, nous sommes des journaliers, on nous embauche et quand nous avons fait le travail, on nous paie.

Mr. von Brevern:

Since when did you work for Oryx?

M. Niasse :

Depuis l'année 1988, j'ai commencé à travailler pour Oryx, depuis 1988.

Mr. von Brevern:

And the work not on board the vessel, what did you do? Where did you perform the work? Did they have an office which you were cleaning or painting? What was your work outside a vessel?

M. Niasse :

Quand je ne suis pas sur le *Saiga*, je travaille sur le quai. Je prête main-forte aux équipes qui travaillent là. Je fais des travaux de nettoyage. Lorsque le gasoil se verse, on nettoie. Si quelque part il y a des saletés, je m'occupe avec d'autres de les enlever. C'est le genre de tâches que j'accomplissais pour Oryx.

Mr. von Brevern:

Can you just give short explanations concerning Oryx. What is Oryx doing? What do they have; do they have a yard, do they have vessels, do they have houses? What is such a company for?

M. Niasse :

Oryx est une société pétrolière, en tout cas c'est ce que j'ai vu. Ils ont des navires qui fournissent du gasoil. Il y a des navires qui viennent s'avitailer en gasoil, ce sont des choses comme cela qui se faisait. Il y a d'autres activités au niveau d'Oryx.

Mr. von Brevern:

When you performed your work on board *M/V Saiga*, was there an agreement between Oryx and the vessel, and the vessel was represented by whom? Have you any idea about that?

M. Niasse :

Oryx m'a offert un contrat, m'a demandé d'aller travailler sur le *Saiga*. Je suis monté à bord du *Saiga*, j'ai commencé à travailler à bord du *Saiga*.

Mr. von Brevern:

When you boarded the *Saiga* who did you talk to, who received you; who gave you instructions?

M. Niasse :

En fait, quand je suis monté à bord du *Saiga*, c'est le chef du dépôt qui m'a appelé, qui m'a expliqué qu'il y avait du travail à faire sur le *Saiga*. Il m'a dit : « On vous embauche pour accomplir ce travail sur le *Saiga*. » Nous étions trois personnes concernées. Nous avons été embauchés tous les trois. Celui qui nous a embauchés nous a amenés devant le capitaine. Le capitaine nous a rencontrés, nous a acceptés et voilà comment cela s'est passé. Ensuite, nous sommes montés à bord, nous avons commencé à faire notre travail.

Mr. von Brevern:

Did you receive a seaman's book when you arrived at the vessel?

M. Niasse :

Non, nous n'avons pas reçu ce document parce qu'en réalité, c'est le marin lui-même qui peut demander cela. Quand je suis monté à bord du *Saiga*, j'avais mon passeport national, c'était un passeport qui datait et j'avais mon attestation.

Mr. von Brevern:

Now I would like to turn to the voyage you have then performed. Can you tell us how many days you were employed on board the vessel before the events to which you have just referred occurred on 28 October?

M. Niasse :

Je ne peux pas en tout cas dire le nombre de jours, mais j'ai fait trois voyages avec le *Saiga* et c'est au cours du troisième voyage que les événements connus se sont produits.

Mr. von Brevern:

No, my question was: how many days were you already at sea before the events occurred. Do you remember that?

M. Niasse :

Combien de jours, je ne sais pas, je ne peux vraiment pas le dire exactement, mais nous nous sommes rendus d'abord en Guinée-Bissau, je ne savais pas où nous nous rendions. Le commandant parle russe, moi je ne parle pas russe. Je ne peux pas savoir quelle était la destination. Il faut que l'on arrive à destination pour que je sache que nous sommes partis de tel point ou de tel lieu et que nous sommes arrivés en tel lieu. Comme cela, de but en blanc, je ne pouvais pas savoir où on allait.

Mr. von Brevern:

The Captain spoke Russian. You referred to the head of the depot – at least that was the word in the translation. Who gave you the instructions? Which language did he speak?

M. Niasse :

Il parlait wolof, comme moi.

Mr. von Brevern:

Do you remember his name?

M. Niasse :

Oui, je sais comment il s'appelle.

Mr. von Brevern:

What was his name?

M. Niasse :

Nous autres, nous l'appelions M. Sylla, le chef du dépôt.

Mr. von Brevern:

Was he Ukrainian or was he a colleague of yours from Senegal?

M. Niasse :

Non, il était Sénégalais.

Mr. von Brevern:

So he was one of three men from Senegal being on board the vessel – you and two others. Is it correct that the head of the depot, to which you just referred, was the boss of you three?

M. Niasse :

Oui. M. Sylla, quand nous étions à Oryx, au dépôt, nous travaillions au dépôt, c'était le chef de dépôt, mais quand nous sommes à bord du navire ... Quand nous descendons à quai, c'est notre chef, mais tant que nous sommes à bord du navire, le navire a son propre chef, son capitaine.

Mr. von Brevern:

But is it correct that you told me that you received your instructions from Mr. Sylla who is one of your colleagues from Senegal employed with Oryx?

M. Niasse :

(Pas de réponse)

Mr. von Brevern:

Thank you. You told us that you did not know exactly, or you do not remember exactly, how many days you were at sea before these events occurred. Do you know the date of these sad events you referred to? Can you tell us the exact date?

M. Niasse :

Oui, je me rappelle, c'est le 28 octobre.

Mr. von Brevern:

Of which year?

M. Niasse :

Il y a deux ans.

Mr. von Brevern:

Three years? 1996 or three years ago from October? It was in October and you said three years ago. Today we are March 1999.

M. Niasse :

C'est le 28 octobre. L'événement est survenu le 28 octobre.

Mr. von Brevern:

Yes, but you said three years ago. Today, as you know, we are 1999. Three years ago would be 1996. Do you mean October 1996?

M. Niasse :

C'est le 28 octobre 1997.

Mr. von Brevern:

But is that three years ago?

M. Niasse :

(Pas de réponse)

Mr. von Brevern:

It is just a question because I was a little astonished. You said *en français* that it was three years ago and then you said 1997. Which is correct, according to your recollection?

INTERVENTION BY MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/5, E, p. 20]

Mr. Plender:

Mr. President, I believe that Mr. von Brevern misheard and that the witness said "two years ago". If that is what the Tribunal heard, perhaps Mr. von Brevern might be corrected.

Mr. von Brevern:

Dr. Plender, I can only hear what the translator said and, indeed, I heard "three years".

The President:

Actually, Mr. von Brevern, it was a mishearing. He said "two years ago".

Mr. von Brevern:

En français?

The President:

No. Were you listening in French or English?

Mr. von Brevern:

I have channel 1, English, and I heard what the translator said, "three years".

The President:

Could you put the question to the witness again.

A Member of the Tribunal:

Perhaps I can help with the problem. The witness made a mistake in Wolof. He said "dawatjek", which is three years ago. I heard in Wolof "daw", last year, "dawjek", two years ago, "dawatjek", three years ago.

(Continuant en français) Donc, il doit se rectifier.

(Continuing in English) It was three years ago.

The President:

I think that regardless of the vagaries of the languages, the witness has now said 1997. It could be three years in one language or four years in another language, but it is 1997 in all languages.

CROSS-EXAMINATION OF MR. NIASSE (CONTINUED)
BY MR. VON BREVERN (GUINEA)
[PV.99/5, E, p. 20–21; F, p. 27–29]

Mr. von Brevern:

Thank you, Mr. President. I agree.

Mr. Niasse, when you referred to the events you have been asked about, when did you realize for the first time that something might occur, something unexpected, to the operation of the vessel from outside? When was the first time you realized that?

M. Niasse :

Oui, quand on nous a donné l'ordre de chercher un abri, de fuir. Moi, immédiatement, je me suis dit : si on nous donne de telles instructions, il y a quelque chose d'exceptionnel qui se passe, donc j'ai fui et je suis allé chercher refuge quelque part. Pour dire vrai, je ne savais pas exactement de quoi il s'agissait, mais j'ai fui, je suis allé me réfugier dans ma cabine.

Mr. von Brevern:

I understand that, but did I understand you correctly? Before the Captain said, "Please flee", you had not realized that anything was, perhaps, going wrong or that the Captain might expect any unexpected events?

M. Niasse :

Oui, avant que le capitaine ne donne des instructions, non je ne pensais à rien d'autre. J'étais occupé à mon travail, je n'ai rien entendu, je ne pensais à rien du tout, j'étais occupé à ce que je faisais. Je n'ai rien vu. Je n'ai pensé à rien d'autre.

Mr. von Brevern:

Mr. Niasse, as a general remark, for my purpose it would sometimes be sufficient if you just said "Yes" or "No", to ease your task. Do you know what work you did when the Captain gave you that instruction?

M. Niasse :

Je suis conscient ... J'étais occupé à des travaux de peinture comme je l'ai dit.

Mr. von Brevern:

Where on the vessel? Inside or outside?

M. Niasse :

J'étais occupé à ces travaux sur le pont.

Mr. von Brevern:

Inside the bridge or outside the bridge?

M. Niasse :

Non, nous étions sur le pont.

Mr. von Brevern:

I understand that you can be on the bridge, in the bridge-house or you can go outside in the "knock". Where were you?

M. Niasse :

J'étais plus ou moins au milieu du pont.

Mr. von Brevern:

What did you do there? What did you paint?

M. Niasse :

Nous peignons de petites traverses fines en fer. C'est ce que nous étions en train de peindre.

Mr. von Brevern:

Do you remember the exact time when the Captain ordered you to flee?

M. Niasse :

Oui, cela devait être vers 9 heures du matin.

Mr. von Brevern:

Nine o'clock on 28 October? Which date was it? Was it the same date you mentioned before?

M. Niasse :

(Pas de réponse)

Mr. von Brevern:

Nine o'clock in the morning or in the evening?

M. Niasse :

Le matin.

Mr. von Brevern:

Do you remember who else was on the bridge besides you at that time?

M. Niasse :

Nous nous étions répartis la tâche. Moi, j'étais sur le pont au milieu, parce que quand nous nous occupions de peinture, les trois, chacun avait une partie du travail à accomplir. Mon travail, je m'occupais de cela, comme je l'ai dit, sur le pont au milieu.

Mr. von Brevern:

I understand your two colleagues – they, too, were on the bridge, doing other work on the bridge, painting?

M. Niasse :

Oui, ils étaient sur le pont également occupés à ces travaux de peinture et ils ont évidemment fui eux aussi.

Mr. von Brevern:

Besides you three painters, who else was on the bridge, do you remember?

M. Niasse :

Nous étions seulement les trois sur le pont.

Mr. von Brevern:

Was the vessel proceeding or was it at anchor? Do you remember that?

M. Niasse :

(Pas de réponse)

Mr. von Brevern:

You said: "We were the only ones on the bridge". I would like to ask you whether you have an explanation for why you were the only ones. Was there not a chief officer or someone else from the navigational crew?

M. Niasse :

J'ai une explication.

The President:

Yes, Mr. Plender?

INTERVENTION BY MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/5, E, p. 22]

Mr. Plender:

I think that there may be an error of translation which may lead to some confusion. I understand that the word "*pont*" from the French has been translated as "bridge".

The President:

Yes, it has been translated as "bridge".

Mr. Plender:

Mr. President, I am one of the last persons present to advise on the correct translation, but my understanding would be that "*passerelle*" is "bridge" and "*pont*" is "deck".

Mr. von Brevern:

And the French word was?

Mr. Plender:

"*Le pont*".

Mr. von Brevern:

For "bridge"?

Mr. Plender:

I am told that "*le pont*" in French was translated as "bridge" in the English version by relay. If that is correct, it may have led to a misunderstanding.

Mr. von Brevern:

Mr. Niasse, could you repeat where you were with your two colleagues? What is the French wording for where you have been?

The President:

Mr. Niasse is not giving evidence in French, so let him use the language and let the interpreters interpret.

CROSS-EXAMINATION OF MR. NIASSE (CONTINUED)
BY MR. VON BREVERN (GUINEA)
[PV.99/5, E, p. 22–27; F, p. 29–36]

Mr. von Brevern:

Mr. Niasse, would you be so kind to perhaps show the Tribunal on the picture where you have worked?

M. Niasse :

Là où j'étais en train de travailler, cela je peux le faire. Mais là où d'autres étaient en train de travailler, ne me demandez pas cela. (*Le témoin regarde la photo qui lui montre M^e von Brevern.*)

The President:

What is the number of that picture?

Mr. von Brevern:

Picture 2. Mr. Niasse indicated that he would have worked in the middle of the deck, in the middle of the vessel on deck.

The President:

On deck.

(*Photograph put on screen*)

Mr. von Brevern:

Could you show that there?

(*Witness indicates*)

M. Thiam :

Monsieur le Président, peut-être qu'il serait plus simple que M. Niasse aille directement suivre à l'écran.

The President:

Yes, because that equipment does not seem to be working. We cannot tell where the light is. Mr. Niasse, would you go up to the map and point to exactly the spot where you were working.

(*Witness indicates*)

The President:

Thank you. It is plain that it was on the deck.

Thank you very much, Mr. Plender, for that clarification

Mr. von Brevern:

When the Captain instructed you to flee, how could you hear him? Was he beside you or was he on the bridge and how could you hear him?

M. Niasse :

Il s'est mis sur le côté du pont et il a hurlé ses instructions.

Mr. von Brevern:

In which language did he shout out his instructions?

M. Niasse :

Je ne comprends pas leur langue. Il parle anglais, je ne parle pas anglais. Il parle russe, je ne parle pas russe.

Mr. von Brevern:

But you thought his instructions were that you should flee?

M. Niasse :

Oui, c'est ce que j'ai compris, qu'il fallait se mettre à l'abri.

Mr. von Brevern:

Is that normal, that if you hear the Captain saying or instructing something in Russian you feel you have to flee? Did you have other instructions?

M. Niasse :

Les gestes étaient expressifs. C'est le langage que nous comprenons. Quand il nous appelle pour manger, il y avait des gestes qui étaient faits. Il y avait un langage gestuel, on comprenait, quand il faisait de tels signes, qu'il fallait venir manger. On ne pouvait pas communiquer par la langue, donc c'est par des gestes.

Mr. von Brevern:

Before the Captain gave you these commands you have not felt like going away from the deck and going into your cabin, for whatever reasons? You felt safe until the order of the Captain?

M. Niasse :

Non, je n'avais aucune idée. Comme d'habitude, quand je me lève le matin, je fais mon travail et quand l'heure de descendre arrive, je cesse de travailler. C'est tout. Je n'avais aucune idée particulière. La paix régnait sur le bateau, il n'y avait pas de problème.

Mr. von Brevern:

You told us that it was about 9 o'clock that the Captain commanded you. When did you start your work that day?

M. Niasse :

Nous autres, nous commençons à travailler à 8 heures. Nous prenons le petit déjeuner à 7 heures et demie jusqu'à 8 heures, et à 8 heures, nous commençons le travail.

Mr. von Brevern:

Before you went to work after you had breakfast, did you meet anyone of the ship's command to talk to them?

M. Niasse :

Non, pas du tout, je n'ai rencontré personne, je n'ai parlé à personne. Mais je vous l'ai dit, on ne communiquait pas, on ne pouvait pas communiquer. Donc, je n'ai rencontré personne, je n'ai rien dit à personne. Chacun sait à quelle heure il faut aller au petit déjeuner. L'heure de début du travail, chacun la connaît. Avant d'aller commencer le travail, nous nous rendions au magasin prendre nos pots de peinture, les outils de travail et nous nous mettions à travailler.

Mr. von Brevern:

When the Captain spoke to you, you told us you went to your cabin. What did your two colleagues do?

M. Niasse :

Les autres ... Lat, lui aussi, il a fui et il est allé dans sa cabine ... l'autre collègue ... franchement, je ne savais pas à ce moment-là où ils étaient allés se cacher. J'étais dans ma cabine, je n'étais pas dans la leur.

Mr. von Brevern:

Do you have a cabin of your own?

M. Niasse :

Non, ce n'était pas le cas. Nous étions trois. On a donné une cabine à l'un d'entre nous, c'est Lat. L'autre allait chez Lat ou chez moi. Nous sommes Sénégalais et nous nous entendions fort bien. C'est comme cela que cela se passait : aujourd'hui, il passe la nuit ici, demain ailleurs.

Mr. von Brevern:

Did you see whether other crew members also fled?

M. Niasse :

Non, je ne les ai pas vus quand ils s'enfuyaient; les autres membres, je ne les ai pas vus quand ils fuyaient. Moi, je suis entré dans ma cabine, je me suis caché là. Le reste, je n'ai rien vu.

Mr. von Brevern:

Coming back to the order of the Captain, you were under the impression that it was rather urgent for you to flee. Was there any other reason for you, did you see anything outside the vessel, was there any noise which annoyed you and caused you to flee, or was it just the command of the Captain?

M. Niasse :

Non, je n'avais rien vu. Je n'avais rien entendu non plus. Moi, j'étais occupé à mon travail. Si j'avais entendu quelque chose, je dirais que j'ai entendu quelque chose, mais je n'ai rien entendu. Je n'ai entendu que ce que le capitaine a dit. Le capitaine nous a appelés et nous a fait comprendre qu'il fallait fuir. En dehors de cela, je n'ai rien entendu d'autre.

Mr. von Brevern:

Now I would like to ask you about your injuries. I understand you have been in your cabin, you locked the cabin and finally there were some bullets and obviously one bullet broke the bull-eye of your cabin. Is that correct? What is the size of the cabin? Where have you been? Have you been directly behind the bullet or did you step aside to be safe? Can you explain the cabin and where you were?

M. Niasse :

Dans la cabine, j'étais à l'intérieur de ma cabine. Quand je suis entré dans la cabine, avant de regarder à travers le hublot, après avoir entendu les rafales de balles, j'étais par terre, je me suis mis par terre. Ensuite, je me suis levé pour savoir qu'est-ce qui se passait. En réalité, une personne, c'est normal ... quand il y a une situation comme cela, il faut quand même essayer de savoir ce qui se passait. Je me suis donc redressé. C'est comme cela que je me suis redressé. J'ai voulu voir à travers le hublot ce qui se passait.

Mr. von Brevern:

First when you enteres your cabin you laid down because you heard some noise. When you got up to look through the window, had the noise stopped, terminated?

M. Niasse :

Quand je suis entré dans la cabine, immédiatement, j'ai entendu des impacts de balles sur la coque du bateau, du navire, du côté des cabines. Heureusement qu'ils n'ont pas tiré à l'avant du bateau parce qu'il y aurait eu une catastrophe, heureusement. C'est après que je me suis redressé pour voir à travers le hublot ce qui se passait.

Mr. von Brevern:

You have just said that that would have been a catastrophe. What do you mean by that? What would have been a catastrophe?

M. Niasse :

S'il y avait eu des coups de feu tirés sur l'avant, le bateau allait simplement s'enflammer, prendre feu.

Mr. von Brevern:

Where was your cabin? We should have demonstrated that. Can you again perhaps show us on one of the pictures where your cabin was? Which side of the vessel was it on, on the front or the back? I will show you the picture. Can we have picture 1 or 2?

M. Niasse :

Telle que la photo se présente, cela va être difficile. Ma cabine se trouve dans le couloir de la salle à manger, là où nous prenions nos repas.

Mr. von Brevern:

Could you show it here? Where's the bull-eye?

The President:

Mr. Niasse, could you go closer to the picture and show us?

M. Niasse :

Est-ce qu'on ne peut pas retourner la photo ou montrer l'autre côté ?

The President:

Mr. von Brevern, I do not want to interrupt your cross-examination, but is this relevant to a particular point?

Mr. von Brevern:

Mr. President, I am still of the opinion that we should know where the cabin was, because we are talking about a bullet and I think that our witness, or the other side, should have the possibility to comment later, and therefore I think we should hear from the witness where his cabin was.

The President:

Thank you.

Mr. Niasse, could you go closer to the picture to point this out?

M. Niasse :

Cela va être difficile de le faire parce qu'il y avait deux couloirs, il y avait un couloir de l'autre côté, à bâbord, et un couloir, à tribord, si on peut dire.

Mr. von Brevern:

On which side of the vessel was your cabin, port or starboard?

M. Niasse :

J'étais du côté de la cuisine, c'est le couloir par lequel on accédait à la cuisine et à la salle à manger.

Mr. von Brevern:

For clarification, Mr. Niasse, did you have a cabin from which, if you looked out of the bull-eye, you could see the sea, or was it a cabin in the interior of the vessel?

M. Niasse :

Non, à travers mon hublot, je pouvais voir dehors.

Mr. von Brevern:

Was it the right side of the vessel or the left side of the vessel?

M. Niasse :

Bâbord ... tribord ... vous savez, un bateau, cela dépend de quel coin on apprécie tout cela. De ce côté-ci, je peux vous dire que c'est du côté droit, je peux me mettre sur telle partie du bateau et je vous dis : c'est le côté gauche. Donc, vous savez ...

Mr. von Brevern:

Could you please be so kind as to show us on the picture where your cabin was?

M. Niasse :

Non, je ne peux pas le faire.

Mr. von Brevern:

Mr. Niasse, on this picture you see the starboard, the right side of the vessel. I will show you another picture with the left or port side of the vessel. I understand that your cabin was not on the right side but it was on the left or port side. Is that correct, and can you demonstrate on this picture 2, is that possible?

The President:

Could you repeat the question, please?

Mr. von Brevern:

Could you now demonstrate on this picture where about your cabin was?

M. Niasse :

Non, sur cette photo, je ne pourrais pas. Si l'on me montrait une photo où apparaissait l'endroit où se trouvait la cuisine, parce que vraiment, là où était ma cabine, on pouvait voir cela des deux côtés.

Mr. von Brevern:

Our question is, where was your cabin seen from the outside of the vessel, not from the inside of the cabin but from the outside if you look at the vessel, at which height? (*Discussion off microphone*)

The President:

Please speak into the microphone.

Mr. von Brevern:

Perhaps you could explain that. Do you find the picture the same there?

M. Niasse :

Je l'ai dit, si vous montez là ...

The President:

Mr. Niasse, could you go closer to the picture? (*Discussion off microphone*) Come back now.

Mr. von Brevern, does that give you an idea?

Mr. von Brevern:

An idea, but, Mr. Niasse, now you showed us the right side of the vessel, is that correct, the starboard side?

M. Niasse :

Je ne peux vous dire ... je vous ai dit déjà ... les histoires de côté droit ou gauche ...

Mr. von Brevern:

Okay. Mr. Niasse, I conclude that it may really be difficult with such a vessel, that you do not remember whether it was on the port or starboard side, is that correct?

M. Niasse :

Certainement. Si vous ne connaissez pas un navire, vous pouvez vous y perdre. C'est un bâtiment d'une taille impressionnante.

Mr. von Brevern:

Coming back to the situation, you told us that you lay down and then came up in order to look at what had happened. What did you see when you looked outside the window?

M. Niasse :

Quand je me suis levé, c'est le moment précis où le projectile est arrivé sur moi, donc je n'ai rien vu. C'est à ce moment que j'ai reçu le projectile.

Mr. von Brevern:

The next situation is that you explained that someone knocked at your door. Did you open it voluntarily or was it opened by a hammer?

M. Niasse :

Non, il ne pouvait pas ouvrir la porte de l'extérieur, c'est moi qui ai ouvert la porte. Quand on ferme de l'intérieur la porte, personne ne peut l'ouvrir. Il faut alors des moyens extraordinaires. Mais une fois que je ferme la porte derrière moi, personne ne peut l'ouvrir de l'extérieur.

Mr. von Brevern:

Did you hear anything before you opened it? Was there a command to open it? Why did you open it?

M. Niasse :

Non, je n'ai pas reçu d'instruction ni d'ordre pour ouvrir la porte, c'est moi parce que je n'entendais aucun bruit sur le bateau, sur le navire et je me suis dit : je vais ouvrir la porte. J'ai ouvert la porte, je n'ai pas reçu d'ordre.

Mr. von Brevern:

Can you give us an idea of how long it took from the moment that you received the instructions of the Captain to the moment when you opened the door, so it was from the time when you flew into your cabin and laid down, again stood up, received the injuries and then opened the door – about the time period of that?

M. Niasse :

Je ne peux pas dire avec exactitude combien cela a duré. J'étais dans un état d'esprit qui ne permettait pas de mesurer l'écoulement du temps. Je ne pouvais pas ... cela, je ne peux pas le dire.

Mr. von Brevern:

You also do not remember how long you were on the floor of your cabin? For example, if it took ten minutes, it seems to be a rather long time. According to your remembrance, do you think that it was some minutes or was it just a very short period?

M. Niasse :

Vraiment, je ne peux pas être précis là-dessus.

Mr. von Brevern:

You told us that someone who was there after you had opened the door hit and insulted you. I understand how it could be possible to hit, do you understand that correctly, with any arm. Do you know what arm it was?

M. Niasse :

L'arme, c'est la crosse de la mitrailleuse.

Mr. von Brevern:

If I remember correctly, you said that you had been insulted. Was that orally? What did he say to you, and in which language did he speak?

M. Niasse :

Ils comprennent l'anglais, ils comprennent le soussou, ils comprennent le français. Quand ils proféraient ces injures-là, c'était en français qu'ils les proféraient. Moi, ce que je comprenais, c'étaient des injures adressées à la mère, parce que les injures en wolof et en français, ce n'est pas tout à fait la même chose. Je l'ai entendu dire : vous autres Sénégalais, vous êtes des truands ... il a dit que nous autres Sénégalais nous sommes des truands. Je ne pouvais rien dire. Ils proféraient des injures. Je ne peux pas répéter cela en wolof, mais ce sont des injures extrêmement graves en wolof. Quand vous insultez quelqu'un en français, nous, en wolof, nous prenons cela pour quelque chose de grave parce que des injures, ce sont des injures.

Mr. von Brevern:

But he spoke in French, didn't he?

M. Niasse :

Il parlait à la fois français et soussou. Mais ce qui m'a le plus fait mal, c'est quand il nous a accusés, nous autres Sénégalais, d'être des truands. Cela, c'est l'injure qui m'a fait le plus mal.

Mr. von Brevern:

Where did he know from that –

The President:

Mr. von Brevern, I think that this point, the point about the insults, is a suitable time. It is now exactly 12 o'clock. Obviously you will need a little more time to complete, so it will be convenient for us to adjourn now and to resume at 2 o'clock. Mr. Niasse will come back to the witness stand when we come back at 2 o'clock. The sitting is suspended.

(The Tribunal adjourns at 12.00 noon.)

Public sitting held on 10 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 10 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Could the witness Mr. Niasse be called to the witness stand.

Mr. Niasse, you are still covered by the declaration you made.

Mr. von Brevern?

Mr. von Brevern:

Mr. President, my colleague Mr. Lagoni wishes to continue with the cross-examination, if you agree.

The President:

Very well. Mr. Lagoni, please.

Examination of witnesses (continued)

CROSS-EXAMINATION OF MR. NIASSE (CONTINUED)

BY MR. LAGONI (GUINEA)

[PV.99/6, E, p. 4-5; F, p. 4-6]

Mr. Lagoni:

Mr. President, Members of the Tribunal.

Mr. Niasse, to continue with very few questions asked to you this morning by Mr. von Brevern. You mentioned in your statement that you heard many bullets. Could you give us briefly any idea how many you heard, just as a rough estimation; was it five, or for example twenty, one hundred, one thousand? What does "many" mean?

M. Niasse:

(Interprétation du wolof) Je dois dire la vérité, je ne peux pas vous dire combien de balles parce que je n'étais pas à l'extérieur. J'ai entendu seulement des impacts, je ne peux pas vous dire un, deux ou plus, je ne peux pas. En tout cas, ce qui est certain, c'est que j'ai entendu beaucoup d'impacts.

Mr. Lagoni:

Thank you very much, Mr. Niasse. To come back to your cabin, there was first of all a slight problem of translation. When there was a reference to a "bull-eye" this was the expression of the German Navy for portholes. So the reference was made to portholes. You said that you looked out of your porthole, your window. Were you seeing the sea, or were you seeing the aisle to the galley, when you looked out?

M. Niasse:

Lorsque j'ai regardé à l'extérieur, je n'ai même pas pu regarder. Dès que j'ai levé la tête pour regarder, le projectile est arrivé sur moi.

Mr. Lagoni:

Mr. Niasse, when you at any other time looked out of your porthole, were you looking on the sea, or were you looking practically inside the ship, on the aisle of the ship?

M. Niasse:

Non, je n'ai pas regardé longtemps, j'ai levé la tête pour regarder à travers le hublot et donc le projectile est arrivé.

The President:

Mr. Lagoni, if I may just interrupt, I think this morning the question was put to him, and he said when he looked out he saw the sea. Maybe you could confirm that, because he is still thinking about the time of the attack, not the time before.

Mr. Lagoni:

Thank you, Mr. President.

M. Niasse:

On m'a posé la question de savoir, lorsque je regarde à travers le hublot, qu'est-ce que je vois. Habituellement, quand je regarde à travers le hublot, je vois la mer. Mais ce jour-là, lorsque

j'ai levé la tête et que j'ai voulu regarder à travers le hublot, je n'ai rien pu voir parce que dès que j'ai levé la tête, le projectile est arrivé sur moi, dans les circonstances que j'ai décrites.

Mr. Lagoni:

Thank you for that. Mr. Niasse, how much did you earn per day, can you remember that?

M. Niasse:

Où, au travail, sur le bateau, le salaire où ?

Mr. Lagoni:

When you were working on board.

M. Niasse:

On me payait par jour 5 000 francs CFA. Les voyages, c'étaient 15 jours, ce qui fait 75 000 francs CFA, plus ou moins 150 dollars américains, un peu moins de 150 dollars.

Mr. Lagoni:

For the whole trip?

M. Niasse:

Oui, le voyage durait 15 jours, donc 15 multiplié par 5 000, vous avez 75 000.

Mr. Lagoni:

Thank you. Who paid for the medical treatment, did you pay for it?

M. Niasse:

Où ? Quand j'étais à Dakar ?

Mr. Lagoni:

In Conakry and then in Dakar.

M. Niasse:

A Conakry, je ne sais pas qui a payé, mais à Dakar, c'est Oryx qui a payé.

Mr. Lagoni:

Who paid, did you pay for the medical treatment in Dakar, for your medical treatment?

M. Niasse:

Non, ce n'est pas moi qui ai payé. J'ai dit que c'était Oryx qui avait acquitté les factures.

Mr. Lagoni:

Thank you. Did you receive any money as compensation for your injuries, and if yes, from whom did you get any money for compensation?

M. Niasse:

Quand j'étais à l'hôpital, je n'avais pas de problème du tout parce que, à la fin de chaque mois, on me remettait de l'argent. Oryx me donnait de l'argent pour subvenir aux besoins de ma famille et aussi à mes propres besoins.

Mr. Lagoni:

After you left the hospital, have you received money from Oryx, or from anybody else?

M. Niasse:

Quand j'étais à l'hôpital tout au long de mon séjour, de même que quand j'étais à la maison, Oryx continuait à me donner de l'argent. Je suis resté en convalescence pendant longtemps sans travailler et Oryx me versait de l'argent.

Mr. Lagoni:

Thank you very much, Mr. Niasse.

Mr. President, that ends my questions.

The President:

Thank you very much.

Maître Thiam, do you want to re-examine?

NOUVEL INTERROGATOIRE DE M. NIASSE
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/6, F, p. 6–9]

M. Thiam:

Je vous remercie, Monsieur le Président. Tout d'abord, M. Niasse a parlé ce matin d'un certain M. Sylla. J'ai pensé qu'il y avait peut-être quelques erreurs de traduction, ce qui m'amène à poser à M. Niasse la question suivante : est-ce que M. Sylla était à bord du *Saiga* avec lui ?

M. Niasse:

(*Interpretation du wolof*) Non, M. Sylla ne se trouvait pas à bord du *Saiga*, il travaillait au dépôt.

M. Thiam:

Ce matin, le Tribunal a pu constater que l'on a projeté la photo n° 1 au témoin. Je voudrais qu'on la lui projette à nouveau. (*Projection de la photo n° 1*) Le Tribunal se souviendra que, lorsqu'on lui a présenté cette photo, M. Niasse a demandé à ce qu'on la retourne. Sûrement qu'il ne savait pas qu'une photo de ce genre ne peut pas se retourner, mais sans doute qu'il voulait atteindre l'autre côté du navire. Alors je voudrais lui demander si, de cette position, à l'arrière du pont, il pourrait décrire le chemin qu'il devait faire pour rentrer dans sa cabine.

M. Niasse:

Si je suis à l'arrière du pont ?

M. Thiam:

Quel chemin faites-vous pour aller à votre cabine?

(*Le témoin s'exécute et montre du doigt.*)

M. Niasse:

Je peux entrer par la cuisine, et aller de ce côté-ci pour entrer dans ma cabine.

M. Thiam:

C'est de l'autre côté du bateau ?

M. Niasse:

Oui.

M. Thiam:

Je vous remercie. Monsieur Niasse, au moment de l'attaque du navire, est-ce que le navire était en mouvement ?

M. Niasse:

Non. Le bateau allait très lentement, dérivait probablement. Le bateau allait à très faible vitesse, 1 nœud, il n'allait pas à grande vitesse.

M. Thiam:

Est-ce qu'à un moment quelconque avant l'attaque il était arrêté ?

M. Niasse:

C'est la nuit que le bateau s'est arrêté, mais vers 8 heures, le matin, quand nous nous sommes réveillés, le bateau allait, comme j'ai dit, lentement.

M. Thiam:

Vous êtes très sûr qu'il allait lentement ?

M. Niasse:

Oui, le bateau avançait lentement.

M. Thiam:

Monsieur Niasse, est-ce que vous pourriez dire au Tribunal si, avant l'attaque, vous avez entendu une sirène, une cloche ou un signal quelconque de la part des vedettes guinéennes ?

M. Niasse:

Moi, je n'ai rien entendu. Si j'avais entendu une sirène – on m'a appris cela au port – si vous entendez une sirène ou une cloche, je m'arrête ou je dois fuir parce que je sais qu'il y a un danger, surtout quand une sirène se met en marche cela veut dire qu'il y a danger et il ne faut pas rester en place, il faut fuir. Mais nous n'avons rien entendu.

M. Thiam:

Monsieur Niasse, pourriez-vous dire au Tribunal si, à votre connaissance, le capitaine de votre navire a essayé de faire un mouvement pour attaquer les vedettes guinéennes ?

M. Niasse:

Pour attaquer les vedettes guinéennes ? Non rien de tel. Il n'a rien fait de tel.

M. Thiam:

Je vous remercie. Je ne veux pas retenir l'attention du Tribunal plus longtemps. Je vais simplement poser une dernière question. A quel endroit est-ce qu'il a su que les assaillants étaient Guinéens ?

M. Niasse:

C'est quand nous sommes arrivés au port de Conakry que j'ai su que les assaillants étaient des Guinéens.

M. Thiam:

J'en ai terminé, Monsieur le Président.

The President:

Perhaps I may ask a question.

Mr. Niasse, when Maître Thiam asked you whether to your knowledge any attempt was made by the Captain to attack the Guinean patrol boats, you said "No", but you had previously said that you were, all the time, in your cabin. Would you have known if something had happened while you were in your cabin?

M. Niasse:

Oui, parce qu'à ce moment-là, quand nous avons fui, personne n'était sur le pont, c'est tout le monde qui a fui, y compris le capitaine. Comment pouvez-vous fuir et en même temps attaquer ? Parce que c'est tout le monde qui a fui.

The President:

We are not getting an interpretation. ...

So you could not tell what the Captain was doing?

M. Niasse:

Je ne peux pas dire exactement ce que faisait le capitaine, je ne sais pas, mais j'ai un ami qui, d'après ce qu'il m'a dit, le capitaine se trouvait aussi en bas. C'est ce que m'a dit cet ami.

The President:

I wanted to ask the question before you left.

Maybe you would like to ask another question?

M. Thiam:

Juste peut-être pour lui demander si le navire avait fait un mouvement brusque et s'il avait heurté quelque chose, de sa cabine, est-ce qu'il aurait pu le savoir ? Est-ce qu'il aurait pu le ressentir ? ... La traduction doit dire aussi : « S'il avait heurté quelque chose. »

M. Niasse:

Oui, probablement. Si le bateau avait fait un mouvement brusque, je ne l'ai pas senti. La situation était brûlante. Est-ce que j'étais en terme de conscience capable de savoir parce que moi j'étais dans mon placard.

M. Thiam:

Je vous remercie, Monsieur le Président.

The President:

Thank you very much.

Mr. Plender?

Mr. Plender:

Before the witness leaves, we received no English translation of the very first question. Nothing turns upon it but accuracy. It may, however, be helpful to have the question put. The question was whether M. Sylla was on board. We appear to have received no translation of the answer.

The President:

Could you kindly answer the question, Mr. Niasse? You heard the question. Could you please give us your answer?

M. Niasse:

Non, M. Sylla n'était pas à bord du bateau. Il est le chef du dépôt, il se trouvait au dépôt. Le navire avait quelqu'un qui s'occupait de diriger l'équipe sur le bateau. M. Sylla restait au dépôt, lui.

The President:

Thank you.

M. Thiam:

Le dépôt dont il parle est à terre ?

M. Niasse:

Le dépôt se trouve dans l'enceinte du port, sur le quai.

M. Thiam:

Je vous remercie, Monsieur. Mais à bord, vous étiez sous les ordres du capitaine ou sous les ordres de quelqu'un d'autre ?

M. Niasse:

M. Sylla ne nous donne pas d'ordre à bord du bateau. Les ordres de M. Sylla, c'est à terre, à quai. Sur le navire, c'est le commandant, le capitaine, et le bosco nous répartit les tâches, parce que c'est à lui que le commandant donne des instructions qui sont retransmises ensuite aux membres de l'équipage.

M. Thiam:

J'en ai terminé, Monsieur le Président.

The President:

Thank you very much, Maître Thiam.

Thank you, Mr. Niasse, for helping us. I know that you have gone through a very difficult experience. I am very pleased to know that you have been able to deal with all the questions very competently. We are very grateful to you. Unless any counsel wishes to put any further questions from your side, you are excused. As I have said before, you may stay here if you wish, but if you want to leave, you are at liberty to do so. Thank you.

Mr. Plender, I think that you are going to call your next witness?

Mr. Plender:

With your permission, Mr. President.

The President:

Yes, you may do so.

EXAMINATION OF MR. STEWART
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/6, E, p. 7–16]

Mr. Plender:

The final witness for the applicant State is Allan Stewart.

The President:

May Mr. Stewart please be called to the witness stand.

Mr. Allan Stewart, sworn in (in English)

Mr. Plender:

Is your name Allan Stewart and are you managing director of Seascot Management Limited?

Mr. Stewart:

I am.

Mr. Plender:

Do Seascot have any functions in relation to the vessel, the *Saiga*?

Mr. Stewart:

Yes, our function is to act as technical and commercial managers of the ship on behalf of Tabona Shipping, the owners.

Mr. Plender:

Did Seascot occupy those functions on 27 and 28 October 1997?

Mr. Stewart:

We did, yes.

Mr. Plender:

Do you continue to exercise those functions?

Mr. Stewart:

We do.

Mr. Plender:

In your capacity as manager, would you be aware of those working aboard the vessel?

Mr. Stewart:

Yes, we have direct contact with the Captain on a more or less daily basis on what is the position of the vessel. And, of course, we are in contact with the Chief Engineer on technical supplies and operations of the ship. So yes, we are well aware of the people on board the vessel.

Mr. Plender:

Were you aware, on 26 and 27 October, of the engagement on board the vessel of Mr. Niasse?

Mr. Stewart:
Yes, we were.

Mr. Plender:
Did Mr. Niasse have a written contract?

Mr. Stewart:
No, he did not have a written contract but he was given an undertaking that we would pay him a certain figure per day. This was explained to him and the Captain gave him that reassurance. What happens is that at the end of every month, or end of a voyage, he has a list made out of the days he has been working and he is given the total amount and he signs a piece of paper saying that he agrees with the Captain that that is the amount of wages due.

Mr. Plender:
What salary was he paid?

Mr. Stewart:
My recollection is that he was paid approximately \$300 per month.

Mr. Plender:
How did that compare with the salary of a qualified seaman?

Mr. Stewart:
A qualified seaman, able seaman – his salary is approximately \$600 per month.

Mr. Plender:
Mr. Stewart, evidence has been given of damage done to the vessel on 27 and 28 October.

Mr. Stewart:
Yes, that is correct.

Mr. Plender:
Are you aware of any temporary repairs made to the vessel?

Mr. Stewart:
When the vessel arrived at Conakry the engineers on board had to make some temporary repairs – because of the damage caused by gunfire in the engine room – to enable the engine to operate.

Mr. Plender:
Was the vessel fully repaired in Conakry?

Mr. Stewart:
No, it was not possible to do that.

Mr. Plender:
Where was it taken for repair?

Mr. Stewart:

In due course it was taken to Dakar, which is the nearest port with reasonable repair facilities in that area.

Mr. Plender:

Did you see the vessel there?

Mr. Stewart:

Yes, I attended the vessel when it arrived – eventually arrived from Conakry.

Mr. Plender:

Did you make an assessment of the extent of damage?

Mr. Stewart:

I did. I went through, with the Captain, the damages and compiled a list of all the repairs we thought we could do in Dakar. We also made a list of all the ones which obviously required either specialist equipment or specialist material from abroad. Also, there was a number of repairs which we thought we would not be able to do in the short term, but we could defer them until a later time.

Mr. Plender:

Did any other person assist in making an estimate of the extent of damage?

Mr. Stewart:

Yes, we obtained the service of a qualified professional hull and machinery surveyor to assess the damages, together with myself and the Captain.

Mr. Plender:

Can you remember now what was his estimate of the cost of repair?

Mr. Stewart:

Yes, the cost of repairs which we intended to do in Dakar equated to – his estimate equated to 58 million Senegalese francs. That is about \$100,000.

Mr. Plender:

What items of damage can you now remember being detected on the vessel?

Mr. Stewart:

Well, there was a good number of damages.

Mr. Plender:

What damage?

Mr. Stewart:

As I said, the most obvious ones were the damages caused by gunfire to the structure of mostly the accommodation, though there was gunfire damage midships on the vessel, broken windows in the wheelhouse. We also had damages in the engine room. Some had been partially repaired, as I said before, to allow the engine to work; some were actually caused to the electrical generating systems, I think through either direct gunfire or ricochets of bullets,

which had put one of them out of action. We had also some structural damage to a ballast tank at the forward end of the vessel because at the time of this attack I understood they were carrying out some ballasting operations for adjusting the trim of the vessel. For security the Captain had been down in the engine room and the pump was running and had been forgotten about until later on when the situation became a little more calm and some of the crew were allowed to go back to their station to start up the engine and proceed towards Conakry. Also the radio communication system was badly damaged by gunfire.

Mr. Plender:

For the purpose of the French translation, did I hear you say that "some of the crew were allowed back"?

Mr. Stewart:

Yes, a good number of the crew I understand and read from the Captain's report were taken off the vessel and put on the Guinean naval cutter. I think it was six of the crew members were allowed to stay on board to sail the vessel under escort to Conakry.

Mr. Plender:

Was there any other type of damage which was detected, other than damage to the ballast tanks and damage caused by gunfire?

Mr. Stewart:

There were damages alongside the accommodation which had been caused by, first of all, the outside doors, which showed evidence of violent entry by shooting locks off the doors. Obviously a search had been made of the accommodation. Doors were broken down in the accommodation.

Mr. Plender:

What was the state of the hull?

Mr. Stewart:

Due to its long period of idleness in Conakry, the underwater area of the hull was quite badly deteriorated and covered with heavy marine growth – the propeller, rudder, all that area – and the external decks and the ship's side also had deteriorated, due to the humid conditions and no materials to maintain the vessel during that long period of inaction at anchor.

Mr. Plender:

Have you prepared a detailed file of costs associated with this incident?

Mr. Stewart:

We have.

Mr. Plender:

So far as the file relates to costs resulting from the attack, can you tell the court briefly what is to be found at tabs 1–52?

Mr. Stewart:

Yes. That is actually a separate list of the medical expenses for the Second Officer and painter, for their injuries, treatment, surgery, repatriation costs and also their sickness and salary benefits for the period they were incapacitated thereafter.

Mr. Plender:

Who bore those costs?

Mr. Stewart:

The shipowner bore these costs, or we bore them as Seascot on behalf of the shipowner.

Mr. Plender:

Does the figure so calculated include compensation for pain and suffering or disfigurement?

Mr. Stewart:

Not at all, no.

Mr. Plender:

At tabs 53–161 you have prepared an inventory of costs of detention of the vessel. Would you summarize the content of that section?

Mr. Stewart:

Yes. This covers, first of all, disbursements from our agents in Conakry covering supplies of fuel oil, payments to pilots, general agency costs, water supply, tugs for manoeuvring the ship in and out of port, general port dues, things associated with, let us say, a semi-normal visit to a port. That figure comes to about \$50,000 in total for the period of detention.

Mr. Plender:

At tabs 155–159 you have prepared a bundle of costs of removal to Dakar. Will you summarize to the Tribunal the nature of these costs?

Mr. Stewart:

Yes. This is simply the costs and, as the vessel was only steaming at 2 knots, it took much longer than normal to reach Dakar from Conakry, three to four days. So it is the cost of fuel, it is the cost of wages, the costs of oil and general expenses for that journey, in fact.

Mr. Plender:

Finally, you have prepared inventories of costs of repairs at Dakar at tabs 155–195.

Mr. Stewart:

Yes, that is correct.

Mr. Plender:

Will you tell the Tribunal in your own words what is the nature of these costs?

Mr. Stewart:

These costs are the actual costs of repairs carried out in Dakar, which are the principal costs. The biggest expenditure was incurred doing the repairs at Dakar Marine, which is a shipyard repair facility, and the other costs are repairs to navigation, electric equipment, also the

supply of new radio equipment, new satellite communication equipment, general freight costs, et cetera: in fact, all associated with the damages.

Mr. Plender:

Have you also made a calculation of the time charter loss?

Mr. Stewart:

Yes. The ship was out of action a total of 153 days, of which 123 were at Conakry, but then we had to spend additional 30 days in Dakar repairing the ship to enable it to re-enter service and be reclassified by the classification society. So, the ship effectively was off-hire, according to the terms of our charterparty, during that period and obtained no income for employment.

Mr. Plender:

In so far as a claim has been made for sums spent, have you satisfied yourself that those sums have actually been paid?

Mr. Stewart:

Yes, all the costs we have listed have long since been paid. The only exception is some of the repairs which we were not able to do at Dakar, and we agreed with the classification society they could be deferred until the ship reaches its main survey and overhaul date, which is April 1999; we could defer these repairs to that time. Some was specialized equipment, some were just repairs that could not actually be done in that part of the world; they have to be done in an area which has sophisticated repair facilities. We have made an estimate for that and the estimate for that is \$30,000 of outstanding repairs that is included in the overall costs.

Mr. Plender:

In so far as your calculations relate to sums which have not been paid but which represent losses, are the sums which you have specified reasonable and proper in your view?

Mr. Stewart:

Yes, we just paid the normal rates for repairs. We tried to negotiate the bill down to the lowest possible figure and for replacement of equipment we generally have contracts with the suppliers for other vessels which show a discount. The costs are probably the lowest number we could achieve to do the repairs and replace the equipment.

Mr. Plender:

Mr. Stewart, I shall now ask you some questions about photographs. The first will be photograph No. 2.

Mr. Stewart:

That is an overall view of the *Saiga* at the oil terminal in Dakar after she has been repaired, probably ready to commence loading again.

Mr. Plender:

As the vessel sits in the water, is that the amount of discharge that would be expected when she is ordinarily at sea and at work?

Mr. Stewart:

Yes. If you look at the different colours in the vessel, you see this black hull and the light coloured area. The light coloured area is the area which is effectively under water when the vessel is loaded. That gives you a good idea of the amount the vessel would sink into the water when it is fully loaded.

Mr. Plender:

Now, we see photograph 5. Where is that photograph taken?

Mr. Stewart:

That is taken from the quay at Dakar at the oil-loading terminal.

Mr. Plender:

Now, a room can be seen on the deck with a door which appears to be blue. What is that room?

Mr. Stewart:

The centre section of the vessel has a pump room. The pump room is midships on this vessel, as we say. To this housing is the top part of the pump room. Down below that there are the actual cargo pumps and ballast pumps of the vessel.

Mr. Plender:

If the crew are in the engine room, do they have access to the pump room?

Mr. Stewart:

No, it is necessary to come out of the engine room, proceed along the main deck and go half-way up the main deck of the vessel to reach this housing, which is the pump room. There is no access from the engine room because between that pump room and the engine room there is a series of cargo tanks.

Mr. Plender:

Now we will see photograph 6. Which part of the vessel is that which can be seen at the right?

Mr. Stewart:

That is the starboard bridge wing.

Mr. Plender:

Is this above or below the bridge room?

Mr. Stewart:

This is level with the bridge. If you walk out of the bridge on the starboard side, you arrive at that deck.

Mr. Plender:

Is this the monkey island?

Mr. Stewart:

No, the monkey island is the deck above that deck, in fact. It is essentially the roof of the wheelhouse.

Mr. Plender:

Now we can see photograph 8. What can be seen in this photograph?

Mr. Stewart:

This effectively is the top deck of the pump room, which again is midships on the vessel, and this shows what we call a Yokohama fender, which is a large fender for placing between the vessel's hull and one of the perhaps big fishing vessels that you would bunker to keep the vessels apart. It shows one inflated and one deflated. The one that is deflated in fact had some gunfire damage, some bullet holes.

Mr. Plender:

We are going to see photograph 9. What is the pipe that can be seen in the centre of the picture?

Mr. Stewart:

That is a ventilator. I think from its location that is the ventilator for the radio room. That deck is actually what we call the monkey island. It is above the radio room. It shows a bullet hole through the ventilator.

Mr. Plender:

Is it possible to tell from the position of the bullet hole the side of the vessel from which firing has taken place?

Mr. Stewart:

I think the picture is the wrong way round. It is the negative. There we are, that is the right way round. That is actually if you look out to the sea, of course, that is on the portside of the vessel, so I think actually this is the exit hole of the bullet, not the entrance hole, because it has taken a large piece of metal away. On the other side there is a hole, so the firing was from the portside, I think.

Mr. Plender:

How close is this position from the engine room?

Mr. Stewart:

This is the very top of the structure and it is about as far away from the engine room that you can get on the accommodation level. It is the very top of the structure. The engine room, of course, is the very bottom of the structure.

Mr. Plender:

Now we will see photograph 10. What can be seen in this photograph?

Mr. Stewart:

This is one of the radar antennas, which has got a few bullet holes in it. When we opened up the casing – this is a fibreglass casing – when you open up the casing you see that the internals are quite badly damaged by the passage of bullets through it.

Mr. Plender:

Is it right, Mr. Stewart, indeed is it obvious, that the antenna is well away from the engine room?

Mr. Stewart:

Yes, again that antenna is on the monkey island. It is above the monkey island, in fact. It is quite high up on the vessel.

Mr. Plender:

Now we will see photograph 12. What part of the vessel does this show?

Mr. Stewart:

I am pretty sure that that is the structure of the radio room, which is actually on the bridge deck behind the bridge, on the portside.

Mr. Plender:

What is the thickness of metal at this point?

Mr. Stewart:

The accommodation structure metal is about 7 mm thick just there.

Mr. Plender:

Is it correct that the holes are of different diameters?

Mr. Stewart:

Yes. You can see the big one, of course. It is not so easy to see on the photograph but you can certainly get your finger right through the hole, so it is probably about 20 mm. The other marks you see where it has been touched up, the paint has been broken off, you can see that they are quite small indents, so to me it appeared like these were small bullets which have not penetrated the steel and, of course, the heavy-calibre bullet has penetrated the steel.

Mr. Plender:

Now may we see photograph 13? What part of the vessel can be seen here?

Mr. Stewart:

This is the bridge wing rail, in fact. It is the wooden taff rail on top of the steel bulwark, as we call it, on the bridge wing. That hole is about level with your waist if you are standing looking out across the sea from the bridge deck.

Mr. Plender:

What is the thickness of metal on the vessel here?

Mr. Stewart:

That is also about 7 mm, and that hole again is, I would think, more than 20 mm because it shows the passage of something from the other direction. This is the opened out metal as it passes through, so obviously a heavy calibre bullet to go through the steel.

Mr. Plender:

Now we will see photograph 14. Is that the right way up?

Mr. Stewart:

Yes, it is at a little bit of an angle, but it actually shows the bottom of the lifeboat. If you are standing on the deck and you look up, you see the bottom of the lifeboat. The photograph is slightly angled, but nevertheless that is okay; that is better, actually. It shows a fibreglass lifeboat and it has been temporarily repaired with a plastic material. It also had some holes from bullets.

Mr. Plender:

Are you able to recall whether these were large or small calibre bullet holes?

Mr. Stewart:

Actually, I do not remember. This was something that was temporarily patched up before I got there, I think.

Mr. Plender:

Now may we see photograph 15? What is the inflatable boat visible there?

Mr. Stewart:

This is, I would not call it a fast rescue craft but it is a semi-rigid, inflatable boat which is used for manoeuvring the discharge hose. You see the collar partially deflated here. It again had some holes from bullets which later on were temporarily patched with vulcanized patches.

Mr. Plender:

Where is the inflatable boat in relation to the radio antenna?

Mr. Stewart:

The inflatable boat in fact is on the main deck, and that is just above the pump room. It is about midships on the ship, so it is a long way from the radio antenna. The radio antenna is the top of the structure and this, in terms of metres, is probably about 70, 80 metres away.

Mr. Plender:

Now may we see photograph 16? What can be seen in that picture?

Mr. Stewart:

That is a partially dismantled electric generator.

Mr. Plender:

Is that in its normal condition? I mean is it in good condition?

Mr. Stewart:

No, it has damaged windings. The wiring has been damaged and cut. It seemed to be by ricochets or bullets – I am not too sure exactly what – but the circular casing on the right-hand side contains the stator or windings and they have been damaged by projectiles.

Mr. Plender:

In what part of the vessel was the generator?

Mr. Stewart:

That is in the engine room.

Mr. Plender:

Now may we see photograph 17? What can be seen here?

Mr. Stewart:

That is another part of the generator. Actually, it is the voltage regulator unit on the side of the generator. It is a little bit the wrong way round at the minute; that is fine now. Again, the wiring was damaged there by something cutting the wiring.

Mr. Plender:

Were you able to see how the wiring came to be damaged?

Mr. Stewart:

Yes, it has been cut by something passing through it with great velocity. It is quite thick wiring. It has an open grille which is to allow ventilation, so obviously if bullets were flying around they can go through the open grille quite easily – there is nothing to stop it – through the air gap, shall we say.

Mr. Plender:

May we now see photograph 18? What can be seen in that photograph?

Mr. Stewart:

Actually, that is another shot of the same thing from a different angle. It is a voltage generation unit on the alternator.

Mr. Plender:

Now photograph 19?

Mr. Stewart:

That is the non-rotating part of the generator, which shows the size and configuration of the wiring. If you damage one of these wires, it is a continuous circuit that goes right round and by rotation of the rotor through this stator or magnetic field you generate electricity, so obviously if you cut one of these wires you do not get a complete circuit, and actually that is what is wrong, one or two of the wires are cut inside the machine, again close to the air gap. This seem to have been caused by projectiles.

Mr. Plender:

Is the damage visible in photographs 16 to 19 consistent with what you would expect had a machine gun been fired in that area?

Mr. Stewart:

Yes, quite possibly. There was other damage which I have not taken pictures of, but there were holes in various fuel, water and lubricating oil pipes which are roughly the diameter of a

bullet, maybe 10,12 mm, which the engineers had previously repaired temporarily before I arrived.

Mr. Plender:

Now we will see photograph 24. Is this the radio room?

Mr. Stewart:

This is the radio room. Some parts of the radio apparatus have been taken out of their casings. It is maybe not quite so easy to see, but on the little gold box with the holes on top of it on the left-hand side you see a long gash, and that in fact is damage caused by what looks like a bullet gone through it completely.

Mr. Plender:

When a person is in the radio room sending a message, what would be the distance between the operator and the point where the bullet hole can be seen?

Mr. Stewart:

Pretty close, I would think. I would not like to be there. I am not completely sure which piece of equipment that has just come out of, but that is actually the radio operator's desk.

Mr. Plender:

Forgive me, Mr. Stewart, did you say "Pretty close, I would not like to be there"?

Mr. Stewart:

I did.

Mr. Plender:

I just say that for the interpreter. Now would you please continue?

Mr. Stewart:

Yes. That is actually the radio operator's desk. He would sit there. The piece of equipment looks like it has come from the left-hand transmitter, so it would be within half a meter of where he was sitting.

Mr. Plender:

Now may we see photograph 27. What can be seen in this photograph?

Mr. Stewart:

It is a piece of radio equipment which has been taken out of its casing. Again, you can see marks of the bullets having passed through it. It looks like a fairly big calibre bullet, because it has not made a simple hole, it has left a big gash.

Mr. Plender:

Were you present when these photographs were taken?

Mr. Stewart:

Yes.

Mr. Plender:

Did you take some of them?

Mr. Stewart:

Yes.

Mr. Plender:

At the time when the photographs were being taken did you see other damage than that which you have photographed?

Mr. Stewart:

Yes, as I say, I only took photographs of the principal parts of damage, really just for our own record, to keep in our office. If you walk round the vessel there were various marks on the accommodation which seemed to be – well, certainly were not there before. There were fresh marks on the hull which in some places the crew had touched them up where they had damaged the steel. Some of these marks you could also see midships close to the fender, and obviously close to the FRC boat, but I didn't bother to photograph these bits and pieces, we had enough of the principal parts.

Mr. Plender:

Mr. Stewart, have you made a written statement for this Tribunal?

Mr. Stewart:

I have, yes.

Mr. Plender:

Is the statement that you have presented true in every respect?

Mr. Stewart:

Yes, it is.

Mr. Plender:

Mr. Stewart, I have no further questions. You may be cross-examined.

The President:

Mr. Plender, before you leave, I just want this for the record.

Mr. Stewart, where were these photographs taken?

Mr. Stewart:

They were taken in Dakar in fact, when the ship arrived in Dakar.

The President:

All of them?

Mr. Stewart:

All of them were taken in Dakar, yes.

The President:

Thank you.

Mr. von Brevern?

CROSS-EXAMINATION OF MR. STEWART
BY MR. VON BREVERN (GUINEA)
[PV.99/6, E, p. 16–26]

Mr. von Brevern:

Thank you, Mr. President.

Mr. Stewart, I would like to put some questions to you relating to your position as ship's manager, whereas my colleague Professor Lagoni will perhaps have some questions with respect to the damages. Mr. Stewart, as we have read, you are the Managing Director of Seascot, and Seascot is the manager of this vessel. I assume that there is a contract with the owner of the vessel?

Mr. Stewart:

That is correct, we have a thing called a management contract which sets out fairly clearly what manager's responsibilities are in respect of services we provide to the shipowner. That would be in respect of crew, technical matters, insurance costs, maintenance costs, general administration and also can cover the commercial operation of the vessel whereby we would find employment for the vessel and we would receive the charter hire, we would check it against the charterparty and we would provide an additional service, accountancy service shall we say, to the owner for his guidance. That is part of the service.

Mr. von Brevern:

And when did you conclude the agreement with the owners?

Mr. Stewart:

I do not remember exactly, but this vessel came into our management I think about February 1997.

Mr. von Brevern:

Have you, as Seascot Management Company, been in contact with the owner of this vessel?

Mr. Stewart:

The vessel was purchased by this company round about February, and this in fact was the time when we took over the management, and the owners had in fact previously another vessel which we managed for, I think, three or four years. That vessel was sold previous to the purchase of this one, so we had, yes, a relationship going on with the owner.

Mr. von Brevern:

And this vessel was, as you told us, bought in February 1997. Do you know where it was bought? Who was the owner before?

Mr. Stewart:

The ship was purchased – it was laid up in England. It was purchased and then taken to the shipyard for repair. It was purchased by Tabona Shipping in February at that time.

Mr. von Brevern:

Could it be possible it has been purchased in an auction?

Mr. Stewart:

Yes, it was purchased at an auction, that is correct. The ship was in England and it was put through a judicial sale, as I say. In Falmouth, in fact.

Mr. von Brevern:

Do you know the former owners?

Mr. Stewart:

Do you mean the immediate one, or some other ones?

Mr. von Brevern:

No, before the owners that have lost their ownership of the vessel through the auction?

Mr. Stewart:

We did not know who the owners were. We had their name of course, but we had no relationship with these particular owners.

Mr. von Brevern:

Do you know which particular nationality it was, and my additional question in this connection is which flag; do you know which flag?

Mr. Stewart:

I know which flag it was, it was a Malta flag because it still had "Valletta" on the stern. My recollection was that, I think, the beneficial ownership of the vessel was an Israeli company, that is all I know about the ownership.

Mr. von Brevern:

What did you mean when you said there was still a stamp of Malta? Where was the stamp?

Mr. Stewart:

If you look at the photographs of the *Saiga* you see "Kingstown" on the stern of the vessel, which was the port of registry. Before it had "Valletta", which is the capital of Malta. You can see that on the stern of the vessel.

Mr. von Brevern:

In your contract with the owners, you have indicated all the various tasks you would have to do. Does that include charterparties on behalf of the owner? Did you negotiate the charterparties?

Mr. Stewart:

In this particular case, yes. This can or cannot be a service we provide. It depends a little bit on the owner's other business. Sometimes the owner would be a cargo owner, and he has his own cargo, and he does not require services to bring cargoes to the vessel or negotiate charterparties. That would be something which he handles himself. But in this case yes, we

negotiated the charterparty on behalf of the owner and took responsibility for ensuring the hire was paid in the proper way, etc.

Mr. von Brevern:

Was it the same when you managed the other vessel from the same company in the first three to four years?

Mr. Stewart:

Yes.

Mr. von Brevern:

Why did you say "in this case we negotiated the charterparties because the shipowner company did not have cargo"?

Mr. Stewart:

No, what I meant was that we manage some ships for companies which let us say may be a grain house. For example, they have their own shipments of grain from the United States to the Far East, and they buy a ship to carry their own cargoes in, so they do not have a technical and crewing division or a knowledge of legislation for the vessel, so they use us to do technical management. It is not necessary to be involved in the commercial trading of the ship, they do that themselves.

Mr. von Brevern:

With respect to the charterparty, you said you have negotiated this and finally it was on your advice that it was signed with the approval of the owners. The contents of the charterparty, do you remember – you have referred that it was two-years charterparty, do you know who the charterparty was?

Mr. Stewart:

Yes, the name of the charter was Lemanía Shipping, a two-year charterparty.

Mr. von Brevern:

Was it for a particular purpose, this charterparty? Did you know what the intended voyage and trading of that vessel would be?

Mr. Stewart:

Yes, we did not know the voyages, but we knew the intended purpose, that the vessel would be used as a bunkering vessel, supplying bunkers offshore. This was understood to be part of the employment of the vessel, but the charterparty is quite a wide ranging document, it allows the charterer to trade the ship anywhere worldwide in any legal trades, in fact, so it is not restricted in any way.

Mr. von Brevern:

Do you remember whether any trade restrictions had been included in the charterparty?

Mr. Stewart:

Well, I did not personally negotiate a charterparty, that was done by the commercial director. The details of the charterparty I am not completely familiar with, but I do not remember there being any restrictions, because it has worldwide trading, this is quite a common terminology,

because the ships may be employed in one area for a short period, and then may find some other employment in some other area for a short period. Sometimes even the ship can be sublet to another charterer, and they are all rights that the charterer has. So I do not remember any particular restrictions, apart from you have to do it in a legal way, of course.

Mr. von Brevern:

Did you know the charterer, the company? Did you know whether they had a lot of vessels engaged and what their normal business was?

Mr. Stewart:

No, not really. Always before we engaged on behalf of the owner, the shipowner service, where we have to get paid for it, we would like to find out if the charterer is able to pay the charter hire, because it is a lot of money, and a lot of expense if anything goes wrong. In the normal course of events we would use a credit checking agency to come up with some information about the charterer, whether it was part of a group, a small company or whatever. So that information would be available, yes.

Mr. von Brevern:

Did you or one of your employees or colleagues instruct the crew at the beginning of this charterparty; were any particular instructions given to observe because this was, perhaps you would agree, it is not a normal business. Did they receive any particular instructions?

Mr. Stewart:

Yes, we have for all vessels which we manage, especially a tanker, we have a special code called the ISM Code now, which is an international safety management code. That entails that certain procedural information must be passed to the vessel, certain levels of training have to be in place and procedures for communication, procedures for accident, procedures for various things. So that information is all passed to the captain as a normal event. What happens normally if a ship is on a time charter, the time charterer or perhaps their agent would send specific instructions to the captain, usually in the form of a document which gives the list of the people who will be supplying him with instructions, information of what bunkers he should have on board, the likely trade he will be involved in, and just the general day to day information of how he should proceed.

Mr. von Brevern:

Do you know, has the charterer handed over such a book of instructions?

Mr. Stewart:

My recollection is that the Master got instructions in that form, yes.

Mr. von Brevern:

Related to what?

Mr. Stewart:

It relates to the normal day to day business of what the ship would be employed in. For example, it says –

Mr. von Brevern:

The schedule, or ...?

Mr. Stewart:

Well, I would say in this sort of trade I do not think there is a very strict schedule, it is not like a liner service where the ship goes from say Rotterdam to New York back and forward. Like lots of the ships we have, they are what we call tramp ships. They trade from one employment to the next, so you complete one voyage and the next voyage instructions would not be there until near the end of the voyage and then you give new instructions, because you have re-employed it.

Mr. von Brevern:

Is that just a guess from you, that some instructions have been handed over, or do you know that for sure?

Mr. Stewart:

Well, I do not recollect having seen these particular instructions myself, but I asked the Captain on one of the occasions I was there, and of course our marine department would also have done that, to say does he have instructions from the charterer, written instructions on all the information he needs to operate the vessel, and he said yes.

Mr. von Brevern:

When you say "by the charterers" you mean the charterers, Lemanía Shipping Group?

Mr. Stewart:

The charterer or their agent. In actual fact, rather like quite often the name of a charterer is just a name – like the similar relationship we have with Tabona Shipping. We are managers for Tabona so we issue all instructions on behalf of the owner. The charterer can have what we call an operating agent, which is maybe part of his own group, shall we say, but a different division of a group which issues instructions directly on behalf of that formal charterer.

Mr. von Brevern:

I am still after the instructions. Did they come from Lemanía, its charterers, or did they come from their agents, and if so, who were the agents?

Mr. Stewart:

No, they come from their operating agents. That is correct. The actual instructions come from the operating agents.

Mr. von Brevern:

Do you know who that was?

Mr. Stewart:

Yes, that is Addax Bunkering Services in Geneva.

Mr. von Brevern:

If such operating agent from the charterer instructs your crew, do you tell your crew, your Captain, that he has to follow the orders of the agent of the charterer?

Mr. Stewart:

Yes, in terms of employment of the vessel, he is obliged to follow the instructions of the charterer or his agent. That is what the charterparty says.

Mr. von Brevern:

It is in the charterparty, that he has to follow the instructions of –

Mr. Stewart:

The charterer or his agent, yes.

Mr. von Brevern:

Or his agent?

Mr. Stewart:

Yes. I am not sure if it spells it out specifically, but that is the implication.

Mr. von Brevern:

You would not have a line in the charterparty where that may be said?

Mr. Stewart:

No.

Mr. von Brevern:

You do not remember? We have it before us, the charterparty.

Mr. Stewart:

Yes, I do not remember exactly whether that was said.

Mr. von Brevern:

So in this case you have instructed your Captain that Addax Bunkering Services would be the company that would give instructions to him?

Mr. Stewart:

Yes, in terms of deployment of the ship. That is correct.

Mr. von Brevern:

In terms of?

Mr. Stewart:

Deployment of the ship. Everything else – instructions we give him for the safety of the vessel, the operation of the crew, technical operations, insurance – everything else we control. He reports to us on that. He also reports, of course, his position and what he is doing. As soon as he gets his orders to go somewhere he sends us – most charterers also send us, we have a communication between our own operation department and the charterer's operation department where they would tell us, "Well, look, the next deployment looks like the ship is going to go from A to B. The aegis will be such and such", and then they send us information, more or less simultaneously as the Captain gets it, so that we are all in the picture.

Mr. von Brevern:

One of the main items of the claims is the loss of hire.

Mr. Stewart:

Yes.

Mr. von Brevern:

Hire is normally, under the charterparty, paid by the charterer to the owner where you receive the money?

Mr. Stewart:

Yes.

Mr. von Brevern:

It is quite a lot of money. Has there been any dispute between the owner and charterer? I understand normally you would ask the charterer to pay the hire.

Mr. Stewart:

Yes.

Mr. von Brevern:

In the present case, did you ask for it – I mean after the *Saiga* was detained in Conakry?

Mr. Stewart:

Yes, of course. We asked for the hire.

Mr. von Brevern:

You asked for the hire?

Mr. Stewart:

Yes.

Mr. von Brevern:

After that time?

Mr. Stewart:

The hire is obliged to be paid every month in advance, so we send an invoice and ask for the hire.

Mr. von Brevern:

And has it been paid?

Mr. Stewart:

For the period the ship was detained, no.

Mr. von Brevern:

Did you accept non-payment or did you, perhaps, go to arbitration? I assumed that you agreed to arbitrate in London instead of the International Tribunal?

Mr. Stewart:

Yes. That is in the charterparty, of course. There is a procedure. A signed charterparty has an arbitration clause, of course, which in this case is that if you have a dispute that you cannot resolve then yes, you have a right to go to arbitration under English law. But we have not got to that stage yet insomuch as we have kindly asked for it and they have said that, well, the circumstances are such that more or less you might say, they were following, in their view, all the correct regulations, they committed no offence. So, under the terms of the charterparty the ship is out of action for something which is beyond their control.

Mr. von Brevern:

I understand you to say, "As yet, we have not done anything".

Mr. Stewart:

But we have had many discussions.

Mr. von Brevern:

There are still many discussions.

Mr. Stewart:

Yes.

Mr. von Brevern:

So it is not yet finally decided whether you will accept that behaviour of the charterers?

Mr. Stewart:

No.

Mr. von Brevern:

When you said that under your management contract you are allowed to do a lot of things, claims for example: your management contract was in relation to Tabona, to the owner?

Mr. Stewart:

Yes.

Mr. von Brevern:

Are you allowed under this contract to pursue claims before the court under your own name or under the name of Tabona, or what is the regulation?

Mr. Stewart:

In the contract it is covered in the insurance section, shall we say. We will use our best endeavours to look after the owner's interest. For example, if you have a cargo claim or cargo shortage claim – for some reason the ship delivers some cargo which is short or perhaps was damaged – then, of course, there would be a claim against the ship which we would defend. Then we would use the vessel's protection and indemnity insurance to defend that claim.

Mr. von Brevern:

Would you do it on the risk of the owner?

Mr. Stewart:

It is done on the risk as the owner. We are acting as the agent of the owner, yes.

Mr. von Brevern:

In case of the *Saiga*, with all the many costs you have referred to, did you, as representative of your company, Seascot Management, bear any costs that you have not yet been reimbursed by the owners, or by someone else?

Mr. Stewart:

Strictly speaking, we do not accept any liability for the costs. As I say, we do our best endeavours to protect the owner's interests and, at the end of the day, where something has to be done and paid for, the owner has to pay for it. The only thing I would say in this particular case is that having, let us say, encouraged in some way the owner to enter into this contract because it seemed a very good contract and seemed that it would tie in very well with the type of ship etc, one feels a slight embarrassment about all the costs you are not able to – you have had to pass on to the owner. Also, at the end of the day, because of this loss of income, the owner, I know, is suffering very greatly because the vessel had a two-year charter which, if it went the full two years, would earn a certain amount of money, of course. At the end of that charter it has to go through a major survey. The income from that charter would pay for most of that survey, or pay a large proportion of that survey. Now a lot of that income is missing, so obviously the owner has –

Mr. von Brevern:

My concrete question is: we have received from Saint Vincent and the Grenadines a bundle of many invoices.

Mr. Stewart:

Yes.

Mr. von Brevern:

Dakar, and so on. I assume that all these invoices have been paid. My question is, have you paid these amounts and were you reimbursed from anybody else?

Mr. Stewart:

No, we were only reimbursed from the owner.

Mr. von Brevern:

From the owner?

Mr. Stewart:

Yes.

Mr. von Brevern:

Did you receive from the owner –

Mr. Stewart:

Yes, yes.

Mr. von Brevern:

Nearly all big amounts?

Mr. Stewart:

Nearly all big amounts. Exactly, yes.

Mr. von Brevern:

I have one further question that relates to your statement. You said under number 1: "Its duties as ship manager include" *inter alia* "dealing with the regulation of flag states and statutory bodies". Could you explain what that includes, that obligation?

Mr. Stewart:

Yes, we have to pay attention to the flag States' requirements. These flag States' requirements are generally delegated to the classification society in respect of safety; construction of the vessel; the load line which determines the amount of cargo it can carry; the safety of the vessel; the radio systems of the vessel. They are all statutory requirements in accordance with the IMO, MARPOL and SOLAS, of course. That is what I mean by that.

Mr. von Brevern:

The vessel which you managed before the *Saiga*, under which flag was that vessel – for Tabona – do you remember that?

Mr. Stewart:

Yes, I think that was Vanuatu, actually, that one.

Mr. von Brevern:

Vanuatu?

Mr. Stewart:

Vanuatu, yes.

Mr. von Brevern:

So you are an expert in Vanuatu merchant shipping law. Have you got information about the law of the new flag which the *Saiga* was flying?

Mr. Stewart:

Saint Vincent and the Grenadines?

Mr. von Brevern:

Yes.

Mr. Stewart:

Yes, we have other ships also under the Saint Vincent and the Grenadines flag.

Mr. von Brevern:

So you know your obligations under this flag, more or less?

Mr. Stewart:

Yes.

Mr. von Brevern:

Did you represent the owner in the auction?

Mr. Stewart:

No, it was done in a slightly different way. There was a solicitor representing the parties of the ship at the time, yes.

Mr. von Brevern:

Do you remember which certificate of registration the *M/V Saiga* had when you took it over, when it was bought?

Mr. Stewart:

As I said, the certificate of registration was an expired Maltese one, but I do not think the actual document was on board the vessel.

Mr. von Brevern:

The Maltese one was expired?

Mr. Stewart:

My impression was, because I do not remember, I do not recollect getting documents from the vessel because we just had been led to understand, so we knew there was a Malta flag on it.

Mr. von Brevern:

When did you take over the operation? The moment the vessel was bought?

Mr. Stewart:

Shortly afterwards, yes.

Mr. von Brevern:

So you had the responsibility?

Mr. Stewart:

Yes.

Mr. von Brevern:

So at that time, it had at first been in the yard?

Mr. Stewart:

Yes, we took it to the shipyard.

Mr. von Brevern:

At that time was it still under Maltese registration?

Mr. Stewart:

Yes, we took it by tug to the shipyard. It was laid up here so rather than start to do piecemeal repairs in Falmouth, which really has no facility, we made a contract with the shipyard in Brest, which is very close by. So we towed it to the shipyard.

Mr. von Brevern:

Who then, from your company, took care of the new registration? Obviously you decided to fly the Saint Vincent flag and I think you must have done something with respect to the registration. Who has done it and when?

Mr. Stewart:

Yes, that was done by our commercial department during the period that the ship was under repair. So obviously we had all the flag sorted out and all these surveys done on the vessel before she could enter service. So that was all done more or less at the one time.

Mr. von Brevern:

Do you know how it was done or was it just that you are the general manager and you knew that everything had to be done and you did not take care of the –

Mr. Stewart:

I did not personally do it but I know the principle of what is involved in registering a vessel. You have to give certain information. You fill in an application form. Actually for Saint Vincent and the Grenadines we deal with the service office they have in Geneva, which is a very efficient office. As I say, we have other ships registered in Saint Vincent and the Grenadines so we know what information is required. We fill in an application form for a provisional registry, as they call it, and a provisional radio licence. Subject to the ship being acceptable, you obtain provisional radio licence and provisional register.

Mr. von Brevern:

And did you receive that?

Mr. Stewart:

We received that, yes.

Mr. von Brevern:

Do you remember the expiry date of that registration document?

Mr. Stewart:

Yes, that is right. Usually, the initial, provisional registry document is issued for six months. You can get another extension of six months if the ship happens to be in a place and you cannot finally get all the bits and pieces together within the six months for permanent registration, or issuance of a permanent registration document, as they call it, because obviously, once you fill in the application form and the ship is accepted for the registry, it remains on the register until or unless it is deleted for some reason or other – is cancelled for some reason or other.

Mr. von Brevern:

So you told us that there is someone specialized in your firm who has to take care of that? He applied to receive the provisional certificate. What happened in your company thereafter, in connection with registration? I should like to know what has happened in your company. Do you know that?

Mr. Stewart:

Yes. To reach permanent registration, you have to comply with certain requirements which are laid down by the flag State. You have to show proof that it has not registered in the previous registry. Also you obtain a document called a deletion certificate. So, in due course the Maltese registry was contacted and they confirmed that the ship was no longer registered with them.

Mr. von Brevern:

Is that your recollection? Do you know that, or do you think that was the rule, that that should have been done? Was that all done, what you have just told us?

Mr. Stewart:

That was done. That was done, yes. The deletion certificate was obtained and that was, in due course, sent to the Saint Vincent and the Grenadines registry.

Mr. von Brevern:

Do you know when it was, the deletion certificate?

Mr. Stewart:

No.

Mr. von Brevern:

You do not know. It was a provisional certificate. Did you receive a permanent one?

Mr. Stewart:

Yes.

Mr. von Brevern:

When?

Mr. Stewart:

In due course the vessel received a permanent one. I think actually the permanent one was issued in about the November time. I think I recollect that it was about the November time.

Mr. von Brevern:

And the provisional one was issued when, do you remember that? At the beginning of March or the middle of March?

Mr. Stewart:

Yes.

Mr. von Brevern:

And the expiry date was, do you remember that?

Mr. Stewart:

Well, it would be six months.

Mr. von Brevern:

That would be before November, would it not?

Mr. Stewart:

Yes, that would be the end of October.

Mr. von Brevern:

Did that mean anything to you or to your colleague?

Mr. Stewart:

I am not sure what the process was. Usually what happens is that shortly after the ship enters service you get this deletion certificate from the previous registry and I think there are some other documents also you are required to produce. They are sent to Saint Vincent and the Grenadines or the flag State and in due course the administration will issue a certificate which says it is a permanent registry to put on board the vessel. But I have seen occasions of course when it may go past the six months and you have to apply for another one, just to keep the record straight on the vessel, shall we say, but it does not always get to the vessel at precisely the right moment because you might be at sea or wherever. Sometimes she could be on a passage and it may expire on the way and the ship will arrive at the port and the agent will say, "Well, your registry document appears to have expired, so we will just get the fax and fax the other one so that you have something for sailing".

Mr. von Brevern:

It may be really difficult for you to remember every single application and the date of it but would you agree that, at least until 12 September, which was the expiry date of the original Provisional Certificate, that before that date you have not received another certificate and have not applied for another certificate? You have just mentioned that you remember that it may have been November.

Mr. Stewart:

I seem to remember it was beyond the date of expiry until we got another one, another temporary one.

Mr. von Brevern:

Quite a different point, a point concerning damages: you said you have paid Mr. Niasse. He is only one of many crew members, I think. I was a little astonished. Is that really correct? You know Mr. Niasse?

Mr. Stewart:

Yes, I do.

Mr. von Brevern:

And Seascot paid him as employer? Were you the employer?

Mr. Stewart:

No. The employer is always the owner. Seascot act as agents for the owner, so he was paid on board the vessel. He would normally be paid on board the vessel in cash by the Master.

Mr. von Brevern:

But the Master will not do so without your approval.

Mr. Stewart:

No, of course not.

Mr. von Brevern:

Do you know how much he received and when?

Mr. Stewart:

His salary is £300 per month, yes.

Mr. von Brevern:

Has he been employed for months?

Mr. Stewart:

I do not recollect how long he was employed actually but he was employed some time before the ship was detained at Conakry.

Mr. von Brevern:

We have been told by Mr. Niasse, and perhaps you can comment on this, that his employment company was a company in Dakar. Is that possible? Can he have two employers?

Mr. Stewart:

It could be. The way we arranged it was that because the crew on this particular type of business is very busy all the time, maybe with the operation of the vessel they are working 24 hours a day bunkering vessels which can be launched in the night of course, and through the day and so on and so forth, nearly all the crew have an assignment involved that is either maintaining the ship in position, running the engines or in fact handling the bunkering system. So we took the view that it would be useful to have some extra maintenance men on board the vessel. I know on one of my visits to Dakar to see the vessel we were discussing this point with Mr. Marc Vervaet, who is the General Manager of Oryx at Dakar. I understand that is part of the Addax Group. He had suggested that we use people here in his own maintenance area, shall we say, and I am sure, if we wanted to take on some extra people, we could take them and sign them on aboard the ship as extra maintenance men. It may be in fact that Mr. Niasse was previously working with Oryx in this way, so he would just continue. The Captain would agree the rate and he would just continue, yes.

Mr. von Brevern:

One question, going back to your management work: you referred to the classification societies you use, do they change or do you have a policy in your company to make use of one particular classification society?

Mr. Stewart:

No. We use a number of classification societies. There are various reasons for that. Usually we take over an existing ship. If it is a new building then of course you have complete choice of what classification society you use to supervise the construction and eventually handle the classification of the vessel. But if the ship is a second-hand vessel it will already have a classification society. If it is one of what we call the IAX group, which is a society which has the highest standards of credentials accepted by all the insurance companies, we would

probably not change the classification society of that ship; we would just leave it with that particular classification society.

Mr. von Brevern:

And in relation to the *Saiga*, did Tabona or you yourself or anybody else decide which classification society you should make use of?

Mr. Stewart:

It was Russian Marine Registry. We have other vessels also with the Russian Marine Registry, so we said, "Just leave it as it is".

Mr. von Brevern:

The last question, again on damage: are you aware of the total amount of repair costs for the vessel? You have demonstrated some particular items but if you take the repair costs and installations of the vessel altogether, have you that figure at present?

Mr. Stewart:

Yes. It is broken down in different sectors: so much we spent at Conakry, so much we spent at Dakar, so much we have deferred to later because we cannot repair it. The total figure is, according to my sheet here when we add them all up, \$595,000.

Mr. von Brevern:

Do you know the value of the vessel at that time?

Mr. Stewart:

At that time in its damaged condition of course it would, I think, probably be worth about \$750,000.

Mr. von Brevern:

In the damaged condition?

Mr. Stewart:

Yes.

Mr. von Brevern:

Thank you, Mr. Stewart.

Thank you, Mr. President. Professor Lagoni would like to continue.

The President:

Yes, Professor Lagoni.

CROSS-EXAMINATION OF MR. STEWART (CONTINUED)
BY MR. LAGONI (GUINEA)
[PV.99/6, E, p. 26–30]

Mr. Lagoni:

Thank you, Mr. President, Members of the Tribunal.

Mr. Stewart, you mentioned in your statement at number 2 "as a consequence of the crew abandoning various pumping and transferring operations in order to save themselves from death and serious injury" – I refer to this little sentence – and that refers to the constructive damage the vessel suffered from the pumping.

Mr. Stewart:

Yes.

Mr. Lagoni:

It is also shown in photograph 20 of these photographs. This structural damage was caused by the ballast pump?

Mr. Stewart:

Yes, I understand that from the Captain's report.

Mr. Lagoni:

During the attack or this turmoil apparently the crew was conducting some ballasting operation there?

Mr. Stewart:

Yes, I understand that they were probably not doing much ballasting operations but they were just putting some ballast in the forward tanks to adjust the trim of the vessel because they had discharged quite a lot of cargo from the forward tanks the previous day in fact.

Mr. Lagoni:

These pumps do not have security switch and when you pump you can sink the boat when you go on pumping, as I understand it.

Mr. Stewart:

No. The ship is in some ways rather old-fashioned in so much as it has steam pumps driven by steam pressure. So it is not like an electric switch you can switch off. You have to manually control the pumps at the pump station, shall we say, and these pumps are in the pump room. It is a progressive operation. You need probably three people: one is controlling the pumps, another one is probably manoeuvring some valves and the other chap would be checking the level in the tank so that you do not over-fill and over-pressurize the tank.

Mr. Lagoni:

But you apparently also mentioned, if I understood you rightly, that after this turmoil they forgot to switch it off.

Mr. Stewart:

I think it was after the turmoil. During the turmoil everybody headed for cover, I think is the way to describe it. Whatever was happening to the ship was the least of their worries. They were more concerned actually for their own position rather than what they were doing.

Mr. Lagoni:

I understand that. Dr. Plender has shown you some pictures and you recollect this midships picture of the pump station. As I can see it, this blue door which he was referring to was on the starboard side of the ship. Is that right?

Mr. Stewart:

Yes.

Mr. Lagoni:

Of course the attack was from the port side and I understood from Dr. Plender that there was no possibility to get from the engine room back here to switch off the pump.

Mr. Stewart:

You have to come out on the deck to get there in fact from the engine room.

Mr. Lagoni:

But the deck is here.

Mr. Stewart:

The picture is a bit confusing because in the centre of the deck rows of pipes go from forward and aft of the vessel. There is a walkway above that and what you see there is the walkway in the centre of the vessel.

Mr. Lagoni:

You have to use this walkway to get to midships.

Mr. Stewart:

Exactly; you can also walk on the deck but that is the simple way to go.

Mr. Lagoni:

In photograph 13 we see the bridge wing with a bullet hole. You mentioned that the size of the structure is about 7 mm steel. Is that right?

Mr. Stewart:

Yes, generally speaking. It varies in different places. This is quite a heavily-constructed vessel. She was built in Bulgaria where things tend to be heavy duty, shall we say, so she has got quite heavy steel. Yes, that would be about 7 mm, I think.

Mr. Lagoni:

According to your impression was that hole caused by solid bullets or by explosive bullets?

Mr. Stewart:

I am not a ballistics expert but I would think it was a solid bullet because it has left its opening.

Mr. Lagoni:

It would have been –

Mr. Stewart:

A big hole, I think.

Mr. Lagoni:

When you came on board to place all the different damages on record, did you count the number of bullet holes? Have you any idea how many bullets were shot?

Mr. Stewart:

No, I did not count the bullet holes.

Mr. Lagoni:

Certainly that would be a very boring and tedious operation.

Mr. Stewart:

When I was at school I was a British Army cadet, as they called it. I did four years with that, so I learnt a little about automatic Sten guns and Bren guns and how many bullets they fire per second. Obviously, if you fire a machine gun you get a lot of bullets in a few seconds. If you look at the vessel, scattered about the accommodation, particularly on the port side as the Captain mentioned and the front of the accommodation, the windows are broken and above that the antenna. Then of course there are bullets in the engine room and there must have been some bullets across the midships there and the fender is punctured. I am not sure, 50 or 60 or something.

Mr. Lagoni:

I was just going to refer to the midship damage. There was this inflatable Yokohama fender, I learnt, as well?

Mr. Stewart:

Yes.

Mr. Lagoni:

And an inflatable lifeboat. Is it possible that they were destroyed because of ricochet or direct firing?

Mr. Stewart:

Yes, it could be ricochet.

Mr. Lagoni:

It could be ricochet?

Mr. Stewart:

It could be ricochet. If you were firing and you hit the deck, for example, the deck is very thick, so normally bullets would not go through the deck but, of course, they would ricochet back up again.

Mr. Lagoni:

Your impression was that the majority, the bulk of the bullets and the bullet holes were in the upper part of the ship, or where have they been? I understand that most of them are from the portside at a 45-degree angle to the bow?

Mr. Stewart:

Yes, mostly from the portside. The heavy holes are certainly on the upper decks.

Mr. Lagoni:

You estimated, although you were in the Naval Cadets or the British Army Cadets, that the diameter is about 20 mm, or you estimated that the calibre of the big hole shots was 20 mm, more or less. Are you aware that the patrol boats have 12.7 mm machine guns fixed on deck and that the arms carried by the soldiers are usually Kalashnikovs, which I think are usually 7.6 mm?

Mr. Stewart:

Yes.

Mr. Lagoni:

So you say that it is a rough estimation?

Mr. Stewart:

Yes. In my days it was a 303, and it is 0.303 of an inch. 0.3 of an inch is –

Mr. Lagoni:

It is nothing?

Mr. Stewart:

Given 11 mm, I suppose it is the same size of bullet, yes.

Mr. Lagoni:

Just let me briefly turn to another question. How can one stop the engine on site?

Mr. Stewart:

You stop the engine from the control station on the bottom platform.

Mr. Lagoni:

On the bridge or downstairs in the –

Mr. Stewart:

Down in the engine room.

Mr. Lagoni:

So you give an order from the bridge, "Stop engine now"?

Mr. Stewart:

Yes.

Mr. Lagoni:

How do they do that, with these traditional –

Mr. Stewart:

Absolutely, telegraphs, yes.

Mr. Lagoni:

Telegraph transmission?

Mr. Stewart:

It rings a bell and it indicates what the captain wishes.

Mr. Lagoni:

In order to stop the engine, you have to go into the engine room?

Mr. Stewart:

There are other ways to stop the engine. If you are a technician, you know other ways to stop the engine, but from the straightforward layman's point of view there is a big lever, you pull the lever, it says "Stop" and it does stop the engine, yes. That is on the bottom of the –

Mr. Lagoni:

If the technician gets the information, he stops the engine?

Mr. Stewart:

Yes.

Mr. Lagoni:

It is a diesel engine?

Mr. Stewart:

A diesel engine.

Mr. Lagoni:

It is not electric?

Mr. Stewart:

No, it is a diesel engine, a slow speed engine.

Mr. Lagoni:

Did you take a photograph of the broken porthole of the cabin of the painter Niasse? Is there any photograph that we have not seen?

Mr. Stewart:

No. The reason for that was that we had some spare porthole glasses on the vessel and the Captain and his crew were in Conakry and took all the broken ones, or a number of the broken ones – and I think Mr. Niasse's cabin was one of them – and put spare glasses in, so when I got there the glasses were replaced.

Mr. Lagoni:

They were already replaced?

Mr. Stewart:

Yes.

Mr. Lagoni:

Is there any reason why the photographs were not taken in Conakry? They were taken afterwards in Dakar, I understand. Would it not have been better or usual at the place where the ship was quite a while, in Conakry?

Mr. Stewart:

For a start, I am sure the Captain did not have a camera, but maybe Captain Merenyi may have had a camera. He certainly made a report. His report on the damages, and also the Captain's report on damages, when I went there it was more or less absolutely correctly described. Sometimes also, to be fair, when you are in ports which are controlled by Customs and guards, there is a rule that you are not allowed to take your camera in the port, so this could have been the same thing.

Mr. Lagoni:

That is your experience?

Mr. Stewart:

Yes.

Mr. Lagoni:

Thank you very much, Mr. Stewart. That ends my questions.

The President:

Thank you very much, Professor Lagoni.

Mr. Plender, we have ten minutes. Do you think that is adequate for you to re-examine?

Mr. Plender:

More than adequate.

RE-EXAMINATION OF MR. STEWART
BY MR. PLENDER (SAINT VINCENT AND THE GRENADINES)
[PV.99/6, E, p. 30]

Mr. Plender:

Mr. Stewart, to the best of your recollection, can you give the date of the provisional registration of the *Saiga*?

Mr. Stewart:

As far as I understand, my memory – and I would have to check the record – seems to indicate that it was about 23 February, the original registration, yes.

Mr. Plender:

For what period is provisional registration obtained in Saint Vincent and the Grenadines?

Mr. Stewart:

You get a piece of paper which says that it is six months. The piece of paper that you get to put on board a ship says that it is a six-month provisional document, but my understanding

also is that once you apply for registration, the vessel is entered as registered on the register, so until it is deleted it in fact remains on the register.

Mr. Plender:

What then is your understanding of the word "provisional" when used in the expression "provisional registration certificate"? What is provisional?

Mr. Stewart:

It is a temporary document. That is my understanding of "provisional".

Mr. Plender:

It is a temporary document. Is the registration, on your understanding, temporary or indefinite?

Mr. Stewart:

My understanding is that the registration is indefinite, unless there is some reason why you take the ship away from that registry or it is deleted by the registrar's office.

Mr. Plender:

Was there in the case of the *Saiga* a subsequent permanent registration?

Mr. Stewart:

Yes.

Mr. Plender:

As you understand the regulations of Saint Vincent and the Grenadines, from what date was the *Saiga* registered on the Saint Vincent Register?

Mr. Stewart:

As I say, my recollection is that it was late February 1997.

Mr. Plender:

As you understand the regulations of Saint Vincent, has she continued to be registered there at all times since?

Mr. Stewart:

Yes.

Mr. Plender:

Mr. President, I have no further questions, unless the Tribunal has any questions.

The President:

Thank you very much.

QUESTIONS PUT TO MR. STEWART
BY THE PRESIDENT
[PV.99/6, E, p. 31]

The President:

Mr. Stewart, do you have this bundle of photographs?

Mr. Stewart:

I do not have it. Perhaps I could borrow Mr. Plender's. (*Handed*)

The President:

If you look at photograph No. 4, you have some black marks. If you look at the first set of portholes at the top of the structure, you will see that there is a black mark to the extreme right, there is one just below, and there is one just below the words "No Smoking"?

Mr. Stewart:

Yes.

The President:

They are black marks?

Mr. Stewart:

Black marks, yes.

The President:

In fact, there is another one just below the one below "No Smoking", directly below it?

Mr. Stewart:

Yes, I see that.

The President:

What are those?

Mr. Stewart:

It appears to me that those are areas of steel that have had some damage which has been touched up with grey undercoat paint.

The President:

Were they damaged by bullets, do you know?

Mr. Stewart:

Actually I do not recollect, to be honest, because there were many places marked by bullets which the crew touched up with primer, and, of course, later on the whole structure would be painted white.

The President:

I see. Thank you very much. That will be all. Like your colleagues, you are released. You may, of course, stay if you wish, but you may leave. Just one moment, please.

Mr. von Brevern?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/6, E, p. 31–32]

Mr. von Brevern:

Mr. President, I have a problem again. I would like to put at least one more question to the witness with respect to the provisional registration. Would you allow me to do that?

The President:

Mr. von Brevern, I do not think I can. As I said, the procedure is quite clear. The party calling the witness examines in-chief and the other party has the right to cross-examine. Thereafter, the party calling the witness is given the opportunity to ask questions in order to clarify any doubts that may have been raised. If we were then to give you the opportunity of further cross-examination, we would have to give the other party the opportunity for further re-examination, and that, of course, would be an impossible situation.

I think that it should be entirely left to you to make reference in your submissions to any points especially if they happen to involve a contradiction. This is the situation, as we agreed during our meeting. There may be situations when an entirely new situation has arisen, but the question of registration and provisional registration has loomed so large in the documentation and in the presentations that it cannot possibly be described as new. In the circumstances, therefore, I do not think that we can break from the normal tradition.

Mr. Stewart, you are released.

Mr. Plender, please.

Mr. Plender:

Members of the Tribunal, that concludes the evidence for the applicant State. Tomorrow morning, with the leave of the President, we propose to deliver three short addresses on the basis of the evidence, and the case for the applicant State will conclude tomorrow morning.

The President:

Thank you very much indeed.

It is just about four minutes to time. I suggest that we break at this point. The sitting will be suspended and we will resume tomorrow morning at 10 o'clock.

(The Tribunal rises at 4 p.m.)

Public sitting held on 11 March 1999, 10.00 a.m.

Tribunal

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Registrar* CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 11 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

At the close of yesterday's sitting the situation was that Saint Vincent and the Grenadines had completed their submission of evidence by witness. We shall now listen to their submissions.

Mr. von Brevern?

Mr. von Brevern:

Mr. President, may I introduce a new member of the delegation of Guinea, Mr. André Leno, Judge of the Appeal Court of Guinea. Thank you, Mr. President.

The President:

Thank you very much.

Maître Thiam?

Plaidoirie de Saint-Vincent-et-les-Grenadines (suite)

EXPOSÉ DE M. THIAM
CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES
[PV.99/7, F, p. 4–18]

M. Thiam :

Monsieur le Président, Messieurs les Juges du Tribunal, comme je vous le disais hier, c'est un grand honneur pour moi de m'adresser à vous encore aujourd'hui. Bien que ce ne soit pas ma première intervention devant le Tribunal, je mesure le poids de la charge qu'un avocat assume devant cette juridiction.

Je dois vous dire cependant, qu'avant hier, comme mes confrères assis sur les bancs de Saint-Vincent-et-les-Grenadines, et comme, j'en suis sûr, la partie guinéenne, j'ai ressenti un profonde tristesse lorsque, alors que nous ne parlions que de la Guinée et des pratiques inavouables qui ont cours dans certaines administrations, un des témoins a cru devoir généraliser ses propos pour les appliquer à toute l'Afrique. Par respect pour le Tribunal, nous n'avions pas voulu interrompre le contre-interrogatoire de ce témoin. Mais, et tel est sans nul doute encore le cas pour la partie guinéenne, nous avons été particulièrement heureux que le Tribunal ait si justement relevé l'offense. Ce procès n'est pas celui du peuple africain, pas plus qu'il n'est celui du peuple guinéen. Il ne doit pas permettre que l'on donne de l'Afrique cette image négative si souvent véhiculée. Certes, il a malheureusement fallu que nous évoquions ici des choses horribles. Mais chacun sait qu'il y a chez nous, Monsieur le Président, une immense majorité d'Africains vivant dans la plus grande dignité. Cette majorité-là ne peut pas, sans rien dire, se laisser offenser par le fait d'une petite minorité qui contraint certains Etats à devoir se défendre devant des juridictions comme la vôtre en invoquant, de manière très embarrassée, les textes qui leur permettent, en droit interne, de ne pas assumer les conséquences de certains actes illégaux de leurs agents. J'y reviendrai tout à l'heure et cela me rappelle à mes devoirs qui sont, aujourd'hui, de ne parler que de droit.

Au nom et pour le compte de l'Etat de Saint-Vincent-et-les-Grenadines, je m'attaquerai aux aspects de la loi guinéenne qui se rapportent au litige qui vous est soumis. Ce litige vient de l'application, par la République de Guinée, de ses lois à un navire battant pavillon de Saint-Vincent-et-les-Grenadines.

La première affirmation de Saint-Vincent-et-les-Grenadines est que ces lois guinéennes, correctement interprétées, ne s'appliquent pas à l'activité à laquelle le *Saiga* se livrait et au lieu où celle-ci s'est déroulée. En d'autres termes, la République de Guinée ne peut pas prouver que le *Saiga* a violé la loi guinéenne, sauf à l'interpréter de manière totalement erronée.

En second lieu, nous affirmons que, si nous avons tort et si la loi guinéenne pouvait être interprétée comme empêchant l'avitaillement en carburant d'un navire étranger par un autre, au-delà de la mer territoriale guinéenne, c'est que cette loi ne serait pas en conformité avec la Convention des Nations Unies sur le droit de la mer et qu'elle ne serait pas, dans ce cas, opposable à Saint-Vincent-et-les-Grenadines.

En conséquence, une telle loi ne pourrait pas être appliquée pour priver les navires battant pavillon de Saint-Vincent-et-les-Grenadines de leur droit à la liberté de navigation et aux autres utilisations de la mer, conformes au droit international, dans la zone économique exclusive de la Guinée. La question de l'applicabilité de la loi guinéenne doit donc être interprétée d'une part, au regard du droit interne guinéen, et d'autre part, au regard du droit international.

Par rapport au droit interne guinéen, comme le docteur Plender l'a déjà souligné, des charges ont été retenues contre le commandant du *Saiga* devant les juridictions nationales de la Guinée. Etant donné que les charges retenues par le Ministère public de la République de Guinée sont fondées sur des actes qui se sont déroulés dans la zone économique exclusive de la Guinée, on était en droit de s'attendre à ce que ces charges aient un rapport quelconque avec les droits exclusifs que la Guinée possède dans cette zone économique exclusive qui reste et doit rester soumise au droit international.

Mais ce ne fut pas le cas. Les charges retenues contre le commandant n'avaient pas de rapport à la pêche ou à d'autres violations des droits souverains que la loi internationale reconnaît à la Guinée dans sa zone économique exclusive. Le commandant a été plutôt accusé, formellement, de divers délits douaniers. Dans son mémoire en réponse, la République de Guinée identifie deux de ces lois qui sont supposées avoir été violées par le *Saiga*.

La première loi sur laquelle la Guinée se base est la loi n° 94/007/CTRN du 15 mars 1994 « portant répression de la fraude sur l'importation, l'achat et la vente du carburant en République de Guinée. » L'article 1 dispose, je cite :

Sont interdits en République de Guinée l'importation, le transport, le stockage, la distribution du carburant par toute personne physique ou morale non légalement autorisée.

L'article 4, sur lequel la République de Guinée se fonde encore, dispose, je cite :

Tout armateur de navire de pêche, détenteur d'une licence de pêche délivrée par l'autorité guinéenne compétente qui se sera fait ravitailler ou aura tenté de se faire ravitailler en carburant par des moyens autres que ceux légalement autorisés sera puni de 1 à 3 ans d'emprisonnement et d'une amende égale au double de la valeur de la quantité de carburant achetée.

L'article 6, sur lequel la République de Guinée se fonde plus loin, dispose, je cite :

Quiconque aura importé frauduleusement du carburant sur le territoire national sera passible d'un emprisonnement de 6 mois à 2 ans, de la confiscation des moyens de transport, de la confiscation des objets servant à masquer la fraude et d'une amende solidaire égale au double de la valeur de l'objet de la fraude, lorsque cette infraction est le fait de moins de 3 individus.

L'article 8 enfin dispose, je cite :

Lorsque le délit visé à l'article 6 de la présente Loi aura été commis par une réunion de plus de 6 individus, qu'ils soient ou non porteurs de l'objet de la fraude, les contrevenants sont passibles d'une peine d'emprisonnement de 2 à 5 ans, d'une amende égale à quadruple de la valeur des objets confisqués en plus des peines accessoires prévues à l'article 6 de la présente Loi.

Mais une lecture des articles 1, 6 et 8 de la loi du 15 mars 1994, aussi bien que la prise en compte de son titre, démontre que ce qui est interdit, c'est l'importation non autorisée de

carburant à destination ou, je cite, dans « le territoire national ». Or, il n'est pas contesté que le *Saiga* n'a pas importé de carburant à destination ou dans le territoire national de la Guinée. Il n'est pas contesté, non plus, qu'il n'est jamais entré dans les eaux territoriales guinéennes. Le seul fondement sur lequel la cour d'appel guinéenne s'est basée pour condamner le capitaine du *Saiga* était tiré de ce que le commandant du navire a fourni du carburant à des navires de pêche dans la zone économique exclusive guinéenne.

Cependant, il est difficile de concilier ce fait avec les articles 1, 6 et 8 de la loi du 15 mars 1994 qui ne visent pas la zone économique exclusive, outre le fait qu'ils ne contiennent strictement aucune disposition répressive visant expressément ou implicitement les armateurs et/ou les capitaines des navires ravitailleurs.

La République de Guinée n'explique pas comment son litige contre le *Saiga* est régi par l'article 4 de la loi du 15 mars 1994. Cet article crée des infractions qui pourraient être commises par l'« armateur de navire de pêche [et le] détenteur d'une licence de pêche délivrée par l'autorité ... compétente ... ».

On ne peut se baser sur aucun élément suggérant que le *Giuseppe Primo*, le *Kriti* et le *Eleni G*, navires approvisionnés par le *Saiga*, importaient du carburant sur le territoire guinéen ou que les propriétaires de ces navires ont fait l'objet, pour ce motif, d'un quelconque poursuite judiciaire.

La deuxième loi à laquelle la République de Guinée se réfère est le code des douanes du 28 novembre 1990. L'article 1 dispose, je cite :

Le territoire douanier comprend l'ensemble du territoire national, les îles situées le long du littoral et les eaux territoriales guinéennes.

La référence expresse aux eaux territoriales guinéennes implique, *a contrario*, que les territoires douaniers ne s'étendent pas à d'autres eaux.

Donc, même si l'interdiction d'importation du carburant sur le territoire national, conformément à la loi du 15 mars 1994, devait être étudiée à la lumière du code des douanes auquel la République de Guinée se réfère en second lieu, il n'y aurait aucun argument pour soutenir sérieusement que le commandant du *Saiga* se serait rendu coupable, selon les lois guinéennes, d'une importation illicite. Tel n'est pas le cas et l'on n'a jamais prétendu que le *Saiga* est entré dans les eaux territoriales de la Guinée.

La République de Guinée se base sur l'article 33 du code des douanes qui crée un rayon d'action douanier de 250 kilomètres. Mais, elle omet de mentionner l'article 33, paragraphe 1, du même code, qui fait une distinction entre « rayon douanier » et « territoire douanier ». Comme l'article 43 du code des douanes français, duquel il semble tirer ses origines, l'article 33 du code des douanes guinéen est inclus dans le chapitre réglementant la Direction des services de la douane. Il prescrit la zone aussi bien insulaire que maritime où les fonctionnaires de la douane sont autorisés à intervenir : c'est cela leur champ d'action. Comme son pendant français, l'article 33, paragraphe 2, n'a pas la prétention de fixer les limites de la côte dont le franchissement implique une importation.

La plupart des autres dispositions du code des douanes citées par la République de Guinée autorisent seulement les services douaniers à intervenir de manière spécifique dans un rayon qui leur est propre. Ils ne permettent pas de soutenir l'argument selon lequel, en droit guinéen, le commandant d'un navire commettrait une faute en approvisionnant d'autres navires dans la zone économique exclusive. La République de Guinée se réfère à l'article 54 –

The President:

I am sorry to interrupt, but the interpreters are finding it difficult to keep up with you.

M. Thiam :

Je présente mes excuses aux interprètes.

La République de Guinée se réfère à l'article 54 qui est inclus dans le chapitre du code des douanes qui traite de l'importation de marchandises à dédouaner. Ce texte impose, à première réquisition, aux commandants de navires se trouvant dans la zone maritime du rayon douanier :

1. de soumettre l'original du manifeste de cargaison au visa *ne varietur* des autorités douanières;
2. de remettre une copie de ce manifeste toujours à première réquisition.

Or, le pétrole à bord du *Saiga* n'était pas une marchandise à dédouaner parce qu'elle n'était ni une marchandise importée, ni une marchandise sur le point d'être importée sur le territoire de la Guinée. Or, les agents des douanes guinéens n'ont jamais allégué avoir présenté, avant l'attaque, la saisie et le pillage du *Saiga*, une quelconque réquisition pour la soumission au visa *ne varietur* du manifeste de cargaison. Or, il n'y avait aucune raison apparente, de fait ou de droit, pour que le capitaine du *Saiga* se soit cru obligé de présenter aux agents guinéens, spontanément, en dehors de toute réquisition, une demande de soumission du manifeste au visa *ne varietur* prévu par l'article 54 du code des douanes guinéen.

Sans en expliquer la signification, la République de Guinée cite l'article 300 du code des douanes, aux termes duquel le Département des douanes n'est responsable de ses agents que lorsque ceux-ci agissent dans le cadre de leurs fonctions. En saisissant le *Saiga*, les agents des douanes guinéennes agissaient, manifestement, dans l'exercice de leurs fonctions. Soulignons qu'une règle internationale impute clairement à un Etat les agissements de ses fonctionnaires, même dans le cas où ceux-ci n'auraient pas agi en conformité avec leurs devoirs dans le cadre de la loi de cet Etat. Dans l'affaire dite [*Caire*]¹⁸, le tribunal a soutenu que l'Etat, conformément à la loi internationale, encourt une responsabilité internationale pour tous les actes délictueux commis par ses fonctionnaires ou ses organes, nonobstant le fait que le fonctionnaire ou l'organe ait agi dans les limites de sa compétence ou ait dépassé ces limites. Il est nécessaire qu'ils aient dû agir, au moins en apparence, comme des fonctionnaires ou institutions habilités, ou, en pratique, qu'ils aient dû utiliser les pouvoirs ou mesures propres à leur mission officielle. Des décisions dans ce sens avaient également été prises par les commissions de réclamations dans l'affaire *Youmans* (1926¹⁹), et dans l'affaire [...] ²⁰.

D'ailleurs, on ne manquera pas de noter que l'Etat guinéen s'est soigneusement abstenu de prétendre qu'il aurait refusé d'encaisser le produit, particulièrement juteux, de la vente de la cargaison du *Saiga* sur laquelle il affirme avoir des droits. Il n'a pas non plus soutenu qu'il aurait refusé de distribuer aux agents et militaires ayant participé à l'attaque, la part qui leur revenait sur la vente de la cargaison. Il n'a pas expliqué qu'il aurait fait indemniser le cuisinier du *Saiga* pour lequel on semble avoir rétabli, en Guinée, ces lois exécrables et horribles sur le travail forcé.

Pas davantage, il n'a soutenu avoir ordonné la restitution du produit du pillage du navire par ses agents qui ne semblent avoir été ni poursuivis, ni sanctionnés pour avoir agi en dehors de leurs fonctions.

¹⁸ Note du Greffe : Référence donnée dans le texte écrit de l'exposé : 1929, *R.I.A.A.*, p. 516 à 530 (section 3, tab 2).

¹⁹ Note du Greffe : Référence donnée dans le texte écrit de l'exposé : *R.I.A.A.*, p. 110 à 116 (section 3, tab 3).

²⁰ Note du Greffe : Référence donnée dans le texte écrit de l'exposé : 1929, *R.I.A.A.*, p. 516 (section 3, tab 4).

Bien au contraire, il semble que la compétence de celui qui a dirigé l'attaque du *Saiga*, le commandant Léonard Bangoura, soit tellement appréciée en Guinée que son nom figure dans la liste des experts que la Guinée a demandé à votre Tribunal d'entendre.

On ne voit pas, dès lors, comment et pourquoi la Guinée invoque une disposition de son code des douanes qui lui permet, en droit interne, d'être exonérée de toute responsabilité pour des agents qui auraient agi en dehors de leurs fonctions. Il y a là un réel mystère. Comme le Tribunal n'aime pas plus les mystères que l'Etat demandeur, ce texte sera écarté.

Saint-Vincent-et-les-Grenadines invite le Tribunal international à décider que la République de Guinée a échoué, de toute évidence, à identifier quelque loi guinéenne que ce soit qui ait été violée par le *Saiga*. L'absence de législation nationale donnant à la République de Guinée compétence pour appliquer et renforcer ses droits de douane dans sa zone économique exclusive, est significative pour, au moins, trois raisons.

Premièrement, la République de Guinée soutient que ses actions contre le *Saiga* étaient justifiées sous le fondement de l'article 58 de la Convention des Nations Unies qui exige des navires étrangers qu'ils se plient aux lois et règlements adoptés par l'Etat côtier. Or, le *Saiga* ne peut pas être accusé d'avoir manqué de se plier aux lois douanières de la Guinée dans sa zone économique exclusive, si en fait, comme c'est le cas, de telles lois n'ont pas été adoptées pour la zone économique exclusive de la République de Guinée.

Deuxièmement, cette absence de législation nationale est un point important pour apprécier le droit de poursuite de l'article 111, paragraphe 1, de la Convention de 1982 qui affirme que :

La poursuite d'un navire étranger peut être engagée si les autorités compétentes de l'Etat côtier ont de sérieuses raisons de penser que ce navire a contrevenu aux lois et règlements de cet Etat.

Dès lors, même si la poursuite a commencé dans une zone économique exclusive de la République de Guinée, ce que Saint-Vincent-et-les-Grenadines conteste, une telle poursuite ne serait pas fondée en l'espèce puisqu'il est certain qu'il n'y a pas de lois et règlements guinéens que le *Saiga* aurait pu violer.

Troisièmement, si les lois douanières de la République de Guinée ne s'étendent pas à sa zone économique exclusive, c'est alors que les prétendues preuves que les cours et tribunaux de la République de Guinée ont amassées, pour établir que le *Saiga* aurait violé ces lois, l'ont été sans nul doute à la suite d'un abus de processus judiciaire. Je ne peux pas omettre de mentionner que cet abus est, ici, d'autant plus flagrant que le processus judiciaire a été poursuivi en violation des droits les plus élémentaires de la défense et en violation de plusieurs règles fondamentales de la procédure en vigueur devant les juridictions répressives guinéennes, comme l'a rappelé M^e Bangoura dans sa déclaration. Cet abus du processus judiciaire aggrave manifestement le préjudice de l'Etat demandeur.

Dans sa recommandation du 2 mars, le Tribunal nous a invité à examiner la question de l'applicabilité de la loi guinéenne dans la zone économique exclusive. Dans cette perspective, je voudrais vous dire, Monsieur le Président, Messieurs les Juges du Tribunal, que même si, par extraordinaire, vous veniez à découvrir qu'une loi guinéenne a eu la prétention d'empêcher le ravitaillement en carburant d'un navire par un autre, hors de la mer territoriale guinéenne, mais dans sa zone économique exclusive, cela ne ferait pas beaucoup avancer la thèse de la Guinée. En effet, Saint-Vincent-et-les-Grenadines soutient que vous devriez considérer qu'une telle loi aurait violé les droits dont jouissent les Etats tiers, au moins dans la mesure où, comme en l'espèce, il n'y a aucune allégation ou preuve que le carburant ait jamais été importé dans la zone douanière guinéenne ou jamais été destiné à y

être importé, ni aucune suggestion que la loi guinéenne ait été imposée ou mise en vigueur pour la protection ou la conservation de l'environnement marin ou pour d'autres buts inscrits dans l'article 56 de la Convention de l'Organisation des Nations Unies.

En d'autres termes, la question déterminante n'est pas, ici, relative à l'interprétation de la loi guinéenne. Elle est relative à son opposabilité aux Etats ou navires étrangers. Même si la loi guinéenne assimile la zone économique exclusive à un rayon douanier de 250 miles à partir de sa propre mer territoriale, elle ne serait pas en mesure, selon le droit international, d'interdire aux navires étrangers d'approvisionner d'autres navires dans cette zone ou dans ce rayon au motif que la Guinée aurait, comme cela a été dit, un « intérêt fiscal à réguler l'avitaillement en haute mer ». Selon les termes de la Cour internationale de Justice : « La délimitation des zones maritimes a un aspect international et ne peut simplement dépendre de la volonté de l'Etat côtier telle qu'elle s'exprime dans sa loi nationale », *Affaire des pêcheries*²¹.

L'article 73, paragraphe 1, de la Convention des Nations Unies n'autorise l'embarquement à bord, le contrôle et la saisie de navires étrangers dans la zone économique exclusive que pour des objectifs spécifiés. Il ne fait aucun doute qu'il n'y a pas de pouvoir général de saisie dans la zone.

C'est la thèse de Saint-Vincent-et-les-Grenadines que peu importe si la zone économique exclusive est décrite comme faisant partie de la haute mer à laquelle des articles spécifiques s'appliquent. Comme la Cour internationale de Justice l'a dit dans les affaires *Compétence en matière de pêcheries*²², il s'agit « d'une troisième catégorie entre la mer territoriale et la haute mer ». Manifestement, elle n'est pas assimilable au territoire nationale.

En outre, même si des lois interdisant ou réglementant l'avitaillement des navires dans la zone économique exclusive devaient être considérées comme opposables par un Etat côtier aux Etats tiers, les articles sur lesquels la République de Guinée se fonde dans le présent cas resteraient inopposables à l'Etat demandeur et aux autres Etats tiers, dès lors que les lois et chartes correspondantes n'ont pas été déposées auprès du Secrétaire général des Nations Unies conformément aux exigences de l'article 75, paragraphe 2, de la Convention des Nations Unies.

Monsieur le Président, Messieurs les Juges du Tribunal, laissez-moi, maintenant, en venir aux raisons pour lesquelles, sous l'angle du droit international, la République de Guinée ne peut pas appliquer ses lois douanières dans sa zone économique exclusive.

Saint-Vincent-et-les-Grenadines soutient que l'avitaillement est un aspect de la liberté de navigation ou un usage internationalement légal de la mer qui en découle, dont tous les navires, y compris le *Saiga*, jouissent dans la zone économique exclusive de la République de Guinée en vertu de l'article 58, paragraphe 1, lettre a), de la Convention. Dans son mémoire en pétition, aussi bien que dans sa réplique, la République de Guinée a cherché à attaquer cette thèse en arguant qu'une différence devait être établie entre la navigation et le commerce et que l'avitaillement est lié au commerce, non pas à la navigation. Elle a aussi argué que le *bunkering* est lié à la pêche, non pas à la navigation et que la première raison de la présence du *Saiga* dans la zone économique exclusive de la Guinée était le commerce, pas la navigation.

Saint-Vincent-et-les-Grenadines a déjà expliqué dans sa réplique pourquoi la différence que la République de Guinée cherche à établir entre la navigation et l'activité commerciale n'est pas défendable. Elle a déjà fait remarquer qu'en dehors des navires de guerre et des vaisseaux de plaisance, toute navigation est une forme d'activité commerciale, puisqu'il s'agit, d'habitude, du transport de marchandises ou de passagers à des fins lucratives

²¹ Note du Greffe : Référence donnée dans le texte écrit de l'exposé : *C.I.J. Recueil 1951*, p. 116 à 132.

²² Note du Greffe : Référence donnée dans le texte écrit de l'exposé : *C.I.J. Recueil 1974*, p. 3, au paragraphe 54.

ou à des fins d'exploration ou d'exploitation des ressources de la mer et de ses fonds. En outre, dans le cas des transports de passagers, une grande partie d'activités commerciales se déroule à bord de navires faisant route, par exemple, la vente des repas ou de produits hors taxes aux passagers. Aucun Etat ne refuse l'accès de tels navires à sa zone économique exclusive ou même à sa mer territoriale tout simplement parce qu'ils se livreraient à des activités commerciales. Il n'y aucune raison sérieuse pour qu'une distinction soit faite entre une activité commerciale se déroulant sur un navire et une autre se déroulant entre deux navires.

La République de Guinée cherche, ensuite, à établir une différence entre le navire ravitailleur et le navire ravitaillé en carburant. Elle affirme que le fait d'acheter du carburant serait lié à la liberté de navigation, mais qu'il n'en serait pas de même pour le fait de vendre du carburant. Seul, le ravitaillement en carburant serait considéré comme un commerce, alors que l'achat de carburant ne le serait pas. Cette distinction est parfaitement insoutenable. L'avitaillement d'un navire en carburant, par un autre, dans les mers et les océans résulte d'une longue histoire. Aussi loin que les recherches de Saint-Vincent-et-les-Grenadines aient pu en témoigner, l'engagement dans cette activité de vaisseaux d'un Etat dans la zone économique exclusive d'un autre n'a jamais été l'objet de contestations par un Etat côtier autre que la République de Guinée. La pratique des Etats montre que cela est une utilisation licite des mers ou bien, pour utiliser le langage des Conventions de 1958 et de 1982, une liberté des mers. Le fournisseur, aussi bien que le bénéficiaire de carburant, doivent pouvoir jouir de cette liberté. Pour les deux cas, il s'agit d'un aspect de la liberté de navigation ou en rapport avec elle.

Si, comme Saint-Vincent-et-les-Grenadines le soutient, l'avitaillement est un aspect de la liberté de la navigation, ou en rapport avec elle, cette liberté doit, certes, être exercée dans la zone économique exclusive, conformément à l'article 58, paragraphe 1, de la Convention de 1982, c'est-à-dire de manière « compatible ... avec les autres dispositions de la Convention ». Bien qu'elle ait étalé les raisons pour lesquelles elle considère que c'est de son intérêt de décourager l'avitaillement de navires de pêche qui sont dans sa zone économique exclusive pour élargir l'assiette de ses revenus de taxation, la République de Guinée a échoué dans l'identification des articles de la Convention des Nations Unies qui interdiraient de tels avitaillements dans la zone économique exclusive. Même si un Etat côtier pouvait appliquer ses droits douaniers à l'avitaillement dans la zone économique exclusive, comme la Guinée le soutient, alors que Saint-Vincent-et-les-Grenadines le conteste, cela ne pourrait, en rien, rendre l'avitaillement incompatible avec les articles de la Convention. De telles lois pourraient seulement réglementer l'avitaillement. De ce fait, cela permettrait de présupposer que l'avitaillement demeure, en principe, possible. En outre, comme nous devons le souligner, la République de Guinée a déjà concédé que l'avitaillement de vaisseaux en transit dans sa zone économique exclusive est acceptable, admettant de ce fait que l'avitaillement en tant que tel est une activité compatible et licite.

Le véritable contentieux entre les parties n'est pas le fait que l'avitaillement en tant que tel soit tolérable ou pas dans la zone économique exclusive. Il s'agit, plutôt, de savoir si un Etat côtier peut étendre ses droits douaniers sur l'avitaillement des navires de pêche évoluant dans la zone économique exclusive. Cependant, la Convention ne permet pas d'établir une dichotomie entre les questions sur lesquelles un Etat a juridiction dans sa zone économique exclusive et les libertés de navigation dont les Etats tiers jouissent. Par exemple, la liberté de navigation des autres Etats est sujette à la juridiction de l'Etat côtier en ce qui concerne la pollution, comme stipulé dans la deuxième partie de la Convention. Donc, même s'il était donné à la République de Guinée de réguler l'avitaillement de navires dans sa zone économique exclusive, à des fins différentes de celles décrites dans l'article 56, paragraphe 1,

lettre b), de la Convention, une telle juridiction ne serait pas en contradiction avec le maintien du droit des autres Etats à s'engager dans des activités d'avitaillement en tant qu'aspect de la liberté de navigation. Ceci est stipulé de façon générale par la seconde moitié de l'article 58, paragraphe 3, de la Convention qui dit qu'en exerçant leurs droits les autres Etats doivent se soumettre aux lois et règlements adoptés par l'Etat côtier en conformité avec la Convention.

A ce stade, il est utile de résumer les arguments de Saint-Vincent-et-les-Grenadines à l'appui de la thèse selon laquelle l'avitaillement est un aspect de la liberté de navigation ou un usage internationalement licite de la mer spécifique à ce cas, et donc tolérable dans la zone économique exclusive sous l'angle de l'article 58, paragraphe 1, de la Convention.

Premièrement, la pratique des Etats montre que l'avitaillement est une activité licite en haute mer. Cela doit être considéré comme faisant partie de la liberté de navigation en haute mer ou lié à elle.

Deuxièmement, il découle de l'article 58, paragraphe 1, de la Convention que l'avitaillement doit être une activité licite des autres Etats dans la zone économique exclusive pourvu qu'il soit compatible avec les autres articles de la Convention. Et il n'y a rien qui suggère l'absence d'une telle compatibilité. En outre, le seul exemple donné en guise d'illustration dans l'article 58, paragraphe 1, d'une utilisation internationalement licite de la mer, liée à la liberté de navigation, est le droit d'user de cette liberté « ... notamment dans le cadre de l'exploitation des navires ... ». Cette phrase est assez vaste pour inclure l'avitaillement. Elle n'est pas assez restrictive pour exclure l'avitaillement.

Monsieur le Président, Messieurs les Juges du Tribunal, en ce qui concerne la zone économique exclusive, Saint-Vincent-et-les-Grenadines soutient que les droits et juridictions de la Guinée en tant qu'Etat côtier sont limités à ceux liés à l'exploitation et à la gestion des ressources naturelles à l'intérieur de cette zone.

Dans ses plaidoiries écrites, la République de Guinée s'est non seulement appesantie sur le droit de protéger ses intérêts publics dans sa zone économique exclusive, mais a, aussi, argumenté que le *Saiga* était dans une zone contiguë quand il approvisionnait le *Giuseppe Primo*, le *Kriti* et le *Eleni G*. Je vais, d'abord, étudier les thèses de la Guinée en me référant aux lois relatives à la zone économique exclusive, ensuite en me référant à celles relatives à la zone contiguë.

Pour que la République de Guinée puisse appliquer sa législation douanière aux navires étrangers dans sa zone économique exclusive, elle doit montrer que ces lois sont expressément autorisées par la Convention. Ceci est clairement stipulé dans l'article 58, paragraphe [3], de la Convention qui exige que les Etats tiers exerçant leurs droits dans la zone économique exclusive d'un Etat côtier – je cite – se soumettent aux lois et règlements adoptés par l'Etat côtier – fin de citation – mais qui précise que de telles lois et règlements doivent être

adoptés par celui-ci [l'Etat côtier] conformément aux dispositions de la Convention et, dans la mesure où elles ne sont pas incompatibles avec la présente partie, aux ... règles du droit international.

Le cas de Saint-Vincent-et-les-Grenadines, dans cette optique, est facilité par le fait que la République de Guinée a concédé que la prétendue application de ses lois douanières à sa zone économique exclusive n'était pas fondée sur ses droits souverains à conserver et gérer les ressources vivantes dans cette zone. Elle n'était pas non plus fondée sur ses droits souverains ayant trait à d'autres activités pour l'exploitation économique de la zone. Elle a cherché à fonder le prétendu exercice de ses droits douaniers dans sa zone économique exclusive sur le besoin de protéger ses intérêts publics. Néanmoins, elle soutient l'avoir fait en

conformité avec les « autres règles du droit international » visées par l'article 58, paragraphe 3, ci-dessus cité et au moyen de lois qui seraient en conformité avec ces mêmes « autres règles ». Probablement, la protection de l'intérêt public invoquée serait une forme d'autodéfense ou une forme de nécessité.

Cependant, la doctrine de la nécessité ne peut pas servir à la République de Guinée dans ce cas. La Cour internationale de Justice a récemment souligné qu'un tel procédé pour exclure l'illégalité d'une action d'Etat ne peut être accepté qu'exceptionnellement (affaire relative au *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)*²³). Dans ce cas, la Cour internationale a soutenu que les conditions qui doivent être remplies, avant que puisse être invoquée la coutume internationale sur la nécessité, sont celles posées par l'article 33 des ébauches d'articles sur la responsabilité de l'Etat rédigées par la Commission du droit international. Selon cet article, la nécessité ne peut justifier un acte que si :

- a) l'acte était le seul moyen de sauvegarder un intérêt essentiel de l'Etat contre un péril grave et imminent;
- b) l'acte ne portait pas sérieusement préjudice à un intérêt essentiel de l'autre Etat.

Or, l'action entreprise contre le *Saiga* ne peut rigoureusement pas être considérée comme le « seul moyen de sauvegarder un intérêt essentiel » de la République de Guinée contre « un péril grave et imminent ». A cet égard, le Tribunal gardera en mémoire la poignante déposition du témoin Djibril Niassa relative aux déclarations qui lui ont été fait par un officier guinéen à propos des arrangements qui auraient été possibles si le capitaine Orlov avait arrêté le navire pour négocier. Si le Tribunal retient ce témoignage, comme nous le demandons, il n'admettra pas que l'on puisse faire un inadmissible amalgame entre « un péril grave et imminent » contre un Etat et ce qui pourrait être considéré comme les besoins urgents de certains de ses agents. Le Tribunal gardera, encore, en mémoire l'acharnement, tout à fait suspect, avec lequel la partie guinéenne a voulu, sans raison qu'elle ait pu avouer, tant devant ses propres juridictions repressives nationales que devant la juridiction internationale, invoquer l'article 300 de son code des douanes qui lui permet de se faire exonérer de toute responsabilité pour certains actes de ses fonctionnaires. En tout état de cause, quel que soit ce que le Tribunal retiendra sur les réelles intentions des fonctionnaires guinéens dans cette affaire, on retiendra que, même s'il a été dit que la perte de revenus des autorités guinéennes découlant du fait que ces navires de pêche s'approvisionnent en carburant du *Saiga* était un « intérêt essentiel », il n'a pas été démontré que la saisie du navire était le « seul moyen » de sauvegarder cet intérêt.

Une solution alternative et plus acceptable serait que la Guinée cherche à inclure dans les traités bilatéraux qu'elle conclut avec les Etats tiers pour permettre aux navires de ces derniers de pêcher dans la zone guinéenne, une obligation de la part de tels navires de s'approvisionner en carburant dans un port guinéen et excluant la possibilité de se faire ravitailler en mer par des navires étrangers. En second lieu, on ne peut pas proclamer que la perte de revenus par la République de Guinée constitue un « péril grave et imminent ». Pour qu'une situation soit périlleuse il faut qu'elle soit dangereuse. Pour qu'elle soit un péril grave et imminent, il faut qu'elle constitue une situation de danger sérieux et immédiat.

Or, il ne peut pas être démontré, en l'espèce, qu'il y avait un danger sérieux et immédiat menaçant la République de Guinée. Dans les paragraphes 97 à 99 de sa réplique, la République de Guinée identifie certains intérêts qui pourraient être menacés si elle devait

²³ Note du Greffe : Référence donnée dans le texte écrit de l'exposé : *C.I.J. Recueil 1997*, paragraphe 51.

permettre un avitaillement en carburant au large de ses côtes. Elle affirme que ses intérêts aussi bien financiers qu'environnementaux seraient menacés. Elle affirme, par exemple, que les risques de marée noire sont plus élevés dans le cas de l'avitaillement en haute mer que dans le cas d'un avitaillement dans un port. Mais, comme la Cour internationale l'a affirmé, je cite : la simple appréhension d'un péril possible ne pourrait suffire dans ce cas (cas cité précédemment, Hongrie/Slovaquie). Plutôt, il doit être établi qu'il existe un danger immédiat ou proche.

Saint-Vincent-et-les-Grenadines, de ce fait, conclut qu'il n'y a aucune règle de droit international permettant à la Guinée de « se protéger contre des activités économiques injustifiées dans sa zone économique exclusive qui affectent son intérêt public ». Le sachant, la République de Guinée tente de se prévaloir d'une juridiction universelle pour les Etats côtiers dans la zone économique exclusive, ce qui est parfaitement contraire à la Convention de 1982. Etant donné qu'un Etat côtier n'a qu'une juridiction d'application – et non une juridiction législative – en ce qui concerne les problèmes douaniers dans sa zone contiguë, il serait inhabituel qu'un Etat côtier puisse revendiquer aussi bien une juridiction, compétence législative qu'une compétence d'application dans sa zone économique exclusive. C'est ce qui en serait la conséquence si les arguments de la République de Guinée étaient corrects. Il n'y a, donc, aucune base légale en droit international sur laquelle la République de Guinée peut s'appuyer pour appliquer ses lois douanières dans sa zone économique exclusive.

Quant à la zone contiguë, permettez-moi maintenant de me pencher sur la prétention de la part de la République de Guinée d'appliquer ses lois douanières dans sa zone contiguë. On voit mal quelle conclusion la République de Guinée cherche à tirer de cette prétention puisque la Guinée a aussi déclaré que l'exercice de son droit de poursuite n'était pas fondé sur des actes commis dans sa zone contiguë. Dans l'article 33, paragraphe 1, de la Convention de 1982, un Etat côtier peut exercer le contrôle nécessaire dans sa zone contiguë pour, premièrement, empêcher une violation de ses coutumes, lois et règlements dans son territoire ou sa mer territoriale; deuxièmement, réprimer toute violation de ses lois et règlements sur son territoire ou dans sa mer territoriale.

Par conséquent, Monsieur le Président, Messieurs les Juges du Tribunal, pour être en mesure d'exercer un contrôle sur le *Saiga* dans sa zone contiguë, la République de Guinée doit être en mesure de prouver, soit qu'il était nécessaire de le faire dans le but de prévenir la violation de ses lois douanières dans sa mer territoriale, soit qu'il était nécessaire de le faire pour réprimer la violation de ses droits douaniers dans sa mer territoriale. Or, il ressort de la déclaration des deux parties que le *Saiga* n'a jamais violé la mer territoriale de la République de Guinée. Il n'y a donc aucune possibilité pour que la République de Guinée ait réellement cherché à réprimer une infraction à ses lois douanières dans sa mer territoriale.

La Guinée pouvait-elle, alors, prétendre qu'elle cherchait à prévenir une infraction à ses lois sur le point d'être commise sur son territoire douanier ? Pour qu'elle puisse le faire, il lui faudrait produire des preuves démontrant qu'elle avait des raisons de croire qu'une violation de ses lois douanières était sur le point d'être commise dans sa mer territoriale. Mais, aucune preuve de la sorte n'a été produite.

Le sachant, la République de Guinée se réfugie derrière un argument selon lequel un Etat côtier a une compétence législative dans sa zone contiguë. La République de Guinée, en effet, a affirmé dans ses prétentions écrites que la compétence des Etats côtiers dans la zone contiguë est plus étendue sous le droit international douanier et inclut une compétence législative. Si cela était le cas, la République de Guinée aurait à démontrer, d'abord, que sa thèse est conforme à la pratique et à la doctrine du droit international et, ensuite, qu'une telle règle serait applicable aux parties à la Convention des Nations Unies. Nous affirmons, pour

notre part, Monsieur le Président, que la Guinée a échoué dans la démonstration de chacun de ces points. Et comme nous, le Tribunal attendra en vain la démonstration du contraire.

Monsieur le Président, Messieurs les Juges du Tribunal, j'ai démontré :

- qu'une interprétation correcte et non partisane des lois guinéennes prétendument violées par le *Saiga* mène à la conclusion qu'elles ne couvrent pas l'avitaillement des navires dans les eaux hors de la mer territoriale de la Guinée;

- que, même si la loi guinéenne appropriée pouvait être interprétée comme interdisant l'avitaillement en dehors de la mer territoriale, une telle loi ne serait pas conforme avec la Convention des Nations Unies sur le droit de la mer. Elle serait par conséquent inopposable à Saint-Vincent-et-les-Grenadines;

- que, par conséquent, une telle loi ne peut pas s'appliquer pour refuser à des navires battant pavillon de Saint-Vincent-et-les-Grenadines leur droit à la liberté de navigation et aux autres utilisations internationalement licites de la mer dans la zone économique exclusive et dans la zone contiguë de la Guinée;

- que le *Saiga* exerçait une activité légale en rapport avec la liberté de navigation.

- enfin, que la République de Guinée n'avait pas le droit d'interférer dans cette activité en application des règles applicables à la zone économique exclusive ou à la zone contiguë.

Ceci conclut mon plaidoyer, Monsieur le Président, Messieurs les Juges du Tribunal. Je vous remercie de votre bienveillante attention et je laisse la parole au docteur Plender.

The President:

Thank you very much, Maître Thiam.

Mr. Plender?

STATEMENT OF MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/7, E, p. 14–23]

Mr. Plender:

Mr. President, Members of the Tribunal. The case for Saint Vincent and the Grenadines is that the arrest of the *Saiga* involved two breaches of the United Nations Convention on the Law of the Sea. First it involved interference with freedom of navigation: the unlawful exercise of the right of hot pursuit, contrary to article 111, paragraph 8, of the Convention. Second, it amounted to a violation of articles 292 and 296, since the Guinean authorities failed to release the vessel and her crew promptly after the posting of the guarantee of US\$ 400,000 on 10 December 19[9]7. On these two questions the Tribunal has now received ample written evidence. It has heard two witnesses at the prompt-relief stage and four at the present stage. In this speech I shall set out briefly our reasons for contending that the evidence supports our case on the issue arising under article 111. Mr. Howe will then deal with the evidence supporting the claim based on articles 292 and 296.

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

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

Captain Laszlo Merenyi gave evidence about the state in which he found the *Saiga* in Conakry and the conditions suffered by the crew while in that port. His evidence on the state of the vessel is consistent with Captain Orlov's account. It is also consistent with the photographs of the vessel subsequently taken in Dakar and with the reports and invoices collated by Allan Stewart. His evidence about the conditions of detention of the crew is again consistent with the account given by Captain Orlov. It is consistent also with the evidence given in the prompt-release proceedings by Mr. Vervaeat.

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

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

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

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

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

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

I now propose to take the Tribunal through the evidence in a chronological order, by which I mean following the events as they occurred. I invite the Tribunal to pay particular attention to detail, to small points which are often the most revealing. The Irish writer Sir Arthur Conan Doyle, best known for his character Sherlock Holmes, wrote: "It has long been an axiom of mine that little things are infinitely the most important." In the present case, little things, the details, often assume special significance in confirming the account given to the Tribunal by the four witnesses for the applicant State and intending to disprove the account to be given by the crew of the Guinean patrol boats.

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

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

The Captain's evidence on that point is corroborated by the unchallenged testimony of the Second Mate, Mr. Klyuyev, given on 27 November 1997. He said that the vessel had been bunkering off the coasts of Morocco, Mauritania and Guinea-Bissau without encountering any difficulty. Both the Captain and Second Mate testified that on 24 October 1997 the vessel left Dakar laden with some 5,400 metric tons of gas oil, intending to supply vessels off the coasts of Senegal, Guinea-Bissau, Guinea, Sierra Leone and Liberia. The vessels to be supplied were

mainly fishing boats but also a tug. The Captain's evidence was that the *Saiga* supplied six named fishing vessels before entering the Guinean exclusive economic zone.

He gave evidence that the charterers had warned him that it might not be safe to bunker vessels off Guinea. He referred, quite spontaneously, to a telex of 22 October and was able to produce a copy of it. The Tribunal will find in the telex a warning about the danger of "oil supplies hunters" off the Guinean coast. You have also heard Captain Orlov's evidence that he had a conversation with one Mr. Li, a translator aboard the *Alfa 1* who had spoken to him about an attack on that vessel in the Guinean exclusive economic zone by what appeared to be navy vessels. There is before the Tribunal written evidence of an attack on that vessel conducted by a navy vessel in the Guinean exclusive economic zone lasting about half an hour, with the use of hundreds of rounds of machine gun fire. The written evidence is to the effect that the ship was left burning and the crew were lucky to escape with their lives. The Guinean authorities denied then – and in written pleadings to this Tribunal they continue to deny – that they were responsible for the attack upon the *Alfa 1*. I do not invite the Tribunal to reach any decision as to whether the Guinean authorities had any responsibility for that attack at all; it is not in issue. What is important is that on 27 October the Master had reason to fear that in those waters he might be subjected to an unlawful attack by what appears to be a navy vessel.

The Captain's evidence on that point is corroborated by the statements of Vincent Kanu and Captain Wyse describing an attack on a Sierra Leonean vessel in Sierra Leonean waters acknowledged to be the responsibility of the Guinean authorities. Of that attack there can be no dispute. The Tribunal has before it written evidence together with a copy of a letter of protest from the Sierra Leone authorities and the Guinean response. I refer, for example, to the letter dated [2] December 1996 from the Guinean Foreign Minister to the President of [Guinea] refusing to return the cargo seized from that vessel (page 205 of the bundle of Annexes to our Memorial, tab 11).

Indeed, in their written observations the Guinean side appears to accept that the Captain had reason to fear an attack because of the experiences of the *Alfa 1* and the *Napetco*. They refer to this at the end of paragraph 15 of their Counter-Memorial where they rely upon the fact that the Captain of the *Saiga* was, in their words, "well aware of the arrests of two other vessels".

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

The Master's evidence was that he was able subsequently to work out that the *Saiga* entered the Guinean exclusive economic zone on the morning of 27 October 1997. On the map – a copy of which is at tab 1 of the blue file supplied with summaries of our speeches – the north-eastern limit of the Guinean exclusive economic zone is indicated by two different lines. The more northerly line designates the outer limit of the Guinean zone on the premise that it follows the latitude 10°20'N. That was the zone claimed by Guinea. The more southerly line shows the limit of the Guinean exclusive economic zone as determined by the Court of Arbitration in the *Guinea – Guinea-Bissau* award, copied at tab [7] of the Annexes of our Memorial.

The *Saiga* crossed the two lines in succession, the northern one first. It is agreed, and there is ample evidence, that the *Saiga* then bunkered three vessels: *Giuseppe Primo*, *Kriti* and *Eleni G* at 10°25'N and 15°42'W. The Captain points out that there is no indication in his charts that Guinea claimed any contiguous zone, let alone that there was an assertion of a contiguous zone embracing the point where the vessels were supplied. Only later has it been asserted that Guinea has a contiguous zone measured from the uninhabited rock known as Alcatraz. Of the three vessels, one was sailing under the Italian flag. None was sailing under the Guinean flag. According to the Guinean Counter-Memorial, the other two flew the Greek flag. The Republic of Guinea has been invited to supply copies of the fishing licences which, on the Guinean case, would have restricted the point at which the fishing boats might obtain their supplies. Despite the invitation of the Tribunal, those licences have not yet been produced. There is literally no evidence to suggest that the Captain had any means of knowing what was in those licences. If, after all these months and all this inquiry, we still do not know what was in the licences, it is manifest that Captain Orlov could not be expected to have known that in October 1997.

I occupied much of the Tribunal's precious time in questioning the Captain so as to demonstrate from telexes, log books and bunkering receipts the precise whereabouts of the vessel at all material times from the time of bunkering until the time of the attack. We now know, from ample objective evidence, as well as from the Captain's testimony and the testimony of Sergey Klyuyev, that the *Saiga* completed the bunkering of the last of the vessels at 1400 hours on 27 October. As may be seen from the exchange of telexes between the vessel and the charterers, the vessel remained at that point until 1626 hours, when the Master telexed that he would sail to a new position 09°50'N, 16°15'W. That was for a rendezvous with some Greek vessels. He expected to arrive at 2000 hours. The Master said that he would not proceed closer than 100 miles of Guinea. At 1842 hours, he received instructions that the proposed rendezvous was not safe and that he should proceed to 9°N, 15°W, and the telex said "which is the usual position where all Greeks are supplied".

I pause there. Those words appear on the telex at page 251, tab 16, of the Annexes to our Memorial. They are contemporaneous, something said at the time, with no knowledge of what may happen in the future and no prescience of what others may make of it. It is a detail carrying particular weight. The reason given to move to that point is that it is "the usual position where all Greeks are supplied". There is no suggestion here that the position was to be within or outside the Guinean exclusive economic zone or that the *Saiga* was to engage in any form of subterfuge, for no form of subterfuge was involved. As the telexes again show, the Master confirmed at 1925 hours that he was complying with those instructions.

On the Guinean side, much has been said in cross-examination to suggest that on receiving the second telex the Captain ought to have known that he was the subject of some lawful enquiry from the Guinean authorities. I submit that the evidence is strongly to the opposite effect. In view of all that he had heard about the *Alfa 1* and in view of the warning about "oil supplies hunters", the Captain was amply justified in fearing an attack of an illegal character. His evidence was that he did not understand that he had to fear lawful police action. On that point, he is to be credited.

In his statement to this Tribunal on Tuesday, the Captain explained that he changed position at about 1900 hours. That is consistent with the verifiable and verified time of the telex. He said that he proceeded at about 7 knots. Questioned by Professor Lagoni, he accepted that his speed over the seabed (which Professor Lagoni called his "real speed") could be determined objectively by reference to the fixed positions measured from the ship's satellite equipment. We invite the Tribunal to do the calculation for itself. It is simply and readily verified, and we have done it. It shows that his speed was some 6.5 knots, a little slower than

the estimate that he gave in court. Indeed, if the Captain's estimate showed a margin of error, the Tribunal may think it significant that he erred on the side of caution. It is perhaps one of Sir Arthur Conan Doyle's "little details". A witness who is determined to embroider or improve his case might have estimated that the vessel was going more slowly than it was. It would have been to his advantage to do so. On the contrary, the Captain's estimate was very slightly against the interests of those whom I represent. In any event, whether it be 7 knots or 6.5 knots, it is certainly not the speed of a vessel racing in some hot pursuit, dashing to escape from a pursuer. Indeed, you have heard no evidence that there was any pursuit of any kind occurring at that point.

The Captain's evidence, given consistently in his two statements and in his oral testimony, is that the vessel crossed the border out of the Guinean exclusive economic zone at about 3.45 on 28 October. That estimate is given on the basis of the vessel's course, which is known, and the Captain's estimate of a speed of 7 knots. An entry in the log book shows that the engines were stopped at about 0424 hours, some five miles south of the Guinean exclusive economic zone. If the ship had been travelling at 6.5 miles per hour – and from the calculations we can show that it was – it follows that it would have taken about 50 minutes to travel those five miles, so the vessel would have crossed the southernmost limit of the Guinean exclusive economic zone a little before 3.45.

This evidence is also consistent with the statement of the Second Mate and with the ship's log book. I place particular emphasis upon the log book because at the time when the Captain and the Second Mate gave their evidence – in the case of the Captain for the Guinean proceedings – the log book was in the possession of the Guinean authorities. The Captain and Second Mate were unable to consult the log book to refresh their memories. Now that the log book is available, it shows that their recollections were exceptionally accurate; their evidence is confirmed in all respects by the log book.

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

The consistent evidence of the log book, the Captain and the Second Mate is that the *Saiga* stopped engines and drifted in the exclusive economic zone of Sierra Leone at approximately 9°03'N, 15°02'W. She drifted there until about 8.30 in the morning. Mr. Niasse confirmed that evidence. He said that the vessel was drifting all night. At about 8.30 the Master located on his radar two vessels approaching rapidly. At the point when he detected them, they were about 11.5 miles away, towards the limit of the radar reach of the equipment as it had then been set. He watched them for 6-10 minutes. At about 8.45, he gave the orders to start the engine. Obviously it would have taken some time to start an engine. It is also obvious that once an engine is started, it would have taken a laden oil tanker some time to reach her maximum speed. The Captain says that this was the case. He estimated her speed at about 4 knots. His account is confirmed independently by Mr. Niasse, who said that the vessel was moving slowly. The Tribunal is invited to conclude that the vessel was moving only slowly when the two Guinean patrol boats came in sight between 9.10 and 9.15 in the morning.

The Captain, the Second Mate and Mr. Niasse are unanimous and consistent in their evidence that the Guinean vessels did not at any stage try to contact the *Saiga* by sound or

light signal or radio. I now take the opportunity to quote Mr. Klyuyev's words from the Tribunal's transcript of 27 [November], since this will be less fresh in your Lordships' minds than the evidence that has been heard this week. I quote the words as they appear from the transcript, beginning at page 19, line 10. He said:

... the vessel was drifting and, as I know, in such a position, the engine is 30 minutes' readiness, for preparing the vessel for movement, it is necessary about 30 minutes but maybe in the case of emergencies this time can be reduced to 20 minutes but not less.

He was asked if there were audible or visual signals from the Guinean authorities and he replied: "No; as I know, there was no announcement from the Guinean authorities".

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

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

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

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

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

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

That is at [paragraphs] 52-53 of the Counter-Memorial.

The suggestion that blank shots were fired is inconsistent with the evidence of the Captain, Mr. Niasse and Sergey Klyuyev, who were unanimous that there was no warning. The suggestion that only small calibre guns were used is inconsistent with the visual evidence – that you have seen – showing large as well as small gun holes. The suggestion that

the gunfire was a "necessary form of instruction" is not consistent with the fact that scores of rounds hit the vessel; these were not shots across the bows. The vessel was riddled with gunfire from the highest point of the antenna down to the engine room. The whole of this evidence is inconsistent with the fact that the *Saiga's* freeboard was only 1 metre 30 centimetres above the sea level, a point confirmed by the Captain, by Allan Stewart and by the photographs. It was an easy matter for the Guinean personnel to board the vessel, by stepping on to it from their own patrol boats. This is in fact what they did. They had no need to use gunfire, least of all on a laden and unarmed tanker.

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

When considering the photographic evidence, the Tribunal may contrast this with the Guinean contention, advanced at paragraph 176 of the Counter-Memorial. At that point Guinea states: "There is ... no proof of any damage to the vessel".

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

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

The Master's evidence is that he then announced that there was a piracy attack and told everyone to go into the engine room. He put the engine on autopilot in a westward direction. That is consistent with the evidence given by Mr. Niassa who said that from the Captain's gestures he understood perfectly well that there was a warning to hide. It is common ground that the vessels that the Master had seen approaching were Guinean launches, P328 and P35. They put armed men aboard, who immobilized the *Saiga* at 8°50'N and 14°50'W, in the words used by Guinea "within the exclusive economic zone of Sierra Leone".

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

There was firing inside from automatic machine, from the light automatic gun machine, and then it was a long shouting, maybe five or six shouting. We did not know what that meant. ... Then at approximately five or ten minutes later our Captain proceeded upstairs and returned with handcuffs and all the crew was taken to the boat by the armed forces.

...

they have treated some people, the cook, and asked him to get something to eat and drink. They take guns and put them at his head and said, "If you don't give us what we want to eat, we will kill you".

...

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

There ends the quotation for the moment. You have seen a photograph confirming this fact. When asked about the wounds to Mr. Niasse, he said:

As I know, he has received glass at his throat and something happened to his eyes They said that the reason why they started shooting was that they saw three black men, Senegalese

...

Then they said that if they had known that the other crew is white and there is a Ukrainian citizen, or one of the former Soviet Union, they will never fire.

...

They said that if they had known there were white people on the boat they would never fire.

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

During that period, some members of the crew suffered injuries. Medical reports show that Sergey Klyuyev sustained gunshot wounds, including one approximately 8 cm long, requiring surgery under general anaesthetic, as well as shrapnel wounds. You have seen medical reports showing that Djibril Niasse suffered gunshot wounds to the chest, haemorrhaging in both eyes – he described how blood was pouring from his eyes – severe contusion of the chest and severe psychological injuries; that one projectile was removed from his chest under general anaesthetic; and that a second, situated behind the collar bone, was left in place because of the serious operating risk involved in a thoractomy. The most recent medical reports show that Djibril Niasse's severe psychological injuries have persisted.

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

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

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

Guinea, at paragraph 183 of its Counter-Memorial, "contests such theft". You have heard the evidence of Captain Orlov whose statement records that "soldiers when through the vessel searching the cabins and stores for anything of interest to them" and you have heard confirmation of this from Mr. Niasse. I invite you to give credit to their evidence.

After the arrest the vessel was taken to the port at Conakry where the Guinean authorities required that the Master and some members of the crew remain aboard the detained vessel. You have heard evidence from the Captain and from Captain Merenyi that there were about 15 soldiers on board, all armed. It was suggested by Professor Lagoni in

cross-examination that they were there to protect the vessel. That may be contrasted with the evidence of Captain Merenyi, who reported that the soldiers caused injuries to two further members of the crew by striking one on the head with a gun and kicking another in the knee, in each case with sufficient severity to require his evacuation for treatment in a hospital.

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

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

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

The discharge was effected on shore between 10 and 12 November. The cargo was confiscated and sold to oil companies in Conakry upon the orders of the local authorities. The Applicants have been led to believe, and have stated in their Memorial, and again in their Reply, that the Guinean authorities realized from the sale a sum in excess of US\$ 3 million. At no stage in these proceedings has that been denied.

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

Mr. President, Members of the Tribunal, in the light of this evidence, we submit that Saint Vincent and the Grenadines has made good the factual part of her claim that she has suffered a breach of her right to freedom of navigation and a violation of article 111 of the United Nations Convention – the rules governing hot pursuit. I now leave it to Mr. Howe to remind the Tribunal of the evidence, both oral and written, on which we rely when submitting that Guinea failed to comply with her obligation to release the vessel promptly following the order of this Tribunal of 11 March last.

The President:

Thank you very much, Mr. Plender.

Mr. Howe, you may please proceed.

STATEMENT OF MR. HOWE
COUNSEL OF SAINT VINCENT AND THE GRENADINES
[PV.99/7, E, p. 24–26]

Mr. Howe:

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

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

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

Throughout this time the vessel and her Master continued to be detained. It was at this stage that Saint Vincent and the Grenadines instituted arbitral proceedings against the Republic of Guinea under Annex VII of the United Nations Convention and requested the prescription of provisional measures. By response dated 30 January 1998 the Republic of Guinea requested the International Tribunal to reject the application for provisional measures.

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

By Exchange of Letters dated 20 February 1998, full copies of those letters are at tab 2 of the Annexes to the Memorial, the parties agreed to transfer the arbitral proceedings to this

International Tribunal. A copy of the letter from the Guinean Agent will be found among the authorities accompanying my first speech, the second item in our bundle.

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

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

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

is firmly of the view that the enactment of the Proposed Joint Decree (or any legislation with the same purpose) would be quite contrary to the rights of freedom of navigation of vessels flying the flag of Saint Vincent and the Grenadines and other States that my wish to supply bunkers to fishing and other vessels outside of the Territorial Waters of Guinea but within their Exclusive Economic Zone.

The Republic of Guinea has yet to respond.

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

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

The President:

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

(The Tribunal adjourns at 12.00 noon.)

Public sitting held on 11 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 11 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

At this stage it is now the turn of Guinea to commence the presentation of its case by submissions and witnesses. I shall now invite the Agent, Mr. von Brevern.

Argument of Guinea

STATEMENT OF MR. VON BREVERN
AGENT OF GUINEA
[PV.99/8, E, p. 4–13]

Mr. von Brevern:

Mr. President, Honourable Judges, first of all I am sorry to say that the Minister of Justice of Guinea has not yet arrived. I had hoped that he would be here, but it is my obligation to start with the statement of Guinea now. We will deal, this afternoon, with the right of Guinea to contest the admissibility and with the objections of admissibility themselves. I will start with referring and interpreting the agreement between the parties to refer the matter from the arbitral tribunal to you. I will deal with rule 97 of your Rules, and the question of the 90 days. Then I will deal with the first admissibility point, concerning the registration of the vessel.

Professor Lagoni will then continue with the issues of genuine link and exhaustion of local remedies. I think that that will take us to four o'clock this afternoon.

Mr. President, Saint Vincent and the Grenadines, as alleged flag State of the *M/V Saiga*, has put forward a variety of claims against the Republic of Guinea. Before dealing with the substantive issues involved, Guinea will raise three objections concerning the admissibility of these claims. The first objection concerns the nationality of the *M/V Saiga*; the second, the right of diplomatic protection of aliens, and the third, the lack of exhaustion of local remedies.

Trying to circumvent dealing with these objections, Saint Vincent and the Grenadines asserts that Guinea is precluded from raising these objections, because of paragraph 2 of the Exchange of Letters dated 20 February 1998 – by which jurisdiction in the present dispute was transferred from an arbitral tribunal to this Tribunal, and which I will refer to as "the 1998 Agreement". This paragraph would preclude the raising of any objection concerning preliminary issues except in connection with article 297, paragraph 3(a), of the Convention.

This assumption receives some support by a superficial reading of the paragraph, which states that the written and oral proceedings before this Tribunal should 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. Saint Vincent and the Grenadines essentially argues that the express mention of the objection based on article 297, paragraph 3, of the Convention, as to the jurisdiction of the Tribunal, would exclude any other objection to the jurisdiction or admissibility of the claims, the more so since the paragraph stipulates that the proceedings should comprise one single phase dealing with all aspects of the merits, assuming that you, Honourable Judges, should decide on the merits of the case in all aspects.

Guinea strongly disagrees with this interpretation and maintains that she did not waive any possible objection to the admissibility of the claims. The Saint Vincentian interpretation fails to explain why on earth Guinea should have waived the raising of any such objection. The answer to the Guinean motivation is easy: there is none. In particular, it is not true, as has been alleged in the Reply of Saint Vincent and the Grenadines, that Guinea agreed to preclude objections to the admissibility of the claims because she was anxious to ensure payment of the US\$ 400,000 or because she wanted to avoid any delay in the present proceedings. Any Guinean attempt to receive payment for the release of the *M/V Saiga* does not have any connection with the alleged preclusion of objections to the admissibility of the claims and should be left out in this context.

The accuracy of the Guinean position is clearly illustrated by the fact that she put forward the objection concerning the non-exhaustion of local remedies during the hearings in the provisional-measures proceedings on 24 February 1998. I remember that day very well because it was my birthday, and the most interesting one I have ever celebrated. This was only four days after the conclusion of the 1998 Agreement – concluded on 20 February and this was on the 24th – which is now claimed to exclude the raising of the objections. In the hearing of 24 February 1998, this contention was not brought up by Saint Vincent and the Grenadines, although Mr. Sands would have certainly done so if there had been any intention between the parties to exclude objections to the admissibility of the claims. The only objection against the invoking of article 295 of the Convention related to the fact that Guinea had advanced the argument only at the stage of oral proceedings and should, therefore, have been estopped from raising it.

Guinea finds the new interpretation of the 1998 Agreement to be rather sly and unfair conduct consciously misinterpreting and ignoring what has been agreed upon in February last year. I pledge to you, Honourable Judges, very strongly, that this misinterpretation be not

accepted as true, in particular since the 1998 Agreement was concluded under the good offices of this Tribunal.

The 1998 Agreement concerned the choice of procedure for the settlement of the present dispute. Its object and purpose was to transfer the dispute from an arbitral tribunal to this Tribunal. The main argument for the transfer was the fact that the constitution of the arbitral tribunal would have unnecessarily delayed the settlement of the dispute and would have been much more costly than to resort to this standing Tribunal with its existing servicing facilities and whose Members and staff are already remunerated and able to conduct this difficult case. There is no argument why the Republic of Guinea should have agreed to preclude the raising of objections to the admissibility of the claims when it concluded an agreement concerning the choice of procedure. Had the parties not concluded the 1998 Agreement, recourse would have been made to arbitral proceedings in which the dispute concerning Guinea's right to contest the admissibility of the claims would never have arisen.

Since the 1998 Agreement essentially established the jurisdiction of the Tribunal, Guinea felt it necessary to expressly mention the objection to the jurisdiction of the Tribunal she had already raised. Otherwise, she would have put herself into contradiction with what she had contended before and would have given up a position she was not ready to give up at that time.

The reference in paragraph 2 of the 1998 Agreement to the objection concerning the jurisdiction of the Tribunal pursuant to article 297, paragraph 3(a), of the Convention does not permit a conclusion *a contrario* that objections to the admissibility would have been waived. As Mr. Howe has rightly explained to us three days ago, the Guinean objections concern the entire case and aim in their entirety at a dismissal of all of the claims advanced by Saint Vincent and the Grenadines.

It cannot be that the parties, by concluding the 1998 Agreement, agreed "concludently" – that is without explicitly mentioning it – that such fundamental objections would be precluded from being raised. The correspondence between the parties prior to the agreement shows that this was not the case. Mr. Howe himself wrote to me on 29 January 1998 that one of the conditions upon which Saint Vincent and the Grenadines would agree to submit the dispute to this Tribunal would be that the proceedings should be limited to a single phase dealing with all aspects, including the merits, and any jurisdictional issues that may arise. There was no word or hint at all that objections to the admissibility of the claims should be waived.

That this formulation was not in the end incorporated in the 1998 Agreement lay in the fact that the parties wanted to receive a decision by this Tribunal that would end the dispute, except, as I just explained, in connection with article 297, paragraph 3, of the Convention. But a decision that would end the dispute could also be a decision rejecting the claims on the grounds of the Guinean objections to their admissibility. Mr. Howe's statement that the parties would try to "take back with one hand what they had given to the Tribunal with the other" does not hit the point. Perhaps this statement can be explained by the fact that Mr. Howe has wrongly pointed out twice that the Guinean standpoint would seek to rob you, Honourable Judges, from exercising your jurisdiction in this case. You know that this is not true. In fact, Guinea is requesting your jurisdiction to decide this dispute, of course taking into account, and possibly on the basis of, the Guinean objections to the admissibility of the claims.

In her pleadings, Guinea has given a detailed interpretation of the meaning of the term "a single phase dealing with all aspects of the merits", and so on. I refer to the points made there and note that Mr. Howe has not commented on the argument that the term "merits" has to be interpreted in the present case in the light of the provisional-measures proceedings and, more important, the prompt-release proceedings which have been carried out either shortly

before or at the time of the conclusion of the 1998 Agreement. As article 292, paragraph 3, of the Convention shows, the term "merits" is used in contrast to the prompt-release proceedings, in which a decision is only sought upon the question of release. All other questions, including questions of the substantive admissibility of the claims, are certainly covered by the term "merits".

Instead of commenting on this, Mr. Howe focused mostly on the commentation of the term "merits" by Sir Gerald Fitzmaurice in his book *The Law and Procedure of the International Court of Justice*, which Guinea had referred to in the Rejoinder to support her contention that there are certain difficulties or ambiguities with respect to the definition of the term "merits". But while making the point that the ordinary definition of the term "merits" would exclude questions of the admissibility of the claims, Mr. Howe did not mention that Sir Gerald clearly pointed at the difficulties in separating questions of substantive admissibility and the ultimate merits. I invite Mr. Howe to simply read the respective passage of the text again.

Moreover, Guinea finds the statements concerning the *Ambatielos Case* to be misleading. Of course, Guinea does not want to compare the circumstances of that case with the ones surrounding the present case. This is not necessary for the point that has been made in the Rejoinder, which is merely to indicate, by citing the commentations on the *Ambatielos Case*, that the term "merits" has been and consequently might be used to mean something different than what ordinarily constitutes the "merits" of a case, having said this, of course, on the premise that an ordinary meaning of this term can be easily established. If such differing interpretation of the term "merits" can be made with respect to the arbitrability of a dispute before another judicial forum, as in connection with the *Ambatielos Case*, why should the same not be possible in connection with the preceding provisional-measures and prompt-release proceedings?

Insofar as the Guinean interpretation differs from what constitutes the ordinary meaning of the term "merits", Guinea invokes article 31, paragraph 4, of the Vienna Convention on the Law of Treaties and submits that she has given a sufficient explanation to have it established that such special meaning has been given to the term "merits" in the 1998 Agreement.

Moreover, article 31, paragraph 1, of the Vienna Convention states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose." Guinea would find it to be bad faith if she was held to have precluded the raising of objections to the admissibility by concluding an agreement that concerned simply the choice of judicial forum. There is no argument why Guinea should have done so.

So far, Mr. President, my statement with respect to the interpretation of the 1998 Agreement. I would now like to deal with the preliminary objections based on article 97 of the Rules of the International Tribunal.

The Republic of Guinea maintains that the words "in a single phase", as contained in the 1998 Agreement, imply that the parties excluded that recourse should be made to the proceedings provided in article 97 of the Rules. In other words, the parties agreed that objections to the admissibility of the claims should be dealt with in the framework of the proceedings on the merits. This is also supported by the *ratio* of article 97, paragraph 7, of the Rules, which says essentially that although the procedure before the Tribunal prescribes, in general, that objections to the jurisdiction or admissibility are to be dealt within proceedings separate from the merits, preference is given to the express wish of the parties to have the objections treated within the proceedings on the merits. The Republic of Guinea submits now, as she has done before, that paragraph 2 of the 1998 Agreement contains exactly such a wish.

In his statement three days ago, Mr. Howe did not clearly address this point. Instead, he tried to make the argument that Guinea would have missed the time period of 90 days to raise her objections as contained in article 97, paragraph 1, of the Rules, because they would fall into the second category of preliminary objections, that is objections to the admissibility of the application as such, for which the time-limit of 90 days from the institution of the proceedings would necessarily apply.

Despite the Saint Vincentian explanations, Guinea continues to maintain that she filed objections of the third category of preliminary objections, that is other objections the decision upon which is requested before any further decision on the merits. This is not to be taken as a legal statement that the Guinean argument concerning the procedural choice with respect to preliminary objections would not apply with respect to objections of the first two categories.

It is true that all claims are encountered by a Guinean objection, yet not all objections concern the same or all claims. Moreover, the Guinean objections are all directed against particular claims and not the application in general. It is not correct to assume, as Mr. Howe has done, that the Republic of Guinea objects to the application as such, because in this case one should not be able to distinguish the objectives of the different objections. An objection to an application as such would, for example, concern certain formal requirements of the application, but Guinea does not raise such an objection.

At any rate, the Republic of Guinea finds this dispute not to have too much relevance, in particular in the light of the non-exhaustive character of preliminary objections. There is a rich, international judicial practice that reveals that, whether or not objections to the jurisdiction or admissibility have been raised at the stage envisaged for preliminary objections, they may still be raised later, even by the court *proprio motu*.

The Permanent Court of International Justice took a very clear position in the *Minority Schools* case with respect to article 38 of the 1926 Rules dealing with preliminary objections:

The object of this article was to lay down when an objection to the jurisdiction may validly be filed, but only in cases where the objection is submitted as a preliminary question, that is to say, when the Respondent asks for a decision upon the objection before any subsequent proceedings on the merits. It is exclusively in this event that the article lays down what the procedure should be and that this procedure should be different from that on the merits.

With respect to the role of the Court, the Court further stated:

... the raising of an objection by one Party merely draws the attention of the Court to an objection to the jurisdiction which it must *ex officio* consider, a Party may take this step at any stage of the proceedings.

Other precedents for the non-exhaustive character of preliminary objections which I would like to mention here are the *ICAO Council Appeal* case and the *Nottebohm* case before the International Court of Justice. In the *ICAO Council Appeal* case, the Respondent had filed objections to the jurisdiction of the Court only at the stage of the oral proceedings, without there having been a preliminary objections phase. At that stage the Respondent had long exhausted his ability to raise formal preliminary objections. In the *Nottebohm* case, the Respondent had filed objections to the admissibility of the claims after the court had already delivered a judgment on other preliminary objections. In this case it could be assumed that the Respondent's ability to raise preliminary objections had been precluded because it may be

expected that a respondent files all of his preliminary objections at the same time and as early as possible.

In both cases, however, the Court examined the objections in detail. In the *Nottebohm* case the Court even dismissed the application on the grounds that the claims were inadmissible.

In the light of what has just been said, it does not matter whether Guinea filed her objections within the 90-days time-limit contained in article 97, paragraph 1, of the Rules. In case you, Honourable Judges, do not follow this argumentation, I request that the objections be admitted and decided upon because of the fact that it belongs to the essential rights of the respondent to be furnished with a pleading on the merits of a case before he has to advance preliminary objections.

The Republic of Guinea raised the objections to the admissibility of the claims immediately after receipt of the Memorial of Saint Vincent and the Grenadines and within the time-limits granted for the filing of the first responding pleading, namely the Counter-Memorial.

The International Court of Justice seems to have recognized this principle in the *Aerial Incident of 3 July 1988* case by having stated:

While a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, it may nevertheless file its objection earlier.

Professor Rosenne has also endorsed this principle and said that it would be rare that the application alone would be sufficient to elucidate questions of jurisdiction or admissibility.

Guinea submits that it would be unfair if she were precluded from raising the objections, since it was only in the Memorial, and not in any other pleading in the prompt-release or provisional-measures proceedings, that Saint Vincent and the Grenadines fully elaborated her claims, in particular the ones for compensation and satisfaction. As will be shown, it is exactly these claims that the objections raised by Guinea primarily oppose.

To conclude the argumentation on the question of whether or not Republic of Guinea is precluded from raising objections, I request that you, Honourable Judges, believe that Guinea submitted the objections on the admissibility of the claims in the Counter-Memorial in good faith in so far as that it is and was her understanding that she was entitled to do so under the 1998 Agreement.

Mr. President, after these introductory remarks, I now come to a first objection concerning the admissibility: the problem of the effective or non-effective registration of the *M/V Saiga* in the registry of Saint Vincent and the Grenadines.

As I have already said, Guinea's first objection concerns the nationality of the *M/V Saiga*; in other words, of Saint Vincent and the Grenadines' standing before this Tribunal as flag State of that vessel. The Republic of Guinea maintains that *M/V Saiga* was not validly registered under the flag of Saint Vincent and the Grenadines on the day of its arrest by the Guinean Customs authorities on 28 October 1997. Thus, the requirements of article 91 of the Convention are not fulfilled and *M/V Saiga* may be qualified to have been a ship without nationality at the time of its attack.

The tanker had been granted a Provisional Certificate of Registry by Saint Vincent and the Grenadines on 14 April 1997. The expiry date of this Provisional Certificate was on 12 September 1997, more than one month before its arrest. A Permanent Certificate of Registry had only been issued by the responsible authority of Saint Vincent and the

Grenadines on 28 November 1997, exactly one month after the arrest of the *M/V Saiga*. The logical conclusion is that the *M/V Saiga* was not validly registered in the time period between 12 September 1997 and 28 November 1997.

After the Republic of Guinea had pointed at that problem in the Counter-Memorial, Saint Vincent and the Grenadines seemed to realize that this might be a very serious issue for their case. That they had such a feeling and took the problem serious is demonstrated by the fact that Saint Vincent and the Grenadines produced some documents, the latest one only very recently, and that the explanations provided by Saint Vincent and the Grenadines differed.

Saint Vincent and the Grenadines first tried to invalidate the Guinean conclusion by arguing that, at any rate, a vessel, once registered under the flag of Saint Vincent and the Grenadines, would remain so registered until deleted from the Registry. In private maritime law there is a rule: once on demurrage, always on demurrage. It seems that Saint Vincent takes up this idea and says: once registered, always registered.

The 1982 Merchant Shipping Act of Saint Vincent and the Grenadines would according to the applicant State provide that "once registered, always registered" would be regulated in section 1, articles 9–42 and 59–61 of that Act. The Merchant Shipping Act is produced in one of the annexes. Of course we had a close look at all the articles of this Act and we realized that this Act shows the opposite. There are only two relevant provisions of that Act dealing with provisional certificates of registration: sections 36 and 37. In her Reply, Saint Vincent and the Grenadines referred particularly to section 37, which reads:

The provisional certificate of registration shall cease to have effect if, before the expir[y] of sixty days from its date of issue, the owner of the ship in respect of which it was issued has failed to produce to the issuing authority-

- (a) a certificate issued by the government of the country of last registration of the ship (or other acceptable evidence) to show that the ship's registration in that country has been closed; or
- (b) evidence to show that the ship has been duly marked as required by section 22.

This provision deals with special circumstances, namely the failure to produce certain documents, in which a provisional certificate ceases to have effect only after two months of its issuance. The wording was:

The provisional certificate ... shall cease to have effect ... before the expir[y] of sixty days from its date of issue.

If these two documents have not been provided within the time period of 60 days after the issuance of the provisional certificate, this provisional certificate is invalid after 60 days. That is the clear meaning of section 37.

The Republic of Guinea does not understand how this very particular provision could support the argument made by Saint Vincent and the Grenadines that a vessel, having been provisionally registered under its flag, remains so registered, exceeding the period for which the provisional certificate was issued. Saint Vincent did so by referring to section 37, which I have just quoted. This does not make sense. The object and purpose of section 37 is to have the opposite effect, namely to diminish the period of validity. So if true documentation had not been delivered to the Registry, the validity of the provisional certificate would have, in

the case of the *M/V Saiga*, come to an end already on 12 May 1997. The reference to section 37 does not help Saint Vincent and the Grenadines.

The other provision of the Merchant Shipping Act that deals with provisional registration is section 36, paragraph 2. This provision prescribes that a provisional certificate of registration shall have the same effect as the ordinary certificate until the expiry of one year from the date of its issue. Consequently a provisional certificate expires one year from the date of its issue. In other words, a provisional certificate cannot be valid for longer than one year, no matter what the circumstances are. Therefore, the registrar could not issue a provisional certificate for more than 12, for example for 13 months; that he could not do.

Section 36, paragraph 2, does not, however, state that such certificate of registration is always in effect for one year, notwithstanding the situation that the registrar terminates its validity already after 6 months, as he did in the present case. You will remember that the validity of the provisional certificate was only for 6 months. In our opinion, the registrar of Saint Vincent and the Grenadines is neither prevented by this paragraph, section 36, paragraph 2, nor by any other provision of the Act to issue provisional certificates with a validity of less than 12 months. In case the registrar limits the validity of the provisional certificate to 6 months, it cannot be argued that such limitation would be invalid, pursuant to section 36, paragraph 2, of the Act.

This reasoning is supported by the official brochure by the Saint Vincent and the Grenadines Maritime Administration which is contained in Annex 5 of the Memorial, and I have that with me and before me. The procedure for registration is described on page 2 and it is clearly separated on the left side and on the right side, and on page 2 it has referred to the provisional registration certificate, and on the right side it has referred to the permanent registration certificate. In this official brochure of Saint Vincent and the Grenadines under the heading of Provisional Registration Certificate it is expressly said, if I may quote: "The provisional registration certificate is issued for six months and can be extended, under certain circumstances, for a further period of six months". That is correct, so that it would altogether be 12 months. This would conform to section 36, paragraph 2, but it is very clearly said normally it is "issued for 6 months", and that it can be extended, under certain circumstances, as a provisional certificate for another 6 months. In light of this, the assertion of Saint Vincent and the Grenadines that a vessel once registered remains so registered until deletion from the registry cannot be accepted.

To invalidate this conclusion, Saint Vincent and the Grenadines then produced a declaration of its Maritime Administration in Geneva dated 27 October 1998, which is produced as Annex 7 in the Reply. It is a declaration or confirmation "To whom it may concern", and the Commissioner for Maritime Affairs said the following:

I hereby confirm that m.t. "SAIGA" ... was registered under the St. Vincent and the Grenadines Flag on 12th March, 1997 and is still today validly registered. ... Monaco on 27th October 1998.

In our view this declaration does not create the desired effect that the *M/V Saiga* is to be regarded as having been validly registered under the flag of Saint Vincent and the Grenadines at the relevant time, namely 27 and 28 October 1997. This declaration is dated 27 October 1998, one year after the arrest of the *M/V Saiga*, and is in fact silent with respect to the question of the *M/V Saiga's* registration at the end of October 1997. The declaration does not say that the vessel was registered on 28 October 1997. It just says that it was registered on 12 March 1997 and is still validly registered today, October 1998.

Both statements seem to be correct. The declaration does not, however, make any comment on the gap of registration between 12 September and 28 November 1997, the date of issuance of the Permanent Certificate of Registration.

Saint Vincent and the Grenadines might differentiate between registration on the one hand and the issuance of a certificate on the other hand. Saint Vincent seems to argue that the validity of a certificate and the registration of a vessel do not stand and fall together. Such differentiation is, however, neither reflected in the Merchant Shipping Act, nor in the brochure, as I have referred to, nor in the provisional certificate itself. The Republic of Guinea contends that registration and certificate may not be considered separately.

Saint Vincent and the Grenadines realized that there might still be a grave problem with respect to what we are discussing at the moment. That is why Saint Vincent produced only very recently another letter of the Deputy Commissioner for Maritime Affairs dated 1 March 1999. This letter was produced to you, Honourable Judges. It contains the following confirmation of the Deputy Commissioner for Maritime Affairs:

I can confirm that the Owners of the "SAIGA" fulfilled the requirements of Article 37 of the Merchant Shipping Act ... having provided satisfactory evidence that (a) the ship's registration in the country of last registration had been closed, and (b) the ship had been duly marked as required by Section 22.

A copy of the ship's carving and marking note in respect of (b) appears at Annex B.

I am a little astonished about the deletion certificate from the former Registry. We have heard that the *M/V Saiga* was registered under the Maltese flag before it was bought in auction by Tabona Shipping Company. I would have expected that if the idea or purpose of this confirmation was to give all evidence possible, then such a certificate should enclose the Declaration of the Classification Society of the Russian Registry. I am not happy that we just read: "I can confirm that the Owners ... fulfilled the requirement of Article 37 that the ship's registration in the last country has been closed", and that the Deputy Commissioner just mentions the two documents.

We should remember that article 37 is the section according to which the provisional certificate expires after two months if these two documents have not been provided. So if these documents have been provided, my conclusion is that the provisional certificate is still valid after 60 days from the date of issuance. Yet, what does the Deputy Commissioner conclude from this? She writes: "The Register entry made on 26.03 1997 accordingly remained effective as at 27th October 1997." That conclusion, as I just explained, really does not follow from section 37. Therefore it is rather astonishing to read this in such an important letter. But the Deputy [Commissioner] then goes on and provides a very interesting further document as Annex A, a copy, not of the Certificate, but of the registry book page.

On one hand, there is the Certificate, and on the other we have the register. You remember that Saint Vincent and the Grenadines may have made, or would perhaps like to make, a differentiation between the Certificate that might be of no great importance, and the registry book, which is according to Saint Vincent and the Grenadines the really essential document.

Annex A, which I have before me, contains a page of the registry. Here, we find the accuracy of the Guinean position clearly demonstrated because this page of the registry says, under the heading "Registration", "Registered: 12/03/1997, Valid thru: 12/09/97". So this is, for us, a very clear demonstration that the registration of the *M/V Saiga* expired on

12 September 1997, not only according to the Provisional Certificate but also to the formal registration book.

You will remember the date which is the important and relevant one, 28 October 1997. This is nearly six weeks after the validity of the Provisional Certificate expired, not only according to the Certificate but also to the Registry Book.

To sum up, if one analyses the two Certificates of Registration, the provisional one and the permanent one of a later date, the declarations by the Maritime Administration of Saint Vincent and the Grenadines and of the Deputy Commissioner for Maritime Affairs, as well as the Merchant Shipping Act, one has to draw the conclusion that the *M/V Saiga* was not validly registered at the relevant time, on 28 October 1997. The fact that *the M/V Saiga* was detained after this time – a fact which might have prohibited the delivery of the Permanent Certificate of Registration – does not change this analysis.

Consequently, the Republic of Guinea asserts that the *M/V Saiga* was a vessel without nationality at the time of its arrest by the Guinean Customs authorities. Therefore, Saint Vincent and the Grenadines may not claim the rights and obligations of a flag State with respect to the *M/V Saiga* concerning the incident of 28 October 1997.

Having said this, Mr. President, I would now like to ask you to give the floor to my colleague, Professor Lagoni, Counsel for the Republic of Guinea, who will now continue with the objection as to the missing genuine link between Saint Vincent and the Grenadines and the *M/V Saiga* and as to other points of admissibility.

The President:

Thank you, Mr. von Brevern.

Professor Lagoni, you may proceed.

STATEMENT OF MR. LAGONI
COUNSEL OF GUINEA
[PV.99/8, E, p. 13–18]

Mr. Lagoni:

Mr. President, Members of the Tribunal, after Mr. von Brevern has addressed the admissibility of objections to the admissibility of these proceedings on the merits before this Tribunal in the light of the 1998 Agreement between the parties, as well as under article 97, paragraph 1, of the Rules of the Tribunal, I will now turn to three substantial objections relating to the admissibility of different claims in this case of the *M/V Saiga*. But before doing so, I would like to start with a general observation.

Mr. Howe remarked in his opening submission before this Tribunal on Monday, 8 March, that our objections to admissibility relate to different claims submitted by Saint Vincent and the Grenadines. It is indeed so that there is an objection to the Vincentian claim to the flag State's freedom of navigation, and there is another one to the submission of the flag State to bring a damage claim on behalf of the *Saiga*. Both objections are based on the absence of a genuine link between the flag State and the ship.

There is also an objection against the claim of Saint Vincent and the Grenadines to bring claims on behalf of foreigners, except in certain very specific situations. We submit that none of these exceptions is given here.

Finally, there is still another objection to claims advanced by Saint Vincent and the Grenadines on behalf of private persons. This objection is made under the exhaustion of local remedies rule, which is provided for in article 295 of the Convention.

So far, Mr. Howe's observations are correct and we agree with them. Guinea does, indeed, submit different objections to different claims. We also agree with him that if the Tribunal would accept all objections made by Guinea, it would not be necessary any more to decide the case on the substance of the different claims because every claim the applicant State advances is alleged to be inadmissible or – to take up one of Mr. Howe's phrases – "nothing is left".

But we do not agree with the conclusion Mr. Howe draws from this, when he submits that the Guinean objections are objections to the admissibility of the entire case. This submission is, in our view, confusing the different substantial claims advanced in this dispute with the whole case. This case before this International Tribunal is, no doubt, more than the sum of the different substantial claims advanced in it. The case includes also procedural claims; in particular claims concerning the admissibility of a substantial claim. This means that if the International Tribunal would decide the dispute because of a lacking genuine link and because of the nationality of the claims and the non-exhaustion of local remedies – and we, indeed, ask the Tribunal to do so – this would not be a decision on the jurisdiction of the case, of course. Neither would it be a decision on the admissibility of the entire case. It would be a decision on the merits of the case based on different legal reasons relating to the admissibility of the different substantial claims that are advanced by the applicant State.

Only for the sake of clearness I venture to add that this is even more evident when the Tribunal would accept certain objections relating to the admissibility of certain claims while refusing other objections and deciding the relevant claims on the substance of the law.

After this introductory remark, Members of the Tribunal, I will turn now to the different objections to admissibility. Therefore, I will address the following questions: first, is there a genuine link between the flag State and the ship? Second, may the applicant State seize the International Tribunal with respect to claims of persons which are not its nationals? Third, have the natural or juridical persons on behalf of which the applicant State has seized

the International Tribunal exhausted the local remedies in Guinea and were they required to do so?

The Republic of Guinea has clearly indicated in the pleadings which objection refers to which claim of Saint Vincent and the Grenadines. Furthermore, we have submitted a number of arguments relating to these questions in the Counter-Memorial (paragraphs 56–89) and in our Rejoinder (paragraphs 51–79). I understand that it is in line with the rules and guidelines of the Tribunal to be as succinct as possible in the oral proceedings. Therefore, I will not repeat these arguments here. Instead, I will try to focus on those essential points on which the parties are still divided in this issue.

Turning first to the genuine link, which, pursuant to the third sentence of article 91, paragraph 1, of the Convention, must exist between Saint Vincent and the Grenadines and the *M/V Saiga*, the Republic of Guinea submits that there is no such link.

It is further submitted that in the absence of a genuine link between the applicant State and the ship, Guinea is not bound to recognize claims relating on the one hand to asserted violations of the flag State's freedom of navigation and, on the other hand, to claims submitted by Saint Vincent and the Grenadines on behalf of the *Saiga* by way of diplomatic protection.

It needs hardly any further explanation here that there is no genuine link between a ship and a State which has not duly registered the ship in its territory.

Therefore the question of the genuine link is only relevant in this dispute if Saint Vincent has duly registered the *M/V Saiga*, and you heard Mr. von Brevern's statement that Guinea is contesting this registration. If this is the case, the essential point of the dispute between the parties relating to the genuine link is the legal concept of such link required under the third sentence of article 91, paragraph 1, of the Law of the Sea Convention.

Saint Vincent and the Grenadines submits that it has ratified a number of conventions of the International Maritime Organization, the IMO. This is not contested by Guinea. Neither is it contested that Saint Vincent and the Grenadines has authorized eleven reputable classification societies to inspect, survey and deliver the safety documents on behalf of Saint Vincent and the Grenadines.

What is contested by the Republic of Guinea, however, is the view of Saint Vincent and the Grenadines that this administrative oversight of vessels flying the Vincentian flag might be a sufficient condition for the genuine link under the Law of the Sea Convention. This is in fact a legal issue.

Guinea submits for the following reasons that administrative oversight is not a sufficient condition for the genuine link: The concept of the genuine link in the modern law of the sea requires more than the adoption of safety, environmental and other shipping legislation of the flag State for ships flying its flag. It also requires more than an effective control over the ship with respect to the IMO conventions. I mention here in particular MARPOL and SOLAS, and for oil tankers since 1 July 1998 the application of the binding International Safety Management (ISM) Code.

The Republic of Guinea is of the opinion that both the exercise of legislative jurisdiction of the flag State over ships flying its flag as well as an effective control are certainly necessary conditions to establish a genuine link between the flag State and the ship. But they are no sufficient conditions for such genuine link under the Law of the Sea Convention. Therefore Guinea maintains that the Law of the Sea Convention requires, in addition to the aforementioned conditions, an effective enforcement jurisdiction of the flag State over the ship. "Enforcement jurisdiction" means in this context criminal and civil jurisdiction of the flag State's courts over the owner or operator of the ship. Accordingly it would not be sufficient that the flag State may have the possibility to withdraw the registration and nationality of a ship in the case that the

shipowner or operator who are abroad would not comply with its laws and regulations. This is not sufficient.

This is made clear, in our opinion, in several provisions of the Law of the Sea Convention. There I can refer back to a statement I made earlier, that the Law of the Sea Convention has severely changed the traditional law of the sea and this court is invited to follow the ideas which are behind these changes.

For example the second sentence of article 217, paragraph 1, reads, and I may quote with your permission, Mr. President: "Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where the violation occurs." The provision speaks of "enforcement", not merely of "control". If the ship is abroad, and most sea-going ships, especially tankers, are usually abroad, especially if they fly the flag of a small country, control is normally exercised on behalf of the flag State by classification societies. And we have learned that the Saint Vincentian flag makes use of seven different effective classification societies. Sometimes flag States send also their own inspectors abroad. I do not know that, in effect, of Saint Vincent and the Grenadines but this would not change the situation.

But the question arises: How could the flag State provide under article 217, paragraph 1, for an effective enforcement of their laws and regulations adopted in accordance with the Convention for the prevention, reduction and control of pollution of the marine environment from vessels, if the ship violates these laws and regulations abroad, and neither the shipowner or operator, or the Master or the crew is under the jurisdiction of the flag State. Enforcement of public laws relating to the protection of the environment cannot be undertaken against a ship, especially if the ship is abroad. Enforcement of environmental laws can only be undertaken against a responsible person who is under your territorial jurisdiction.

To take another provision of the Convention: According to article 217, paragraph 4, of the Convention, "if a vessel commits a violation of rules and standards established through the competent international organization or general diplomatic conference, the flag State ... shall provide" not only "for immediate investigation". The flag State shall also, "where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred". That means the flag State shall not only investigate, it shall also institute, where appropriate, proceedings in respect of the alleged violation irrespective of where the violation occurred. In these proceedings the flag State can impose penalties, as it is expressly provided in article 217, paragraph 8, and also in article 228, paragraphs 1 and 3. Such proceedings can only be instituted against the perpetrator if he or she is under the jurisdiction of the flag State. The Master and crew on the vessel are under the jurisdiction of the flag State but the owner abroad and the operator abroad are not.

In the case of the *Saiga*, for example, the owner is a company established in Cyprus on behalf of which a British ship management company operates with respect to the technical maintenance and general operational and financial administration including the placing of crew on the ship. The crew is mainly from Ukraine with a few Senegalese maintenance workers. Although the flag State has formally flag State jurisdiction over the Master and the crew, in practice all responsible persons are out of the reach of the flag State's courts and its administration. The institution of criminal proceedings, for example, as they are envisaged in certain cases by the Law of the Sea Convention, would be useless in such a case. On the other hand, proceedings against a registered agent present in the flag State are useless if not illegal because the agent is certainly not the perpetrator.

I take a final example: Article 235, paragraph 2, of the Convention reads:

States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of

damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

How could a flag State fulfil this obligation to ensure recourse for compensation, when the liable shipowner or operator is not subject to its civil jurisdiction, because he is a foreigner residing abroad.

In conclusion, the Convention requires that the flag State has also enforcement jurisdiction in criminal and civil matters over the shipowner or operator. Therefore, in the law of the sea of *today*, this kind of jurisdiction forms an essential aspect of the genuine link. Or, to say this in more general terms, States cannot grant their nationality to ships without adopting the obligations and responsibilities which the Law of the Sea Convention provides for flag States.

However, contesting this view, Dr. Plender mentioned in his opening submission of 8 March, and I may quote him: "I venture the observation, in passing, that if this proposition were accepted [the Guinean proposition], a substantial proportion of the world's tonnage would immediately be deprived of the protection of international law." This is in fact a very relevant observation, because reliance on the flag is very important for international shipping and could not be left out of sight by the International Tribunal.

But not all open registers consider a registered agent in the country as sufficient for registration. Others do require that the owner, which is normally a company, is a national of or a resident in the flag State. The requirement of a registered agent, who is not responsible for the shipowner – at least not in criminal law, not in civil law –, is certainly by far the lowest standard in this respect international shipping registers may require.

On the other hand, one has to take into account that the Law of the Sea Convention has considerably enlarged the obligations of the flag State with respect to ships flying its flag to a great extent as compared with the legal situation before the Convention has come into force in 1994. The Convention has also changed the legal situation for open registers, and I invite the International Tribunal to take this into consideration.

But the applicant State has submitted in its Reply of 19 November 1998 (paragraph 81) yet another argument against the view taken here. It has been suggested there that according to the text of article 91, paragraph 1, the genuine link must exist between the flag State and the ship, not between the State and the shipowner. This is, according to the text, true but we submit that this view is not tenable because otherwise the registration would already be sufficient to grant nationality to a ship. In this case the third sentence of article 91, paragraph 1, would be redundant. If registration were sufficient to grant nationality, we would not need a genuine link. Article 91, paragraph 1, would be redundant and redundancy cannot be presumed. The "ship" in this provision is, in our view, a generic term which stands for the shipowner also or, in the case of bareboat charter, the bareboat charterer.

Taking all this into account, the Republic of Guinea submits that registered agent, as required in section 9, paragraph 3, of the Merchant Shipping Act 1982 of Saint Vincent and the Grenadines (Annex 6 to the Reply), for the *M/V Saiga* could not fulfil the conditions of a genuine link under the Law of the Sea Convention. Neither does the mere presence of Vincentian nationals which is provided in the law I have mentioned in respect of the manning of Vincentian ships provide a sufficient requirement for a genuine link.

The example of *M/V Saiga* shows that, in the light of the numbers of qualified seamen needed for all ships flying the Vincentian flag, this is a provision of the Merchant Shipping Act with practically nil effect, certainly at least with respect to the *Saiga* because no Vincentian national was on board. Accordingly, the Republic of Guinea submits that there was no genuine link between the flag State and *M/V Saiga* at the time when the ship was arrested by Guinean authorities, at least no genuine link as we read that term in the Law of the Sea Convention in the context of other obligations the flag State has.

Turning now to my second question, whether Saint Vincent and the Grenadines could claim damages on behalf of persons who are not its nationals, I will again try to be succinct because the issue has been submitted at some length in the written proceedings, both in our Counter-Memorial, paragraphs 73–78, and in particular in the Rejoinder, paragraphs 66–70.

At the centre of this issue is the so-called "exception of foreign seamen-rule" from the general principle that a State can exercise diplomatic protection only if the injured persons are its nationals. It is indeed common ground between the parties that such an exception exists in usual international law.

There is essentially one aspect, however, on which the parties are still divided. This aspect relates to the application of the aforementioned exception to the claims submitted by Saint Vincent and the Grenadines on behalf of the Master and the crew. The Republic of Guinea contests that the aforementioned customary rule is still valid in the circumstances of open registers at present.

There are, in our view, several reasons for this submission. The previously mentioned exception of the general rule of the nationality requirement was developed in times when open registers were unknown in international shipping, and this exception has been developed mainly in immigrant countries which wanted to attract foreign seamen. Hence, most decisions confirming this exception are decisions of national courts in the United States. In other decisions – there are decisions from other States as well – the foreign seamen were at least domiciled in the flag State. None of the crew members of the *M/V Saiga* apparently were domiciled in Saint Vincent and the Grenadines.

Moreover, the previously mentioned exception of foreign seamen rule was developed in times of conflict in the interest of the flag State with a view to protecting the seamen on board neutral ships. Accordingly, as quoted by Dr. Plender, the Arbitral Tribunal in the *Worth v. United States* case²⁴ held, about 100 years ago in 1898: "the flag protects the ship and every person and thing thereon not contraband".

Besides this, the exception avoided discrimination of foreign seamen belonging to the crew with respect to the protection of the flag State. In the case of an open register, however, the situation is completely different. The ships are usually manned with foreigners from different countries. Discrimination of foreigners against nationals is no real problem on such a ship if all crew members are foreigners. The foreign crew members are not inclined to become resident in the flag State, or even to immigrate. The crews frequently change.

Accordingly, we submit that the exception from the general rule that there is no right of diplomatic protection of foreigners loses its original sense in the circumstances of an open register. Why should foreign seamen be in a better position than foreign workers who live in the country? Why should the flag State have the right to protect foreign seamen, whereas the territorial State would have no such right in relation to foreigners who are not seamen but who have lived for many years in that country? Therefore, the Republic of Guinea submits that it is highly doubtful whether the customary exception of foreign seamen from the general rule of the nationality of the claims would apply in the case of the *M/V Saiga*.

The second aspect of this question relates to the protection of claims of the foreign shipowner and the foreign cargo owner. It is agreed between the parties that the flag State can protect the ship only if the ship has the nationality of the flag State. The protection of foreign shipowners and cargo owners is, technically speaking, not a case of the application of the exception of foreign seamen; it is essentially a question of the scope of the flag State's right to exert diplomatic protection over ships with its nationality. This right relates generally to the ship with the nationality of the flag State. Therefore, I concede that we no longer maintain the

²⁴ Note by the Registry: Reference given in the written text of the statement: Moore's *Digest of International Arbitration*, Vol. III (1898) p. 2350-2351 (Section 5).

objection of the nationality of the claims with respect to the claims of the shipowner in relation to the ship.

The third objection against the claims in respect of which Saint Vincent and the Grenadines has seized this Tribunal relates to the local remedies rule. This again is not new in this dispute. The view of the Republic of Guinea has been submitted in its Counter-Memorial of 16 October 1998 (paragraphs 79–85) and in the Rejoinder of 28 December 1998 (paragraphs 71–79). In this context the Republic of Guinea submits that effective local remedies available in Guinea have not been exhausted by the Master of the *Saiga*, its crew members, the shipowner and the cargo owner on behalf of whom Saint Vincent and the Grenadines have filed claims. I should add that another member of this delegation will come at a later date to address you on details of the local remedies that are effectively available in Guinea.

The main point that is dividing the parties in this issue is the view submitted by Dr. Plender on Monday, 8 March. He stated as follows:

Where a State acts in breach of international law, in relation to a person or property beyond its territorial jurisdiction, the State cannot demand that the individuals who have suffered damage should exhaust local remedies, for such a demand would reinforce that State's wrongful assertion of jurisdiction.

It is asserted by Saint Vincent here that the "jurisdictional connection", this requirement between the State against which the claim is brought and the person in respect of whom it is advanced, is lacking because the arrest of the *Saiga* took place outside the territorial waters of Guinea. Saint Vincent and the Grenadines submit that the voluntary presence of the *Saiga* in the Guinean exclusive economic zone in order to bunker fishing vessels there is not sufficient to establish a jurisdictional connection for the purpose of the exhaustion of local remedies.

Here again a question of the new law of the sea is at stake. It is common ground between the parties that the local remedies rule applies in proceedings before the International Tribunal in accordance with article 295 of the Convention. It is also not in dispute that the necessary jurisdictional connection is lacking in a case which has occurred on the high seas. On the other hand, one cannot conclude from the fact that exclusive economic zone is not a part of the territorial sea, that there is no jurisdictional connection between the coastal State and a foreign ship in the exclusive economic zone. There is certainly such jurisdictional connection in any case where the coastal State's sovereign rights in the exclusive economic zone are affected. Dr. Plender is emphatic in rejecting this proposition. The distinction between sovereignty and sovereign rights to which he refers is, in our opinion, of no relevance when, as Dr. Plender, quoting Judge Córdova in the *Interhandel Case*, states that "the purpose of the local remedies rule is ... respect for the sovereignty of States". But this does not confine the local remedies rules to a case occurring in the territory of the State. The respect for the sovereignty of the State is equally required when its sovereign rights in its exclusive economic zone are affected or involved.

Moreover, as the claim to exclusive jurisdiction in the exclusive economic zone flows also from the sovereignty of the State – only sovereign States can establish an exclusive economic zone – the same is, in our view, also true with respect to a dispute concerning the coastal State's jurisdiction in its exclusive economic zone. That in our very case this is also a case that involves a neighbouring exclusive economic zone on the basis of article 111 of the Law of the Sea Convention does not alter the situation.

The dispute in this case is whether or not the coastal State has exclusive jurisdiction over bunkering activities in its exclusive economic zone. The mere fact that the applicant State is contesting this jurisdiction cannot determine the question of the objection Guinea is raising as to the admissibility of claims. Otherwise an objection against the coastal State's measures against a ship on innocent passage through its territorial sea would also exclude the local remedies rule, in spite of the fact that this rule applies, as said, in the territorial sea.

Therefore in conclusion, the Republic of Guinea, considering that there was a jurisdictional connection with the *M/V Saiga*, submits that diplomatic protection requires the exhaustion of local remedies in this case as well. We have shown in the pleadings that it was not required, and, as I mentioned, we will show at a later stage that there were effective possibilities to exhaust local remedies.

Thank you very much, Mr. President, Members of the Tribunal. This ends my presentation for today.

The President:

Thank you very much indeed, Professor Lagoni.

Mr. von Brevern, will that be all for today? Could you indicate what your plans for tomorrow morning are? Will you be making a statement before you call witnesses, or will you be calling witnesses, and if so, how many witnesses?

Mr. von Brevern:

Mr. President, I am sorry to say again that I will see the Minister of Justice only tomorrow morning or perhaps this evening, and it depends upon his own intention whether we make a statement before calling the witnesses. We will call Mr. Sow, Mr. Bangoura and Mr. Camara as witnesses, unless I receive different information tonight, and I will hand over that information as soon as I receive it, if it is different from what I have told you. Thank you very much.

The President:

Thank you very much indeed. That being the case, we will leave matters as they are, and tomorrow morning you will inform us as to how you intend to proceed.

Mr. Plender, do you have any comments?

Mr. Plender:

I have no comment to make at this stage, Mr. President.

The President:

That being the case, we are only ten minutes ahead of schedule. I suggest that we break off at this time. The meeting will be closed and we will resume tomorrow morning at 10 o'clock.

(The Tribunal rises at 3.50 p.m.)

Public sitting held on 12 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 12 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

We will now resume.

Mr. von Brevern?

Mr. von Brevern:

Mr. President, Honourable Judges, Mr Joseph and colleagues from the delegation of Saint Vincent and the Grenadines, I have the great pleasure and honour to introduce to you the head of the delegation of the Republic of Guinea, the Minister of Justice, M. Maurice Zogbélemou Togba. The Minister of Justice intends to give a declaration, not now but later on. Thank you very much.

The President:

Thank you very much. We are very pleased to welcome His Excellency. May I now ask you, Mr. von Brevern, to indicate to us the witnesses whom you intend to call today? We will then proceed to call the first one.

Examination of witnesses

EXAMINATION OF MR. BANGOURA
BY MR. VON BREVERN (GUINEA)
[PV.99/9, E, p. 4–10; F, p. 4–13]

Mr. von Brevern:

Mr. President, Honourable Judges, the delegation of the Republic of Guinea intends to call three witnesses. We would first like to call Mr. Bangoura, who was the head of the mission in connection with the *M/V Saiga*. Thereafter, we would like to call Mr. Mangué Camara, who was on the small patrol boat, which first arrived at the *Saiga*. Thereafter, we would like to call Mr. Sow, who was on the larger patrol boat. I will conduct the examination of Mr. Bangoura and Mr. Camara. Mr. Sow will first be questioned by Mr. Diallo and later on by Professor Lagoni. If you agree, I would like to start with the witness Mr. Bangoura.

The President:

Thank you very much. Before you do that, I take it that these are the only three witnesses and that the other names on your communication of 4 March will no longer be coming to the Tribunal?

Mr. von Brevern:

That is correct, Mr. President.

The President:

Thank you very much indeed.

The witness may please be called to the witness stand.

M. Léonard Bangoura prête serment (en français).

Mr. von Brevern:

Mr. Bangoura, you are a witness today in connection with the *M/V Saiga*. You have before you and I have before me a written declaration. Is that a declaration written by you?

M. Bangoura :

Oui.

Mr. von Brevern:

Is everything in order and does it conform to the reality of what you have put down there?

M. Bangoura :

Oui.

Mr. von Brevern:

Could you tell the Tribunal what function you have, or had, if it was different in October 1997, when the *Saiga* was arrested? What function did you have?

M. Bangoura :

En octobre 1997, j'étais le chef de la brigade des douanes du port de Conakry.

Mr. von Brevern:

Did you receive an order, and from whom, to search for a vessel called the *M/V Saiga*?

M. Bangoura :

Le 26 novembre 1997, de la direction nationale des douanes, nous avons reçu l'ordre de mission.

Mr. von Brevern:

What was your reaction after you had received that order? What orders did you give?

M. Bangoura :

Nous avons préparé la mission en mettant les moyens logistiques en place et en nous mettant en rapport avec l'état-major de la marine nationale.

Mr. von Brevern:

Why did you have to cooperate with the Navy?

M. Bangoura :

Nous devons coopérer avec la marine parce que nous ne disposons pas des moyens adéquats pour faire une opération en mer. La marine étant l'organe qui dispose des vedettes pour les opérations en mer, nous passons toujours par elle pour envoyer nos hommes.

Mr. von Brevern:

Is my understanding correct that the boats that you used were not Customs boats but were boats from the Guinean Navy?

M. Bangoura :

Affirmatif.

Mr. von Brevern:

How many patrol boats did you ask for in order to execute the order?

M. Bangoura :

Nous avons demandé une mission à la marine. La mission a été désignée avec deux vedettes, une petite et une grande.

Mr. von Brevern:

Can you indicate the difference between the two boats in relation to size, the number of crew members and speed?

M. Bangoura :

Je ne peux pas donner la vitesse de ces deux bateaux. Je sais que le plus petit est plus rapide que le grand.

Mr. von Brevern:

Is it correct that the small boat did not have cabins?

M. Bangoura :

Non, il n'a pas de cabine, de logement comme la grande vedette.

Mr. von Brevern:

Is it correct that it was a so-called open air boat?

M. Bangoura :

Tout à fait.

Mr. von Brevern:

Could the length of that vessel be about 6 metres?

M. Bangoura :

Environ.

Mr. von Brevern:

After you had contacted the Navy, you had to organize the trip out. Did it take some hours before you could go?

M. Bangoura :

Oui.

Mr. von Brevern:

Why? What had to be organized?

M. Bangoura :

Ce retard a été dû par un moyen logistique car il fallait trouver du carburant, trouver les vivres pour les hommes qui doivent être embarqués à bord. C'était un problème de logistique.

Mr. von Brevern:

Did you also have to organize arms?

M. Bangoura :

Oui.

Mr. von Brevern:

I understand that on these two vessels the crew of the Navy was the ordinary crew and then your people from the Customs side. Is that correct?

M. Bangoura :

Affirmatif.

Mr. von Brevern:

Did all these people, including the Navy people and the Customs people, wear arms and have arms? Did you organize arms for everybody?

M. Bangoura :

Non.

Mr. von Brevern:

For whom did you or someone else organize arms?

M. Bangoura :

Nous, douaniers à bord, nous étions quatorze pour toute la mission et sept avaient le PMAK. Au niveau de la marine, c'était l'équipage qui était chargé de conduire la mission, donc eux n'ont pas d'armes.

Mr. von Brevern:

So I understand that seven members of that mission had a PMAK. Is that a machine gun? Do you know the calibre?

M. Bangoura :

C'est le fusil individuel, canon de 7,62.

Mr. von Brevern:

Is PMAK a short form for a Kalashnikov?

M. Bangoura :

Oui, c'est le pistolet mitrailleur.

Mr. von Brevern:

And besides that pistol of the seven crew members, did you have any further ammunition on board?

M. Bangoura :

Non, il n'y a pas de munitions.

Mr. von Brevern:

Do you remember that one, or perhaps two, both patrol boats, had a cannon on board?

M. Bangoura :

Reprenez votre question, s'il vous plaît.

Mr. von Brevern:

On the patrol boat, was there installed constantly, firmly installed, a machine gun or a cannon?

M. Bangoura :

A bord des deux vedettes, oui, elles ont leurs armes initiales.

Mr. von Brevern:

Did you organize ammunition for these firmly installed machine guns?

M. Bangoura :

Non, ces armes n'ont pas été utilisées. Elles sont initialement conçues avec le bateau, depuis l'usine.

Mr. von Brevern:

Yes, Mr. Bangoura, but I understood that you did not have ammunition and it was not organized, it was not taken on the mission.

M. Bangoura :

Oui, nous n'avons pas emporté de telles munitions.

Mr. von Brevern:

What happened after you were organized and the mission could start; can you tell us on which of the two patrol boats you were?

M. Bangoura :

J'étais sur la grande vedette.

Mr. von Brevern:

Did you both leave Conakry at the same time?

M. Bangoura :

Non.

Mr. von Brevern:

Which one left first?

M. Bangoura :

La petite vedette.

Mr. von Brevern:

Do you know which aim the small patrol boat had, what should it do?

M. Bangoura :

C'était une mission de reconnaissance, au nord.

Mr. von Brevern:

So you have been ... the small patrol boat received a position where to go when it left Conakry?

M. Bangoura :

Oui.

Mr. von Brevern:

And is it correct that it was the *M/V Saiga* to which the small patrol boat should go?

M. Bangoura :

Effectivement.

Mr. von Brevern:

And is it correct that the small patrol boat went first because it was organized faster and ready before the large patrol boat was ready to go, and is it correct that there was another reason; that the small patrol boat has a greater speed to reach the *M/V Saiga*?

M. Bangoura :

Oui.

Mr. von Brevern:

So is it correct that the idea was that the small patrol boat should stop the *M/V Saiga*?

M. Bangoura :

Oui.

Mr. von Brevern:

Did the small patrol boat reach the *M/V Saiga* after she left Conakry?

M. Bangoura :

Non.

Mr. von Brevern:

What happened; why not?

M. Bangoura :

Parce qu'à partir de notre base à terre, nous avons été informés que le *Saiga* devait changer de mouvement. C'est ainsi qu'on l'a rappelée pour reprendre route avec la grande vedette.

Mr. von Brevern:

So the small one was ordered back, and is it correct that then both vessels met at a point which was outside the port of Conakry?

M. Bangoura :

Oui.

Mr. von Brevern:

After that, do you remember what happened then? The order I understand was to look for the *M/V Saiga*. Do you remember what the two patrol boats did then in order to reach the *M/V Saiga*?

M. Bangoura :

Lorsque les deux vedettes ont été mises en remorquage parallèle, nous avons mis le cap sur le sud. A un moment, tard la nuit, vers le petit matin, j'ai été informé par le capitaine du navire qui m'a amené sur son radar et m'a indiqué beaucoup d'objectifs. Après une communication que nous avons suivie ensemble, après les calculs qu'il a eu à effectuer, il nous a indiqué un objectif qui semblait être l'objectif recherché.

Mr. von Brevern:

Do you remember when that was? You speak of the morning, is that correct, of 28 October. Do you remember at about what time?

M. Bangoura :

Environ 3 heures et demie.

Mr. von Brevern:

I assume that before you went to that point you had been on the sea for several hours, and you had gone quite a great distance to come to that point which you were just referring to, is that correct? Out of Conakry to that point.

M. Bangoura :

Oui.

Mr. von Brevern:

You also told us that you had taken the southern direction, is that correct? In the direction of the border with the neighbouring country Sierra Leone.

M. Bangoura :

Oui.

Mr. von Brevern:

When you received the information from the other patrol boat that they had seen and discovered the *M/V Saiga* on the radar, did you ask about the position of the vessel, or more concretely, did you ask whether you were still in the Guinean waters?

M. Bangoura :

Oui, j'ai posé la question au capitaine de la vedette.

Mr. von Brevern:

What was the answer?

M. Bangoura :

Il m'a dit que le navire *Saiga* était dans les eaux guinéennes.

Mr. von Brevern:

And thereafter what did you and the other patrol boat do, after you had discovered the *Saiga* on radar?

M. Bangoura :

Nous avons progressé vers l'objectif.

Mr. von Brevern:

Do you know about what distance it was from your position to the position of the *Saiga* at the moment when you discovered her there?

M. Bangoura :

Ce qui m'a été rapporté, parce que je ne suis pas marin, c'est que l'on était environ à 44 ou 45 mètres.

Mr. von Brevern:

Is it correct that such a distance was too long to have let the small patrol boat go alone to the *Saiga*, and is it correct that there was another reason why she could not yet go alone, because she was not able to operate alone on the high seas?

M. Bangoura :

On ne pouvait pas laisser la petite vedette à cette distance.

Mr. von Brevern:

So you proceeded to the south, both patrol boats together?

M. Bangoura :

Oui.

Mr. von Brevern:

Did you finally come to a point where it was decided that the small patrol boat which could go much faster should now go alone?

M. Bangoura :

Oui.

Mr. von Brevern:

Do you remember the distance from that point to the *Saiga*?

M. Bangoura :

Ce qui m'a été rapporté, sensiblement, on était entre 10 et 11 milles à côté du *Saiga*.

Mr. von Brevern:

What did you see with respect to the small patrol boat when it had left you? You do not understand my question? If I understood you correctly, the small patrol boat left you while the *Saiga* was at a distance of 10 miles. It was felt that this was a distance which the small patrol boat could go alone since you would not be so fast, but would reach it in due time and assist it, is that correct?

M. Bangoura :

Oui.

Mr. von Brevern:

The small patrol boat, when it left you, did it switch on any light, any sound? Have you seen anything, have you heard anything?

M. Bangoura :

Au départ, la petite vedette à destination du *Saiga*, j'étais sur le pont, j'ai vu le feu lumineux bleu qui tourne. J'ai entendu sa sirène.

Mr. von Brevern:

You were on the big patrol boat. Do you remember when about you arrived at the *Saiga* calculated from the time when the small patrol boat had left you; how long did it take you, for these 10 miles, to go to the *Saiga*?

M. Bangoura :

Je crois que nous sommes arrivés au *Saiga* vers 9 heures, 9 heures 05, comme cela.

Mr. von Brevern:

What did you find there? What did you see?

M. Bangoura :

En arrivant ?

Mr. von Brevern:

Perhaps you could explain to the Tribunal what the situation was when you came there. What happened to the *Saiga*? Was it already immobilized, what did you see with respect to the crew? Can you explain a little bit?

M. Bangoura :

Quand nous sommes arrivés au *Saiga*, nous avons trouvé que le bateau était déjà immobilisé par nos hommes qui étaient à bord. Sur le pont, j'ai rencontré quelques membres d'équipage qui m'ont été présentés par ceux qui étaient là-bas. Ils étaient au nombre de trois. Après que ceux-ci se soient présentés à moi, ils ont conduit d'autres aussi. Ceux-ci aussi étaient trois.

Mr. von Brevern:

You told us the *Saiga* had already stopped. Was the Captain with the people from the small patrol boat? Did you meet the Captain at once when you came on board?

M. Bangoura :

Non.

Mr. von Brevern:

Did you finally talk to the Captain?

M. Bangoura :

Quand les trois, deuxième qu'ils ont retrouvés, se sont présentés à moi, j'ai demandé qui était le capitaine. Personne ne s'est présenté. Les deux qui n'étaient pas du même [...] que les autres, parmi eux, un a montré le capitaine du doigt.

Mr. von Brevern:

When you arrived at the *Saiga*, did you see that there might have been a fight? Did you see any damage to the vessel?

M. Bangoura :

Non. De prime à bord, dès que je suis rentré dans le navire, on ne pouvait pas sentir tout ce qui s'était passé parce que j'étais sur le pont.

Mr. von Brevern:

I understand that when finally the crew was found, also the Captain, did you explain to him that the vessel would have to go to Conakry and would be arrested?

M. Bangoura :

Oui.

Mr. von Brevern:

On your way then to Conakry, did you remain on board the *Saiga*, do you remember?

M. Bangoura :

Non, j'étais dans la grande vedette, au retour.

Mr. von Brevern:

Before you returned to your patrol boat, did you inspect the *M/V Saiga* more thoroughly and did you realize, did you see, damage on the vessel?

M. Bangoura :

Ce n'étaient pas des dégâts majeurs que nous avons constatés sur place là-bas, parce que quand j'ai demandé au capitaine de faire venir des membres d'équipage sur le pont, c'est à ce moment que nous sommes montés ensemble dans sa cabine. J'ai constaté que la première porte était cassée, pour entrer dans la cabine de pilotage.

Mr. von Brevern:

I understand that after the *Saiga* arrived in Conakry you were often on board the *M/V Saiga*. Did you see at that time – perhaps there you had more chance to see more parts of the vessel – more damage than at the first moment on the high seas?

M. Bangoura :

Non.

Mr. von Brevern:

Can you tell us when you escorted the *Saiga* into the port of Conakry, what was the status of the vessel? What was the state of the crew? Were they in detention, had they been arrested, could they leave the vessel if they so wanted?

M. Bangoura :

Les membres de l'équipage n'ont jamais été arrêtés. Ils étaient libres de quitter le navire à tout moment et à tout instant.

Mr. von Brevern:

As Customs, you had brought the vessel into the port of Conakry. Did you feel responsible for the vessel in any way and did you do anything in that connection?

M. Bangoura :

Oui, nous avons mis des hommes de garde à bord pour la sécurité des membres de l'équipage et du navire lui-même.

[...] ²⁵

²⁵ Note by the Registry: A passage was struck off the record following an intervention by Mr Plender (see following page) and a ruling of the President of the Tribunal (see page after following page).

INTERVENTION BY MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/9, E, p. 10–14]

Mr. Plender:

Mr. President, I wish to register an objection and protest to this line of questioning. According to article 72 of the court's rules of procedure, a party is obliged to communicate to the Registrar in sufficient time before the opening of the proceedings information regarding the evidence that it is to produce. Mr. President, you directed that this should be done. The respondent State indicated that it would call Mr. Bangoura to provide evidence about the laws and regulation of Guinea, the enforcement rules of customs laws, the applicability of the laws to the *Saiga* and the legal measures taken against fishing vessels.

The evidence now given has nothing to do with any of those questions. It comes as a complete surprise. It raises issues which should have been put to Mr. Merenyi. He was here; he could have been asked questions about this and he could have answered them. He has now been released. To present this account without any warning, written or oral, after the departure of Mr. Merenyi, is in flagrant violation of the rules of procedure.

The President:

Mr. von Brevern, do you have any response to that?

Mr. von Brevern:

If I have understood my colleague Dr. Plender correctly, he regrets the situation that Mr. Merenyi is no longer present because otherwise he could have put questions to Mr. Bangoura. As far as I know your Rules, it is in no way possible that a witness of a party puts questions to the witness of another party, and therefore I would like you not to follow the objections of my colleague.

The President:

Mr. von Brevern, I think that the point made does not turn on Captain Merenyi. That is secondary. I must say that because there have been two Bangouras, my attention was not immediately drawn to the fact that Commander Léonard Bangoura, who is giving evidence now, is the person named in paragraph 5 of your communication to the Tribunal dated 4 March.

That communication was given to the Tribunal in accordance with the requirements of article 72 of the Rules of the Tribunal. As Dr. Plender quite rightly points out, in that you had indicated the line and the matters on which this witness was to be called. It has now been brought to my attention, and I think it is very pertinent, that in fact he has now been asked to give evidence on a completely different subject matter. I think that it is in that context that the issue of Captain Merenyi's presence or otherwise has been raised.

This concerns not only the other party. If the Tribunal had been aware that information was to be given and evidence was to be addressed to matters involving his relationship with the authorities in Guinea, quite clearly the Tribunal would have been interested to know the reaction of Saint Vincent and the Grenadines. In the event, neither the Tribunal nor, I presume, the other party, could have known that this matter was going to be put in evidence. Therefore I believe that the evidence that you are now adducing from Léonard Bangoura is not the evidence that you informed the Tribunal you would be asking of him. That evidence cannot, therefore, be permitted to be given because it would be contrary

to the Rules of the Tribunal. I think that it is also fair to say that it will be unfair not only to the other party but also to the Tribunal. It is, in effect, a surprise to all of us.

Mr. von Brevern:

Mr. President, Honourable Judges, all the statements of the witnesses presented by Saint Vincent and the Grenadines we received only very recently before they were called. Therefore, so far there is no difference from the statement of Mr. Bangoura, which we have presented to you. We are on the same lines. The subject on which Mr. Bangoura was, indeed, nominated to you, was the customs legislation. You will realize that we had nominated two witnesses to you. We thought that we would not call the other witness because it would be sufficient to have one. I am still firmly of the opinion that everything that Mr. Bangoura has told us is in connection with the customs legislative situation in Guinean waters.

There is one point under the issues I have mentioned in connection with Mr. Bangoura; that is, applicability of Guinean laws to *M/V Saiga*. Mr. President, I think that everything said here could be put under this heading.

The President:

Mr. von Brevern, I am sorry but the point I am making, which I think is the same point that was made by Mr. Plender, is not the question of what Captain Bangoura knows or does not know. The question is that in your communication, which was required under our Rules, you informed us that Captain Bangoura and Mr. [Mangué] Camara will be giving evidence on the laws and regulations of Guinea according to which offshore bunkering in the customs radius is prohibited; the enforcement rules of custom laws; applicability of Guinean laws to *M/V Saiga* and legal measures taken against the fishing vessels after having been supplied by *M/V Saiga*.

This is expert evidence. In your letter you said there would be witnesses and experts and I have actually marked "experts". That would be the correct designation. The evidence that you are adducing now is not expert evidence but factual evidence relating to the events leading to the arrest of *M/V Saiga*. This aspect was not, at any time, indicated for Mr. Bangoura, although you had indicated that another of the witnesses that you intended to call, Sub-Lieutenant Mangué Camara, was going to give evidence about this. Mr. Plender's point and my point is that this line of questioning now is completely contrary to the information that you gave. Since that information was not given within the time-limit, that information cannot be given. You can question Mr. Bangoura on the issues in respect of which you have previously informed the Tribunal. Therefore, the information that he has given and the evidence that he has given up until now²⁶ will, in my view, be struck off the record because it is contrary to the Rules of the Tribunal. That is my ruling.

Mr. Plender:

Mr. President, before Mr. von Brevern replies, I am prepared to go some way in his direction. The point to which I raise particular objection is that Mr. Bangoura should be asked about exchanges between him and Captain Merenyi. There is no indication whatever that he was to be asked about these points. Had we known that evidence was to be given about negotiations with Captain Merenyi, we would, of course, have asked Captain Merenyi about this and asked him to remain. If Captain Bangoura is, notwithstanding what the President has said, to be asked questions about the mission and his presence on the mission, I, for my part, am quite

²⁶ Note by the Registry: This should read "and the evidence on the point on which Mr. Plender raised his objection". (See also the clarification given by the President on the page after the following page.)

prepared to allow Mr. von Brevern latitude on that. But we are placed at a serious disadvantage when the witness is asked to explain exchanges between himself and Captain Merenyi, without warning.

The President:

Thank you very much. I am very grateful for that accommodation. However, I think that the issue is fundamental as far as the Tribunal's Rules are concerned. We now have evidence of a completely novel kind. We have a situation in which the witness is being led to give evidence that the Tribunal has not been informed about. It is, of course, entirely for you, Mr. von Brevern, if you wish Captain Bangoura to give evidence of the type that you said another witness was going to give. But, as I have said, I do not believe that this line of questioning at this time, to this witness, is permissible.

As Dr. Plender has said, it will create a very difficult situation. In the discussions between the agents, the issue was raised as to whether any of the witnesses should be permitted to stay. You have suggested that you might wish, in the light of evidence, to question the witnesses again. At that point it was entirely possible and appropriate for you to have indicated that this possibility existed. I am sure that if you had indicated the possibility of exchanges between one of your witnesses and one of the witnesses of Saint Vincent and the Grenadines, either Mr. Plender or myself would have understood and appreciated the need for certain arrangements. Either an arrangement would have been made or some other solution would have been found. Unfortunately you did not give us this information. It is possible that you did not have it, but I think it would be totally contrary to our Rules to permit this line of questioning to be given: first because insufficient notice has been given to the other party but, much more importantly, because it is entirely contrary to the information that you gave to the court as regards the line of evidence to be provided by this witness.

This witness can, of course, continue to provide evidence on the lines that you suggested you were going to call; that is the circumstances leading to the arrest of the *Saiga*. But if you want this witness to deal with negotiations between the representatives of the *Saiga* after the arrest and the arrival in Conakry, I would respectfully tell you that this Tribunal would not be able to accept that evidence at this stage for the reasons given.

Mr. von Brevern:

Mr. President, I would like to make one remark. I, indeed, had the wish, and I put it to the other party, that we would like Captain [Merenyi] to remain here after our witnesses have been heard so that we would have a chance to call Captain Orlov again.

Mr. Lagoni:

Captain [Merenyi]?

Mr. von Brevern:

No, no, Captain Orlov. It is quite a different story. We said that we would like to put questions to Captain Orlov later on in the proceedings. That has not been accepted by the Agent of Saint Vincent. Therefore, I am not too happy about this reaction now, but I was nearly at the end. It was really the very last question. Why I put this question – and I could not know this before when I nominated the agents and witnesses – is because I was very surprised during the presentation of the witness to hear about the negotiations Captain Merenyi had in Guinea. I think that nobody knew that before. However, I will accept what you have said, but only if you will allow me ... We have heard this witness; we have received, at this stage, an objection from Dr. Plender. I am of the opinion that you have said

that so far you accepted the objection; that as of now I am not allowed to put any further questions. However, I would very much like you not to strike out all the questions I have put before. Dr. Plender could have objected before, but he did not. Therefore, I am at the end of questioning the witness. Thank you very much, Mr. President.

The President:

Mr. von Brevern, I think you have misunderstood me. I did not say that we have struck out the evidence given by the witness. I have repeated that since you had indicated that you are going to call evidence with regard to the circumstances leading to the arrest of the *Saiga*, you are perfectly within your rights to present that to us. I was talking about the evidence concerning the negotiations between the witness and Captain Merenyi. That evidence was not foreshadowed in your communication to the Tribunal and it was not foreshadowed in the negotiations that you had with the other parties under my good offices. That is what I was referring to. If you wish to continue your line of questioning with regard to the circumstances leading to the arrest of the vessel, that is perfectly in order.

Mr. von Brevern:

Thank you very much, Mr. President. I fully accept your decision, and I am indeed at the end of my examination. Thank you so much.

The President:

Thank you very much indeed.

Mr. Plender, would you like to cross-examine? Just a moment, Mr. Plender.

Professor Lagoni, please.

Mr. Lagoni:

Mr. President, would you allow me to ask the witness one or two short additional questions along the line that Mr. von Brevern has taken?

The President:

Yes, that will be perfectly all right.

Mr. Lagoni:

Can I do it from *here*?

The President:

No, I think it would be much better for you to do it from the podium.

M. Thiam :

Monsieur le Président ?

The President:

Yes, Maître Thiam?

INTERVENTION PAR M. THIAM
CONSEIL DU SAINT-VINCENT-ET-LES-GRENADINES
[PV.99/9, F, p. 18–19]

M. Thiam :

Monsieur le Président, je voudrais profiter du petit incident que vous avez réglé pour en soulever un autre.

La partie guinéenne, dans sa lettre du 4 mars 1999, à laquelle vous faisiez référence tout à l'heure, avez également annoncé que M. André Saféla Leno, magistrat, serait entendu comme expert. Puis nous avons entendu de la part de la partie guinéenne que M. André Saféla Leno était membre de la délégation guinéenne. Nous aimerions avoir des précisions sur ce point. Nous aimerions savoir si l'orthographe du nom de M. Leno, sur la lettre de Maître von Brevern, est correcte. Car sur l'arrêt de la cour d'appel de Guinée du 3 février 1998, qui a condamné le capitaine Orlov, nous trouvons une autre orthographe, qui est André Saféla Leno, mais cette fois-ci, le nom « Leno » est écrit L-e-n-o. Je pense que nous pouvons demander à la partie guinéenne de nous éclairer pour savoir s'il s'agit au moins de la même personne.

The President:

Thank you very much indeed.

Mr. von Brevern, I would be grateful if you could clarify the matter raised by Maître Thiam.

Mr. von Brevern:

Mr. President, I have no doubt that the name as I have mentioned it in the letter which Maître Thiam quoted is written correctly.

The President:

Thank you very much.

Maître Thiam, does that satisfy you?

M. Thiam :

Cela ne répond pas à mon autre question. S'agit-il de la même personne qui a signé l'arrêt de la chambre correctionnelle de la cour d'appel de Conakry concernant le capitaine Orlov ?

Mr. von Brevern:

Mr. President, I am sorry to say that I have to correct myself. The correct spelling is L-e-n-o.

The President:

The more important question as I see it, as asked by Maître Thiam, is whether M. André Saféla Leno – L-e-n-o – is one and the same person as the person who signed the judgment against the Captain.

Mr. von Brevern:

I cannot see that this question is of so much importance, but I can answer this in the affirmative.

The President:

This gentleman is not now going to appear as an expert on behalf of Guinea?

Mr. von Brevern:

No. It has been decided that Mr. Leno would be part of the delegation and would address the court in that capacity, instead of being an expert.

The President:

I would suggest, Maître Thiam, that we cross the bridge when we come to it. It is, of course, entirely up to the Agent of Guinea to call any person, and at that point it would be within the rights of the Applicant and also the responsibility of the Tribunal to determine whether, in the light of antecedent facts, the appearance of the person for the purpose intended will be appropriate or not. I would suggest that we leave the matter pending until the time it arrives.

M. Thiam :

Je vous remercie, Monsieur le Président, mais si j'ai bien compris M^e Leno ne sera pas appelé comme expert parce qu'il est dans la salle, ni comme témoin.

The President:

That is correct.

M. Thiam :

Il ne pourra donc s'adresser au Tribunal comme magistrat ayant condamné M. Orlov et qui vient aujourd'hui soutenir l'Etat de Guinée. C'est bien cela ?

The President:

I understand that he will be addressing the court in some capacity on some points which I think will become apparent later on. I think that Mr. von Brevern is quite clearly going to take advice about this matter, in the light of this exchange.

M. Thiam :

Je vous remercie, Monsieur le Président.

The President:

Thank you very much.

Professor Lagoni, please.

EXAMINATION OF MR. BANGOURA (CONTINUED)
BY MR. LAGONI (GUINEA)
[PV.99/9, E, p. 15–16; F, p. 19–21]

Mr. Lagoni:

Thank you, Mr President.

Mr. [Bangoura], in addition to what Mr. von Brevern asked you, I would like to ask you a few more questions. There is a *procès-verbal*, number 29, Conakry, the date of which is 31 October 1997. Who wrote this *procès-verbal*? You can see it here. Do you want to have a look at it?

M. Bangoura :

C'est le chef de la brigade mobile nationale.

Mr. Lagoni:

Is it signed by you, or is it not from you?

M. Bangoura :

Non, c'est nous, la douane, qui avons rédigé, mais c'est le chef de la brigade mobile qui est le signataire principal.

Mr. Lagoni:

The Mobile Brigade is from the Navy?

M. Bangoura :

Elle appartient à la douane.

Mr. Plender:

Mr. President, I think there may be a small translation point from German to English. The witness has been asked about a *procès-verbal* of the 31st. We have a *procès-verbal* of the 13th. I think that Professor Lagoni may be referring to the 13th and describing it as the 31st. Perhaps we may have that point checked.

Mr. Lagoni:

Mr. President, I think we are talking about the same *procès-verbal* which is Annex 19 to the Memorial, and the date, as I read it, is the 31st, but I think it does not make any difference. It is "Conakry le 31/10/97" on page 271 of your Memorial.

M. Thiam :

Monsieur le Président, nous parlons du même document, mais il est bien daté du 13 novembre 1997. Peut-être qu'une meilleure lecture nous permettrait de le constater.

Mr. Lagoni:

Mr. President, this may be right. I am looking at the signature in Conakry on page 271. This is obviously the signature of the Captain on the 31st. Thank you very much.

So it is not made by you. Who gave the information in this *procès-verbal*?

M. Bangoura :

J'ai dit que c'est nous qui avons rédigé, la douane.

Mr. Lagoni:

But in the *procès-verbal*, there were some specific times and hours given. *Inter alia*, it says in the English version "At about 4 o'clock on the following day." Was this given from your estimation?

M. Bangoura :

Oui.

Mr. Lagoni:

Thank you very much. I have another question. How many officials from the Customs were on board the small patrol boat?

M. Bangoura :

Trois.

Mr. Lagoni:

Were they all armed?

M. Bangoura :

Oui, avec leurs PMAK.

Mr. Lagoni:

Could the Customs officials use the mounted machine gun on the small patrol boat?

M. Bangoura :

Non.

Mr. Lagoni:

When do Customs use weapons? You called them pistols. In which situations are you allowed to use them?

M. Bangoura :

Lorsqu'il y a un refus d'obtempérer.

Mr. Lagoni:

I think this ends my questions. Thank you very much, Mr. President.

The President:

Thank you, Professor Lagoni.

Mr. Plender, please.

CONTRE-INTERROGATOIRE DE M. BANGOURA
PAR M. PLENDER (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/9, F, p. 21–22]

M. Plender :

Monsieur Bangoura, j'ai l'intention de poser quelques questions. Permettez-moi, tout d'abord, de vous informer que les questions que je vous poserai ne sont pas pour moi, ni pour l'Etat de Saint-Vincent, mais pour permettre au Tribunal de faire la lumière sur cette affaire. Vous comprenez ? (*Le témoin fait un signe affirmatif de la tête.*) Voyez-vous un inconvénient à ce que toute la lumière soit faite sur l'affaire ?

M. Bangoura :
(*Pas de réponse*)

M. Plender :

Oui ? Vous voyez un inconvénient ?

M. Bangoura :

Je voudrais que mon avocat soit à côté de moi pour vous répondre.

M. Plender :

Monsieur Bangoura, je vous pose quelques questions afin d'informer le Tribunal.

M. Bangoura :

Oui, mais je voudrais que mon avocat soit à mes côtés pour que je puisse donner la réponse, s'il vous plaît.

M. Plender :

Vous avez votre avocat et vous êtes sous la direction du Président.

The President:

Mr. Bangoura, you do not have an advocate. You are a witness for this Tribunal. You are not charged with or accused of any offence. You are here to provide evidence to assist the Tribunal.

M. Bangoura :

Merci, Monsieur le Président, je m'en excuse.

M. Plender :

Monsieur Bangoura, depuis combien de temps travaillez-vous pour la douane ?

M. Bangoura :

Moi ?

M. Plender :

Oui.

M. Bangoura :

Je suis dans les douanes depuis 25 ans.

The President:
Mr. von Brevern?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/9, E, p. 17]

Mr. von Brevern:

Mr. President, I am sorry to intervene, but is it correct that Mr. Plender asked, or told the witness, I have not quite understood, that he puts questions to the witness not on behalf of Saint Vincent and the Grenadines, but for whom else? Perhaps I can ask for clarification. For whom does he put these questions?

The President:

Mr. Plender?

M. Plender :

S'il y a un malentendu, je le regrette. Je suis un avocat pour Saint-Vincent. Mais ce que je voulais dire, c'est que la vérité est importante, non pas pour moi, non pas pour Saint-Vincent, mais pour le Tribunal. Avez-vous bien compris ?

M. Bangoura :

Oui.

CONTRE-INTERROGATOIRE DE M. BANGOURA (SUITE)
PAR M. PLENDER (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/9, F, p. 22–35]

M. Plender :

Selon vous, avec une expérience de 25 ans, vous avez sans doute un entraînement pour vos fonctions ?

M. Bangoura :

Continuez, s'il vous plaît, parce que la question n'est pas posée.

M. Plender :

Oui. Avez-vous reçu un entraînement ?

M. Bangoura :

Oui.

M. Plender :

Et cet entraînement vous informe de certains éléments concernant vos compétences ?

M. Bangoura :

Oui.

M. Plender :

Dans quelle zone de mer êtes-vous compétent ?

M. Bangoura :

Notre compétence s'étend sur 250 kilomètres, à l'intérieur du littoral.

M. Plender :

Merci. C'est la zone douanière ?

M. Bangoura :

Zone maritime de douane.

M. Plender :

La zone maritime douanière. Et quelles sont les relations entre cette zone douanière et la zone économique de la Guinée ?

M. Bangoura :

Les relations entre la zone économique ... ? Reformulez votre question, s'il vous plaît.

M. Plender :

Considérez-vous que vous êtes compétent, en dehors de la zone économique exclusive, si vous vous trouvez dans la zone douanière ?

M. Bangoura :

Je vous demanderais avec respect de voir l'article 34 du code de la douane, s'il vous plaît. Vous y trouverez la réponse à votre question.

M. Plender :

C'est l'article 35 qui précise que la zone douanière a une étendue de 250 kilomètres, n'est-ce pas ?

M. Bangoura :

Non, pas 35, j'ai dit 34. Je n'ai pas dit 35.

M. Plender :

Je m'excuse, c'était mon erreur. La question est de savoir si cet article est celui qui mentionne les 250 kilomètres.

M. Bangoura :

Affirmatif.

M. Plender :

Donc, vous considérez que votre compétence est réglée par cet article ?

M. Bangoura :

Selon la loi nationale, oui.

M. Plender :

Si vous embarquez pour une mission, vous vous concentrez sur cette zone douanière ?

M. Bangoura :

Oui.

M. Plender :

Votre attention n'est pas fixée sur les limites de la zone économique exclusive ? Elle est fixée plutôt sur la zone douanière ?

M. Bangoura :

La zone maritime.

M. Plender :

Oui, exactement. Merci. Estimez-vous que l'un de vos devoirs soit d'empêcher l'avitaillement des navires de pêche dans cette zone douanière ?

M. Bangoura :

Les navires qui sont autorisés peuvent le faire, mais ceux qui ne sont pas autorisés n'en ont pas le droit.

M. Plender :

Vous considérez que l'une de vos fonctions est d'empêcher l'avitaillement de ces navires qui n'ont pas un permis ?

M. Bangoura :

Oui.

M. Plender :

Est-ce que l'avitaillement des navires dans la zone économique pose un problème pour la Guinée ?

M. Bangoura :

Cela pose un problème économique, oui.

M. Plender :

Y a-t-il en Guinée des radars à terre qui permettent de suivre l'évolution des navires dans la zone douanière ?

M. Bangoura :

Non. La douane n'a pas de radar, c'est la marine qui détient les radars. Je ne peux pas répondre à cette question de la marine.

M. Plender :

Donc si un document devant ce Tribunal prétendait qu'il y a des radars à terre en Guinée, il n'aurait pas été exact ?

M. Bangoura :

Reprenez votre question.

M. Plender :

S'il y a un document qui prétend que la Guinée dispose de radars à terre, ce document ne serait pas exact ?

M. Bangoura :

La douane –

M. Plender :

Non, s'il y a un document devant ce Tribunal qui dit que la Guinée dispose de radars à terre, alors une telle affirmation serait inexacte ?

M. Bangoura :

Je ne l'affirme pas.

M. Plender :

Merci. Combien de navires étrangers avez-vous saisis dans la zone douanière guinéenne pendant votre carrière de 25 ans ?

M. Bangoura :

Ma carrière de 25 ans n'est pas destinée seulement à saisir les navires.

M. Plender :

Bien entendu, mais auriez-vous donc la gentillesse de répondre à ma question. Combien de navire avez-vous saisis ?

M. Bangoura :

Dans ce même cas ?

M. Plender :

Pendant votre carrière. Pourriez-vous nous donner un nombre global ?

M. Bangoura :

Je reconnais avoir assisté à une opération.

M. Plender :

C'était donc votre première expérience d'une telle affaire ? Est-ce que vous dites au Tribunal que c'est la première fois, dans une carrière de 25 ans, que vous avez participé à la saisie d'un navire dans la zone économique guinéenne ?

M. Bangoura :

Dans la zone maritime, j'ai participé à une opération.

M. Plender :

C'est cette opération, c'est l'opération concernant le navire *Saiga* ?

M. Bangoura :

Non.

M. Plender :

Ah ! Il y avait une autre opération ?

M. Bangoura :

Vous m'avez demandé, d'après mon expérience. Je vous dis que j'ai participé à une opération. La seconde, c'est le *Saiga*.

M. Plender :

Et la première, pourriez-vous donc nous donner le nom du navire ?

M. Bangoura :

Africa.

M. Plender :

Merci. Vous n'étiez donc pas concerné dans l'attaque sur le *Napetco* ?

M. Bangoura :

Non.

M. Plender :

Est-ce que vous étiez informé de cette attaque ?

M. Bangoura :

Non, il n'y a pas eu d'attaque.

M. Plender :

Il n'y a eu aucune attaque sur le *Napetco* ?

M. Bangoura :

Il n'y a pas eu d'attaque.

M. Plender :

Est-ce que le navire n'a pas été saisi ?

M. Bangoura :

Il y a eu saisie du navire, oui, mais il n'y a pas eu d'attaque.

M. Plender :

Vous étiez donc informé d'une opération concernant le navire *Napetco* ?

M. Bangoura :

Oui.

M. Plender :

Cette opération a-t-elle été faite dans la zone douanière guinéenne ?

M. Bangoura :

Je ne peux pas le dire parce que je n'ai pas fait l'opération. J'ai été informé étant fonctionnaire de la douane.

M. Plender :

Étiez-vous informé de la saisie du navire dans la zone douanière guinéenne ?

M. Bangoura :

Je vous dis que cette affaire, je ne l'ai pas traitée, j'ai été informé. Quand on est au service, quand un problème se pose, on est informé. Mais en ce qui concerne le déroulement ... je n'ai pas suivi cela. Je ne sais pas.

M. Plender :

Est-ce que votre témoignage est que vous ne savez pas si ce navire a été saisi dans ou en dehors de la zone guinéenne ?

M. Bangoura :

Je vous dis que je ne peux pas l'affirmer à partir du moment où je n'ai pas suivi l'opération. J'ai été informé étant fonctionnaire de mon administration, c'est tout. Mais en ce qui concerne le déroulement, comment cela s'est passé, je ne peux pas l'affirmer ici.

M. Plender :

Monsieur Bangoura, si vous ne savez pas, il n'y a aucune objection à ce que vous répondiez « je ne sais pas », mais ce que je vous demandais, c'était si le *Napetco* avait été saisi au-dehors de la zone guinéenne.

M. Bangoura :

Monsieur, je vous dis que je ne connais pas cette affaire de *Napetco* parce que je n'ai pas suivi le dossier. Je ne peux pas répondre ici, quelle était sa position, où il a été saisi et ce qui s'est passé. Non.

M. Plender :

Merci. Avez-vous des instructions permanentes sur l'usage des armes contre des navires de commerce ?

M. Bangoura :

Reprenez votre question, s'il vous plaît.

M. Plender :

Y a-t-il des instructions permanentes régissant les opérations du service des douanes, notamment en ce qui concerne l'usage des armes ?

M. Bangoura :

Non, il n'y a pas d'instruction spéciale ni permanente.

M. Plender :

Vous n'avez aucune instruction sur l'usage des armes ?

M. Bangoura :

Les instructions des armes ... sur l'usage des armes ? Comment s'il vous plaît ? Je ne comprends pas votre question, si vous pouviez la reprendre.

M. Plender :

Est-ce que les agents de la douane guinéenne ont des instructions concernant la permissibilité de l'usage des armes ?

M. Bangoura :

Non. Dans les pouvoirs des agents, ils sont autorisés à porter l'arme.

M. Plender :

Je vais donc maintenant vous posez quelques questions concernant la mission contre le *Saiga*. Est-il exact que vous avez reçu l'ordre de mission le 26 novembre ?

M. Bangoura :

L'ordre de mission a été établi le 26 novembre.

M. Plender :

Cet ordre de mission vous a été communiqué le 26 novembre ?

M. Bangoura :

Au chef de mission, oui.

M. Plender :

A quelle heure ?

M. Bangoura :

Je ne m'en souviens pas.

M. Plender :

Selon les informations que vous avez reçues, est-ce que le *Saiga* aurait pénétré dans les eaux guinéennes le 26 novembre ?

M. Bangoura :

Non.

M. Plender :

Selon ces informations, où était ce navire le 26 novembre ?

M. Bangoura :

Le 26 novembre ?

M. Plender :

Le 26 novembre, oui. Oh, je m'excuse, j'aurais dû dire octobre, je m'excuse.

M. Bangoura :

Reprenez votre question, s'il vous plaît.

M. Plender :

Est-il exact que vous avez reçu l'ordre de mission le 26 octobre ?

M. Bangoura :

Le chef de mission a reçu l'ordre de mission le 26 octobre.

M. Plender :

Et selon les informations que vous aviez à l'époque, où se trouvait le navire *Saiga* ?

M. Bangoura :

Le *Saiga* était au nord.

M. Plender :

Dans les eaux guinéennes ou hors de la zone guinéenne ?

M. Bangoura :

Hors de la zone guinéenne.

M. Plender :

Si le navire était hors de la zone guinéenne, pourquoi est-ce que les autorités guinéennes s'en occupent ?

M. Bangoura :

Parce qu'on savait qu'il devait continuer, il avait déjà donné rendez-vous à certains bateaux.

M. Plender :

A quelle date êtes-vous parti du port de Conakry ?

M. Bangoura :

Le 27.

M. Plender :

Le 13 novembre, avez-vous signé un procès-verbal concernant le *Saiga* ?

M. Bangoura :

Oui.

M. Plender :

Est-ce que ce procès-verbal était exact ?

M. Bangoura :

Oui.

M. Plender :

Dans la toute première ligne, vous dites que vous êtes parti de Conakry le 26 octobre. Est-ce que cela est exact ou non ? On va vous montrer une copie.

M. Bangoura :

Le 26 octobre ? C'est écrit ? « En exécution de l'ordre du mission n° 770 du 26 octobre », mais on n'a pas écrit que l'on est parti de Conakry le 26.

M. Plender :

Notre copie n'est pas très lisible. Cette mission contre le *Saiga* était-elle punitive ou préventive ?

M. Bangoura :

La mission n'est ni punitive ni préventive.

M. Plender :

A votre avis, que diriez-vous comme étant l'objet de la mission ?

M. Bangoura :

L'objet de la mission, c'était la recherche et la répression de la fraude.

M. Plender :

Quel type de fraude exactement ?

M. Bangoura :

Je ne connais pas cela.

M. Plender :

Vous venez de dire que l'objet était la répression des fraudes. Quelle espèce de fraudes ?

M. Bangoura :

Le coulage des pétroliers en mer.

M. Plender :

A l'intérieur de la Guinée ?

M. Bangoura :

Oui, nous sommes des Guinéens.

M. Plender :

Si je vous ai bien compris, vous dites que la fraude était l'avitaillement des navires, y compris des navires de pêche dans la zone guinéenne ?

M. Bangoura :

Oui.

M. Plender :

Avez-vous affirmé dans votre procès-verbal que vous aviez reçu des renseignements sur la présence dite clandestine du tanker dans la zone guinéenne ?

M. Bangoura :

Oui.

M. Plender :

Est-il exact que vos autorités avaient écouté et enregistré des conversations par radio entre ce tanker et des navires de pêche ?

M. Bangoura :

Affirmatif.

M. Plender :

Est-ce que dans ces conversations, le *Saiga* a annoncé par radio sa position précise ?

M. Bangoura :

A renoncé ou a annoncé ? Reprenez votre question.

M. Plender :

A annoncé.

M. Bangoura :

Oui.

M. Plender :

Au moment du départ, aviez-vous localisé exactement le *Saiga* ou saviez-vous seulement où le localiser, compte tenu des conversations radios ?

M. Bangoura :

Si je comprends bien votre question, vous dites, au départ, si nous avons localisé le *Saiga* ou si c'est la conversation radio qui nous a permis de localiser le *Saiga* ?

M. Plender :

Oui, c'est la question.

M. Bangoura :

Je vous dirais que c'est la radio qui nous a permis d'écouter le *Saiga* dans sa conversation.

M. Plender :

Comment jugez-vous donc l'assertion selon laquelle la présence du tanker aurait été clandestine ?

M. Bangoura :

Parce que le tanker n'avait pas d'autorisation.

M. Plender :

Considérez-vous normal qu'un tanker, sur une mission clandestine, annonce par radio sa position précise ?

M. Bangoura :

Oui, mais il n'a pas annoncé aux autorités pour dire : « Je suis là ». Il était en conversation avec ses clients.

M. Plender :

Vous appelez clandestine la présence d'un navire quand il ...

M. Bangoura :

Lorsqu'il n'est pas annoncé au port, les services d'accostage du port ne l'ont pas pris en charge, c'est une présence clandestine.

M. Plender :

Par le mot « clandestine », tout ce que vous voulez dire est qu'il n'avait pas annoncé sa position directement au port guinéen ?

M. Bangoura :

Oui.

M. Plender :

Est-il exact que vous avez fait route vers le sud de la zone guinéenne parce que le *Saiga* avait donné un rendez-vous à une position proche de l'endroit où vous l'avez trouvé ?

M. Bangoura :

Nous avons fait route parce qu'il avait changé de direction.

M. Plender :

Le *Saiga* avait annoncé, n'est-ce pas, exactement où il aurait eu son prochain rendez-vous.

M. Bangoura :

Je vous dis que nous avons changé nous aussi notre cap parce qu'il a changé de route, il y a eu rupture de communication.

M. Plender :

A quelle heure, le matin, avez-vous eu contact par radar ?

M. Bangoura :

Environ 3 heures et demie.

M. Plender :

Quelle était la direction du *Saiga* à ce moment précis ?

M. Bangoura :

Je ne peux pas vous dire cela, Monsieur, je ne suis qu'un douanier à bord.

M. Plender :

Est-ce que vous savez, par le radar, la vitesse du *Saiga* ?

M. Bangoura :

Moi, je ne le sais pas, moi.

M. Plender :

Est-il exact que vous avez signé un procès-verbal selon lequel le *Saiga* aurait voyagé à grande vitesse ?

M. Bangoura :

A quel endroit ?

M. Plender :

Dans votre procès-verbal du 13 novembre. Je vous lis les mots :

Nous avons immédiatement foncé dans sa direction, tout en augmentant la vitesse pour vite le rattraper. Mais il semblait filer plus vite que nous en direction de la frontière du sud.

M. Bangoura :

Cela, c'est après sa détection

M. Plender :

Vous pouvez le voir, c'était après la détection par radar.

M. Bangoura :

C'est ce que je dis.

M. Plender :

Dans les mots « il semblait filer plus vite que nous ».

M. Bangoura :

Affirmatif.

M. Plender :

La vitesse maximum de la petite vedette, quelle est elle ?

M. Bangoura :

La vitesse de la petite vedette ?

M. Plender :

Oui.

M. Bangoura :

Je ne peux pas le dire, c'est le capitaine, le commandant du bateau qui va le dire.

M. Plender :

Si je vous informe que nous avons des informations techniques qui donnent sa vitesse et la vitesse maximum est de 35 noeuds, est-ce que vous désirez faire comprendre que le *Saiga* semblait filer à une vitesse de 35 noeuds ?

M. Bangoura :

Nous ne l'avons écrit nulle part.

M. Plender :

Est-il exact que le navire semblait filer plus vite que vous ?

M. Bangoura :

Affirmatif.

M. Plender :

Vous avez filé très lentement ?

M. Bangoura :

Oui.

M. Plender :

Mais, dans ce procès-verbal, vous avez dit, dans la ligne intérieure, que vous avez augmenté votre vitesse.

M. Bangoura :

Oui.

M. Plender :

Alors, si après avoir augmenté la vitesse, vous avez filé très lentement, pourriez-vous donc expliquer pourquoi vous dériviez ? Pourquoi vous n'avez pas filé plus vite ?

M. Bangoura :

Cela dépend de la capacité des machines.

M. Plender :

Pourriez-vous donc estimer pour le Tribunal la vitesse du tanker ?

M. Bangoura :

Le technicien de la marine viendra vous expliquer cela. Moi, je ne peux pas le dire, étant douanier. Je n'ai reçu que des informations à bord.

M. Plender :

Monsieur Bangoura, n'est-il pas évident, même à un petit enfant, qu'un tanker ne va pas plus vite qu'une vedette de patrouille armée ?

M. Bangoura :

Je ne peux pas infirmer ni affirmer. Cela dépend des moteurs de cette vedette.

M. Plender :

Alors, selon vos témoignages, le tanker semblait filer plus vite que votre vedette.

M. Bangoura :

Oui.

M. Plender :

Y a-t-il un moment où ce tanker s'est arrêté pour se laisser dériver ?

M. Bangoura :

Je ne peux pas l'affirmer parce que je n'étais pas à bord du tanker.

M. Plender :

Si je vous disais qu'il a stoppé ses machines à 4 heures 25 du matin, que diriez-vous ?

M. Bangoura :

Moi je ne peux rien dire autour de cela.

M. Plender :

Avez vous lu le journal du *Saiga* ?

M. Bangoura :

A l'époque, oui.

M. Plender :

Et ce journal de bord mentionne que les machines ont été stoppées à 4 heures 25 le matin, n'est-ce pas ?

M. Bangoura :

Je ne me rappelle pas de cela parce qu'il y a un an que je ne l'ai pas relu.

M. Plender :

Est-il possible qu'avant l'arrivée des vedettes, le *Saiga* dérivait ?

M. Bangoura :

Je ne peux pas l'affirmer parce que je n'étais pas dans la petite vedette.

M. Plender :

Est-ce que vous désirez indiquer que c'est possible ?

M. Bangoura :

Non, je ne peux pas l'indiquer.

M. Plender :

Parce que si le navire avait dérivé, cela aurait été un élément extrêmement important, n'est-ce pas ?

M. Bangoura :

Cela, Maître, je ne peux pas le dire parce que je n'étais pas dans la petite vedette.

M. Plender :

Mais vous avez signé un procès-verbal dans lequel vous dites que le navire semblait filer plus vite que le vôtre. Vous ne dites rien sur la possibilité que le *Saiga* dérivait.

M. Bangoura :

Je ne peux pas le dire parce que je n'étais pas dans la petite vedette qui a été la première à l'aborder. Je ne peux pas affirmer quelque chose, je n'étais pas présent.

M. Plender :

Si, en vérité, le *Saiga* avait dérivé pendant plusieurs heures, vous auriez dû le mentionner dans le procès-verbal, n'est-ce pas ?

M. Bangoura :

S'il était prouvé que le navire était en dérive, je l'aurais mentionné.

M. Plender :

Donc il y a deux possibilités : ou le *Saiga* ne dérivait pas pendant quelques heures, et votre procès-verbal est exact; ou votre procès-verbal n'est pas exact. Est-ce que vous êtes d'accord ? Il n'y a que deux possibilités ?

M. Bangoura :

Je ne peux pas vous dire que le procès-verbal n'est pas exact, Monsieur. Il n'y a pas cette possibilité pour dire qu'un procès-verbal n'est pas exact.

M. Plender :

Donc, si le procès-verbal est exact, il s'ensuit, n'est-ce pas, que le journal de bord n'est pas exact.

M. Bangoura :

Je tiens cela de vous, vous ne tenez pas cela de moi.

M. Plender :

Monsieur Bangoura, selon le journal de bord, le navire aurait dérivé pendant 4 heures. Est-ce que le journal de bord est exact ou non ?

M. Bangoura :

Maître, je ne peux pas le dire parce que je n'ai pas assisté à l'établissement du journal de bord. Il y a de cela un an. Depuis 1997, jusqu'à maintenant, je n'ai pas lu ce journal.

M. Plender :

Si le journal de bord avait été faux, cela aurait été un point très important, n'est-ce pas ?

M. Bangoura :

Je ne peux pas apprécier la vérité ou le mensonge de ce journal de bord. Je ne peux pas apporter ici d'appréciation de ce journal.

M. Plender :

Si le capitaine du navire est poursuivi devant le parquet, il aurait été extrêmement important, n'est-ce pas, de porter à la connaissance du tribunal, qu'il aurait manqué de maintenir un journal de bord exact.

M. Bangoura :

Vous dites que si ...

M. Plender :

Si le journal de bord est faux, c'est un élément important, n'est-ce pas ?

M. Bangoura :

Je vous dis que je ne peux pas juger ici de ce journal de bord.

M. Plender :

Pourquoi n'avez-vous pas attiré l'attention du parquet de Conakry sur le contenu du journal de bord ?

M. Bangoura :

(Pas de réponse)

The President:

Mr. Plender, I would suggest that the witness cannot be asked why he did not do that because he has been at pains to say that he did not know anything about the truthfulness or otherwise of the contents of the log book. If that is the case, he could not possibly be expected to draw this to the attention of the tribunal.

Mr. Plender:

(Continuing in English) That is right. I shall not persevere. The witness did say that he had seen the log book.

The President:

Yes, but he says that he cannot say whether it was true or not true.

M. Plender :

(Continuant en français) En approchant le *Saiga*, l'avez-vous observé à jumelle ?

M. Bangoura :

Avec quelle vedette ? Avec quelle vedette, s'il vous plaît ?

M. Plender :

Je vous demande si vous, Monsieur, vous avez observé le *Saiga*, de la vedette sur laquelle vous étiez stationné.

M. Bangoura :

Non, on n'était pas stationné, on était en marche.

M. Plender :

Bien entendu, mais est-ce que vous avez observé le *Saiga* à la jumelle ?

M. Bangoura :

A la première distance, on ne pouvait pas voir le *Saiga* à la jumelle.

M. Plender :

En approchant le *Saiga*, avez-vous utilisé vos jumelles ?

M. Bangoura :

Moi, je n'avais pas de jumelles, non.

M. Plender :

En approchant le *Saiga*, avez-vous observé des personnes à bord ?

M. Bangoura :

Je vous dis que le *Saiga* a été abordé par la première petite vedette. Moi, j'étais dans la grande vedette. Ce qui s'est passé à ce niveau, je ne peux pas vous l'expliquer parce que je n'étais pas présent. J'ai dit plus haut, même quand on me l'a demandé tout à l'heure, j'ai dit que quand nous sommes arrivés les éléments de la petite vedette étaient déjà à bord du *Saiga*.

M. Plender :

Tout cela est bien compris. Mais je vous pose la question encore : quand vous êtes arrivé près du *Saiga*, avez-vous vu des personnes à bord ?

M. Bangoura :

Quand moi, mon bateau, le P328 qui nous conduisait, est arrivé, je vous dis que les éléments étaient sur le pont. Il y avait déjà trois membres de l'équipage sur le pont, plus nos agents.

M. Plender :

Avez-vous vu à ce moment des membres de l'équipage du *Saiga* ?

M. Bangoura :

Oui.

M. Plender :

Donc, où étaient-ils et que faisaient-ils à ce moment-là ?

M. Bangoura :

Je ne sais pas si l'on se comprend, Maître, s'il vous plaît. Je vous dis que la petite vedette a été la première à aborder le *Saiga*. Quand nous, nous arrivons, dès que nous avons accosté le *Saiga*, ils avaient déjà retrouvé quelques membres de l'équipage au nombre de trois qui étaient sur le pont. Mais dire maintenant où ils étaient, ce qu'ils faisaient, je ne peux pas l'affirmer.

M. Plender :

Est-ce que c'est parce que vous ne vous rappelez pas ?

M. Bangoura :

Je ne peux pas me rappeler d'une opération à laquelle je n'ai pas participé. Dans la première vedette, je n'y étais pas. La seconde vedette, quand nous sommes arrivés, j'ai dit – et je persiste et je signe – qu'il y avait trois membres de l'équipage qui étaient déjà sur le pont. Mais dire maintenant, avant notre arrivée sur le bateau, que je vais parler de cela, je ne peux pas mentir.

M. Plender :

Monsieur Bangoura, est-ce que j'ai bien compris que selon votre témoignage, quand vous êtes arrivé près du *Saiga*, et avant que vous soyez arrivé à bord, vous n'avez vu aucun membre de l'équipage du *Saiga* ?

M. Bangoura :

Peut-être que je me fais mal comprendre autour de ce point. Je ne sais pas ce que vous voulez tirer de moi, mais je vous dis que la petite vedette a été la première à aborder le *Saiga*. Quand nous l'avons accosté, les membres de l'équipage étaient déjà sur le pont. Je ne peux pas dire mieux que cela, Maître.

M. Plender :

Les membres de l'équipage qui étaient sur le pont, étaient-ils des membres de l'équipage de vos vedettes ou des membres de l'équipage du *Saiga* ?

M. Bangoura :

Quand la grande vedette est arrivée ?

M. Plender :

Quand la grande vedette est arrivée avec vous, à ce moment-là, avez-vous vu des membres de l'équipage du *Saiga* sur le pont du *Saiga* ?

M. Bangoura :

Oui.

M. Plender :

Merci. Étaient-ils sous garde ? Que faisaient-ils ?

M. Bangoura :

Sous garde de qui ?

M. Plender :

De votre équipage, des soldats, des membres de la marine ?

M. Bangoura :

Non, pas la marine.

M. Plender :

Qu'est-ce qu'ils faisaient à ce moment-là, ces membres de l'équipage du *Saiga* ?

M. Bangoura :

Ils étaient sur le pont en attendant que l'on retrouve les autres aussi.

M. Plender :

Est-ce que ces membres de l'équipage étaient armés ?

M. Bangoura :

Je n'ai pas vu d'armes avec eux.

M. Plender :

Avant votre arrivée, aviez-vous une raison sérieuse de croire qu'ils étaient armés ?

M. Bangoura :

On ne pouvait pas le savoir.

M. Plender :

En approchant le *Saiga*, avez-vous vu, personnellement, des signaux émis par la petite vedette ?

M. Bangoura :

Oui.

M. Plender :

Y avait-il un message par radio ?

M. Bangoura :

Je n'étais pas dans la cabine radio.

M. Plender :

Savez-vous s'il y avait un message par radio ?

M. Bangoura :

Je n'étais pas dans la cabine radio.

M. Plender :

Vous avez répété votre réponse. Je répète la question. Saviez-vous, oui ou non, s'il y avait un message par radio ?

M. Bangoura :

Moi, je ne peux pas le savoir, sauf si on me le rapporte, mais dire ce que j'ai suivi, ce qu'ils ont fait, non. Je n'étais pas dans la cabine radio.

M. Plender :

Avez-vous écouté des signaux émis au *Saiga* ?

M. Bangoura :

Je vous dis, au départ de la petite vedette, j'ai écouté la sirène, j'ai vu, j'ai vu le feu qui tournait, qui faisait le girophare, le feu bleu.

M. Plender :

Y avait-il des tirs de balles à blanc ?

M. Bangoura :

A la distance où j'étais, je ne pouvais pas l'affirmer parce que, moi, je n'étais pas dans la petite vedette.

The President:

Mr. Plender, it is now 12 o'clock and it is quite plain that it will not be possible for you to complete your cross-examination within the next minute. I suggest that we suspend the sitting and resume at 2 o'clock.

May I request the Agents kindly to meet with me either immediately at 12.15 or at quarter-to-two, at your convenience? Which would you prefer?

Mr. Plender:

(Continuing in English) Immediately.

The President:

At 12.15 then. Thank you very much. The sitting is suspended.

(The Tribunal adjourns at 12.00 noon.)

Public sitting held on 12 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 12 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Will the witness Mr. Bangoura please take the stand?

Mr. Plender, you may proceed.

Audition des témoins (suite)

CONTRE-INTERROGATOIRE DE M. BANGOURA (SUITE)
PAR M. PLENDER (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/10, F, p. 4–15]

M. Plender :

Monsieur Bangoura, avant le déjeuner je vous posais quelques questions sur l'état du *Saiga* quand vous y êtes arrivé. Vous vous rappelez ? (*Le témoin acquiesce.*) Lorsque vos hommes ont réussi à prendre à l'abordage le *Saiga*, y avait-il des hommes sur la passerelle de ce navire ?

M. Bangoura :

Lorsque nos hommes ont abordé le *Saiga* ? C'est bien cela ?

M. Plender :

Oui, exactement.

M. Bangoura :

Je vous dis que je n'étais pas dans la première vedette. C'est après que nous, nous sommes arrivés avec la grande vedette.

M. Plender :

Vous avez signé un procès-verbal et je vais vous lire quelques lignes de ce procès-verbal : « Nos hommes ont réussi ... à se larguer à bord, mais ils trouvèrent la cabine de pilotage vide. » Est-ce vrai ?

M. Bangoura :

Oui.

M. Plender :

Et le navire avançait donc en automatisme. C'est vrai ?

M. Bangoura :

Le navire progressait en automatisme.

M. Plender :

S'il avait été en pilotage automatique, il aurait marché donc dans une direction constante, n'est-ce pas ?

M. Bangoura :

Cela, je ne peux pas le savoir.

M. Plender :

Vous ne savez pas si un navire en pilotage automatique suit une direction constante ?

M. Bangoura :

Je ne peux pas vous le dire ici parce que je ne suis pas technicien de la marine.

M. Plender :

Vous avez déclaré dans le même procès-verbal que le *Saiga* aurait tenté de faire sombrer la petite vedette. Est-ce vrai ou non ?

M. Bangoura :

Oui, c'est vrai.

M. Plender :

Est-ce que vous l'avez vu ?

M. Bangoura :

Si nous l'avons vu ?

M. Plender :

Est-ce que vous avez vu le *Saiga* tentant de faire sombrer la petite vedette ?

M. Bangoura :

Cela, c'est selon le compte rendu qui nous a été fait par ceux qui étaient à bord.

M. Plender :

Si je vous ai bien compris alors, votre témoignage est que vous ne l'avez pas vu vous-même, mais que quelqu'un vous en a informé. Est-ce exact ?

M. Bangoura :

Oui.

M. Plender :

Et vous désirez faire croire au Tribunal qu'un tanker chargé de 5 000 tonnes de gasoil pouvait tenter d'aborder vos vedettes rapides ?

M. Bangoura :

Reprenez votre question s'il vous plaît ?

M. Plender :

Est-ce que vous désirez sérieusement faire croire à ce Tribunal international qu'un tanker chargé de 5 000 tonnes de gasoil pouvait tenter d'aborder une petite vedette armée, avec une vitesse maximum de 35 noeuds ?

M. Bangoura :

La petite vedette armée avait des hommes à bord, qui avaient des armes. Ce n'est pas la vedette armée qui était venue contre le *Saiga*. C'est un navire qui était chargé, quand il faisait ses manœuvres, ce sont les vagues qui étaient autour, donc les vagues causées par le navire ont essayé de jouer sur la petite vedette.

M. Plender :

Et vous désirez faire croire au Tribunal que ces manoeuvres auraient été faites au moment où la passerelle était vide et le navire en pilotage automatique ?

M. Bangoura :

Oui.

M. Plender :

Est-il vrai que le tanker était pleinement chargé ?

M. Bangoura :

Je ne peux pas dire qu'il était pleinement chargé, mais il était chargé.

M. Plender :

Avez-vous vu peut-être sa ligne de flottaison ?

M. Bangoura :

Je ne connais pas cette ligne de flottaison.

M. Plender :

N'était-il pas assez simple de prendre l'abordage ?

M. Bangoura :

N'était-il pas simple de prendre ... ?

M. Plender :

D'y pénétrer, pour entrer dans le navire ?

M. Bangoura :

Je ne sais pas ... pour entrer dans le navire ou bien ?

M. Plender :

Vous l'avez fait vous-même, n'est-ce pas ? Vous n'étiez jamais à bord du *Saiga* ?

M. Bangoura :

Moi, je suis monté à bord du *Saiga*.

M. Plender :

Alors, en entrant dans le *Saiga*, avez-vous eu des difficultés ? Avez-vous dû grimper sur une échelle ?

M. Bangoura :

Quand moi je suis venu ?

M. Plender :

Oui, quand vous êtes venu.

M. Bangoura :

La difficulté pour grimper dans le *Saiga* ... nous avions déjà l'échelle, nous.

M. Plender :

C'est simple n'est-ce pas ?

M. Bangoura :

Pour qui ? A partir du moment où le navire était immobilisé, tout était rentré dans l'ordre.

M. Plender :

Quand vous y êtes arrivé ?

M. Bangoura :

Oui, tout était rentré dans l'ordre à ce moment.

M. Plender :

La distance entre la vedette et le pont du tanker n'était pas énorme ?

M. Bangoura :

La distance entre le tanker et quelle vedette ?

M. Plender :

La vedette à partir de laquelle vous êtes entré sur le *Saiga*.

M. Bangoura :

C'est une grande vedette.

M. Plender :

Il n'était pas tellement difficile de prendre l'étape de cette vedette au tanker ?

M. Bangoura :

C'était une grande vedette. Elle était plus grande que la première.

M. Plender :

Votre réponse est oui ou non ?

M. Bangoura :

Elle était plus grande que la première.

M. Plender :

Monsieur Bangoura, peut-être vous ne me comprenez pas. La question est de savoir s'il était difficile d'entrer de votre vedette au tanker.

M. Bangoura :

Non, il n'était pas difficile à cet instant.

M. Plender :

Merci. Une fois à bord du *Saiga*, avez-vous vu des déchets ?

M. Bangoura :

Vous dites ? Reprenez s'il vous plaît.

M. Plender :

Une fois à bord du *Saiga*, avez-vous vu des trous de balles ?

M. Bangoura :

Des trous de balles ?

M. Plender :

Oui, c'est la question.

M. Bangoura :

Oui, mais quand vous dites des trous de balles ?

M. Plender :

La question est de savoir si vous avez vu des trous de balles ou d'autres dommages sur le *Saiga* ?

M. Bangoura :

Des étuis de balles, vous voulez dire, ou des plombs de balles ?

M. Plender :

Est-ce que vous avez vu des trous ou des dommages sur le *Saiga* ou aucun élément qui n'était pas normal ?

M. Bangoura :

Je vous dis, j'ai eu à vous dire que quand je suis arrivé sur le pont, je n'étais pas encore sur la passerelle. C'est à la passerelle où nous avons constaté que la porte était cassée.

M. Plender :

Vous n'avez vu rien d'autre ? Seulement une porte cassée ?

M. Bangoura :

A cet instant, oui.

M. Plender :

Et plus tard peut-être ?

M. Bangoura :

Oui.

M. Plender :

Qu'est-ce que vous avez vu ?

M. Bangoura :

J'ai vu à l'intérieur une ou deux portes cassées.

M. Plender :

C'est tout ?

M. Bangoura :

Ce que j'ai vu à ce moment, oui.

M. Plender :

Et plus tard ?

M. Bangoura :

Quand on devait partir sur Conakry, le capitaine a dit qu'il fallait lui donner le temps de changer un tuyau qui était cassé.

M. Plender :

Je vais vous montrer quelques photographies, Monsieur. La première photographie porte le n°12. Je dois tout d'abord expliquer que, selon Saint-Vincent, ces trous étaient photographiés quand le *Saiga* est arrivé à Dakar, après quelques réparations. La première question est : Avez-vous vu sur le *Saiga* des trous qui ressemblent aux trous sur cette photographie ?

M. Bangoura :

Moi, je n'ai pas vu ces trous. Je ne sais pas sur quelle partie du bateau. Je ne vois qu'une peinture noire et au milieu, je vois un point plus noir encore. C'est tout. Cela ressemble peut-être à une plaque de peinture accrochée.

M. Plender :

Vous n'acceptez pas que ce que l'on peut voir sur cette photographie est un trou ?

M. Bangoura :

Je dis que ce que je vois de mes yeux, je ne vois pas que cela ressemble à un trou.

M. Plender :

Je vous montre une autre photo alors, la n° 13. Est-ce un trou ou non ?

M. Bangoura :

Je ne peux pas l'affirmer, c'est une photo.

M. Plender :

Est-ce une photo d'un trou ?

M. Bangoura :

Je ne peux pas l'affirmer parce que je ne suis pas photographe, je n'ai pas fait de photo sur un trou pour savoir lorsqu'on fait une photo sur un trou et qu'on reproduit ce que cela va donner.

M. Plender :

Quand vous étiez sur le *Saiga*, vous n'avez pas vu des trous comme cela ?

M. Bangoura :

Moi, je n'ai pas vu des trous comme cela.

M. Plender :

Je vais vous montrer d'autres photographies, la n° 15. Que pouvez-vous y voir ?

M. Bangoura :

Sur la photo ?

M. Plender :

Oui.

M. Bangoura :

Je vois un dessin qui semble être un zodiac accroché.

M. Plender :

Pleinement gonflé ou non ?

M. Bangoura :

Je ne peux pas l'affirmer parce que c'est sur photo que je le vois. Je ne sais pas s'il est gonflé ou pas.

M. Plender :

Eh bien on va en voir d'autres. La photographie n° 3. Vous voyez la passerelle ?

M. Bangoura :

Oui.

M. Plender :

Est-ce que vous pouvez voir des déchets, des marques sur la passerelle ?

M. Bangoura :

De mes yeux, je vois ici des points de peinture qui sont différents de l'autre couleur de peinture de la roue. Je vois des portes qui ressemblent aussi à des fenêtres. Je vois que c'est écrit : « *No smoking* ».

M. Plender :

On peut voir la n° 7. Est-ce que vous voyez un trou dans cette photo ?

M. Bangoura :

De mes yeux, je ne vois pas de trou.

M. Plender :

Vous portez des lunettes, Monsieur ?

M. Bangoura :

Porter des lunettes ?

M. Plender :

Si vous ne pouvez pas voir, je me demande si vous avez besoin de lunettes.

M. Bangoura :

Non, je porte des lunettes seulement pour lire.

M. Plender :

N° 9, n° 11, n° 23 et n° 30. Si je disais, Monsieur Bangoura, que le navire aurait été criblé de balles de l'antenne à l'*engine*, à l'intérieur et à l'extérieur, de balles de grand calibre et de petit calibre, qu'est-ce que vous diriez ?

M. Bangoura :

Je ne l'affirmerais pas parce que, moi, je n'ai pas vu, à partir des photos que vous venez de présenter, ces trous. Moi, à bord, nous n'avons pas utilisé des balles de grand calibre parce que nous n'en avions pas.

M. Plender :

Si je disais que vous n'auriez pas manqué de voir ces trous et que vous savez très bien que les gens, sous votre direction, tiraient à plusieurs reprises sur le navire ...

M. Bangoura :

Ils n'ont pas tiré sur le navire.

M. Plender :

Personne ?

M. Bangoura :

Non.

M. Plender :

Pas un seul tir ?

M. Bangoura :

Il y a eu un tir de sommation dans le navire, mais pas sur le navire.

M. Plender :

Dans ce cas, pourquoi est-ce que votre procès-verbal et le témoignage devant le tribunal de première instance parle de la nécessité de tirer ? Pouvez-vous répondre ?

M. Bangoura :

Reprenez votre question, s'il vous plaît.

M. Plender :

Si personne ne tirait, pouvez-vous expliquer comment vous avez signé un procès-verbal qui parle des tirs ?

M. Bangoura :

Je crois que je n'ai pas dit ici que personne ne tirait pas, comme vous le dites. Vous avez dit qu'ils ont tiré sur le bateau, moi je dis non, qu'ils ont tiré dans le bateau, sur le pont.

M. Plender :

On peut vérifier avec le procès-verbal de ce Tribunal. Vous avez dit qu'il y avait des tirs quand les armées se trouvaient à bord du navire. Est-ce vrai ?

M. Bangoura :

Oui.

M. Plender :

Est-ce que vous l'avez vu ? Avez-vous vu des hommes qui tiraient ?

M. Bangoura :

Des hommes qui tiraient ?

M. Plender :

Oui.

M. Bangoura :

Quels hommes ?

M. Plender :

C'était ma prochaine question : qui tirait ?

M. Bangoura :

Non, c'est vous qui demandez si j'ai vu des hommes qui tiraient. Moi, je vous demande : quels hommes ?

M. Plender :

La première question était : avez-vous vu quelqu'un qui tirait ?

M. Bangoura :

Vous me demandez si j'ai vu les hommes. Je vous demande : quels hommes ?

M. Plender :

N'importe lesquels. Avez-vous vu une personne, n'importe laquelle, tirer ?

M. Bangoura :

Je vous dis que oui.

M. Plender :

Alors, qui tirait ?

M. Bangoura :

Je vous dis que nos hommes.

M. Plender :

Combien d'hommes tiraient ?

M. Bangoura :

Non. Je ne sais pas combien d'hommes tiraient. Ils ont fait deux ou trois coups de sommation.

M. Plender :

Des tirs à blanc alors ? S'agissait-il de balles à blanc ?

M. Bangoura :

Non, c'étaient des balles réelles.

M. Plender :

Pourriez-vous donc expliquer pourquoi on n'a pas tiré des balles à blanc ?

M. Bangoura :

Parce qu'on n'avait pas cela à notre disposition.

M. Plender :

Sur le navire, avez-vous vu des membres de l'équipage blessés ?

M. Bangoura :

Il y a eu deux blessés que nous avons rapportés dans notre rapport.

M. Plender :

Est-ce que vous vous rappelez d'un Sénégalais blessé, M. Niasse ?

M. Bangoura :

M. Niasse avait le côté de l'oeil, je ne me rappelle plus de quel côté maintenant, mais il se plaignait de l'oeil.

M. Plender :

Le côté d'un œil ?

M. Bangoura :

Oui.

M. Plender :

Si je disais que le sang coulait de ses yeux, de tous les deux ?

M. Bangoura :

Non. L'autre qui avait son bras bandé, qui avait reçu –

M. Plender :

Un moment, attendez, on parle de M. Niasse. Vous dites qu'il n'avait qu'une petite blessure dans un de ses yeux ?

M. Bangoura :

Oui.

M. Plender :

Il avait des projectiles dans la gorge.

M. Bangoura :

Non.

M. Plender :

Non ?

M. Bangoura :

Non.

M. Plender :

Il avait d'autres projectiles dans la poitrine.

M. Bangoura :

Non, parce que, arrivés au port de Conakry, nous avons eu à le conduire à l'hôpital. A l'hôpital, il a eu l'oeil nettoyé et sa vision est redevenue normale. Il est retourné la même nuit à bord.

M. Plender :

Monsieur Bangoura, je dois vous informer que le Tribunal a reçu le témoignage contraire, y compris des radiographies de l'hôpital de Dakar.

M. Bangoura :

Je vous apprends aussi, Maître, que nous, à Conakry, au niveau de l'hôpital, cela n'a pas été signalé au médecin qui l'a reçu. Et même quand on l'a amené le 31-10-97, pour une seconde visite, on n'a prescrit qu'un produit pour l'œil, c'est tout. On avait une ordonnance pour lui et on a acheté le produit. Là, il n'y avait aucune autre plainte.

M. Plender :

Je vous suggère, Monsieur Bangoura, qu'il était absolument évident que les blessures de ce monsieur étaient graves. C'est vrai ou non ?

M. Bangoura :

Non, pas à notre connaissance.

M. Plender :

Y avait-il des injures proférées à ce monsieur ?

M. Bangoura :

Il n'y a jamais eu d'insultes proférées à ce monsieur, de quel droit ?

M. Plender :

Vous en êtes certain ?

M. Bangoura :

Très sûr.

M. Plender :

Dans un état blessé, il était menacé, insulté par les hommes sous votre charge.

M. Bangoura :

Non, non et non.

M. Plender :

Savez-vous comment M. Niasse a été blessé ?

M. Bangoura :

Selon ses explications à lui ou bien moi ? Parce que moi, je n'étais pas là-bas quand il s'est blessé. Je l'ai vu sur le pont. Je ne peux pas donner ici une version que je n'ai pas suivie.

M. Plender :

Avez-vous dit à quelqu'un qu'il aurait frappé sa tête sur une fenêtre ?

M. Bangoura :

Si j'ai dit à quelqu'un ?

M. Plender :

Oui.

M. Bangoura :

A qui j'ai dit qu'il a frappé sa tête ?

M. Plender :

Je peux être plus précis. Avez-vous informé les avocats du Gouvernement guinéen qu'il aurait subi un petit accident avec une fenêtre ?

M. Bangoura :

Oui.

M. Plender :

Je vous suggère alors que c'était pleinement évident que les blessures qu'il a subies étaient tellement graves qu'il aurait été impossible que ce soit le résultat de taper sa tête contre une fenêtre.

M. Bangoura :

Si l'hôpital n'a pas signalé autre chose, je ne peux pas l'affirmer ici.

M. Plender :

Je vous pose donc quelques questions concernant l'autre blessé. Décrivez, s'il vous plaît, les blessures de l'autre.

M. Bangoura :

Je ne peux pas décrire les blessures de l'autre parce que je n'ai pas assisté à son opération. C'est un compte rendu que j'ai reçu.

M. Plender :

Dans votre procès-verbal, vous avez signé que ce monsieur était blessé. Etiez-vous informé du fait qu'il était blessé ?

M. Bangoura :

Vous dites-même que nous avons écrit dans le procès-verbal qu'il était blessé.

M. Plender :

Donc, auriez-vous la gentillesse d'informer ce Tribunal sur ce que vous avez vu avec vos propres yeux concernant le deuxième blessé ?

M. Bangoura :

Ce que j'ai vu, je l'ai vu sur le pont avec le bras bandé. Et de là-bas, quand on est retourné à Conakry la nuit, nous l'avons embarqué pour l'hôpital.

M. Plender :

Vous étiez le commandant de la mission ?

M. Bangoura :

De la douane, oui.

M. Plender :

Avez-vous donc demandé à quelqu'un de vous informer comment ce monsieur a été blessé au bras ?

M. Bangoura :

C'est à l'hôpital, qu'il a été demandé.

M. Plender :

Vous n'avez donc pas demandé à n'importe quelle personne sur le navire ?

M. Bangoura :

Personne ne pouvait savoir comment il s'était blessé.

M. Plender :

S'il avait été tiré dessus par un des hommes sous votre charge, on aurait dû le savoir, n'est-ce pas ?

M. Bangoura :

S'il était tiré par un de nos hommes, son bras serait cassé.

M. Plender :

Qu'est-ce que vous suggérez au Tribunal, que le bras n'était pas cassé, et que des balles n'étaient pas trouvées dans le bras ?

M. Bangoura :

A Conakry, on n'a pas retrouvé de balles dans le bras.

M. Plender :

Le cuisinier du *Saiga* n'a-t-il pas été menacé d'une arme à feu sur la tempe ?

M. Bangoura :

Je n'en ai pas connaissance.

M. Plender :

Le capitaine, était-il menotté ?

M. Bangoura :

Non.

M. Plender :

Non ?

M. Bangoura :

Non.

M. Plender :

Vous en êtes certain ?

M. Bangoura :

Le capitaine n'a jamais été menotté.

M. Plender :

Est-ce que j'ai bien compris votre témoignage ce matin ? Vous avez dit au Tribunal que l'équipage était libre de quitter la Guinée dès que vous êtes revenu à Conakry. Est-ce vrai ?

M. Bangoura :

Oui.

M. Plender :

Le passeport n'était pas saisi ?

M. Bangoura :

Le passeport de qui ?

M. Plender :

De l'équipage.

M. Bangoura :

Non.

M. Plender :

Non ?

M. Bangoura :

Non.

M. Plender :

Jamais ?

M. Bangoura :

Le passeport du capitaine du navire.

M. Plender :

Et des autres ?

M. Bangoura :

Ils n'ont pas été saisis –

M. Plender :

Jusqu'au 17 novembre ?

M. Bangoura :

Ils n'ont pas été saisis parce qu'ils n'ont pas demandé.

M. Plender :

Il y avait des soldats ou des gendarmes guinéens sur le *Saiga* pendant quelques semaines après l'arrivée à Conakry, n'est-ce pas ?

M. Bangoura :

Des gendarmes ?

M. Plender :

Des armés.

M. Bangoura :

Non, il y avait des fonctionnaires, les agents des douanes et de la marine qui étaient là pour assurer la sécurité de la vedette et de son équipage.

M. Plender :

Et ces gens portaient des armes ?

M. Bangoura :

Oui.

M. Plender :

Combien ?

M. Bangoura :
Pour la garde ?

M. Plender :
Combien de gens armés y avait-il sur le navire ?

M. Bangoura :
Tous les jours ?

M. Plender :
Les premiers jours ?

M. Bangoura :
Non, pas le premier jour. Depuis tout le temps que le *Saiga* était là-bas, la garde était confiée à la douane et à la marine.

M. Plender :
Combien de personnes y avait-il ?

M. Bangoura :
Je ne peux pas l'affirmer parce que je n'étais pas le chef du poste de garde.

M. Plender :
Si je vous suggère qu'ils étaient quatorze ou quinze, est-ce possible ?

M. Bangoura :
Non, ce n'est pas possible.

M. Plender :
Est-il exact, Monsieur, que vous auriez dit ce matin, en répondant à une question de la part de l'avocat de la Guinée, que vous avez pris contact avec le *Saiga* vers 3 heures 30 le matin ?

M. Bangoura :
Environ.

M. Plender :
Mais dans le procès-verbal, vous avez dit que le contact avait été fait à 4 heures.

M. Bangoura :
Non, vers.

M. Plender :
Vous savez, n'est-ce pas, que ce changement de l'heure est extrêmement important.

M. Bangoura :
Non, je n'ai pas dit que le contact a eu lieu exactement à 4 heures ou que le contact a eu lieu exactement à 3 heures. J'ai dit : vers.

M. Plender :

Parce que si le *Saiga* avait quitté la limite de la zone économique de la Guinée à 3 heures 35, il aurait été embarrassant de suggérer que le contact n'ait pas été fait jusqu'à 4 heures. Sachant ce fait, vous avez changé votre témoignage.

M. Bangoura :

Comment, j'ai changé mon témoignage ?

M. Plender :

Est-ce que vous avez changé votre témoignage parce que vous savez maintenant que le *Saiga* n'était pas dans les limites de la zone économique exclusive à 4 heures ?

M. Bangoura :

Je regrette, Maître, je n'ai pas changé mon témoignage pour dire parce qu'il y a cela ... Je tiens cela de vous, pas de moi.

M. Plender :

Que diriez-vous au Tribunal si je vous disais que vous, les soldats et les douaniers qui vous accompagnaient, avaient attaqué un navire marchand paisible, loin de votre mer territoriale, que vous l'avez criblé de balles sachant que cela pouvait mettre en danger la vie des personnes à bord, que l'équipage a été brutalisé, blessé, traumatisé, menacé, menotté par votre faute et que votre témoignage devant ce Tribunal est aussi plein de trous que le *Saiga* ?

The President:

Mr. von Brevern?

Mr. von Brevern:

I would like to ask whether this is a question. I thought that in a cross-examination the advocate can put questions to a witness. I do not think this was a question and I would strongly ask that perhaps you ask Mr. Plender to restrict himself to questions. Thank you, Mr. President.

The President:

Thank you, Mr. von Brevern. I think that perhaps it is not unreasonable for you to be worried about it but it was a question, because the question was: what would he say to the Tribunal if he made all those allegations, and it is entirely within the right of the witness to reject that suggestion. The question is: what would you say to a tribunal if I said this, and he could say whatever his response is. I think it is a question. Let us hear what the witness says first.

M. Plender :

C'est ma dernière question et je désire savoir si vous l'acceptez ou non.

M. Bangoura :

Non.

M. Plender :

Merci. Veuillez rester là. M^e Thiam, le bâtonnier du Barreau sénégalais, désire poser quelques questions supplémentaires.

CONTRE-INTERROGATOIRE DE M. BANGOURA (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/10, F, p. 15–39]

M. Thiam :

Monsieur Bangoura, je voudrais, avec votre collaboration, essayer de combler les trous de votre témoignage, dont parlait M^e Plender tout à l'heure. D'abord, je voudrais vous demander s'il y a un lien entre le fait que le Gouvernement de votre pays invoque l'article 300 du code des douanes qui lui permet d'échapper à sa responsabilité pour les actes de ses fonctionnaires qui seraient illégaux ? Est-ce qu'il y a donc un lien entre ce fait et le fait que vous ayez demandé tout à l'heure à avoir un avocat ?

M. Bangoura :

Reprenez votre question s'il vous plaît, Maître.

M. Thiam :

Pourquoi avez-vous demandé tout à l'heure à avoir un avocat à vos côtés ?

M. Bangoura :

Reprenez votre question, Maître, s'il vous plaît. Vous avez parlé d'abord de l'article 300 du code des douanes.

M. Thiam :

Monsieur Bangoura, je change ma question pour l'instant. Pourquoi avez-vous demandé à avoir un avocat devant ce Tribunal ?

M. Bangoura :

La question a été déjà débattue et répondue par M. le Président du Tribunal, Maître.

M. Thiam :

Monsieur le Président n'a pas répondu, je crois, à cette question. Mais est-ce qu'il y a un lien ?

M. Bangoura :

J'ai présenté mes excuses à la cour parce que je suis là en tant que témoin.

M. Thiam :

Je suis persuadé que le Tribunal a retenu vos excuses, mais est-ce qu'il y a un lien entre le fait que vous ayez demandé un avocat et le fait que la République de Guinée invoque l'article 300 du code des douanes ?

M. Bangoura :

Je n'ai pas de réponse à cette question.

M. Thiam :

Je vous remercie. Monsieur Bangoura, je ne connais pas votre formation. Vous n'êtes peut-être pas un juriste, mais vous pouvez dire au Tribunal ce que vous savez des droits de la Guinée dans la zone économique exclusive et dans la zone contiguë.

M. Bangoura :

Cette question sera débattue par un compatriote ici dans la salle ultérieurement.

M. Thiam :

Qu'est-ce que vous, vous en savez, Monsieur Bangoura ?

M. Bangoura :

De mon expérience de douaniers ?

M. Thiam :

Si vous voulez, ou de toute autre expérience que vous voulez.

M. Bangoura :

D'accord. On continue.

M. Thiam :

Qu'elle est donc votre connaissance des droits de la Guinée dans ces deux zones que je viens de mentionner ?

M. Bangoura :

Je sais une seule chose, que la zone maritime, l'étendue de la zone maritime, je l'ai défini tout à l'heure ici, vous pouvez-vous rapporter à cet article du code des douanes.

M. Thiam :

Vous parlez de la zone maritime du rayon douanier ?

M. Bangoura :

Affirmatif.

M. Thiam :

Mais vous n'avez aucune connaissance quant aux droits de la Guinée dans la zone économique exclusive et la zone contiguë ?

M. Bangoura :

Si. Le code de la marine marchante en parle.

M. Thiam :

Qu'est-ce qu'il dit ?

M. Bangoura :

Je ne peux pas le dire ici parce que je ne l'ai pas sous les yeux.

M. Thiam :

Est-ce que votre formation implique une formation continue ?

M. Bangoura :

Si ma formation implique une formation continue ?

M. Thiam :

Exact. C'est ma question.

M. Bangoura :

Mais oui.

M. Thiam :

Est-ce que dans votre formation continue on aborde ces questions sur l'étendue de vos pouvoirs dans les différentes zones maritimes ?

M. Bangoura :

Tout à fait.

M. Thiam :

Alors, pouvez-vous expliquer au Tribunal ce que vous savez des droits de la Guinée dans ces différentes zones ?

M. Bangoura :

Des droits dans quelle matière ?

M. Thiam :

Vous choisissez la matière que vous voulez. Donnez une réponse au Tribunal, si vous voulez.

M. Bangoura :

Reprenait votre question, Maître.

M. Thiam :

Je peux la répéter jusqu'à demain si vous voulez. Qu'est-ce que vous connaissez des droits de la Guinée dans la zone économique exclusive et dans la zone contiguë ?

M. Bangoura :

Je vous dis que, cela, c'est débattue dans le code de la marine marchande, mais que je ne l'ai pas sous la main ici.

The President:

Mr. von Brevern, please?

Mr. von Brevern:

Mr. President, I have the feeling that at least the last question is really of no relevance to the subject the witness is called for, at least not in the form that he is asked: what do you know of. We are not at school here. I think if Maître Thiam formulates a concrete question, then that would be fine, but just to ask "what do you know of" is not of relevance.

The President:

Maître Thiam, I think we will get the same result if you could perhaps ask for the information that you want. Is it particular information that you want about a particular point or do you want to find out about his state of knowledge of the legal situation? Could you ask a more concrete question?

M. Thiam :

Monsieur le Président, je vais donc poser une question plus concrète.

Monsieur Bangoura, vous avez offert au Tribunal, je crois, d'abord de comparaître comme expert et, dans le document que j'ai sous les yeux, vous deviez comparaître comme

expert dans les questions de loi en ce qui concerne la République de Guinée, et l'applicabilité des lois guinéennes sur le *Saiga*. Comme nous sommes devant ce Tribunal, et pour parler des droits de la Guinée dans la zone économique exclusive et, éventuellement, dans la zone contiguë, je pensais que vous aviez des connaissances sur cette matière. Si vous n'en avez pas autrement que si vous avez votre code de la marine marchante devant vous, je vous remercie de le dire au Tribunal. Vous avez compris la question ?

M. Bangoura :
Non.

M. Thiam :
Vous deviez comparaître ici ... On nous a annoncé que vous deviez comparaître comme expert sur les lois guinéennes et sur l'application de ces lois sur le *Saiga*. C'est pour cela que vous deviez comparaître ici. Vous êtes donc, je le présume, un expert. Si vous êtes un expert, je vous demande d'éclairer le Tribunal sur vos connaissances en la matière. Pouvez-vous le faire ?

M. Bangoura :
Non, pour ce soir, ici, sur le –

M. Thiam :
Donc vous êtes un expert qui ne fonctionne pas ce soir ? C'est bien cela.

M. Bangoura :
Non, moi je ne vous dis pas que je suis un expert qui ne fonctionne pas ce soir. Je suis là, certes, on m'a amené ici pour être témoin d'une situation.

The President:
Mr. Bangoura, the Tribunal perceives that there is a misunderstanding. I will explain it this way. Maître Thiam is absolutely right in assuming that, on the basis of the information that we had, you are an expert in the laws of Guinea, because that is how you were advertised. However, this morning it became clear that you were giving evidence on the facts of the arrest of the *Saiga*. The misunderstanding is quite easy to perceive. Maître Thiam was operating on the basis that you were giving the evidence that you were supposed to give and you expected to be questioned on the evidence that you have actually given. I think that the situation is very clear now. Maître Thiam, you are entitled to reach your conclusion, but the facts are that in fact Mr. Bangoura has been brought here not as originally advertised, but merely to give evidence on the facts of the arrest of the *Saiga*.

Mr. von Brevern, would that be your understanding of the situation?

Mr. von Brevern:
Yes, Mr. President. Thank you very much.

M. Thiam :
Je comprends que ce n'est donc pas un expert.

Alors, est-ce que M. Bangoura peut nous dire quelle est la différence que fait son code douanier entre le rayon douanier et le territoire douanier ?

M. Bangoura :
Vous dites de faire la différence entre le rayon douanier et le territoire douanier ?

M. Thiam :
Exact.

M. Bangoura :
Je ne comprends pas ce que vous voulez dire.

M. Thiam :
Vous ne comprenez donc pas qu'il y ait une distinction entre territoires douaniers et rayons douaniers ?

M. Bangoura :
Le territoire douanier ... Le rayon douanier est inclus maintenant dans le territoire douanier.

M. Thiam :
Vous avez une loi guinéenne qui le dit ?

M. Bangoura :
C'est un arrêté, oui.

M. Thiam :
Vous avez l'arrêté ?

M. Bangoura :
Pas sur moi ici.

M. Thiam :
Mais le code des douanes lui, pour l'instant, et jusqu'à ce que l'on ait cet arrêté, qu'est-ce qu'il en dit ?

M. Bangoura :
Qu'est-ce qu'il en dit ?

M. Thiam :
L'article premier, qu'est-ce qu'il dit ?

(Le témoin consulte ces documents.)

M. Bangoura :
Le territoire douanier comprend l'ensemble du territoire national, les îles situées le long du littoral et les eaux territoriales guinéennes. Toutefois, des zones franches soustraites à tout ou partie de la législation et de la réglementation douanière, peuvent être constituées à l'intérieur du territoire douanier.

M. Thiam :
Ce territoire douanier que vous venez de voir défini par l'article premier de votre code des douanes, comment est-ce que vous le définissez par rapport au rayon douanier que vous avez évoqué tout à l'heure de l'article 34 ?

M. Bangoura :

Cela, c'est la définition. L'article 34 donne la définition du rayon des douanes qui comprend une zone maritime et une zone terrestre.

M. Thiam :

D'accord. Est-ce que l'on peut commettre des infractions douanières dans le rayon des douanes, dans une partie du rayon des douanes qui ne serait pas couverts par le territoire douanier ?

M. Bangoura :

Le territoire douanier couvre l'ensemble du territoire national.

M. Thiam :

Oui, et le rayon douanier ?

M. Bangoura :

Le rayon douanier, à cette époque, étaient défini comme une zone située. Maintenant, la définition, à partir de cet arrêté ministériel, c'est l'ensemble du territoire national.

M. Thiam :

Mais, est-ce que cela comprend le rayon douanier ?

M. Bangoura :

Oui.

M. Thiam :

Cela comprend donc le rayon douanier.

M. Bangoura :

Cela comprend l'ensemble du rayon douanier.

M. Thiam :

Vous considérez donc que toute importation à l'intérieur du rayon douanier doit être soumise au régime de déclaration prévu par votre code ?

M. Bangoura :

Oui.

M. Thiam :

Dès que cela franchit le rayon douanier ?

M. Bangoura :

Le territoire douanier –

M. Thiam :

Je vous parle du rayon douanier. Vous me dites que cela correspond aux territoires douaniers, mais moi je vous parle du rayon douanier.

M. Bangoura :

Moi, je vous parle du territoire.

M. Thiam :

Parlons donc du rayon douanier. Est-ce que, si moi j'importe une marchandise, si je franchis la limite du rayon douanier avec une marchandise, je dois la déclarer à la douane ?

M. Bangoura :

Dès que vous franchissez le rayon du territoire douanier vous ...

M. Thiam :

Je dois faire une déclaration ?

M. Bangoura :

Obligatoirement.

M. Thiam :

Je vous remercie d'avoir éclairé la cour sur votre connaissance du droit douanier. Dites moi, à quel moment, Monsieur Bangoura, avez-vous commencé la poursuite du *Saiga* ?

M. Bangoura :

Le capitaine du navire viendra vous donner cette précision.

M. Thiam :

Mais vous devez en avoir une connaissance. Vous étiez à bord des vedettes.

M. Bangoura :

Oui, mais moi, j'étais transporté.

M. Thiam :

Vous ne savez pas alors à quel moment la poursuite a commencé ?

M. Bangoura :

La poursuite a commencé à quel moment ?

M. Thiam :

Oui.

M. Bangoura :

C'est dès qu'on l'a découvert sur le radar.

M. Thiam :

Dès que vous l'avez découvert sur le radar vous avez commencé la poursuite ?

M. Bangoura :

En direction de lui maintenant, parce que les premiers qui étaient sortis avant ... Lorsque notre base a été informée du mouvement, elle est retournée et est venue se faire remorquer pour continuer la chose.

M. Thiam :

Dites moi, quand vous partez en mission comme cela, est-ce qu'il y a de l'alcool à bord de vos navires ?

M. Bangoura :
Non.

M. Thiam :
Est-ce que des hommes pourraient embarquer de l'alcool sans que vous le sachiez ?

M. Bangoura :
Non, pas du tout.

M. Thiam :
Vous fouillez le bateau ?

M. Bangoura :
Notre bateau ?

M. Thiam :
Vous l'avez fouillé pour être sûr qu'il n'y avait pas d'alcool à bord ?

M. Bangoura :
Il est préparé quand on prépare la mission, c'est dans ce cadre-là.

M. Thiam :
Donc, vous êtes persuadé qu'aucun homme n'a pu boire ?

M. Bangoura :
Aucun homme n'a pu boire.

M. Thiam :
Dites moi, Monsieur Bangoura, est-ce que vous connaissez les dispositions de l'article 111 de la Convention des Nations Unies sur le droit de la mer ?

The President:
Maître Thiam, one minute, please. It appears that the exchanges are so quick that the interpreters are finding it difficult to follow. Thank you.

M. Thiam :
Je recommence. Connaissez-vous les dispositions de l'article 111 de la Convention des Nations Unies sur le droit de la mer ?

M. Bangoura :
Comme je n'ai pas le livre sous mes yeux ici comme vous l'avez là ...

M. Thiam :
Est-ce que, d'une manière générale, vous savez à peu près ce que la Convention dit sur le droit de poursuite ?

M. Bangoura :
D'une manière générale ?

M. Thiam :

Oui.

M. Bangoura :

Si j'ai le temps de préparer un document, je peux le produire.

M. Thiam :

Mais vous connaissez l'article 111 ?

M. Bangoura :

Oui.

M. Thiam :

D'accord. Alors, vous le lisez en français.

M. Bangoura :

Vous pouvez le lire là-bas parce que ma vision est un peu faible.

M. Thiam :

Vous avez des lunettes ...

M. Bangoura :

Oui, mais qui sont très faibles ...

M. Thiam :

Ah ! Est-ce que vous voulez expliquer au Tribunal que vos lunettes vous permettent de lire votre code des douanes mais pas la Convention des Nations Unies sur le droit de la mer ?

M. Bangoura :

Je tiens cela de vous, Maître, vous ne tenez pas cela de moi.

M. Thiam :

Mais je vous ai vu lire tout à l'heure l'article premier –

M. Bangoura :

Oui, mais j'ai des difficultés.

The President:

Yes, Mr. von Brevern?

Mr. von Brevern:

Mr. President, I do not understand why the witness should be obliged to read something out. Maître Thiam could do it himself. I do not understand the question and I would like to object to it.

M. Thiam :

Monsieur le Président, je peux répondre moi-même. Je n'ai pas demandé au témoin de lire le texte. Mais le témoin a dit lui-même : que s'il avait le document il pourrait répondre. Donc je

lui remets le document et je lui demande si maintenant il peut répondre. S'il ne veut pas le prendre, j'en prendrai acte et le Tribunal aussi.

Voulez-vous prendre le document ?

M. Bangoura :

Je vous laisse le soin de lire.

M. Thiam :

Je n'ai pas l'intention de lire cette Convention, ou alors je vais vous en lire un petit passage. Il est dit dans le paragraphe 4 *in fine* de cette Convention :

La poursuite ne peut commencer qu'après l'émission d'un signal de stopper, visuel ou sonore, donné à une distance permettant au navire visé de le percevoir.

Vous avez dit au Tribunal que vous aviez commencé la poursuite aussitôt que vous aviez repéré le *Saiga* sur le radar. Vous avez également dit au Tribunal que vous vous trouviez alors à une distance de 40 milles marins. Est-ce que vous pensez que dans ces conditions vous pouviez commencer une poursuite dont les conditions supposent que vous donniez d'abord un signal de stopper visuel ou sonore à une distance permettant au *Saiga* de le percevoir ?

M. Bangoura :

A cette distance, c'était l'appel radio, mais à une distance plus près, quand la petite vedette fut lâchée, c'est à ce moment que les signaux ont commencé.

M. Thiam :

Vous avez dit tout à l'heure que vous n'aviez pas pu entendre personnellement un appel radio. Est-ce que vous le confirmez ou est-ce que vous changez votre témoignage sur ce point ?

M. Bangoura :

Non. Lorsque la question m'a été posée j'ai dit que je n'étais pas dans la cabine radio. Cela c'est au moment où on a lâché la petite vedette. La question m'a été posée par votre confrère. C'est à ce moment que j'ai dit que c'est quand on a lâché la petite vedette, je n'étais plus dans la salle radio.

M. Thiam :

Je dois vous informer, Monsieur Bangoura, que ici les choses sont très bien faites, grâce à Dieu, et que vous à l'heure vous verrez les verbatims qui sont les procès-verbaux de l'audience. Et je suis persuadé que, comme moi, comme toutes les personnes présentes dans cette salle, on pourra y lire une question qui vous a été posée : « Est-ce que vous avez personnellement entendu des appels radio ? » Et la réponse que vous avez donné : « Je n'étais pas dans la cabine radio. »

M. Bangoura :

Dans la petite vedette. Quand la petite vedette a été lâchée.

M. Thiam :

Vous ajoutez maintenant que c'est dans la petite vedette.

M. Bangoura :

Non, je vous explique. Lorsque la question m'a été posée, j'ai dit que quand on a lâché la petite vedette, j'ai vu le feu bleu et j'ai entendu la sirène. La communication, je n'étais pas dans la cabine radio de la grande vedette. Je l'ai dit ici.

M. Thiam :

Est-ce que vous avez entendu des appels radio au *Saiga* ?

M. Bangoura :

Quand la petite vedette a été lâchée, je vous dis que je n'étais pas dans la cabine radio.

M. Thiam :

Est-ce que, à un moment quelconque, avant ou après que la petite vedette ait été lâchée, pour reprendre votre expression, vous avez entendu un appel radio ?

M. Bangoura :

Lorsqu'on est descendu du pont pour la cabine, on suivait la communication de la petite vedette qui l'appelait.

M. Thiam :

La petite vedette appelait le *Saiga* ?

M. Bangoura :

Voilà.

M. Thiam :

Est-ce qu'il y a eu une réponse du *Saiga* ?

M. Bangoura :

Non.

M. Thiam :

Avez-vous donc la certitude que le *Saiga* avait entendu ?

M. Bangoura :

Je ne peux pas l'affirmer parce que je n'étais pas à bord du *Saiga*.

M. Thiam :

Vous avez dit que le 26 octobre est le jour où vous avez reçu votre ordre de mission, et qu'à ce moment-là le *Saiga* était en dehors des eaux guinéennes. Vous le confirmez ?

M. Bangoura :

Oui.

M. Thiam :

Est-ce que cela veut dire qu'il était par conséquent en dehors du rayon douanier ?

M. Bangoura :

Tout à fait.

M. Thiam :

Vous avez dit aussi que si vous avez reçu cet ordre, c'est parce que le *Saiga* avait l'intention de livrer du gasoil à des navires de pêche.

M. Bangoura :

Oui.

M. Thiam :

Et vous avez été informé de ce que les livraisons devaient avoir lieu dans les eaux guinéennes, en général ?

M. Bangoura :

Oui.

M. Thiam :

Ma question est donc : dans quelle partie des eaux guinéennes ? Est-ce que c'était, si vous voulez que je sois plus précis, est-ce qu'on vous a dit que le *Saiga* allait entrer dans la mer territoriale ? Est-ce qu'on vous a dit qu'il allait entrer dans la zone contiguë ? Est-ce qu'on vous a dit qu'il allait être dans la zone économique exclusive ? Ou est-ce qu'on vous a dit qu'il serait en haute mer ?

M. Bangoura :

Nous avons été informés par nos services radio à terre qu'il progressait dans la zone maritime.

M. Thiam :

Je crois que, pour que vous puissiez constater une infraction ou même la prévenir, il faut quand même que vous ayez une petite idée de l'endroit précis où le navire devait se diriger ?

M. Bangoura :

Oui, mais les cassettes qui étaient là donnaient déjà sa position.

M. Thiam :

Alors, est-ce que c'était dans la zone contiguë ? Dans la mer territoriale ? En haute mer ?

M. Bangoura :

Il était dans la zone maritime du rayon douanier, pardon, du territoire douanier.

M. Thiam :

Donc, à aucun moment vous n'avez pu supposer, indépendamment du fait qu'il allait entrer dans la zone maritime du rayon douanier, qu'il allait rentrer dans une partie particulière de ce rayon maritime ?

M. Bangoura :

Non.

M. Thiam :

Je vous remercie. Votre mission, est-ce qu'elle était préventive ou punitive ?

M. Bangoura :

Je vous dis que la mission n'est ni préventive ni punitive.

M. Thiam :

Vous êtes absolument sûr de cela ?

M. Bangoura :

Pour être plus clair, quand vous dites qu'elle était préventive ou punitive, vous voulez dire quoi ?

M. Thiam :

Est-ce que vous vouliez punir des infractions à la loi douanière qui avaient déjà été faites ou est-ce que vous vouliez empêcher que des infractions à cette loi douanière soient commises ?

M. Bangoura :

Non, il faut réprimer.

M. Thiam :

Mais réprimer quoi ? Le 26 octobre –

M. Bangoura :

On n'était pas partis encore, c'était la préparation de la mission.

M. Thiam :

Vous aviez l'ordre de mission.

M. Bangoura :

Ouis, mais quand l'ordre de mission est donné, ce n'est pas de suite que les hommes partent. C'est une stratégie interne qu'il faut adopter, parce que ces fraudeurs ont leurs complices aussi, donc c'est entre la souris et le chat.

M. Thiam :

Par conséquent, vous vouliez réprimer une infraction ou bien vous vouliez l'empêcher ?

M. Bangoura :

Non. On ne l'a pas empêchée, parce qu'on ne pouvait pas l'empêcher.

M. Thiam :

Si je vous disais ceci, je vais vous faire une affirmation. Le 27 octobre 1997, après que les trois navires de pêche eurent été ravitaillés dans la zone contiguë de la Guinée, les vedettes guinéennes [P]328 et P35 ont reçu l'ordre d'inspecter le *Saiga* à raison de la violation de la législation guinéenne.

Je repète. Si vous avez besoin d'un peu de repos et de boire, je ne vois pas d'inconvénient, Monsieur le Président, à suspendre un peu.

M. Bangoura :

Je vous en prie.

M. Thiam :

Le 27 octobre 1997, on parle donc du 27 octobre 1997, après que trois navires de pêche eurent été ravitaillés dans la zone contiguë de la Guinée, les vedettes guinéennes P328 et P35 ont reçu l'ordre d'inspecter le *Saiga* à raison de la violation de la législation guinéenne. Est-ce que ce serait vrai ou est-ce que ce serait faux, si je vous faisais cette affirmation ?

M. Bangoura :

Vous tenez cela de qui ?

M. Thiam :

Je vous fais cette affirmation, pour l'instant, est-ce qu'elle est vraie ou est-ce qu'elle est fausse ?

M. Bangoura :

Vous ne tenez pas cela de moi, ce n'est pas de ma plume.

M. Thiam :

Est-ce que c'est vrai ou est-ce que c'est faux ? Je vous affirme que c'est le 27 octobre que vous avez reçu l'ordre d'inspecter le *Saiga* parce qu'il avait déjà violé la législation guinéenne, je vous l'affirme.

M. Bangoura :

Cela n'engage que vous.

M. Thiam :

C'est faux ou c'est vrai ?

M. Bangoura :

Je ne peux pas le dire parce qu'on n'a pas reçu l'ordre d'inspecter le navire.

M. Thiam :

Votre ordre de mission est bien du 26 ?

M. Bangoura :

Oui, mais je vous dis que nous n'avions pas reçu l'ordre d'inspecter ce navire.

M. Thiam :

Votre ordre de mission est du 26 ?

M. Bangoura :

Affirmatif.

M. Thiam :

Alors, si vous ne deviez pas inspecter le navire, vous deviez faire quoi ?

M. Bangoura :

D'abord il faut le rechercher. Quand vous demandez d'inspecter, inspecter pourquoi ?

M. Thiam :

Je n'en sais rien, Monsieur Bangoura, ce que je voudrais savoir, c'est ce que mentionnait exactement votre ordre de mission ?

M. Bangoura :

La recherche et la répression.

M. Thiam :

Donc votre mission était répressive ?

M. Bangoura :

Oui.

M. Thiam :

Vous avez expliqué au Tribunal qu'à cette date, le 26 octobre, il n'y avait encore aucun délit de commis.

M. Bangoura :

Oui, mais on ne devait pas partir, je vous dis ici, vous pouvez le voir, que l'ordre de mission a été établi le 26 pour des raisons de logistique et des raisons internes, la mission ne pouvait partir que le 27 et je vous dis encore que cela, c'est pour des raisons internes.

M. Thiam :

Nous allons continuer, mais pour votre information je voudrais que le passage que je viens de lire figure au paragraphe 16 du contre-mémoire de la Guinée, du moins dans la version française, que j'ai. Vous avez dit tout à l'heure au Tribunal que la petite vedette était partie en reconnaissance avant que vous-même vous ne soyez parti. C'est vrai ou faux ?

M. Bangoura :

Si, je l'ai dit.

M. Thiam :

Sa mission était bien une mission de reconnaissance ?

M. Bangoura :

Quand je dis une mission de reconnaissance, lui, il avait mission d'aller vers le nord, à partir de la position que nous avons reçue. Donc s'il devrait continuer, il serait appuyé par une base qui est ailleurs. Maintenant que nous avons reçu l'information que le *Saiga* change de position, c'est à ce moment qu'ils ont été rappelés.

M. Thiam :

Vous avez écrit dans votre procès-verbal ... je vois que vous pouvez lire le procès-verbal. Vous avez écrit dans votre procès-verbal :

A 17 heures 05 (heure légale) nous avons remorqué la petite vedette P-35 qui était partie au paravant nous attendre à l'île Sorro avec un groupe de notre équipage.

Est-ce que cette vedette devait vous attendre ou est-ce qu'elle est partie en reconnaissance et elle a été rappelée ?

M. Bangoura :

C'est du retour de sa mission qu'il est parti à Soro.

M. Thiam :

Donc votre procès-verbal ne mentionne pas toute la vérité ?

M. Bangoura :

Si.

M. Thiam :

Pourquoi n'a-t-il pas mentionné que la vedette était partie en reconnaissance vers le nord ?

M. Bangoura :

Ce procès-verbal a été rédigé par ceux qui étaient à bord de la grande vedette.

M. Thiam :

Mais vous l'avez signé ?

M. Bangoura :

Oui.

M. Thiam :

Pourquoi ceux qui étaient à bord de la grande vedette ? Pardonnez-moi, Monsieur Bangoura, vous étiez à bord de la grande vedette, vous avez signé ce procès-verbal et vous avez donné des instructions pour que la petite vedette aille vers le nord.

M. Bangoura :

Oui.

M. Thiam :

Pourquoi ne l'avez-vous pas mentionné sur ce procès-verbal ?

M. Bangoura :

Il n'était pas nécessaire, à partir du moment où il est remorqué et la base fondamentale ici c'était la grande vedette.

M. Thiam :

Vous voulez expliquer au Tribunal donc qu'en tant qu'agent chargé d'une mission officielle de recherche d'infraction, qui je suppose est tenu d'informer à charge et à décharge, vous choisissez les éléments que vous incorporez dans votre procès-verbal ?

M. Bangoura :

Je ne vous ai pas dit que nous choisissons les éléments que nous incorporons.

M. Thiam :

Qu'est-ce qui vous permet de juger ce qui est important de noter ou ce qui ne l'est pas dans des faits, qui sont des faits vrais, d'après vous.

M. Bangoura :

Nous n'avons pas jugé ici les faits.

M. Thiam :

Je passe à un autre point. Lorsqu'on vous a posé la question de savoir à quel moment le contact radar avec le *Saiga* a été établi, ce matin vous avez dit, je vous cite : « Tard dans la nuit, au petit matin. » Est-ce bien la phrase que vous avez employée ?

M. Bangoura :

Oui.

M. Thiam :

Pouvez-vous expliquer au Tribunal si, dans la connaissance que vous avez du français, le petit matin correspond à 3 heures 30 du matin ?

M. Bangoura :

Oui.

M. Thiam :

Pouvez-vous expliquer au Tribunal pourquoi il y a une différence d'une demi-heure entre votre témoignage de maintenant, d'aujourd'hui, et ce que vous avez écrit dans le procès-verbal ?

M. Bangoura :

Je n'avais pas l'heure exacte, c'est pour cela que j'ai dit « vers ». Dans le procès-verbal, j'ai dit « vers ».

M. Thiam :

Est-ce que maintenant vous avez l'heure exacte ?

M. Bangoura :

Environ.

M. Thiam :

Environ !

M. Bangoura :

Environ.

M. Thiam :

Est-ce que vous pouvez expliquer au Tribunal ce que cette réponse veut dire ?

M. Bangoura :

C'est ce que je vous explique, je dis « environ », parce que je ne me rappelle pas exactement de l'heure qu'il était. Je ne peux pas dire exactement : il était telle heure.

M. Thiam :

Il était 3 heures 30 à 4 heures ... environ.

M. Bangoura :

Oui.

M. Thiam :

Pourquoi, quand vous avez rédigé votre procès-verbal, vous avez préféré dire « 4 heures environ » ?

M. Bangoura :

Non, j'ai dit « vers 4 heures du matin ».

M. Thiam :

Très bien. Pourquoi avez-vous préféré dire « vers 4 heures du matin » –

M. Bangoura :

Parce que –

M. Thiam :

Laissez-moi terminer, s'il vous plaît. Vous ne pouvez pas répondre à une question qui n'est pas encore formulée, Monsieur Bangoura, et je suppose que, lorsque vous interrogez des contrevenants au code des douanes, vous leur laissez le temps de vous répondre et d'entendre vos questions. Alors, pourquoi est-ce que vous avez choisi, dans le procès-verbal, de dire « vers 4 heures du matin » et pourquoi est-ce qu'aujourd'hui, vous choisissez de dire « vers 3 heures 30 » ?

M. Bangoura :

Environ.

M. Thiam :

Pourquoi est-ce que vous choisissez de dire « environ 3 heures 30 » ?

M. Bangoura :

Parce que je n'avais pas l'heure exacte.

M. Thiam :

Pourquoi l'heure de référence est différente dans un cas et dans l'autre cas ? Dans un cas, l'heure de référence est 4 heures; dans l'autre cas, vous vous référez à 3 heures 30.

M. Bangoura :

De 3 heures 30, on va vers 4 heures.

M. Thiam :

Et de 4 heures, on va vers 4 heures 30.

M. Bangoura :

Oui.

M. Thiam :

C'est exact ? De 4 heures 30, on va vers 5 heures.

M. Bangoura :

Tout à fait.

M. Thiam :

Alors, pourquoi avez-vous choisi, dans le procès-verbal, de faire référence à 4 heures et, ici, devant ce Tribunal, de ne faire référence qu'à 3 heures 30 ?

M. Bangoura :

Parce que je n'avais pas l'heure exacte.

M. Thiam :

Mais enfin, Monsieur Bangoura, vous n'avez pas l'heure exacte plus aujourd'hui que le jour où vous avez rédigé ce procès-verbal ? Nous sommes d'accord ?

M. Bangoura :

C'est ce que je vous dis. Je n'ai pas vu, je n'ai pas regardé l'heure exacte.

M. Thiam :

Je suis persuadé, Monsieur Bangoura, que le Tribunal a très bien compris que vous n'aviez pas l'heure exacte à cette époque-là et qu'aujourd'hui, vous n'avez toujours pas l'heure exacte. Mais ma question est quand même claire et simple, il me semble. Pourquoi, à ce moment-là, vous vous êtes référé à 4 heures et, aujourd'hui, vous préférez vous référer à 3 heures 30 ?

M. Bangoura :

Oui, c'est ce que j'ai dit, qu'il était environ 3 heures 30 du matin.

M. Thiam :

Donc, il pouvait aussi être environ 4 heures ...

M. Bangoura :

Je ne l'affirme pas. On partait vers 4 heures du matin.

M. Thiam :

Dites-moi, qui était le chef à bord de vos vedettes ?

M. Bangoura :

Le chef de ... ?

M. Thiam :

Le chef de la mission ? Qui donnait des ordres ?

M. Bangoura :

A qui ?

M. Thiam :

Quelle est la personne qui ne recevait d'ordre de personne d'autre que d'un supérieur hiérarchique se trouvant à terre ?

M. Bangoura :

Vous savez, il y a deux équipes : il y a une équipe de la douane et une équipe de la marine. J'étais le chef de la douane.

M. Thiam :

Et la marine avait un chef ?

M. Bangoura :

Le capitaine du bateau, parce que la marine, c'est un équipage.

M. Thiam :

Est-ce que vous considérez qu'à bord d'un navire de la marine nationale, vous êtes, même comme chef de mission de la douane, sous les ordres du commandant de ce navire ?

M. Bangoura :

Non, je ne suis pas sous ses ordres, Maître.

M. Thiam :

Par conséquent, nous avons affaire à un navire où il y avait plusieurs équipages ?

M. Bangoura :

Non, il y a un seul équipage, l'équipage était de la marine.

M. Thiam :

Et vous étiez des passagers ?

M. Bangoura :

Oui, des missionnaires.

M. Thiam :

Missionnaires, passagers ?

M. Bangoura :

Pas passagers, des missionnaires.

M. Thiam :

Tout à l'heure, il me semble que lorsque M^e Plender vous interrogeait, vous avez dit « j'étais passager ».

M. Bangoura :

Non.

M. Thiam :

J'ai pu me tromper. Enfin, missionnaire à bord, vous n'êtes pas sous les ordres du commandant ?

M. Bangoura :

Non.

M. Thiam :

Cela veut dire que vous pouviez faire ce que vous vouliez ?

M. Bangoura :

Comme quoi, par exemple ?

M. Thiam :

Je ne sais pas.

M. Bangoura :

Quand vous dites que nous pouvons faire ce que nous voulons, je ne comprends pas ce passage.

M. Thiam :

Je vous pose la question et je ne change rien à ce que je viens de dire. Si vous n'étiez pas sous les ordres du commandant, vous pouviez donc faire ce que vous vouliez ?

M. Bangoura :

Non, la mission, ce n'était pas une mission comme cela, de faire ce que l'on veut.

M. Thiam :

Dites-moi, Monsieur Bangoura, est-ce que vous pouvez éclairer le Tribunal et dire quels sont les hommes qui ont pris place à bord de la petite vedette rapide pour intercepter le *Saiga* ?

M. Bangoura :

La petite vedette ?

M. Thiam :

Exactement.

M. Bangoura :

Il y avait trois douaniers et trois membres de l'équipage.

M. Thiam :

Qui étaient exactement les douaniers ?

M. Bangoura :

Le sous-lieutenant.

M. Thiam :

Oui, allez-y ...

M. Bangoura :

Le sous-lieutenant Mangué Camara, le sous-lieutenant Sogbè Soumah, et l'adjudant Aly Diaby.

M. Thiam :

Cela pour la douane ?

M. Bangoura :

Oui.

M. Thiam :

Et pour la marine ?

M. Bangoura :

Je ne me rappelle pas, mais le lieutenant qui dirigeait pour la marine était un sous-lieutenant de la marine. Je ne me rappelle pas de son nom.

M. Thiam :

Il y avait des hommes qui n'étaient pas des officiers ou des sous-officiers ?

M. Bangoura :

Où cela ?

M. Thiam :

Sur la petite vedette ?

M. Bangoura :

Non, déjà à partir de sous-lieutenant, c'est officier.

M. Thiam :

Je demande si, en dehors de ces officiers des douanes que vous avez cités et des officiers de la marine nationale, il y avait, pour manoeuvrer le navire ou pour toute autre raison, des hommes qui ne soient ni officiers ni sous-officiers ?

M. Bangoura :

Je ne connais pas l'équipage, mais ils avaient désigné trois éléments qui devaient conduire.

M. Thiam :

Alors vous avez dit que vous n'aviez pas de balles à blanc ? Vous n'étiez pas équipés de balles à blanc ?

M. Bangoura :

Non.

M. Thiam :

Vous êtes absolument certain de cela ?

M. Bangoura :

Oui.

M. Thiam :

Je vais vous lire un autre passage. Je vais vous faire une autre affirmation :

Quand les cibles, c'est-à-dire les vedettes guinéennes qui s'approchaient du *Saiga* ont été à un ou deux milles environ, j'ai entendu des coups de feu, le navire n'avait pas obtempéré aux tirs à blanc, signal habituel en mer de stopper et d'arborer le pavillon.

Est-ce vrai si je fais cette affirmation ou est-ce faux ?

M. Bangoura :

Je ne peux pas le dire parce que je ne connais pas l'origine de votre écrit.

M. Thiam :

Mais peu importe l'origine. Moi je vous affirme pour l'instant, je vous affirme que vous avez tiré à blanc. Pendant que vous me dites que vous n'aviez pas de balles à blanc. Est-ce que je dis la vérité si j'affirme que vous avez tiré à blanc ?

M. Bangoura :

J'ai déjà fait ma déclaration et je ne trouve pas de raison de changer ici.

M. Thiam :

Donc il n'y avait pas de balles à blanc ?

The President:

Excuse me.

Professor Lagoni, please.

Mr. Lagoni:

Thank you, Mr. President, with my apologies, I may shed some light on this matter of the blank shots. It is an error which I made in getting information from Guinea. I misunderstood that they in fact sent blank shots, but they declared that they shot above the ship. It was a misuse of the English term. I did not know that "blank shot" is a very specific term in this situation. The question is caused in the Counter-Memorial by my remark. So it should be clear that Guinea did not submit that there were blank shots, there were shots above the ship. Thank you.

The President:

Thank you very much, Mr. Lagoni.

Maître Thiam, I think what is being suggested is that the statement that they were not blank shots, from the witness, does not contradict the statement that you are reading, because the first statement was based on an error.

M. Thiam :

Je remercie le professeur Lagoni de cette précision. Il m'oblige cependant à lire le procès-verbal de douane dans un autre passage : « Nous avons donc fait intervenir quelques uns de nos hommes armés qui, malgré les tirs n'arrivèrent pas à l'immobiliser ». Je voudrais demander au témoin s'ils ont tiré au-dessus du bateau ou sur le bateau.

M. Bangoura :

On a tiré au-dessus du bateau.

M. Thiam :

Comment pouvez-vous l'affirmer, puisque vous n'étiez pas là apparemment.

M. Bangoura :

Suivant le compte rendu qui nous a été fait.

M. Thiam :

Le jugement du tribunal de Conakry dit que vous avez tiré sur le pont.

Je crois, Monsieur le Président, que je dois signaler au Tribunal qu'il y a une erreur de traduction en anglais de ce document, dans les documents que vous avez. Je mentionne le jugement de Conakry du 17 décembre 1997. Il est dit, à la page numérotée comme étant la page n° 2, mais qui est en fait la page n° 3, je crois : « Qu'il leur a fallu [en parlant donc des agents de la douane] tirer sur le port », est-il écrit dans ce document, « du navire, faisant fracasser des vitres de celui-ci ».

Je m'excuse, Monsieur le Président, Messieurs les Membres du Tribunal, mais je lis *in extenso* ce qui est écrit dans ce document. Je ne suis pas responsable des erreurs de rédaction. Mais il est bien écrit : « il leur a fallu tirer sur le port du navire, faisant fracasser des vitres de celui-ci ». Je crois que la bonne lecture de ce texte est : « il leur a fallu tirer sur le pont du navire faisant fracasser les vitres de celui-ci. »

Alors, si vous avez tiré au-dessus du navire, Monsieur Bangoura, d'où est-ce que le magistrat, qui a écrit ce jugement, a pu tirer la circonstance que l'on avait en réalité fait feu sur le navire au point de fracasser les vitres de celui-ci ? Ce sont donc les vitres qui ont été fracassées et je ne sais pas que l'on puisse fracasser des vitres en tirant au-dessus d'un navire.

M. Bangoura :

Cela n'engage que le rédacteur. Mais je crois que ce jugement a été mis en appel.

M. Thiam :

Tout à fait, mais enfin c'est ce qui a été dit dans un document officiel, dont les écritures sont des écritures authentiques qui valent jusqu'à inscription de faux. Par conséquent, vous pensez que nous pourrions faire une action en faux contre le magistrat qui a écrit cela ?

M. Bangoura :

Maître, cela n'engage que le magistrat.

M. Thiam :

Très bien, je vous remercie. Je vais vous faire encore une autre affirmation personnelle. Les vedettes ont alors émis des signaux sonores, je parle de vos vedettes, et ont même fait sonner des cloches à bord. Est-ce vrai ?

M. Bangoura :

Oui, à bord de celle où j'étais.

M. Thiam :

D'accord, mais celle qui a abordé le *Saiga* en premier, est-ce que vous avez entendu des cloches ?

M. Bangoura :

Je ne peux pas l'affirmer parce que je n'étais pas à bord.

M. Thiam :

Mais votre vedette, quand vous êtes arrivé, vous avez sonné des cloches ?

M. Bangoura :

Avant notre arrivée, nous avons sonné et à l'arrivée aussi, nous avons sonné.

M. Thiam :

Expliquez au Tribunal quel besoin de sonner des cloches et de donner des sommations si le navire, comme vous l'affirmez, était déjà sous saisie, arraisonné ?

M. Bangoura :

On s'en approche, c'est pour informer les membres de l'équipage et tous ceux qui sont à bord que nous sommes arrivés à destination. Cela, c'est pour le rassemblement.

M. Thiam :

Est-ce que la petite vedette qui a arraisonné le *Saiga* n'a pas sonné les cloches pour la même raison ?

M. Bangoura :

Je ne sais pas.

M. Thiam :

Comment pouvez-vous affirmer que l'on a sonné des cloches en guise de sommation au *Saiga* ?

M. Bangoura :

Moi, je ne sais pas, je ne parle que de la grande vedette.

M. Thiam :

A-t-on tenté de renverser votre grande vedette ? Est-ce que le *Saiga* a tenté une manoeuvre pour la renverser ?

M. Bangoura :

Je vous dis ici que je ne peux pas répondre à cela parce que je n'étais pas dans la petite vedette, quand elle a abordé le *Saiga*.

M. Thiam :

Je vous en remercie, j'avais très bien compris, mais je parle de votre vedette.

M. Bangoura :

Notre vedette, nous n'avons trouvé que le navire immobilisé.

M. Thiam :

Donc on n'a pas tenté de renverser votre vedette ?

M. Bangoura :

Non. La grande vedette ?

M. Thiam :

Oui, la grande vedette, a-t-on tenté de la renverser ?

M. Bangoura :

A partir du moment où le navire est immobilisé, il ne peut plus faire de mouvement.

M. Thiam :

Donc on n'a pas tenté, je crois, de renverser votre vedette ?

M. Bangoura :

La grande vedette, oui, pas la petite.

M. Thiam :

Est-ce qu'on a tenté de renverser la grande vedette ?

M. Bangoura :

Je vous dis que non.

M. Thiam :

Merci, c'est tout ce que je voulais savoir, je vous remercie infiniment. Si je vous affirmais que le *Saiga* a alors tenté, à deux reprises, de faire sombrer les vedettes, ce que les équipages de ces dernières ont pu éviter de justesse, est-ce que ce serait vrai ?

M. Bangoura :

Non, je vous dis ici que c'est la petite vedette qui était venue. Après deux tours, c'est au deuxième tour que les vagues étaient grandes.

M. Thiam :

Monsieur Bangoura, pourtant la question que je vous ai posée nécessite une réponse très courte : oui ou non. Est-ce vrai, ce que je viens de vous affirmer ou est-ce faux ?

M. Bangoura :

Je parle de la précision. C'est la petite vedette.

M. Thiam :

Donc, ce n'est qu'une seule vedette ?

M. Bangoura :

Oui.

M. Thiam :

Il semblerait, Monsieur le Président, Messieurs les Membres du Tribunal, que les affirmations contenues dans le contre-mémoire de la Guinée, au paragraphe 16, sont également erronées. Cela fait beaucoup d'erreurs, il me semble ...

Et vous, combien de temps après êtes-vous arrivé sur les lieux avec la grande vedette ?

M. Bangoura :

Je ne me rappelle pas parce que je n'ai pas chronométré.

M. Thiam :

A peu près.

M. Bangoura :

Je ne peux pas le dire à peu près.

M. Thiam :
Une heure ?

M. Bangoura :
Je ne peux pas l'affirmer.

M. Thiam :
Deux heures ?

M. Bangoura :
Je ne peux pas le dire.

M. Thiam :
Dix minutes ?

M. Bangoura :
Je ne peux pas affirmer quelque chose que je ne connais pas.

M. Thiam :
Au moment de l'arraisonnement du *Saiga* par la petite vedette, est-ce que vous pouviez apercevoir ce qui se passait à la jumelle ?

M. Bangoura :
Je n'avais pas de jumelles, je ne portais pas de jumelles.

M. Thiam :
Était-il à une distance où on pouvait l'apercevoir ?

M. Bangoura :
Je vous dis que je n'avais pas de jumelles et je ne pourrais pas l'affirmer.

M. Thiam :
Quand vous êtes arrivé sur les lieux, vous étiez déjà dans la zone économique exclusive de la Sierra Leone ?

M. Bangoura :
Je ne peux pas l'affirmer.

M. Thiam :
Le navire n'avait pas franchi la frontière au moment où il a été arraisonné ?

M. Bangoura :
Au moment où il a été arraisonné ?

M. Thiam :
Oui. Est-ce que le navire avait franchi ou pas la frontière ?

M. Bangoura :
(*Le témoin consulte des documents.*) Si, il avait passé.

M. Thiam :

Il avait passé la frontière ?

M. Bangoura :

Oui, quand on le pourchassait.

M. Thiam :

Par conséquent, est-ce que vous étiez dans le rayon douanier de la Guinée ?

M. Bangoura :

Non, mais on a commencé chez nous et on est parti.

M. Thiam :

Je vous demande, à ce moment précis si vous étiez dans le rayon douanier de la Guinée ?

M. Bangoura :

A partir du moment où il avait franchi la frontière ...

M. Thiam :

Il n'était plus dans le rayon douanier ?

M. Bangoura :

Non.

M. Thiam :

Je vous remercie. Que dites-vous des formalités de l'article 231(a) de votre code des douanes ? Plutôt 231, paragraphe 3(a), qu'en dites-vous ?

M. Bangoura :

Qu'est-ce qu'il stipule ?

M. Thiam :

Vous avez le code des douanes ?

M. Bangoura :

Oui, mais l'écriture est très petite, je vous prie ...

M. Thiam :

Je ne suis pas obligé aussi de vous le lire.

M. Bangoura :

Je vous en prie.

The President:

Mr. Bangoura, I did not intervene earlier, but you have read from this Code earlier, and I think you should be able to read from the Code.

M. Bangoura :

Oui.

(Le témoin s'exécute et lit en silence.)

M. Thiam :

Ce texte est relatif, je crois, aux saisies en dehors du rayon douanier. C'était notre cas, puisque vous dites que nous étions en dehors du rayon douanier ?

M. Bangoura :

Non.

M. Thiam :

Ah, ce n'est pas notre cas.

M. Bangoura :

Ce n'était pas votre cas.

M. Thiam :

Et pourtant vous dites que vous êtes d'accord pour interpréter ce texte avec moi, comme étant un texte qui s'applique aux saisies en dehors du rayon.

M. Bangoura :

Ici, c'est une poursuite que l'on a engagée et on est parti du territoire douanier guinéen pour aller ailleurs.

M. Thiam :

Est-ce que ce texte ne s'applique pas également aux poursuites ? Est-ce que vous pouvez donner une lecture des deux premières lignes du paragraphe 3 au Tribunal ?

M. Bangoura :

De quel article ?

M. Thiam :

Nous parlions de l'article 231(1), (2) et (3), paragraphe 3, les deux première lignes.

M. Bangoura :

« En cas de saisie après poursuite à vue, le procès-verbal doit constater – ».

M. Thiam :

S'agissait-il de poursuite à vue, en dehors du rayon douanier ?

M. Bangoura :

Non.

M. Thiam :

Donc vous n'aviez pas à respecter les formalités de ce texte ?

M. Bangoura :

Si.

M. Thiam :

Vous les respectiez ou pas ?

M. Bangoura :

Si.

M. Thiam :

Est-ce que vous les avez respectées ?

M. Bangoura :

Oui.

M. Thiam :

Montrez-nous où, dans le procès-verbal, vous avez apporté les mentions.

M. Bangoura :

Ici, c'est dans le rayon et nous nous parlons ici du territoire douanier.

M. Thiam :

Vous avez expliqué vous même au Tribunal, tout à l'heure, que d'après un nouveau décret – dont nous ignorons l'existence –, le territoire et le rayon douanier, c'est la même chose.

The President:

Mr. von Brevern?

Mr. von Brevern:

Mr. President, I object to the question, if it was a question. What Mr. Thiam said when he said he was quoting the witness, we, at least, have not heard the witness having said this, namely that the customs territory would be identical to the customs radius.

The President:

Maître Thiam, do you have a response to that before I say something?

M. Thiam :

Monsieur le Président, moi, je me sens toujours être sous la protection de votre Tribunal. Ce que j'affirme, je l'ai entendu, je crois comme tout le monde, je m'en remets donc à la sagesse de votre Tribunal.

Je vais poser une autre question à M. Bangoura. Est-ce qu'il pense qu'il devait respecter les dispositions de l'article 230 de son code des douanes ?

M. Bangoura :

Oui.

M. Thiam :

Est-ce que vous les avez respectées ?

M. Bangoura :

Tout à fait.

M. Thiam :

Où avez-vous mentionné dans le procès-verbal que vous avez mis des scellés sur les panneaux et les écoutilles du bâtiment et que vous avez rédigé le procès-verbal au fur et à mesure du déchargement ?

M. Bangoura :

Le déchargement a été fait d'un trait.

M. Thiam :

Vous avez déchargé 5 000 tonnes de gasoil en une seule journée ?

M. Bangoura :

Non, pas en une seule journée. C'était un déchargement continu.

M. Thiam :

Jour et nuit ?

M. Bangoura :

Jour et nuit.

M. Thiam :

Et vous avez mentionné, au fur et mesure, de ce déchargement ?

M. Bangoura :

Non, il était continu.

M. Thiam :

Vous aviez apposé des scellés sur les panneaux et les écoutilles ?

M. Bangoura :

Oui.

M. Thiam :

Où est-ce mentionné dans le procès-verbal ?

M. Bangoura :

Non, nous n'avons pas mentionné dans le procès-verbal à partir du moment où une mise à disposition a été faite au niveau du bureau des hydrocarbures qui avait pour charge du refoulement du produit.

M. Thiam :

Donc vous avez mis la marchandise immédiatement à la disposition du bureau ...

M. Bangoura :

Des douanes des hydrocarbures.

M. Thiam :

Vous avez, pour ce motif, estimé qu'il n'était pas nécessaire d'apposer des scellés ?

M. Bangoura :

Des scellés où ? Sur le bateau ?

M. Thiam :

Sur le bateau.

M. Bangoura :

Le refoulement avait déjà commencé.

M. Thiam :

Vous avez préféré prendre tout l'équipage ?

M. Bangoura :

Comment ?

M. Thiam :

Les garder ?

M. Bangoura :

Où ?

M. Thiam :

Sous bonne escorte ?

M. Bangoura :

Non.

M. Thiam :

Avec des armes ?

M. Bangoura :

Non.

M. Thiam :

Merci. A propos d'armes, vous avez dit que vous êtes autorisé à les utiliser en cas de refus d'obtempérer.

M. Bangoura :

Oui.

M. Thiam :

Est-ce que vous pouvez donner plus de détails au Tribunal ?

M. Bangoura :

Sur quels motifs ?

M. Thiam :

Dans quelles circonstances les instructions que vous avez vous autorisent à faire usage d'armes à feu contre des personnes qui ne sont pas armées ?

M. Bangoura :

Je vous renvoie aux dispositions de l'article 41 du code des douanes.

M. Thiam :

Cette fois-ci vous pouvez peut-être le lire.

M. Bangoura :

(Pas de réponse)

The President:

Mr. Bangoura, yes.

M. Bangoura :

L'article ...

M. Thiam :

J'espère, Monsieur, que ce n'est pas la première fois que vous lisez ce texte ?

M. Bangoura :

Où ?

M. Thiam :

Je dis : j'espère que ce n'est pas la première fois que vous prenez connaissance de ce texte ?

M. Bangoura :

Non.

M. Thiam :

Alors vous pouvez, je pense, expliquer au Tribunal quand est-ce que vous êtes autorisé à faire usage de vos armes ?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/10, E, p. 28–29]

The President:
Mr. von Brevern?

Mr. von Brevern:
Mr. President, I really would appeal to you to ask Maître Thiam to preserve the dignity of this witness. Thank you, Mr. President.

The President:
Thank you, Mr. von Brevern. I think that every witness has their dignity and that that should be preserved, but the situation is a little difficult because Mr. Bangoura said he was referring to a particular provision. Then he was asked to read it and we are waiting for him to read it. But I think the difficulty we are having is that Mr. Bangoura is able to read at certain times and not able to read at other times, and that is creating problems for the Tribunal itself, too. I think it is a very simple matter. If he has to read a paragraph, all he has to do is to read it. If he chooses to be able to read at certain times and not at others, it creates problems for all concerned.

Mr. von Brevern?

Mr. von Brevern:
I consider it most unusual to ask a witness several times to read out an article. This is not what Maître Thiam wants as fact. He has to ask about facts and not whether he can read out. Thank you.

The President:
I think we should stop this exchange. The present situation is that it is the witness who said, in answer to a question as to under which conditions are they allowed to use arms, "I am referring to article 41". In that circumstance I think it is not only fair but necessary that the witness should tell us what article he is referring us to. He does not have to read it. He can give us the gist of it.

Mr. Bangoura, please?

CONTRE-INTERROGATOIRE DE M. BANGOURA (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/10, F, p. 40–51]

M. Bangoura :
Article 41 :

1. Les agents des douanes ont, pour l'exercice de leurs fonctions, le droit au port d'armes.
2. Outre le cas de légitime défense, ils peuvent en faire usage
 - a) lorsque des violences ou voies de fait sont exercées contre eux ou lorsqu'ils sont menacés par des individus armés;
 - b) lorsqu'ils ne peuvent immobiliser autrement les véhicules, embarcations et autres moyens de transport dont les conducteurs n'obtempèrent pas à l'ordre d'arrêt;
 - c) lorsqu'ils ne peuvent autrement s'opposer au passage d'une bande de personnes, armées ou non, qui ne s'arrêtent pas aux sommations qui leur sont adressées;
 - d) lorsqu'ils ne peuvent capturer vivants les animaux employés pour la fraude ou que l'on tente d'importer ou d'exporter frauduleusement, ou qui circulent irrégulièrement.

M. Thiam :
Alors, dans le cas du *Saiga*, quel est le paragraphe que vous invoquez ?

M. Bangoura :
Paragraphe b.

M. Thiam :
Autrement dit, vous pensiez qu'il était impossible d'immobiliser le *Saiga* autrement que par l'usage d'armes à feu ?

M. Bangoura :
Oui.

M. Thiam :
Est-ce que vous pensez que ... Vous avez dit que vous n'avez pas utilisé des mitrailleuses ?

M. Bangoura :
Non.

M. Thiam :
Vous n'avez utilisé que des armes de petit calibre ?

M. Bangoura :
Tout à fait.

M. Thiam :
Est-ce que vous pensez qu'une arme d'un petit calibre peut immobiliser un tanker lancé à grande vitesse ?

M. Bangoura :
Oui.

M. Thiam :
Comment ?

M. Bangoura :
Par la méthode que nous avons utilisée.

M. Thiam :
C'est-à-dire ?

M. Bangoura :
Celui qui était à bord viendra expliquer au Tribunal comment cela s'est passé.

M. Thiam :
Donc vous n'avez pas tiré au-dessus. Vous disiez tout à l'heure que vous avez tiré au-dessus.

M. Bangoura :
On a tiré au-dessus.

M. Thiam :
Alors, est-ce que vous avez tiré pour immobiliser le navire ?

M. Bangoura :
Je ne peux pas le dire. Je vous dis que ceux qui ont fait l'opération, dont l'un d'entre eux est là, celui-ci vous l'expliquera. Je ne peux pas expliquer parce que je n'étais pas présent.

M. Thiam :
Je vous remercie infiniment, mais c'est vous qui invoquez le paragraphe b de l'article 41. C'est vous-même ?

M. Bangoura :
Oui.

M. Thiam :
Expliquez au Tribunal en quoi ce paragraphe b de l'article 41 était applicable dans les circonstances ?

M. Bangoura :
Pour ce refus d'obtempérer ... Je ne peux pas expliquer au Tribunal ici quelque chose que je n'ai pas vécu. Je vous dis que celui qui était là-bas, quand il viendra, en temps voulu, il va vous expliquer comment cela s'est passé et comment il y a eu refus d'obtempérer.

M. Thiam :
Dites-moi, Monsieur Bangoura, vous étiez le chef de la brigade mobile des douanes ?

M. Bangoura :
Non.

M. Thiam :

Qu'aviez-vous exactement comme fonction ?

M. Bangoura :

Maintenant ?

M. Thiam :

A cette époque.

M. Bangoura :

Chef de la brigade des douanes du port de Conakry.

M. Thiam :

Très bien. Lorsque vos hommes font usage d'armes, ils doivent vous rendre compte, il me semble ?

M. Bangoura :

Oui.

M. Thiam :

S'ils ont fait usage de leurs armes dans des circonstances que la loi n'autorise pas, est-ce que vous menez une enquête ?

M. Bangoura :

Ils sont déférés au tribunal.

M. Thiam :

Est-ce que vous, vous menez une enquête d'abord ?

M. Bangoura :

Oui, nous devons mener une enquête.

M. Thiam :

Par conséquent, avez-vous mené une enquête dans cette circonstance ?

M. Bangoura :

Non, parce que là c'était légitime.

M. Thiam :

Vous avez conclu que c'était légitime.

M. Bangoura :

Oui.

M. Thiam :

On vous a donc fait un rapport ?

M. Bangoura :

Verbal, oui.

M. Thiam :

Alors, si on vous a fait un rapport verbal, vous devriez pouvoir dire au Tribunal pourquoi est-ce qu'il était nécessaire d'utiliser les armes pour immobiliser le *Saiga*, puisque c'est vous-même qui invoquez les dispositions de ce texte particulier ?

M. Bangoura :

Mais c'est ce que je vous dis. Celui qui a vécu les faits, comme il doit passer ici pour expliquer en temps voulu, expliquera au Tribunal comment cela s'est passé.

M. Thiam :

Très bien. Vous, qui êtes son supérieur, qui étiez le chef à l'époque –

M. Bangoura :

Tout ce que je peux dire ici –

The President:

Maître Thiam, excuse me, it appears that the line of questioning is not going to get us anywhere, and I say that without any inferences. I would suggest that we draw the right inferences, both you and the Tribunal, and that you proceed to other lines of questioning.

M. Thiam :

Je vous remercie, Monsieur le Président. Je crois que votre réponse montre que j'ai atteint mon objectif.

Je voudrais demander au témoin s'il connaît les dispositions de l'article 226.

(Le témoin cherche l'article dans un document.)

M. Thiam :

Excusez-moi, Monsieur Bangoura, ce n'est pas vraiment l'article 226, mais l'article 236 du code des douanes et, notamment, Monsieur Bangoura, les dispositions finales du premier paragraphe. Cette fois-ci je vais lire, si vous voulez bien :

Les procès-verbaux rédigés par deux agents des douanes ou, conformément à l'article 223-1 ci-dessus, par deux agents d'autres Administrations spécialement habilités font foi jusqu'à inscription de faux des constatations matérielles qu'ils relatent.

Vous connaissez cette disposition ?

M. Bangoura :

Oui.

M. Thiam :

C'était ma question. Est-ce que vous savez, en général, pourquoi un législateur met une disposition semblable pour les codes des douanes, pour les procès-verbaux des agents des douanes, ou pour les procès-verbaux des huissiers ou pour toute autre procès-verbal dont les écritures ont un caractère authentique ? Est-ce que vous savez en général pourquoi ?

M. Bangoura :

Reprenez votre question, parce que vous avez lu cet article.

M. Thiam :

Savez-vous pourquoi le législateur protège les agents des douanes en disant que les inscriptions sur les procès-verbaux tiennent jusqu'à inscription de faux ?

M. Bangoura :

Oui.

M. Thiam :

Pourquoi a-t-on mis cela dans la loi ?

M. Bangoura :

Pour protéger les agents.

M. Thiam :

Quelle est la contrepartie de cette faveur que le législateur vous fait ?

M. Bangoura :

Je n'en ai pas souvenance.

M. Thiam :

Ne vous semble-t-il pas que la contrepartie, c'est que comme partout ailleurs, vous ne puissiez signer que ce que vous avez personnellement constaté ?

M. Bangoura :

Oui.

M. Thiam :

C'est cela ?

M. Bangoura :

Oui.

M. Thiam :

Vous avez expliqué au Tribunal tout à l'heure qu'il y a beaucoup de mentions dans ce procès-verbal que vous avez signées et que vous n'avez pas personnellement constatées.

M. Bangoura :

Le procès-verbal est rédigé par l'ensemble des missionnaires. C'est lorsque ce sont tous les faits qui se sont produits dans la mission qui sont rapportés dans un procès-verbal consigné. C'est pour cela que vous verrez que c'est signé par l'ensemble des missionnaires de la douane.

M. Thiam :

Mais le procès-verbal contient des faits que vous-même vous n'avez pas personnellement constatés.

M. Bangoura :

Ce sont des faits rapportés. C'est l'ensemble du rapport. C'est une synthèse de l'ensemble des faits qui se sont produits là-bas.

M. Thiam :

Donc vous avez transmis les faits.

M. Bangoura :

Chacun de nous a fait un rôle. C'est l'ensemble de ces faits-là qui sont transcrits ici dans ce journal.

M. Thiam :

Pour l'heure, vous êtes le premier témoin de la République de Guinée et ce que vous avez signé, vous ne pouvez pas confirmer au Tribunal que vous l'avez personnellement constaté ?

M. Bangoura :

Je vous dis. La partie de ce que moi, j'ai pu faire, c'est ce que j'ai expliqué au Tribunal. Donc un autre signataire aussi, du même procès-verbal, viendra ici et il dira ce à quoi, lui aussi, il a assisté.

M. Thiam :

Donc vous n'avez pas personnellement constaté que le *Saiga* semblait filer plus vite que vous en direction de la frontière sud. Vous ne l'avez pas personnellement constaté ?

M. Bangoura :

Cela, c'est à partir du radar.

M. Thiam :

Est-ce que vous l'avez constaté ?

M. Bangoura :

C'est à partir du radar.

M. Thiam :

Dois-je comprendre, d'après votre réponse, que vous l'avez constaté à partir du radar ?

M. Bangoura :

Oui, sous les explications du radariste qui était à bord.

M. Thiam :

Dans la marine nationale guinéenne, il y a un radariste qui a pu constater qu'un tanker chargé de 5 000 tonnes de gasoil va plus vite, est allé, à un moment donné, plus rapidement que des vedettes de votre marine ?

M. Bangoura :

La vedette à bord de laquelle on se trouvait, oui.

M. Thiam :

Est-ce que le radar n'était pas défectueux ?

M. Bangoura :

Je ne peux pas vous dire cela ici.

M. Thiam :

Vous avez constaté, personnellement, que le navire a été rattrapé et que sommation lui a été faite de s'arrêter ?

M. Bangoura :

Oui.

M. Thiam :

Maintenant vous l'avez constaté ?

M. Bangoura :

J'ai expliqué ici, qu'au départ de la petite vedette, j'ai entendu la sirène. J'ai vu de mes yeux le feu bleu. En ce qui concerne les communications radios, je n'étais pas dans la salle de transmission.

M. Thiam :

Ce qui est écrit, Monsieur Bangoura, dans ce procès-verbal, c'est ceci : « Le navire fut rattrapé et sommation lui fut faite de s'arrêter ». D'après ce procès-verbal, la sommation a suivi le fait que le navire ait été rattrapé. Donc c'est après, et nous ne parlons pas du départ de la vedette, c'est lorsque la vedette est arrivée. On aurait fait, d'après ce procès-verbal, une sommation. Est-ce que vous l'avez personnellement constaté à ce moment-là ?

M. Bangoura :

C'est le feu de sommation ?

M. Thiam :

Donc de là où vous étiez, vous pouviez apercevoir le feu de sommation ?

M. Bangoura :

Non, c'est suivant le compte rendu. Cela c'est la première vedette. Je ne peux pas parler de la petite vedette, de ce qui s'est passé là-bas.

M. Thiam :

Donc vous ne pouvez pas personnellement affirmer au Tribunal que ce qui est écrit ici, vous l'avez lui-même constaté.

M. Bangoura :

Celui qui l'a constaté est là, il va le dire au Tribunal le moment venu.

M. Thiam :

Très bien. Mais vous, vous ne l'avez pas constaté. C'est cela ma question.

M. Bangoura :

Je n'ai pas constater quoi ?

M. Thiam :

Ce dont on parle.

M. Bangoura :

Je vous ai répondu.

M. Thiam :

Ce n'est pas grave, Monsieur. Il est dit des « qualités préalablement déclinées, nous avons continué à lui sommer ». Je suppose que vous vouliez dire « à le sommer ». Cela aussi, vous ne pouvez pas personnellement affirmer au Tribunal que vous l'avez constaté ?

M. Bangoura :

(Pas de réponse)

M. Thiam :

Je vous ai posé une question, Monsieur Bangoura.

M. Bangoura :

Toujours, c'est la même personne qui continue.

M. Thiam :

Quand vous écrivez aussi : « Quand nous l'avons abordé, il tenta par deux fois de faire sombrer notre vedette que nous avons évité avec justesse. » Cela aussi, vous ne pouvez pas affirmer personnellement que vous l'avez constaté ? C'est exact ?

M. Bangoura :

Oui, jusqu'ici c'est la même personne.

M. Thiam :

« Nous avons donc fait intervenir quelques uns de nos hommes armés qui, malgré les tirs, n'arrivèrent pas à l'immobiliser. » Cela aussi, vous ne pouvez pas l'affirmer au Tribunal que vous l'avez constaté ?

M. Bangoura :

C'est la même personne qui continue.

M. Thiam :

« Le navire changea de direction en prenant celle de la haute mer », vous ne pouvez pas non plus personnellement affirmer que c'était vrai ?

M. Bangoura :

Non.

M. Thiam :

Vous dites que vous avez coupé les tuyauteries.

M. Bangoura :

Oui.

M. Thiam :

Vous avez coupé les tuyauteries ?

M. Bangoura :

C'est ce qui m'a été rapporté. Et aussi quand le capitaine, au moment où la vedette, le navire devait aller sur Conakry, le capitaine a demandé la permission.

M. Thiam :

On pouvait donc arrêter le navire autrement que par l'usage des armes ?

M. Bangoura :

A cette époque, non. On n'avait pas de possibilité.

M. Thiam :

Enfin, vous avez écrit qu'il a fallu couper les tuyauteries pour empêcher la fourniture de lubrifiant aux moteurs.

M. Bangoura :

Oui.

M. Thiam :

« Le moteur ainsi éteint, le navire s'immobilisa finalement. » C'est parce que vous avez coupé les tuyauteries que vous avez réussi à arrêter le navire ...

M. Bangoura :

Oui.

M. Thiam :

Ce n'est donc pas du fait de l'usage des armes.

M. Bangoura :

Je vous dis que ce passage sera expliqué par un autre témoin.

M. Thiam :

Je vous remercie. Est-ce que vous avez un délai pour rédiger vos procès-verbaux, Monsieur Bangoura ?

M. Bangoura :

Le procès-verbal doit être rédigé de suite, sans divertir à d'autres actes après le dépôt du litige.

M. Thiam :

Oui ... alors votre procès-verbal n'a été rédigé que le 13 novembre, il me semble.

M. Bangoura :

La fin de la rédaction, c'est le 13 novembre.

M. Thiam :

Vous avez donc diverti à d'autres tâches, entre-temps ?

M. Bangoura :

Non.

M. Thiam :

Ah bon. Du 28 octobre au 13 novembre, tous les agents ayant participé à la saisie du *Saiga* n'ont rien fait d'autre que de s'occuper du *Saiga* et de dresser ce procès-verbal ? Combien faut-il de jours pour écrire ces quelques lignes ?

M. Bangoura :

Le procès-verbal n'est dressé qu'après avoir conduit au bureau la marchandise du litige et le moyen de transport.

M. Thiam :

Le *Saiga* est entré au port quel jour ?

M. Bangoura :

Il est entré dans le port le 29.

M. Thiam :

N'est-ce pas un bureau des douanes, le port ?

M. Bangoura :

Non.

M. Thiam :

C'est quoi ?

M. Bangoura :

C'est une brigade.

M. Thiam :

C'est une brigade des douanes ?

M. Bangoura :

Oui.

M. Thiam :

Très bien. Le navire, qui est un objet saisi, il me semble, fallait-il le déplacer du quai pour l'amener dans un bureau particulier ?

M. Bangoura :

Le bureau particulier, ici, c'est le bureau des hydrocarbures.

M. Thiam :

Bien. Je ne vais pas continuer sur cette voie, Monsieur le Président, je vais suivre vos recommandations.

Dites moi, le livre de bord, vous l'aviez saisi ?

M. Bangoura :

Retenu, il n'a pas été saisi.

M. Thiam :

Vous l'aviez retenu, vous l'aviez amené avec vous physiquement, je veux dire.

M. Bangoura :

Oui.

M. Thiam :

Or, il se trouve que ce livre de bord, comme vous le disait M^e Plender ce matin, il mentionne qu'à 4 heures du matin le navire était arrêté. Vous vous affirmez le contraire. Il y a manifestement – et je ne crois pas être excessif si je le dit – quelque part, une fausse déclaration : soit c'est dans votre procès-verbal, soit c'est dans le livre de bord. Est-ce que jusque là, vous êtes d'accord avec moi ?

M. Bangoura :

Je vous laisse continuer d'abord, je ne sais pas où vous voulez en venir.

M. Thiam :

Je veux en venir à ceci, Monsieur Bangoura, si vous avez saisi le livre de bord et que le capitaine était lui-même arrêté, à quel moment aurait-il pu inscrire une fausse mention dans son livre de bord ?

M. Bangoura :

Mais j'estime que depuis ce matin, dans aucune de mes déclarations, je n'ai dit ici qu'il y avait une fausseté dans le livre de bord.

M. Thiam :

Donc vous affirmez –

M. Bangoura :

Je ne le soutiens pas. Je me rappelle avoir dit ici que je n'affirme pas, je n'infirmes pas parce que je n'avais pas la possibilité de le faire.

M. Thiam :

Donc le livre de bord, vous ne pouvez pas affirmer que c'est un faux ? Que les écritures qui y sont sont des faux ?

M. Bangoura :

Je ne l'ai pas affirmé, et je ne l'infirmes pas aussi.

M. Thiam :

Est-ce que vous voulez revenir sur votre déclaration et accepter alors que le navire était à l'arrêt à 4 heures du matin ?

M. Bangoura :

Je ne peux pas revenir sur ma déclaration pour dire que le navire était à l'arrêt, parce que je n'étais pas ni à côté du navire ni dans le navire à 4 heures du matin.

M. Thiam :

Je vous remercie. Le Tribunal appréciera. Vous avez dit tout à l'heure qu'il y a eu un tir de sommation dans le navire. Pouvez-vous peut-être être plus précis et dire ce que cela veut dire : « un tir de sommation dans le navire » ?

M. Bangoura :

Un tir de sommation, c'est un tir de PM, un coup.

M. Thiam :

« Dans le navire », cette partie de la phrase veut dire ?

M. Bangoura :

Il était sur le pont du navire, pas dans la passerelle, mais sur le pont.

M. Thiam :

Autrement dit, celui qui a donné le tir de sommation était déjà sur le navire, sur le *Saiga* ?

M. Bangoura :

Oui.

M. Thiam :

Est-ce qu'avant il avait fait des tirs de sommation avant de monter sur le *Saiga* ?

M. Bangoura :

Je n'ai pas eu connaissance de cela.

M. Thiam :

Ces tirs de sommation, vous avez dit que ce n'était pas avec des balles à blanc.

M. Bangoura :

Non.

M. Thiam :

Il a tiré où ?

M. Bangoura :

En l'air.

M. Thiam :

Ah, il a tiré en l'air. Ce n'était pas susceptible de blesser ou de causer des dégâts sur le navire ?

M. Bangoura :

Non, je ne peux pas le dire parce que je ne savais pas quelle était sa position par rapport ...

M. Thiam :

Dites-moi, M. Niasse a été blessé ?

M. Bangoura :

Je n'ai pas vu la plaie.

M. Thiam :

Tout à l'heure, vous avez dit au Tribunal que vous avez vu qu'il avait une blessure à un œil.

M. Bangoura :

Non, pas la blessure. J'ai dit que c'était l'œil qui lui faisait mal, ce n'était pas la plaie ouverte qui était là, mais ... enfin il souffrait de l'œil, je ne sais pas de quel côté, mais quand on l'a amené à l'hôpital qu'il a reçu les soins sur l'œil, il a vu clair.

M. Thiam :

A votre avis, comment a-t-il pu être blessé ?

M. Bangoura :

Je ne peux pas l'expliquer parce que je n'étais pas là quand il s'est blessé.

M. Thiam :

Qui peut affirmer qu'il s'est blessé en se jetant d'une fenêtre ?

M. Bangoura :

Pris de peur, il semblerait.

M. Thiam :

Vous ne pouviez pas l'affirmer, maintenant vous dites que « il semblerait ».

M. Bangoura :

Il semblerait. Je ne l'ai jamais affirmé, depuis ce matin.

M. Thiam :

Monsieur Bangoura, vous étiez à la tête d'hommes courtois, polis, mais armés. Alors, pourquoi M. Niasse aurait-il eu peur au point de se jeter d'une fenêtre ?

M. Bangoura :

Parce que personne n'était sur le pont, donc dès que les gens sont venus à bord, tout le monde c'était caché.

M. Thiam :

Tout à l'heure, M^e Plender vous a posé la question et vous lui avez dit : « il a été blessé selon quelle version » ? Cela laissait supposer qu'il y avait une version de M. Niasse et une autre version. Est-ce que j'avais compris de mon banc là-bas, ou bien est-ce que j'étais distrait ?

M. Bangoura :

Non.

M. Thiam :

Il n'y avait pas deux versions ?

M. Bangoura :

Non.

M. Thiam :

Vous n'avez jamais entendu M. Niasse ?

M. Bangoura :

Pour sa blessure ?

M. Thiam :

Oui.

M. Bangoura :

Si j'ai bonne souvenance, j'ai dit : « quand il y a eu panique à bord, c'est à ce moment qu'il s'est heurté, lui, à une vitre. »

M. Thiam :

Mais vous n'êtes pas allé vers lui pour lui demander ce qui s'était passé ?

M. Bangoura :

Après, oui, avant de l'emmener à l'hôpital ...

M. Thiam :

Vous lui avez demandé ?

M. Bangoura :

Oui.

M. Thiam :

Quelle était donc sa version ?

M. Bangoura :

Celle que je vous donne.

M. Thiam :

Il a dit qu'il s'était jeté d'une fenêtre ?

M. Bangoura :

Non, pas d'une fenêtre. Il a dit : « quand je suis rentré dans ma cabine », c'est à ce moment-là. Quand ils ont été pris de peur, chacun s'est caché, parce qu'ils étaient deux seulement à la passerelle, dans leur cabine.

M. Thiam :

Vous avez fouillé tout le navire. Il n'y avait pas de drogue ?

M. Bangoura :

Moi, je ne l'ai pas vu.

M. Thiam :

Il n'y avait pas non plus d'armes ?

M. Bangoura :

On l'aurait mentionné dans le procès-verbal.

M. Thiam :

Les membres de l'équipage ne faisaient que leur travail ?

M. Bangoura :

Je ne sais pas ce qu'ils faisaient au moment où on est arrivé.

M. Thiam :

Je veux dire qu'ils ne faisaient rien, eux, d'illégal ?

M. Bangoura :

Sauf la vente.

M. Thiam :

Je ne parle pas du capitaine ni de l'armateur. Mais ceux qui étaient sur le navire, qu'est-ce qu'ils faisaient d'illégal ? Rien ?

M. Bangoura :

Non.

M. Thiam :

Bon. Peut-être le capitaine pouvait-il avoir peur s'il pensait qu'ils faisaient quelque chose d'illégal ?

M. Bangoura :

Oui.

M. Thiam :

Pouvez-vous nous expliquer ce qui justifiait une telle frayeur chez M. Niasse ?

M. Bangoura :

J'ai dit, moi, que je n'étais pas là-bas pour pouvoir vous expliquer la raison d'une telle frayeur. J'ai dit que ce qui m'a été rapporté par M. Niasse, c'est ce que je vous dis ici. Je n'étais pas là au moment où il avait cette frayeur et je n'étais pas là.

M. Thiam :

J'imagine la scène : des fonctionnaires courtois, comme nous souhaitons les avoir, qui montent à bord, qui posent des questions, qui demandent les livres, y a-t-il une seule raison pour qu'un marin qui n'est pas concerné par le commerce du navire ait une telle frayeur qu'il se jette contre une vitre ?

M. Bangoura :

Je ne peux pas vous répondre à cette question parce que moi, je n'étais pas là.

M. Thiam :

Qui a fait la cuisine pour vos hommes ?

M. Bangoura :
Nos hommes ?

M. Thiam :
Oui.

M. Bangoura :
Nous avons notre cuisinier à bord.

M. Thiam :
A bord du *Saiga* ?

M. Bangoura :
Non, à bord du P328.

M. Thiam :
Vous avez dit que les passeports n'ont pas été saisis parce qu'ils n'ont pas demandé –

M. Bangoura :
Les passeports –

M. Thiam :
Laissez-moi terminer. Les passeports n'ont pas été saisis parce qu'« ils n'ont pas demandé ... ». C'était votre phrase, si ma mémoire est bonne et surtout mes notes. J'aurais voulu que vous expliquiez au Tribunal qui c'est « ils » ?

M. Bangoura :
Les membres de l'équipage.

M. Thiam :
Donc vous aviez les passeports ?

M. Bangoura :
Pour le contrôle, oui.

M. Thiam :
Vous ne pensiez pas qu'il était plus naturel que vous les rendiez puisque c'est vous qui les aviez pris ?

M. Bangoura :
Nous les avons remis à l'agent consignataire.

M. Thiam :
A quel moment ?

M. Bangoura :
Chaque fois qu'il demandait.

M. Thiam :
Ils étaient donc contraints d'aller demander un passeport que vous aviez pris ?

M. Bangoura :

Ils n'étaient pas contraints.

M. Thiam :

Pourquoi n'avez-vous pas donné spontanément les passeports ?

M. Bangoura :

On ne pouvait donner spontanément les passeports parce qu'on ne savait pas à qui. C'est au moment où on a su qui était le consignataire.

M. Thiam :

Monsieur Bangoura, j'en ai terminé et je suis au regret de dire que les trous évoqués par M^e Plender tout à l'heure, vous ne les avez toujours pas comblés.

The President:

Thank you very much.

It is quite plain, Mr. von Brevern, that you will not be able to undertake re-examination tonight. The Tribunal will also have a few questions to put before re-examination.

Mr. Bangoura, you will have to come back tomorrow to the witness stand.

Before we adjourn I would like to urge counsel on both sides. We have had this experience on both occasions when witnesses on each side have been cross-examined. I do appreciate that we want to arrive at the truth, but as I said a little earlier, where witnesses are either unable or unwilling to give information or explain apparent contradictions, I would suggest that after one or two attempts the matter should be left there and the Tribunal will draw its own conclusions.

I say this not merely because it may appear that witnesses are being harassed, but it will also help, perhaps, to keep up with the time schedule that we have set which, as you know, is very tight. I think that this happened three or four days ago in respect of a witness from the other side and it has happened here. It is the function of counsel to ensure that they receive the right answers. However, where witnesses are either unwilling or unable to give them, for some reason, I think that we should perhaps stop a little earlier and leave the conclusions to be drawn by the other side and by the Tribunal. Thank you very much. The sitting is closed. We will meet tomorrow at 10 o'clock.

(The Tribunal rises at 4.00 p.m.)

Public sitting held on 13 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 13 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, Président; M. WOLFRUM, Vice-Président; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, juges; M. CHITTY, Greffier.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

The witness Mr. Bangoura will please be called to the witness stand.

Mr. von Brevern, I take it that you wish to re-examine the witness.

Mr. von Brevern:

Yes, Mr. President, my colleague Professor Lagoni will do it.

The President:

Thank you.

Examination of witnesses (continued)

RE-EXAMINATION OF MR. BANGOURA
BY MR. LAGONI (GUINEA)
[PV.99/11, E, p. 4-7; F, p. 4-8]

Mr. Lagoni:

Mr. President, Members of the Tribunal, I will proceed by asking questions of the witness Mr. Bangoura.

Mr. Bangoura, if foreign tankers come into the Guinean customs radius, who is surveilling these tankers?

M. Bangoura :

C'est la douane.

Mr. Lagoni:

And how do you survey them, how do you know they are there; which means?

M. Bangoura :

Lorsque ce sont des navires qui sont destinés au port de Conakry, et qu'ils entrent dans la zone du rayon de douane, ils sont conduits par eux-mêmes jusqu'au bureau.

Mr. Lagoni:

My question went slightly in another direction. You mentioned yesterday that there was radio surveillance, and I would like to know how you know where the tankers are in the zone and how can you know it, and what does radio surveillance mean? Could you explain this to the Tribunal, please?

M. Bangoura :

Ici, on entend par surveillance radio : nous avons notre base qui est à terre qui suit les communications radio dans la zone maritime.

Mr. Lagoni:

How do you know then where a tanker is at a certain time?

M. Bangoura :

Il s'annonce lui-même et il donne sa position. C'est à partir de la conversation du pétrolier avec ses clients que nous savons si c'est un pétrolier ou un autre navire de commerce.

Mr. Lagoni:

So I understand that you listen to the conversation between the tanker and the customers, which are the fishing vessels, and the tanker gives its position at a certain time for a meeting with the fishing vessels, and then you know exactly where the tanker is.

M. Bangoura :

Oui.

Mr. Lagoni:

On which frequency do you do this surveillance on the radio; are there special frequencies on which the tanker and the fishing vessels communicate?

M. Bangoura :

Nous procédons par une recherche automatique.

Mr. Lagoni:

So you search the whole area until you get the communication between the tanker and the fishing vessel?

M. Bangoura :

Oui.

Mr. Lagoni:

This was also the way you spotted the *Saiga* in the contiguous zone of Guinea, I understand?

M. Bangoura :

Oui.

Mr. Lagoni:

Did you already know that the *Saiga* was coming into the exclusive economic zone of Guinea before she arrived there; did you already hear her when she was still in the waters of Guinea-Bissau?

M. Bangoura :

Oui.

Mr. Lagoni:

And this is all done the same way?

M. Bangoura :

Tout à fait.

Mr. Lagoni:

So when the tanker is silent, you cannot spot it by this means, is that correct?

M. Bangoura :

Non.

Mr. Lagoni:

What does "no" mean, you cannot spot it then?

M. Bangoura :

Non, nous ne pouvons pas le repérer.

Mr. Lagoni:

Thank you. I understand that there are also radar stations on the coast of Guinea, but the Customs do not use them, is that correct?

M. Bangoura :

C'est exact.

Mr. Lagoni:

I also understood from the examination yesterday that you are not a sailor, so on board the big patrol boat P328 you got your information about the nautical matters, about the radio, the position of the *Saiga*, the distance of the *Saiga* from the commander of the patrol boat, is that correct?

M. Bangoura :

Oui.

Mr. Lagoni:

The commander of both patrol boats, I understand, on that mission was Lieutenant Sow?

M. Bangoura :

Oui.

Mr. Lagoni:

Did he tell you that the *Saiga*, on the morning of 28 October 1997 was laying in the exclusive economic zone of Sierra Leone waiting for fishing vessels?

M. Bangoura :

Reprenez votre question.

Mr. Lagoni:

Did Lieutenant Sow tell you that the *Saiga*, on the morning of 28 October 1997, was laying in the exclusive economic zone of Sierra Leone waiting for fishing vessels at the meeting point? I refer to a question Dr. Plender asked you yesterday where he said that you did not know apparently, or did not mention in the *procès-verbal*, that the *Saiga* was drifting for a few hours?

M. Bangoura :

Non.

Mr. Lagoni:

Mr. Bangoura, to turn to another point, did you expect when you wrote the *procès-verbal* of 13 November 1997 that you would be questioned and cross-examined on the details of the *procès-verbal* before this International Tribunal?

M. Bangoura :

Non.

Mr. Lagoni:

Can I assume that, if you had known this at those times, you would have been more precise on some details, especially nautical details as concerning times for example, written in the *procès-verbal*?

M. Bangoura :

Oui.

Mr. Lagoni:

You mentioned also in the cross-examination by Dr. Plender the people who gave the report of the events on board the small patrol boat. Were these people Customs officers or sailors who gave the report on events to you to write the *procès-verbal*?

M. Bangoura :

Des douaniers.

Mr. Lagoni:

Therefore, an estimation that the tanker *Saiga* tried to sink the small patrol boat was their point of view, their impression?

M. Bangoura :

Oui.

Mr. Lagoni:

Thank you. I have very few more questions, on the customs radius. You said yesterday, according to the English version of the verbatim record, which was the only one I saw, that the Guinean customs radius is 150 km. I assume that is obviously a lapse and that it is 250 km. You can confirm that?

M. Bangoura :

La zone maritime, c'est 250 kilomètres.

Mr. Lagoni:

Thank you. Can you say a word on the legal character of the customs radius, the maritime zone as you call it? Is it a zone of surveillance, or what kind of zone is it?

M. Bangoura :

Ici, il y a d'abord le rayon douanier qui est inclus dans le territoire douanier. C'est une partie qui est réservée pour la douane pour faire la surveillance dans le territoire.

Mr. Lagoni:

But you do not carry out surveillance with respect to ships which go in transit through the customs radius – for example, only in transit from Guinea-Bissau to Sierra Leone?

M. Bangoura :

Il n'y a pas de contrôle.

Mr. Lagoni:

But you use the customs radius for surveillance with respect to offshore bunkering by foreign tankers?

M. Bangoura :

Exact.

Mr. Lagoni:

And you may use the customs radius for surveillance of ships who are going into the port of Conakry?

M. Bangoura :
C'est exact.

Mr. Lagoni:
Thank you. This is my last question, Mr. Bangoura. Were the Customs officers who entered the *Saiga* on the morning of 28 October trained to stop the engine of a tanker

M. Bangoura :
Ils ont une formation spécifique.

Mr. Lagoni:
But do they have specific training, for example, on how to stop the engine? The *Saiga* was going on automatic steering. Did they know how to simply go on the bridge and switch off the engine?

M. Bangoura :
Non.

Mr. Lagoni:
So I understand they were not sailors, they were Customs people?

M. Bangoura :
Oui.

Mr. Lagoni:
Thank you very much, Mr. Bangoura.
Mr. President, that ends my questioning. Thank you very much.

The President:
Thank you very much. That appears to be the end of Mr. Bangoura's evidence.
Mr. Bangoura, you are released. Thank you very much for assisting the Tribunal.
Mr. von Brevern, you may call your next witness.

M. Bangoura :
Monsieur le Président, je vous remercie. Avec votre permission, j'aimerais pouvoir rester dans la salle, s'il vous plaît.

The President:
Yes, you may remain in the room. You are released from your duties as a witness. You may remain in the room, but whenever you wish, you may also leave.

M. Bangoura :
Je vous remercie.

The President:
Mr. von Brevern, your next witness, please?

Mr. von Brevern:
Mr. President, the next witness is Mr. Mangué Camara.

INTERVENTION BY MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/11, E, p. 7–8]

Mr. Plender:

Mr. President, we have not yet received any statement for Mr. Camara. It is important that we should have one and have an opportunity of reading it before he is presented.

The President:

The Tribunal does not have the statement either.

Mr. Plender:

May I request, in the circumstances, that there be a short adjournment to enable us to read and prepare, otherwise we shall be totally taken by surprise.

The President:

Mr. von Brevern?

Mr. von Brevern:

I am sorry that we are only now in a position to provide it. However, I do not think that Mr. Plender will be surprised by what he reads. At least with this witness we outlined very clearly and specifically, days ago, the subjects on which the witness would be called.

The President:

Mr. Plender, I see the point you are making. I was in the same situation as you in the beginning. I have just received the statement, which consists of one page. I wondered whether, in the circumstances, you might not be able to acquaint yourself with the evidence, both as it is written and as the witness will be led to produce in examination-in-chief.

Mr. Plender:

Mr. President, this does present quite a difficulty for us. We have to compare this with other statements. Maître Thiam, who will be responsible for cross-examination, is placed in the position of having to do it impromptu.

Mr. von Brevern:

Perhaps I may make one additional remark. We are more in the habit of asking the witnesses here before you, and do not think that what the witness has written in his statement is as important for us. What is more important is what we hear from him. We will lead him through the subject we have already mentioned. But, of course, we would not object if you will deduct this from our time. I would fully agree, if Maître Thiam needs five minutes to read through.

The President:

I think there is another way of dealing with this. Mr. Plender, the witness statement, as we have now, is not, strictly speaking, a requirement of the Rules. It is an arrangement which we all felt would be convenient to the Tribunal and to the parties.

As you recall, on one occasion there was some disagreement as to whether the statements are to be read out in court or were to form the basis of cross-examination. I think in the circumstances, and in view of the brevity of the statement, perhaps the solution in this case would be for the witness to read the whole of the statement, which is what would have

happened if this statement had not been available. Since this statement is not, technically speaking, required, we could operate on the basis that this is the first time that the statement is being made available to the other party. I suggest that the witness reads the statement, and on the basis of that we have the examination-in-chief and subsequently the cross-examination. Would that be a compromise to get us out of this difficulty?

Mr. Plender:

Mr. President, we are in your hands and we will follow your suggestion.

The President:

Thank you very much.

In that case, Mr. von Brevern, after the witness has made a declaration, we will request that he reads this statement, which is only one page. It will, perhaps, not require the suspension of fifteen minutes. It may add five minutes to the time, but I think we can live with that.

Mr. von Brevern:

Mr. President, may I then ask my delegation whether the statement of the next witness, Mr. Sow, has already been distributed. If not, I should like to ask that it be distributed now.

The President:

It has been distributed. Could the witness be asked to make the required declaration, please.

EXAMINATION OF MR. M. CAMARA
BY MR. VON BREVERN (GUINEA)
[PV.99/11, E, p. 8–15; F, p. 9–20]

M. Mangué Camara prête serment (en français)

Mr. von Brevern:

Mr. Camara, before I put questions to you relating to the arrest of the *M/V Saiga*, is it correct that you have made a statement for the Tribunal?

M. M. Camara :

Oui.

Mr. von Brevern:

If this is your statement, could you please follow the wish of the International Tribunal and read it out?

M. M. Camara :

Oui.

Mangué Camara, sous-lieutenant,
En service à la Brigade Mobile Nationale des Douanes, Conakry

Je suis arrivé dans le P. 328 ...

– il y a une erreur ici, c'est le P35 –

... à une certaine distance du navire SAIGA, la vedette P. 35 a été larguée avec un équipage de 6 personnes à bord. Dès son départ elle a mis sa radio en marche, en appelant « SAIGA, SAIGA, stop, stop. C'est la marine guinéenne. »

Arrivé à proximité de SAIGA, nous avons vu une grande fumée et le navire a bougé. Le patron de la vedette avait mis la sirène et le feu bleu tournait toujours. SAIGA était en progression. La vedette a fait le tour du navire deux fois et personne n'était là. C'est à ce moment que nous avons fait la sommation en tirant en l'air avec notre arme individuelle (le PMAK). Mais cela n'a rien changé. Saiga était toujours en marche.

C'est alors que le patron de la vedette a cherché à l'accoster. Trois des membres de l'équipage de la vedette sont montés à bord de SAIGA.

Aussitôt nous avons cherché à rentrer dans le bateau SAIGA, mais toutes les portes étaient fermées et on ne voyait personne. Quand nous sommes descendus sur le pont, un de nous a retrouvé une porte à la partie arrière du bateau qui n'était pas fermée. Nous l'avons ouverte mais celle-ci ne pouvait nous permettre l'accès dans le bateau. C'était juste un trou d'évacuation de la chaleur dégagée par le moteur. On pouvait voir le moteur à partir de cette porte. C'est ainsi qu'un de nous a tiré sur un tuyau dedans pour immobiliser le navire.

A un certain moment nous avons constaté que le navire commençait à stopper son moteur. C'est à ce moment qu'un de nous a pris un marteau sur le pont qui était à côté d'une boîte de peintures. C'est à

l'aide de ce marteau que nous avons cassé une porte de la passerelle qui menait à une cabine de pilotage. Nous sommes rentrés, il y n'avait personne. La seconde fut aussi cassée, ce qui nous a permis d'être dans le couloir pour vérifier toutes les autres portes qui étaient fermées. C'est ainsi que nous avons cassé une porte dans le couloir pour trouver un membre de l'équipage dans sa chambre auquel on a demandé de nous montrer le capitaine. Il n'a pas voulu nous répondre. Il nous dirigea devant une porte en parlant sa langue. Cette porte fut ouverte. Il y avait deux marins. C'est à ce moment que le P. 328 a accosté et nous avons fait le compte rendu au chef de mission qui nous avait rejoint à bord.

Mr. von Brevern:

Thank you very much, Mr. Camara. This indeed helps me a lot because most of my questions have now been answered. What you have just read out is correct?

M. M. Camara :

C'est exact.

Mr. von Brevern:

When you read out the first line you said there was an error. What did you mean by that? Two launches are mentioned and the question was: on which launch were you?

M. M. Camara :

J'étais dans le P328. Je suis descendu à bord du P35.

Mr. von Brevern:

I did not understand that. There were two launches. You can only have been on board one launch. Were you on board the larger one or the smaller one?

M. M. Camara :

La petite vedette.

Mr. von Brevern:

The small one was the P35; is that correct?

M. M. Camara :

C'est exact.

Mr. von Brevern:

You were not on the P328?

M. M. Camara :

Non.

Mr. von Brevern:

Mr. Camara, was this mission the first mission of that kind in which you took part?

M. M. Camara :

Oui.

Mr. von Brevern:

When you approached with your small launch to the *Saiga* how did you feel? Did you feel safe or did you fear perhaps that one of the crew members of the *Saiga* might have arms? Did you feel safe or more uncertain and unsafe?

M. M. Camara :

Oui, j'avais peur qu'un membre ait une arme.

Mr. von Brevern:

Is it that you yourself had arms; is that correct?

M. M. Camara :

J'avais un PMAK.

Mr. von Brevern:

And on board the small launch were you the only one who had arms?

M. M. Camara :

Non.

Mr. von Brevern:

Who else had arms?

M. M. Camara :

Les deux autres avaient des armes, plus moi.

Mr. von Brevern:

When you referred to the two others and yourself, was there anyone else on board the small launch?

M. M. Camara :

Oui.

Mr. von Brevern:

Who was that?

M. M. Camara :

C'étaient les trois autres membres de l'équipage.

Mr. von Brevern:

Were they also from the Customs or from the Navy?

M. M. Camara :

C'étaient des marins.

Mr. von Brevern:

Is my understanding correct that on board the small launch there were three representatives of the Customs and each of you had arms and there were also three representatives of the Navy who did not have arms?

M. M. Camara :

Oui.

Mr. von Brevern:

You have read out from your declaration that you fired in the air after you had circled the *Saiga* twice. Is that correct?

M. M. Camara :

Nous avons tiré en l'air.

Mr. von Brevern:

What was the purpose of this firing?

M. M. Camara :

Le but, c'était pour que le navire s'arrête.

Mr. von Brevern:

When you went around the *Saiga* twice, what was the effect of the sea and the waves, perhaps caused by the *Saiga* for your launch?

M. M. Camara :

Le *Saiga* faisait des vagues qui ont même failli renverser la vedette au deuxième tour. C'est à ce moment-là que nous avons fait la sommation en tirant en l'air. Nous avons cherché à l'accoster. Quand on l'a accosté, on est monté à bord.

Mr. von Brevern:

We will come to that later, Mr. Camara. Is it correct that when you circled the *Saiga*, you came into problems with your small vessel because of the waves caused by the moving of the *Saiga*? Obviously, and is this correct, there were rather strong movements of your launch.

M. M. Camara :

Très secouée.

Mr. von Brevern:

When you decided to fire into the air to give a signal to the *Saiga* to stop, were these movements still going on?

M. M. Camara :

Oui, il était toujours en marche.

Mr. von Brevern:

Would you think that it might have been possible that these shots – by the way, was it one shot or more shots – that this one or more shots perhaps may have hit one part of the vessel by chance, which perhaps you did not want but it happened because of the movement of the vessel? Is that possible?

M. M. Camara :

C'est possible.

Mr. von Brevern:

Do you remember how many shots you shot in the air?

M. M. Camara :

Nous avons tiré une fois.

Mr. von Brevern:

Did each of you three fire once?

M. M. Camara :

Un seul a tiré.

Mr. von Brevern:

With respect to firing, do you know any rule under Guinean law or in your Customs service which regulates when you are entitled to make use of your arms?

M. M. Camara :

Nous avons droit de faire l'usage de nos armes quand il y a refus d'obtempérer et quand on se sent menacé.

Mr. von Brevern:

Do you know an additional rule, in particular with respect to vessels you are looking for?

M. M. Camara :

Reprenez votre question.

Mr. von Brevern:

Do you know a rule in your law according to which a firing might also be possible for the purpose of immobilizing a vessel that has violated Guinean laws?

M. M. Camara :

Article 45 du code des douanes.

Mr. von Brevern:

You know that such a rule exists in your Customs Code?

M. M. Camara :

Oui.

Mr. von Brevern:

When you then decided to go on board the *M/V Saiga* did you go alone or did your two colleagues from Customs accompany you?

M. M. Camara :

Oui.

Mr. von Brevern:

Did you see anyone on board the *M/V Saiga*?

M. M. Camara :

Personne. Au moment où nous sommes entrés, il n'y avait personne.

Mr. von Brevern:

Can you explain what you did then?

M. M. Camara :

Oui, je peux l'expliquer. Quand nous sommes montés à bord, nous avons cherché à entrer dans le bateau. On a trouvé que toutes les portes étaient fermées. Nous avons fait le tour, nous n'avons rien vu.

Nous sommes descendus sur le pont. Quand nous sommes descendus sur le pont, nous avons vu un qui est sorti à la passerelle, mais ce n'est pas tout son corps que l'on a vu, il a mis sa main sur la fenêtre. On a vu son bras. L'un de nous a vu. Quand il a vu, de peur il nous a dit : « Attention, il y a quelqu'un ». En disant cela, il a tiré en l'air.

Aussitôt, lui aussi, il est rentré dans la cabine de pilotage. On l'a vu rentrer dans la cabine de pilotage en courant. Nous sommes partis encore derrière. Nous sommes partis encore derrière lui. Il avait fermé la porte. A ce moment, le bateau était toujours en marche. On s'est dit : cherchons à rentrer dans ce bateau, il faut qu'on l'immobilise.

Tout le monde s'est mis encore à rechercher pour être dans le bateau. Un de nous est parti à la partie arrière. C'est à ce moment qu'il a trouvé une porte et qu'il l'a ouverte. Quand il a ouvert cette porte, on a regardé à l'intérieur. Il n'y avait pas d'escaliers, il n'y avait rien, c'était seulement une porte d'évacuation de la chaleur dégagée par le moteur. C'est ainsi qu'un de nous a tiré sur le tuyau. Quand il a tiré sur le tuyau, le bateau a ralenti. Quand il a ralenti, il a stoppé le moteur.

Nous sommes redescendus encore sur le pont. Un de nous a trouvé un marteau à côté d'une boîte de peinture. Il a pris ce marteau. Nous sommes partis vers la cabine de pilotage. Nous avons cassé cette porte, nous sommes rentrés à l'intérieur. C'était fermé. Il n'y avait personne. Il y avait une seconde porte qui était à l'intérieur de la cabine. Nous avons cassé celle-là pour être dans le couloir.

Quand nous sommes arrivés, nous avons vérifié que toutes les portes aussi étaient fermées à l'intérieur. C'est ainsi que nous avons cassé une troisième porte. Nous avons sorti un membre de l'équipage. Quand nous l'avons sorti, nous lui avons demandé le capitaine. Il nous a conduit devant une cabine. Il a parlé dans leur langue. Cette porte a été ouverte d'elle-même par ceux qui étaient dedans. Il y avait deux autres qui étaient sortis. Cela a coïncidé avec l'accostage du P328 et nous avons rendu compte au chef de la mission. C'était jusque là.

Mr. von Brevern:

Mr. Camara, I am very grateful to you for your explanation and testimony of the whole situation, and it leaves only a very few questions for me. Coming back to the point when you proceeded to the *Saiga*, was the *Saiga* proceeding or was she at anchor or drifting?

M. M. Camara :

A proximité du *Saiga*, nous avons vu une fumée noire qui est montée. Aussitôt il a bougé, avant que l'on arrive.

Mr. von Brevern:

Coming back to the firing, as I understood you, there were three firings, the first one when you were still outside the *Saiga*, the second one when you saw someone. Is it correct that you felt attacked by that person on the porthole, as you explained?

M. M. Camara :

On s'est senti agressé parce que nous avons fait le tour du bateau par deux fois, on n'a vu personne. On a fait la sommation en tirant en l'air, on n'a vu personne. Au moment juste où nous sommes sur le pont, nous n'avons pas vu tout son corps, c'est rien que sa main que l'on a vu maintenant sur la fenêtre. Nous avons cru qu'il était en position de tir. Le premier qui l'a vu, il a même dit : « Attention, il y a quelqu'un », en tirant en l'air. C'est là que le deuxième coup, ce coup-là aussi est venu.

Mr. von Brevern:

Thank you. I understand that the third firing was when you saw through a window into the engine. Is it correct that you fired at an object or a part of the engine in order to immobilize the vessel? Is that correct?

M. M. Camara :

C'est exact.

Mr. von Brevern:

Did you see any other alternative to stopping or immobilizing the vessel, the *Saiga*?

M. M. Camara :

C'était la dernière possibilité.

Mr. von Brevern:

You then told us that the big launch came after you had found other crew members of the *M/V Saiga*. Do you remember whether there was some damage done to the vessel besides the obvious damage in the engine that you mentioned?

M. M. Camara :

Il peut y en avoir, parce qu'au moment où l'on tirait, on faisait la sommation, nous étions dans la vedette et les vagues qui étaient là, produites par le bateau *Saiga* ... je ne peux pas dire ici que quand on tire en l'air cela peut être précis. Cela peut arriver.

Mr. von Brevern:

But did you see something damaged on the vessel and, if so, what?

M. M. Camara :

La porte par laquelle on est entré. Nous avons vu cela parce qu'on l'a cassé avec le marteau.

Mr. von Brevern:

Do you remember whether there had been shots to the fender or the radio installation? Have you seen any shots to the satellite antenna or any other devices for communication, or any other damage to the vessel?

M. M. Camara :

Non, cela, je ne sais pas, je n'ai pas vu.

Mr. von Brevern:

Did you realize that at least one or more of the *Saiga*'s crew members were injured?

M. M. Camara :

Oui, j'en ai vu deux.

Mr. von Brevern:

Can you briefly explain what you saw and what sort of injuries they had?

M. M. Camara :

Il y en avait un qui était blessé au bras. Le second avait sa main sur son oeil. Donc ce sont les deux.

Mr. von Brevern:

Do you have any idea where these injuries might have come from?

M. M. Camara :

Non. Peut-être, cela peut être causé au moment où l'on a fait la sommation. Il se peut qu'une balle, par un tir non orienté, cela peut blesser.

Mr. von Brevern:

Do you know where the person with the injured arm was? Was he one of the crew members who was in the engine? Do you remember that?

M. M. Camara :

Le blessé est sorti de la salle des machines, celui qui était blessé au bras. Il est sorti de la salle des machines.

Mr. von Brevern:

With regard to the other one who had an injury to his eye, do you remember very well that he had only an injury to his eye, or did he show other signs of injury perhaps to another part of his body?

M. M. Camara :

Je n'ai constaté que sa main sur son oeil.

Mr. von Brevern:

Mr. President, I have one question. We have heard from the witness that he did not see any further damage other than that he has mentioned to us. I had intended originally, as you know, to show him the pictures and ask him to confirm that the vessel had such damage. I think it is not necessary to do this because I assume that you would agree that his answer will be "No, I cannot confirm this damage". If you so agree, we do not have to go through that exercise, otherwise I would indeed just put the photographs on the screen and ask him whether he can confirm that the vessel had such damage. Can you enlighten me?

The President:

Mr. von Brevern, it is up to you. If you wish to take his general answer that he did not see any damage to the vessel, that would be adequate and you would not need to go to the specific damage. However, if you wish to reinforce the fact, it is up to you. As far as the Tribunal is concerned, any evidence that you feel is important to your case will be admitted.

Mr. von Brevern:

I think it would be better if we did it rather quickly. Do we have the pictures still available to be put on the screen?

Mr. Camara, you will be shown some pictures and I would like to ask you whether you have seen these parts of the vessel.

Can we have photograph 1?

Do you remember that vessel?

M. M. Camara :

Oui.

Mr. von Brevern:

It is a picture of the *Saiga*?

M. M. Camara :

Oui.

Mr. von Brevern:

Picture 2. Picture 3. You must have seen this? Do you remember which porthole of which vessel that is? Do you remember, is that the *Saiga*?

M. M. Camara :

Oui, c'est le *Saiga*.

Mr. von Brevern:

First of all, can you see, and secondly can you remember if there was any damage to this part of the vessel?

M. M. Camara :

Non, il n'y a rien.

Mr. von Brevern:

We can go rather quickly through photograph 4. Do you remember any damage here?

M. M. Camara :

Non.

Mr. von Brevern:

Do you remember that the fenders were damaged?

M. M. Camara :

Les défenses ?

L'interprète :

La traduction est « défenses » en français. Ce sont de petits coussins de protection.

M. M. Camara :

Non.

Mr. von Brevern:

No. 5, please?

M. M. Camara :

Non.

Mr. von Brevern:

Photograph 7. You have been on the porthole. Have you seen that?

M. M. Camara :

Je ne suis pas arrivé là.

Mr. von Brevern:

Do you remember that this is part of the *Saiga*? You have not been there?

M. M. Camara :

Je ne suis jamais arrivé à cette partie.

Mr. von Brevern:

Photograph 8 shows the fenders. Did you see any damage here?

M. M. Camara :

Non.

Mr. von Brevern:

Picture 9, please. Have you seen that?

M. M. Camara :

Oui, j'ai vu.

Mr. von Brevern:

What did you see there?

M. M. Camara :

Je vois un grand trou là.

Mr. von Brevern:

No, the question is whether you have seen this part of the vessel on board the *Saiga*?

M. M. Camara :

Non, non, non.

Mr. von Brevern:

So your explanation was "I saw the hole in this picture but I do not remember that this was on board of the *Saiga*".

M. M. Camara :

Non.

Mr. von Brevern:

Have you seen such a thing on board the *Saiga*, undamaged?

M. M. Camara :

Non, non, non.

Mr. von Brevern:

Picture 10, please. Do you see any damage?

M. M. Camara :

Non.

Mr. von Brevern:

Do you remember having seen this when you were on board the *Saiga*, have you seen that?

M. M. Camara :

Non.

Mr. von Brevern:

Eleven please. Would it be possible that you shot at this here, or one of your colleagues; do you remember that?

M. M. Camara :

Non, je ne me souviens pas.

Mr. von Brevern:

And have you seen this; what is it, a satellite? When you were on board did you see that, do you remember that?

M. M. Camara :

Moi, je ne peux pas connaître cela, je ne suis pas marin.

Mr. von Brevern:

Twelve please. Have you seen such a hole on board the vessel?

M. M. Camara :

Non.

Mr. von Brevern:

Thirteen please. The same question here.

M. M. Camara :

Non.

Mr. von Brevern:

Fifteen please. Do you remember that; was that on board the *Saiga*?

M. M. Camara :

Non, je n'ai pas vu cela. Je ne me souviens pas.

Mr. von Brevern:

We show you pictures 16, 17, 18, 19 and 20, please. Do you remember these were parts of the *Saiga*?

M. M. Camara :

Non.

Mr. von Brevern:

The last one, 23 please. No, 29 please, the very last one. What do you see here, do you remember that?

M. M. Camara :

Oui, c'est une porte..

Mr. von Brevern:

Was that or could that have been on board the *Saiga*?

M. M. Camara :

C'est une porte que je vois ici, mais là rien ne prouve que c'est la porte du *Saiga*. C'est une porte.

Mr. von Brevern:

Do you remember that the doors on board the *Saiga* were similar?

M. M. Camara :

Oui.

Mr. von Brevern:

Do you remember how you opened the doors; some of these doors were closed, you told us. How did you open these doors?

M. M. Camara :

Avec un marteau.

Mr. von Brevern:

Could that be a door of the *Saiga* that was opened or a little bit destroyed by a hammer?

M. M. Camara :

Oui.

Mr. von Brevern:

Thank you, Mr. Camara. This ends my questions to you. Thank you very much.

The President:

Thank you.

Mr. Plender?

Mr. Plender:

Maître Thiam will pose questions to the witness.

The President:

Thank you very much.

Maitre Thiam, please.

CONTRE-INTERROGATOIRE DE M. M. CAMARA
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/11, F, p. 20–34]

M. Thiam :

Bonjour, Monsieur Camara.

M. M. Camara :

Bonjour.

M. Thiam :

Vous pouvez peut-être expliquer au Tribunal depuis combien de temps vous travaillez pour la douane ?

M. M. Camara :

Je suis dans les douanes depuis dix ans.

M. Thiam :

Vous avez subi un entraînement spécial ?

M. M. Camara :

Oui.

M. Thiam :

Et à la brigade mobile du port, vous y étiez depuis combien de temps ?

M. M. Camara :

J'ai fait deux ans à la brigade mobile.

M. Thiam :

Deux ans avant la saisie du *Saiga* ou deux ans après ?

M. M. Camara :

Deux ans. A la saisie du *Saiga*, cela faisait deux ans.

M. Thiam :

Excusez-moi, je n'ai pas bien compris votre réponse. C'était deux ans avant la saisie du *Saiga* ou deux ans après la saisie du *Saiga* ?

M. M. Camara :

Deux ans avant la saisie.

M. Thiam :

Et pendant deux ans à la brigade mobile du port, vous n'avez saisi aucun autre navire que le *Saiga* ?

M. M. Camara :

J'ai participé à la mission du *Saiga*.

M. Thiam :

Je crois savoir qu'effectivement vous avez participé à la mission du *Saiga*, mais ma question était de savoir si, en dehors de la saisie et de l'arraisonnement du *Saiga*, vous avez participé à d'autres missions en deux ans ?

M. M. Camara :

Non.

M. Thiam :

Quel était votre rang dans la brigade mobile ?

M. M. Camara :

Agent de brigade.

M. Thiam :

Donc, comme agent de brigade, chaque fois qu'il y a eu des opérations de saisie, vous n'étiez pas de service, pendant deux ans.

M. M. Camara :

Je n'étais pas désigné.

M. Thiam :

Excusez-moi, je n'arrive pas à entendre les réponses du témoin. Vous n'étiez pas ... ?

M. M. Camara :

Désigné.

M. Thiam :

Ah, vous n'étiez pas désigné, mais vous êtes au courant quand même que d'autres saisies ont eu lieu ?

M. M. Camara :

Je ne me rappelle pas de cela.

M. Thiam :

Vous ne vous en souvenez pas ... En ce qui concerne l'ordre de mission que vous avez reçu, pourriez-vous dire au Tribunal à quelle heure vous l'avez reçu, le 26 octobre ? A moins que vous l'ayez reçu un autre jour ?

M. M. Camara :

L'ordre de mission établi est remis au chef de mission. C'est lui qui doit savoir l'heure à laquelle il l'a reçu.

M. Thiam :

Vous, vous ne savez pas l'heure à laquelle votre chef de mission a reçu l'ordre de mission ?

M. M. Camara :

Non.

M. Thiam :

Savez-vous le contenu de la mission ?

M. M. Camara :

Quand l'ordre de mission est établi, on dit seulement aux agents concernés, ceux qui vont à la mission : « Rendez-vous a tel lieu, à telle heure ».

M. Thiam :

Est-ce que vous saviez que vous aviez mission d'arraisonner précisément le *Saiga* ou est-ce qu'on ne vous avait rien dit sur ce point-là ?

M. M. Camara :

Non, rien m'a été dit.

M. Thiam :

Lorsque vous avez embarqué à bord, vous avez embarqué le 26 ou le 27 ?

M. M. Camara :

Le 27.

M. Thiam :

Est-ce que vous auriez remarqué que des hommes avaient embarqué de l'alcool ou auraient embarqué de l'alcool ?

M. M. Camara :

Où ?

M. Thiam :

A bord des vedettes de la marine nationale.

M. M. Camara :

Je n'ai pas remarqué tout cela.

M. Thiam :

Vous-même, vous n'en aviez pas ?

M. M. Camara :

Non.

M. Thiam :

Est-ce que vous avez affirmé dans le procès-verbal de douane, qui a été signé, que vous aviez reçu des renseignements sur la présence dite clandestine d'un tanker dans la zone économique exclusive de la Guinée ?

M. M. Camara :

Le procès-verbal est au niveau du chef de mission.

M. Thiam :

Vous avez signé un procès-verbal de douane ?

M. M. Camara :

Oui.

M. Thiam :

Est-ce que ce procès-verbal est daté du 13 novembre 1997 ?

M. M. Camara :

J'ai seulement fait la signature, je n'ai pas fait la lecture.

M. Thiam :

Vous avez donc signé un procès-verbal que vous n'avez pas lu ?

M. M. Camara :

Non.

M. Thiam :

Je vous remercie. Savez-vous à quel moment le *Saiga* a été repéré ?

M. M. Camara :

Je ne sais pas ce moment.

M. Thiam :

A quel moment vous êtes passé de la grande vedette à la petite vedette ?

M. M. Camara :

C'est quand on ... je suis passé... c'était le 28 à 8 heures et quelques minutes.

M. Thiam :

Huit heures le matin ?

M. M. Camara :

Oui.

M. Thiam :

On peut dire que 8 heures le matin, c'est le petit matin à votre avis ?

M. M. Camara :

C'était 8 heures et quelques minutes.

M. Thiam :

Ce n'était pas à 3 heures 30 ?

M. M. Camara :

Non.

M. Thiam :

Ce n'était pas non plus 4 heures ?

M. M. Camara :

Non.

M. Thiam :

Lorsque vous êtes arrivé auprès du *Saiga*, il était arrêté ?

M. M. Camara :

A proximité, le *Saiga* avait lancé son moteur, auprès du *Saiga*, il était en marche.

M. Thiam :

D'accord, mais je suppose qu'un navire qui lance ses moteurs, avant de le lancer, il est arrêté ?

M. M. Camara :

Quand je suis venu, il était en marche.

M. Thiam :

Je vous remercie. J'ai bien compris cela, mais essayez de comprendre ma question, Monsieur Camara. Ai-je raison de supposer qu'un navire qui lance ses moteurs est arrêté au moment où il le fait ?

M. M. Camara :

Oui.

M. Thiam :

Donc, lorsque vous êtes arrivé et qu'il a lancé ses moteurs, jusque là il était arrêté, le *Saiga* ?

M. M. Camara :

Il était en marche.

M. Thiam :

Pourquoi y a-t-il une exception à la règle que vous venez de définir tout à l'heure en ce qui concerne le *Saiga* ?

M. M. Camara :

Quelle règle ?

M. Thiam :

Vous voulez dire que le *Saiga*, quand il a ses moteurs arrêtés, il est en marche ?

M. M. Camara :

Non, quand le moteur est arrêté, il n'est pas en marche.

M. Thiam :

Donc, le *Saiga* était arrêté au moment où vous avez vu de la fumée sortir de ses cheminées ?

M. M. Camara :

Quand il y a de la fumée qui sort de sa cheminée, ça c'est un départ.

M. Thiam :

Expliquez-nous. Vous savez, il n'y a pas de raison de s'énerver. Je veux simplement savoir : si c'est un départ, c'est que le navire est arrêté.

M. M. Camara :

Nous sommes arrivés auprès du *Saiga*, le *Saiga* était en mouvement déjà.

M. Thiam :

Il allait vite ou pas ?

M. M. Camara :

La vitesse n'était pas grande.

M. Thiam :

Bien. Avez-vous constaté des manoeuvres de nature à vous laisser penser que son capitaine ou un membre quelconque de l'équipage ait eu la volonté de renverser votre vedette ?

M. M. Camara :

C'étaient les vagues produites par le *Saiga* qui ont voulu renverser notre vedette.

M. Thiam :

Votre réponse, c'est que les vagues causées par le *Saiga* ont voulu renverser votre vedette ?

M. M. Camara :

Oui.

M. Thiam :

Est-ce que dans le mot « voulu », vous voyez une intention de la part des vagues ou de la part du *Saiga* ? Ou des membres de son équipage ?

M. M. Camara :

Enfin, pour moi, puisque c'était une petite vedette, les vagues qui étaient là, pour moi, constituaient un danger.

M. Thiam :

Peut-être qu'il serait intéressant de savoir si votre entraînement est tel que des vagues qui sont naturelles en mer puissent être considérées comme un danger, mais pour l'instant, la question est la suivante : Vous avez dit que les vagues « ont voulu » renverser l'une des vedettes ou votre vedette. Je voulais savoir si vous pensiez qu'il y avait une volonté délibérée de la part des vagues ou une volonté délibérée de la part de l'un des membres de l'équipage du *Saiga*.

M. M. Camara :

Je ne peux pas vous expliquer la partie parce que je ne suis pas marin, je suis un douanier.

M. Thiam :

Est-ce que, Monsieur Camara, les vagues sont naturelles, sur la mer, à votre avis ?

M. M. Camara :
Oui.

M. Thiam :
Et spécialement lorsqu'elles sont dans le sillage d'un navire.

M. M. Camara :
Reprenez votre question.

M. Thiam :
Est-ce qu'il est naturel qu'un navire produise, dans son sillage, une vague ou des vagues ?

M. M. Camara :
Elle peut produire des vagues.

M. Thiam :
Votre vedette elle-même produisait des vagues ?

M. M. Camara :
Oui.

M. Thiam :
Est-ce que quelqu'un qui vous aurez suivi pourrait vous accuser de ce seul fait d'avoir voulu tenter une manoeuvre pour le renverser ?

M. M. Camara :
S'il refuse d'obtempérer, je l'aurais accusé.

M. Thiam :
Je parle de quelqu'un qui vous poursuivrait, vous. Est-ce que, du seul fait qu'il y a une vague derrière votre vedette, vous l'auriez accusé d'avoir voulu le renverser ?

M. M. Camara :
Oui.

M. Thiam :
Vous l'auriez accusé ?

M. M. Camara :
Oui.

M. Thiam :
Je vous remercie. Donc, le procès-verbal que vous n'avez pas lu dit – je vous informe donc – qu'à deux reprises, le *Saiga* a tenté des manoeuvres pour renverser vos deux vedettes. Est-ce que tout cela est exact ?

M. M. Camara :

C'est la petite vedette qui est arrivée la première, la seconde est arrivée lorsque j'étais dans le bateau *Saiga*. Donc je ne peux dire que pour la petite vedette.

M. Thiam :

Alors, pour la petite vedette, est-il exact que, par deux fois, le *Saiga* ait tenté de la faire sombrer, en produisant des vagues ?

M. M. Camara :

Oui, parce que nous avons fait deux fois le tour.

M. Thiam :

Mais le *Saiga*, lui, n'a pas changé de cap ?

M. M. Camara :

Le *Saiga* a changé de cap, parce qu'il était en train de tourner un peu.

M. Thiam :

Je veux dire : il n'a tenté aucune manoeuvre brutale pour aller vers votre vedette ?

M. M. Camara :

Non, non. Il n'est pas venu vers notre vedette, c'est nous qui étions en train de faire le tour, c'est à ce moment que les vagues ont voulu renverser notre vedette.

M. Thiam :

Dites-moi, Monsieur Camara, quand vos chefs ont rendu compte à leur chef, est-ce qu'à un moment ou à un autre vous étiez avec eux ?

M. M. Camara :

Le compte rendu de quoi ?

M. Thiam :

De la mission, de l'exécution de la mission.

M. M. Camara :

Je n'étais pas avec eux.

M. Thiam :

Est-ce que le *Saiga* allait vite juste après avoir démarré ses machines ?

M. M. Camara :

Au départ, il n'allait pas vite, mais cela a augmenté de vitesse, petit à petit.

M. Thiam :

Mais est-ce qu'il a pu atteindre, à un moment quelconque, une vitesse telle que l'on ait pu penser qu'il allait plus vite que vous ?

M. M. Camara :

Là, je ne peux pas définir cela.

M. Thiam :

Est-ce que vous l'avez vu, à un moment quelconque, se déplacer plus rapidement que votre vedette ?

M. M. Camara :

Il avait quand même une vitesse.

M. Thiam :

Est-ce que vous aviez des jumelles ?

M. M. Camara :

S'il y a des jumelles, c'est seulement les marins qui les utilisent.

M. Thiam :

Est-ce que vous avez vu dans votre vedette des marins utiliser des jumelles ?

M. M. Camara :

Non. Je n'ai pas vu de jumelles.

M. Thiam :

Lorsque vous avez accosté le *Saiga*, vous avez dit que vous n'aviez vu personne sur le pont ?

M. M. Camara :

Il n'y avait personne.

M. Thiam :

Et vous avez dit tout à l'heure que vous vous êtes senti menacés parce que vous n'aviez vu personne.

M. M. Camara :

Que l'on s'était senti menacés lorsqu'on n'a vu personne ?

M. Thiam :

M^e von Brevern vous a posé une question et il vous a dit : « Pourquoi vous sentiez-vous menacé ? » Vous avez dit : « Nous avons fait deux fois le tour du bateau, c'est parce que nous avons fait deux fois le tour du bateau et que nous n'avons vu personne ».

M. M. Camara :

Oui.

M. Thiam :

C'est bien cela ?

M. M. Camara :

Oui, c'est bien cela.

M. Thiam :

D'accord. Est-ce que vous pourriez expliquer au Tribunal et à moi-même d'ailleurs aussi, comment le fait de ne voir personne peut créer chez vous un sentiment de menace ?

M. M. Camara :

Déjà qu'il n'y avait personne et que le bateau ne faisait qu'avancer, notre vedette n'a pas la grandeur de ce bateau, elle a pris la haute mer et nos carburants sont limités. Nous sommes à bord, je me suis senti menacé.

M. Thiam :

Monsieur Camara, vous avez dit que, pendant deux ans, vous n'avez participé à aucune mission de ce type. Pensez-vous que votre supérieur hiérarchique à ce moment-là, M. Bangoura, a fait le meilleur choix en vous désignant pour accoster et arraisonner le *Saiga*, puisque vous n'aviez pas d'expérience ?

M. M. Camara :

C'est au chef d'apprécier cela.

M. Thiam :

Est-ce que, placé dans la circonstance, dans les mêmes circonstances, si vous aviez été le chef, vous auriez confié une mission de ce genre à quelqu'un qui n'a jamais participé à une saisie ?

M. M. Camara :

Je n'ai pas compris cette question, s'il vous plaît.

M. Thiam :

Je n'insisterai pas. Mais enfin, vous ne voyez personne sur le navire et vous vous sentez menacé. Cela, c'est quelque chose que je n'arrive toujours pas à comprendre.

Je m'excuse de revenir sur ce point, mais je crois qu'il est important que nous ayons une réponse du témoin.

Aviez-vous, Monsieur Camara, une raison sérieuse de penser que des hommes cachés étaient armés ?

M. M. Camara :

A partir du moment, quand il est venu à la fenêtre, nous avons vu sa main. Moi, j'ai cru personnellement qu'il était en position de tir ou de faire du mal.

M. Thiam :

Je vais vous faire projeter la photo n° 3. Auriez-vous l'amabilité, Monsieur Camara, de vous déplacer et de montrer votre position au moment où vous avez aperçu, à une fenêtre ou à un hublot quelconque, le bras dont vous parlez ? Auriez-vous l'amabilité, par la même occasion, de montrer au Tribunal le hublot d'où vous aviez pu apercevoir le bras en question.

M. M. Camara :

Je peux.

M. Thiam :

Je vous en prie. (*Le témoin montre un endroit précis sur la photo.*) C'est quelle position, Monsieur Camara ?

M. M. Camara :

Cette position ?

M. Thiam :

Oui, ce que vous avez montré ?

M. M. Camara :

C'est la cabine, vers la cabine, la porte de la cabine.

M. Thiam :

C'est là que vous avez aperçu le bras ?

M. M. Camara :

Le bras était ici, il a mis le bras comme cela.

M. Thiam :

Vous étiez où ?

M. M. Camara :

Nous, nous étions là, sur le pont.

M. Thiam :

Je vous remercie. Donc, Monsieur Camara, vous étiez à découvert ? Vous étiez à découvert, Monsieur Camara ?

M. M. Camara :

A découvert, c'est-à-dire ?

M. Thiam :

Vous n'étiez pas à l'abri sur le pont ?

M. M. Camara :

Oui.

M. Thiam :

Quelqu'un, du haut de la passerelle que vous nous avez montré, aurait pu vous mettre en joue facilement, et par surprise ?

M. M. Camara :

Non, lui, c'est son bras que nous avons vu. Nous avons vu son bras. Dès que nous avons vu son bras, nous nous sommes sentis menacés. S'il avait eu quelque chose, il pouvait nous tirer dessus.

M. Thiam :

Enfin, vous pensez qu'un bras, c'est suffisant pour créer une menace ?

M. M. Camara :

Cela indique une position de tir.

M. Thiam :

Cela indique une position de tir ?

M. M. Camara :

Oui.

M. Thiam :

Vous avez observé une arme ?

M. M. Camara :

Nous avons observé la position.

M. Thiam :

Juste la position de tir ?

M. M. Camara :

Oui.

M. Thiam :

Dites moi, Monsieur Camara, est-ce qu'il vous est venu, à un moment quelconque, à l'esprit que si un navire veut se défendre, il n'attend pas qu'on l'aborde ? Qu'on le prenne à l'abordage et que, s'il y a des armes à bord, peut-être qu'ils auraient pu en faire usage au moment même où vous avez fait vous-mêmes usage de vos armes pour faire des sommations, selon vous ?

M. M. Camara :

Oui, nous avons fait des sommations.

M. Thiam :

Mais, est-ce qu'il ne vous est pas venu à l'esprit que, au moment où vous faisiez des sommations, des criminels qui se trouveraient sur le navire auraient peut-être, à ce moment-là, essayé de vous empêcher d'abord d'y entrer, de le prendre à l'abordage avec leurs armes ?

M. M. Camara :

C'est quand nous sommes montés à bord avec des armes.

M. Thiam :

Vous êtes montés sans crainte ?

M. M. Camara :

Oui, parce qu'il était en marche, il fuyait. C'est pourquoi nous sommes montés à bord.

M. Thiam :

Il fuyait, et ma question est : vous êtes montés sans crainte ?

M. M. Camara :

Nous sommes montés avec nos dispositions aussi.

M. Thiam :

Oui, mais vous aviez peur en montant ?

M. M. Camara :

Evidemment, quand tu montes à bord de quelque chose dont tu ne connais pas, honnêtement, tu dois prêter attention.

M. Thiam :

Vous voulez dire que vous avez reçu un entraînement qui vous permet, après dix ans de fonctions, d'avoir peur d'un fuyard ?

M. M. Camara :

(Pas de réponse)

M. Thiam :

Vous aviez peur de personnes qui prenaient la fuite ?

M. M. Camara :

Quelqu'un qui prend la fuite, il est capable de se défendre aussi.

M. Thiam :

Il n'était pas encore acculé que je sache. Il prenait la fuite et vous vous êtes senti menacés par quelqu'un qui prenait la fuite. Si c'est cela, vous le dites simplement au Tribunal.

M. M. Camara :

(Pas de réponse)

M. Thiam :

Dites-moi, vous dites que vous avez appelé le *Saiga* sur le canal 16. Est-ce exact ?

M. M. Camara :

J'ai dit que le patron de la vedette a ouvert la radio, j'ai entendu : « Saiga, Saiga, stop, stop ».

M. Thiam :

Est-ce que vous avez entendu une réponse ?

M. M. Camara :

Je n'ai pas entendu parce que, quand il a appelé deux fois, il a mis la sirène.

M. Thiam :

Est-ce que vous pensez que la sirène de l'endroit où vous étiez était audible par des personnes à bord du *Saiga* ?

M. M. Camara :

Je ne peux pas apprécier cela.

M. Thiam :

Avez-vous une raison de penser que quelqu'un à bord du *Saiga* a vu les feux lumineux bleus dont vous parlez ?

M. M. Camara :

Là, je ne peux pas apprécier.

M. Thiam :

Revenons en aux blessures. Qu'avez-vous constaté exactement pour le marin sénégalais ?

M. M. Camara :

Je l'ai vu, il avait un bras sur l'oeil.

M. Thiam :

Est-ce qu'il voyait ou à votre avis, était-il aveugle ?

M. M. Camara :

Le bras couvrait l'oeil, je ne pouvais pas dire s'il était aveugle ou s'il était blessé.

M. Thiam :

Le bras couvrait un seul oeil ou les deux yeux ?

M. M. Camara :

C'est pourquoi j'ai dit un oeil, c'est un.

M. Thiam :

Un seul œil. Par conséquent, il n'était pas aveugle. Il avait un autre œil.

M. M. Camara :

Il avait l'autre.

M. Thiam :

Alors, on dit qu'il était borgne ? Vous êtes d'accord avec moi ?

M. M. Camara :

Non, je ne peux pas apprécier, parce que la main couvrait, si l'œil était [...] ou quoi, je ne sais pas.

M. Thiam :

Il n'avait perdu qu'un seul oeil. Est-ce que vous avez vous-même ou est-ce que vous avez vu quelqu'un de votre équipe qui se soit occupé de ce blessé ?

M. M. Camara :

Oui.

M. Thiam :

Qu'a-t-on fait pour lui ?

M. M. Camara :

Il a été amené à l'hôpital.

M. Thiam :

A bord du *Saiga* d'abord.

M. M. Camara :

A bord. On a d'abord amené les deux blessés dans le P328. Le Sénégalais était dans le P328, on l'a amené là-bas.

M. Thiam :

Mais enfin, si vous l'avez fait simplement passer d'un navire à l'autre, ce n'est pas cela des soins. Ma question est de savoir, s'il a été soigné ? Est-ce qu'il a été soigné en mer ?

M. M. Camara :

Non, cela je ne sais pas.

M. Thiam :

Est-ce que vous vous êtes préoccupés de cela ?

M. M. Camara :

Les deux blessés ont été amenés dans un seul endroit.

M. Thiam :

Mais, est-ce que vous vous êtes préoccupés de savoir si on avait essayé de les soigner en mer ?

M. M. Camara :

Moi ?

M. Thiam :

Vous, oui.

M. M. Camara :

Je n'étais pas avec eux, mais j'ai vu, on les a fait passer dans le P328.

M. Thiam :

A un moment quelconque vous avez vu les deux blessés puisque vous en avez parlés.

M. M. Camara :

Dans le *Saiga*.

M. Thiam :

Très bien. Est-ce que, à ce moment-là, vous avez essayé de les soigner ou est-ce que vous avez vu quelqu'un essayer de les soigner ?

M. M. Camara :

L'autre avait déjà le bras bandé, l'autre blessé.

M. Thiam :

Est-ce que le Sénégalais, vous avez tenté de le soigner ou vous avez vu quelqu'un essayer de le soigner ?

M. M. Camara :

Là, je ne sais pas, on l'a fait passer dans le P328.

M. Thiam :

Dites-moi, Monsieur Camara, pourquoi est-ce qu'il a fallu 30 minutes pour rassembler l'équipage ?

M. M. Camara :

D'autres étaient dans la machinerie, donc il a fallu que le capitaine les recherche.

M. Thiam :

Vous étiez à bord du *Saiga* aux environs de 9 heures. Est-ce que je me trompe ?

M. M. Camara :

Oui. Aux environs de 9 heures ... il était 9 heures moins, c'est 9 heures moins.

M. Thiam :

Est-ce que si j'emploie l'expression « environ 9 heures », cela vous convient ?

M. M. Camara :

Oui.

M. Thiam :

Vous avez terminé les opérations à quelle heure ?

M. M. Camara :

Je n'ai pas chronométré. Quand le chef de mission est venu, toutes les opérations étaient maintenant à sa charge.

M. Thiam :

Si je vous disais que – une supposition – vous avez mis 30 minutes pour récupérer l'équipage et que les opérations se sont terminées à 12 h 30 ... supposons, c'est une supposition, je n'affirme rien.

Mais si je vous disais que vous êtes montés à bord à 9 heures, que vous avez mis 30 minutes pour récupérer l'équipage, ce qui fait 9 heures 30, que vous aviez certaines réquisitions à faire, que vous les avez faites et vous avez obtenu un certain nombre de documents que votre chef nous a dit hier avoir obtenus, qu'avez-vous fait de 9 h 30 à 12 h 30 sur le navire ?

M. M. Camara :

Quand l'équipage était rassemblé, le chef de mission a dit : « Cap sur Conakry ». Le commandant a dit : « Donnez-moi quelque temps. »

M. Thiam :

Le commandant Orlov, vous voulez dire ?

M. M. Camara :

Orlov. De donner quelque temps, qu'il répare le tuyau qui conduit l'huile dans le moteur, parce que ce tuyau a été percé.

M. Thiam :

Combien de temps a-t-il fallu pour réparer ce tuyau ?

M. M. Camara :

Je n'ai pas chronométré, s'il vous plaît.

M. Thiam :

Que faisiez-vous sur le navire une fois vos opérations terminées, jusqu'à 12 h 30 ?

M. M. Camara :

(Pas de réponse)

M. Thiam :

Vous n'avez pas participé à la réparation du tuyau, je suppose ?

M. M. Camara :

Je ne suis pas arrivé là.

M. Thiam :

C'est bien ce que je me disais. Alors, que faisiez-vous sur le navire de 9 h 30 à 12 h 30 ?

M. M. Camara :

De 9 h 30 à 12 h 30, je crois que le temps de rechercher et le temps de réparation, c'est ce qui a causé ce temps.

M. Thiam :

D'accord, mais le temps de rechercher, c'était une demi-heure. Cela nous mène à 9 h 30. Vous n'avez pas participé, ni aucun de vos hommes, je crois, si je me trompe vous m'interrompez, aux réparations nécessaires à la tuyauterie. Qu'est-ce que vous-même et vos hommes avez fait de 9 h 30 à 12 h 30 sur ce navire ?

M. M. Camara :

De 9 h 30 à 12 h 30, sur le navire, on était dans le navire, tout le monde était dans le navire, on était en attente de la réparation après avoir collecté tout le monde.

M. Thiam :

Est-ce que vous avez pillé le navire ?

M. M. Camara :

Non.

M. Thiam :

Est-ce que vous avez saccagé le navire ?

M. M. Camara :

Non.

M. Thiam :

Comment expliquez-vous les photos que l'on vous a montrées tout à l'heure et qui ont été prises après la saisie du *Saiga* ?

M. M. Camara :

Après la saisie du *Saiga* ... Les photos qui ont été montrées ici, ce n'est pas à ma connaissance. Je ne connais pas cela. Je ne sais pas.

M. Thiam :

Qui vous a fait la cuisine à bord du *Saiga* ?

M. M. Camara :

On avait nos repas froids à bord du P328.

M. Thiam :

Mais vous avez ramené le *Saiga* à Conakry.

M. M. Camara :

Oui.

M. Thiam :

Et vous aviez des hommes à bord.

M. M. Camara :

Oui.

M. Thiam :

Qui faisait la cuisine pour eux ?

M. M. Camara :

La cuisine venait de la ville. On mettait leur manger dans la vedette, on le donnait tous les jours.

M. Thiam :

C'est-à-dire que, tous les jours ... vous faisiez ... Combien de temps il a fallu pour rentrer à Conakry ?

M. M. Camara :

Oh là là, je ne peux pas connaître cela parce que je n'ai pas chronométré.

M. Thiam :

Pendant ce temps-là, vos hommes qui étaient à bord du *Saiga*, qui leur faisait à manger ?

M. M. Camara :

Pendant quel moment ?

M. Thiam :

Pendant toute la période, depuis le moment où vous-même et vos hommes êtes montés sur le *Saiga* jusqu'au moment où il est arrivé en rade du port de Conakry.

M. M. Camara :

On avait notre manger à bord du P328. Ce n'est pas dans le *Saiga* que l'on mangeait.

M. Thiam :

Donc vous êtes restés plusieurs heures à bord du *Saiga* sans manger ?

M. M. Camara :

Mais ... le matin, par exemple, après que j'ai fini de faire le compte rendu, j'étais parti prendre mon café à bord du P328.

M. Thiam :

Je vais, je pense, en terminer. Une question peut-être. Avez-vous notifié au propriétaire du navire, la saisie ?

M. M. Camara :

Tout cela, cela revient au chef de la mission. Ce n'est pas moi qui le fait, je suis sous ordre.

M. Thiam :

Est-ce que, à votre connaissance, le chef de la mission a fait une offre de transaction ?

M. M. Camara :

Je ne sais pas. C'est à lui de répondre à cette question.

M. Thiam :

Est-ce qu'il était tenu de le faire ?

M. M. Camara :

Vraiment, je ne sais pas.

M. Thiam :

Est-ce que vous connaissez les dispositions de l'article 226 du code des douanes ? Paragraphe un.

M. M. Camara :

Non.

M. Thiam :

Vous ne connaissez pas ces dispositions ? Vous voulez que je vous le montre peut-être. Vous l'avez oublié ou vous ne le connaissait pas ?

M. M. Camara :

J'ai dit non.

M. Thiam :

Je ne vous demande pas d'en donner lecture au Tribunal, je vous demande simplement de vous remémorer ce texte.

M. M. Camara :

Je peux lire ?

The President:

Mr. von Brevern?

Mr. von Brevern:

Mr. President, perhaps we could all know the contents of that article. Perhaps Maître Thiam could explain it to us before he puts his question.

The President:

Maître Thiam, once he has acquainted himself with it, maybe you could also let the Tribunal know what it says exactly.

M. Thiam :

Je vais lire moi-même les dispositions de l'article :

Lorsque les marchandises saisies ne sont pas prohibées, il est offert mainlevée des moyens de transport sous caution solvable ou sous consignation de la valeur. Cette offre,

– paragraphe 2 –

ainsi que la réponse, sont mentionnées au procès-verbal.

Est-ce que, à votre avis, votre chef aurait dû suivre cette procédure ?

M. M. Camara :

Moi, je suis un exécutant. C'est au chef d'apprécier cela. Je ne dois pas vous apprécier cela.

M. Thiam :

Très bien. Je vais en terminer avec le procès-verbal. Vous confirmez au Tribunal que vous l'avez signé sans le lire ?

M. M. Camara :

(Pas de réponse)

M. Thiam :
Réponse, Monsieur Camara ?

M. M. Camara :
Oui ? Si je l'ai ?

M. Thiam :
Signé sans le lire.

M. M. Camara :
Non.

M. Thiam :
Non, cela veut dire vous l'avez signé après l'avoir lu, ou vous ne l'aviez pas lu ?

M. M. Camara :
Non, je ne l'ai pas lu.

M. Thiam :
Donc, vous ne pouvez pas, ici, témoigner du contenu du procès-verbal ?

M. M. Camara :
Non, je ne peux pas témoigner du contenu du procès-verbal.

M. Thiam :
Monsieur le Président, je crois que j'en ai terminé.

The President:
Thank you very much.
Mr. Plender, do you have any questions?

Mr. Plender:
Mr. President, I have no questions to put, either under my own name or that of Mr. Bangoura.

The President:
Thank you. We are very relieved to hear that!
Mr. von Brevern, would you like to re-examine?

Mr. von Brevern:
After we have heard the questions of Maître Thiam, we have some additional questions. My colleague Mr. Camara will start with his questions, if you will allow it.

The President:
This is another Mr. Camara who will re-examine Mr. Camara!
Maître Thiam?

INTERVENTION PAR M. THIAM
CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES
[PV.99/11, F, p. 34–36]

M. Thiam :

Je suis désolé de perturber le déroulement de l'audience. Je voudrais simplement que M. Camara nous donne son identité exacte.

The President:

Yes, that is an initial piece of information that we would all like to have.

Mr. von Brevern, could you give us some information about Mr. Camara or would you like him to do that himself?

Mr. von Brevern:

I would like Mr. Camara to introduce himself.

The President:

Mr. Camara, will you do that, please?

M. M. A. Camara :

Je suis donc Mamadi Askia Camara, directeur de la division de la réglementation et de la législation à la direction nationale des douanes à Conakry.

The President:

Thank you. Mr. Camara, does the witness Mr. Camara work under you, or do you work with him?

M. M. A. Camara :

Je ne travaille pas avec M. Mangué Camara, mais je suis responsable au niveau de l'administration centrale chargée des questions de réglementation et de législation. Je travaille avec tout le monde dans la mesure où je conçois, j'élabore les projets de textes qui régissent l'activité douanière en Guinée. Je vous remercie.

The President:

Thank you.

Maître Thiam, is that adequate for you?

M. Thiam :

M. Camara, peut-il nous dire si M. Mamadi Askia Camara – si je n'écroche pas votre nom et vous m'en excuserez si tel était le cas – je crois qu'il est le supérieur hiérarchique du témoin. Vous êtes, dans l'administration, son supérieur hiérarchique ?

The President:

That is precisely the question that I asked. Could you please answer it? I asked whether you worked with him or whether he worked under you, and Maître Thiam is asking if you are his superior.

M. M. A. Camara :

Dans la structure des administration douanières, il y a des services centraux et il y a les services extérieurs. Il y a l'administration centrale, il y a le service d'exécution. Je ne travaille pas directement avec M. Mangué Camara, non, mais je suis de l'administration centrale, chargé simplement de la conception et de l'élaboration des projets de texte. Donc, à ce titre, du point de vue hiérarchie, je pourrais être à un grade supérieur par rapport à lui.

The President:

Maître Thiam, is there any objection, and, if so, what is the precise objection, to Mr. Camara re-examining the witness Camara on behalf of Guinea?

M. Thiam :

Monsieur le Président, M. Camara est le supérieur hiérarchique du témoin. Je pense qu'en cette qualité il ne peut pas l'interroger. Maintenant, je me mets à la disposition du Tribunal.

The President:

Mr. Camara?

M. M. A. Camara :

Je ne sais pas ce qu'il entend par supérieur hiérarchique. Je regrette. Je pourrais être absolument directeur national des douanes de mon pays, cela ne signifie pas que je suis un supérieur hiérarchique direct de mon agent M. Mangué Camara. Je suis dans la hiérarchie de l'administration, nécessairement, un peu plus au-dessus de M. Mangué Camara, mais je ne suis pas son supérieur hiérarchique direct. Entre M. Mangué Camara et moi-même, il y a beaucoup d'autres étapes. Il n'est qu'un agent d'une unité d'exécution. Entre lui et moi il y a bien d'autres structures. Je ne suis donc pas son supérieur hiérarchique.

The President:

Mr. Thiam?

M. Thiam :

La question n'est pas qu'il soit ou pas le supérieur hiérarchique direct. La question est qu'il est le supérieur hiérarchique, comme il la dit lui-même et, en cette qualité, je vois mal comment il pourrait interroger le témoin.

The President:

At all events, the issue is fairly simple. The Government of Guinea has the right to choose its representation. It has chosen Mr. Camara, who happens to work for the Customs service, as one of the advocates in this case. The Tribunal cannot interfere with this choice, which is a matter for the sovereign State. However, if in putting questions there appears to be either a conflict of interest or an improper use of authority or position, the other party at that time will have a right to object and the Tribunal will decide whether to sustain or overrule the objection. At this point in time I do not think the Tribunal can prevent Mr. Camara from acting as one of the counsel of Guinea. I will permit Mr. Camara to perform the function for which he has been designated by the Agent.

NOUVEL INTERROGATOIRE DE M. M. CAMARA
PAR M. M.A. CAMARA (GUINÉE)
[PV.99/11, F, p. 36–37]

M. M. A. Camara :

Je vous remercie, Monsieur le Président. Je voudrais demander à M. Mangué Camara : est-ce qu'il existe, dans votre administration, une brigade mobile du port ou une brigade mobile nationale ?

M. M. Camara :

Une brigade mobile nationale.

M. M. A. Camara :

Est-ce que la brigade à laquelle vous appartenez ne fait de la surveillance qu'en mer ?

M. M. Camara :

Non, ce n'est pas seulement en mer.

M. M. A. Camara :

Est-ce qu'elle ne fait pas de la recherche et de la répression des fraudes sur les frontières terrestres ?

M. M. Camara :

Oui, elle fait la recherche et la répression des fraudes sur les frontières terrestres.

M. M. A. Camara :

Est-ce que, depuis que vous êtes en douane, vous n'auriez jamais entendu que les contrebandiers étaient quelquefois armés et agressifs ?

M. M. Camara :

Oui, j'ai entendu cela.

M. M. A. Camara :

Et, est-ce que vous n'avez jamais appris que des douaniers ont été tués par des fraudeurs ? Je voudrais par exemple vous rappeler le cas du douanier qui a été tué dans la région de Beyla au poste de Sirana à la frontière guinéo-ivoirienne ?

M. M. Camara :

Oui.

M. M. A. Camara :

Ou encore le cas de M. Joseph Banbeau de la brigade maritime qui a été noyé par des contrebandiers dans l'océan Atlantique en provenance de la Sierra Leone ?

M. M. Camara :

Oui.

The President:

Dr. Plender?

INTERVENTION BY MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/11, E, p. 28]

Mr. Plender:

Mr. President, I am afraid that I have a separate objection. Not being a lawyer, Mr. Camara may not appreciate that re-examination is not the stage for the re-examiner to give evidence.

The President:

You have a point there.

Mr. Camara, if you are going to introduce new evidence, new information, this should be done at the stage of examination-in-chief. What you are required to do at this point is to clarify any issues that you consider need to be clarified in the light of the cross-examination of the other party. You may do so, but you are not permitted to introduce new information.

Mr. von Brevern, please.

Mr. von Brevern:

Mr. President, in my understanding, these questions relate to the question of whether the witness was in fear when he boarded the *Saiga*. This was a subject as to which Maître Thiam put a lot of questions. Therefore, I think that this side has the right to re-examine on those questions.

The President:

It is not so much a question of the re-examination but the nature of the evidence. If the question is whether he had heard of Customs officers being in jeopardy or danger, that relates to the point, but if he is going to introduce examples of which the Tribunal and the other party have had no prior information, that is a completely different situation. I hope you understand the point.

You may proceed.

NOUVEL INTERROGATOIRE DE M. M. CAMARA (SUITE)
PAR M. M.A. CAMARA (GUINÉE)
[PV.99/11, F, p. 37–38]

M. M. A. Camara :

Je vous remercie, Monsieur le Président.

Je voudrais demander à M. Camara : n'est-ce pas pour toutes ces considérations que la loi a reconnu aux douaniers le droit au port d'armes ?

M. M. Camara :

Oui.

M. M. A. Camara :

J'ai entendu dire tout à l'heure à propos du procès-verbal que des éléments auraient manqué. Est-ce que, conformément à l'article 225 du code des douanes, est-ce une obligation d'indiquer l'heure de rédaction d'un procès-verbal conformément à l'article 225 du code des douanes ? Est-ce que les mentions qui sont requises aux termes de l'article 225, est-ce que l'heure du début de rédaction est mentionnée ? N'est-ce pas seulement l'heure de la clôture du procès-verbal qui est mentionnée ?

M. M. Camara :

Oui.

M. M. A. Camara :

Vous avez tout à l'heure été interrogé pour savoir : pour quelle raison avez vous signé un procès-verbal que vous n'avez pas lu. Est-ce que vous n'avez pas signé ce procès-verbal parce que vous avez participé à la saisie ?

M. M. Camara :

Oui.

M. M. A. Camara :

Je vous remercie, Monsieur le Président, ce sont ces clarifications que je voulais demander à M. Camara. Je vous remercie.

The President:

Thank you very much indeed, Mr. Camara.

Mr. von Brevern, we have only three minutes left before the adjournment. Do you think that you can manage in that time?

Mr. von Brevern:

That will be sufficient, Mr. President. I have only a few questions to ask.

RE-EXAMINATION OF MR. M. CAMARA (CONTINUED)
BY MR. VON BREVERN (GUINEA)
[PV.99/11, E, p. 29–30; F, p. 38–40]

Mr. von Brevern:

First, Mr. Camara, you were asked whether, when you received your orders and left the port of Conakry, you knew which vessel you were searching for. What was the answer?

M. M. Camara :

Reprenez votre question.

Mr. von Brevern:

When you left the port of Conakry, did you know which vessel you were looking for?

M. M. Camara :

Il m'a été dit que c'était un navire qui était en train d'opérer en mer, que c'était un navire pétrolier.

Mr. von Brevern:

Is it correct that before you proceeded together with the big patrol boat, you first went out to sea alone from the port of Conakry?

M. M. Camara :

No.

Mr. von Brevern:

You do not remember?

M. M. Camara :

Si j'ai quitté Conakry ? Comment ?

Mr. von Brevern:

Where did you meet the big patrol boat after you left Conakry? Did you leave the port of Conakry together with the big patrol boat?

M. M. Camara :

Oui, oui, nous avons quitté ensemble, avec le grand navire au port de Conakry.

Mr. von Brevern:

So you do not remember that before you met the big patrol boat near the Isle of Soro you alone, the small patrol boat alone, tried to go in a westerly direction to find the vessel you should find?

M. M. Camara :

Voilà, je n'ai pas compris la question. Nous avons quitté dans la petite vedette, nous sommes partis jusqu'à la hauteur du Cap Koundindé. Le patron de la vedette nous a dit de revenir à Soro.

The President:

Mr. von Brevern, I am afraid without waiting for an objection, this witness started telling us in his evidence about when they left in P35, which we have corrected, to go along with the P328. In your examination-in-chief no mention at all was made about the period before. I think it is a little too late now to come back to the period before.

Mr. von Brevern:

Okay. Next question. You have been asked about a time from Maître Thiam, and you said it was about 8 o'clock and not 3.30. Do you remember which time you meant? What happened at 8 o'clock and not at 3.30?

M. M. Camara :

A 3 h 30, là je ne peux pas affirmer cela parce que je n'étais pas dans la cabine. Cela, c'est le chef de mission qui connaît cela. Je ne peux pas vous affirmer cela. Ce qui s'est passé, je ne peux pas vous l'affirmer.

Mr. von Brevern:

No, but you answered a question of Maître Thiam that it was at 8 o'clock. What was at 8 o'clock? Was that the time when you left the big patrol boat in order to proceed to the *Saiga* alone?

M. M. Camara :

Oui, c'était l'heure à laquelle.

Mr. von Brevern:

Thank you. Then Maître Thiam asked you whether you would think that the sirens could have been heard by the *Saiga* and the blue light would have been seen by the *Saiga*. Is it correct that you answered "I do not know"? My question is, do you think that, at the distance from your small patrol boat to the *Saiga*, had there been someone at the porthole of the *Saiga* on deck, would this person have been able to hear the siren and to see the blue light?

M. M. Camara :

Elle pouvait voir parce que déjà, à distance, là où on était, on pouvait voir le bateau. Il pouvait voir et il pouvait entendre.

Mr. von Brevern:

And at the moment you were very close to the *Saiga*, did you still have the sirens on and the signal, the blue light?

M. M. Camara :

Il y avait non seulement la sirène, il y avait la lumière bleue jusqu'au moment où on a fait la sommation, les deux tours, il y avait toujours cela.

Mr. von Brevern:

Thank you. The last question is, is it correct that before the *Saiga* proceeded to the port of Conakry after it had been immobilized, the engine was repaired and was in order and the *Saiga* could move to Conakry with her own engine?

M. M. Camara :

Il est parti de son propre moteur. Le *Saiga* est parti jusqu'à Conakry de son propre moteur, sans aucun problème.

Mr. von Brevern:

Thank you, Mr. Camara.

Thank you, Mr. President, we are now at the end of our re-examination.

The President:

Thank you very much. We are a little past our normal closing time, but not too much. So we will break for two hours and resume at 2 o'clock, at which time I expect you will be calling your third witness.

Mr. von Brevern:

That is correct, Mr. Sow, yes.

The President:

Thank you very much. The sitting will be suspended.

(The Tribunal adjourns at 12.05 p.m.)

Public sitting held on 13 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 13 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Mr. von Brevern, would you please call your witness?

Mr. von Brevern:

The examination will be conducted by my colleague Professor Lagoni.

M. Ahmadou Sow prête serment (en français).

Examination of witnesses (continued)

EXAMINATION OF MR. SOW
BY MR. LAGONI (GUINEA)
[PV.99/12, E, p. 4–21; F, p. 4–30]

The President:

Professor Lagoni, you may proceed.

Mr. Lagoni:

Thank you, Mr. President. Mr. President, Members of the Tribunal, I will start with the questions put to our last witness here.

Your name is Lieutenant Sow? Do I pronounce your name correctly?

M. Sow :

Ahmadou Sow, commandant adjoint et navigateur du patrouilleur P328 de la brigade des unités flottantes de la marine nationale de la République de Guinée.

Mr. Lagoni:

Mr. Sow, your military rank is lieutenant, is that right?

M. Sow :

Exact.

Mr. Lagoni:

Lieutenant Sow, have you written this declaration which bears your name?

M. Sow :

Bien sûr.

Mr. Lagoni:

Did you know that you would be supposed to write such a declaration for the International Tribunal before you came here to Hamburg?

M. Sow :

Non, parce que c'est la première fois pour moi d'être devant une cour internationale. Je savais que je devais faire des déclarations, mais écrites, je ne m'attendais pas.

Mr. Lagoni:

Thank you. Did you write this declaration alone?

M. Sow :

Oui.

Mr. Lagoni:

On the basis of what facts and dates did you write this declaration?

M. Sow :

J'ai écrit cette déclaration en partant de mes notes parce que chaque fois que je fais une mission je m'attends à faire un compte rendu. Donc, ce compte rendu, aujourd'hui, est lié à ma présence ici. Donc j'ai tiré les informations de mes notes.

Mr. Lagoni:

So you are talking about notes. Usually on ships you have a log book. Do you have a log book on your patrol boat?

M. Sow :

Non, compte tenu de ses dimensions, dans ma vedette, je n'ai pas de livre de bord. Je fais juste des prises de notes que je remets au propre une fois arrivé à la base pour me permettre de faire mon compte rendu parce que, pour chaque mission, je dois faire un compte rendu.

Mr. Lagoni:

I can understand that you do not have a log book on the small patrol boat, which is a launch as I understand it. But you have not got a log book on the bigger one, the P328, have I understood you right on this?

M. Sow :

Sur la petite vedette, nous n'avons pas de livre de bord. Sur la grande vedette, à chaque fois que nous devons sortir, on nous donne des fiches où nous pouvons faire des prises de notes pour faciliter, avoir la mémoire pour le compte rendu des événements qui se sont passés.

Mr. Lagoni:

Are you in a position to show such a report, did you write such a report after the mission on 27/28 October 1997?

M. Sow :

C'est exact.

Mr. Lagoni:

Could you show the Tribunal for example such a report here; do you have it with you?

M. Sow :

Oui, je l'ai.

Mr. Lagoni:

Could you show it (*Handed*). Thank you very much. I think we give that with the documents of the case here.

Mr. Plender:

May we be supplied with a copy, Mr. President?

Mr. Lagoni:

We have to make a copy. I do not even have a copy.

The President:

We can arrange for copies to be made very quickly.

Mr. Lagoni:

You also supplied me with a chart, a nautical chart. This is this chart which you have seen before?

M. Sow :

Oui.

(Map distributed to parties and Members of the Tribunal)

Mr. Lagoni:

This is supplied to the parties and to the Tribunal, of course. Did you have the log book of the *Saiga* when you prepared this chart?

M. Sow :

Oui, pour situer les différentes positions et la marche du *Saiga*, oui.

Mr. Lagoni:

Otherwise you could not have the course of the *Saiga* on the chart, I would guess.

M. Sow :

Oui.

Mr. Lagoni:

Did you have the *procès-verbal* of 13 November 1997 for preparing your declaration? When you prepared your declaration for today, did you have a copy of the *procès-verbal*, if I may show it to you?

M. Sow :

J'ai pris connaissance de ce *procès-verbal* seulement une fois à Conakry. Je ne l'ai pas utilisé pour préparer ma déclaration.

Mr. Lagoni:

Thank you. Is this *procès-verbal* a document of the Customs administration, could you tell me? Did you sign it?

M. Sow :

Non, je ne l'ai pas signé.

Mr. Lagoni:

So it is of the Customs administration?

M. Sow :

Bien sûr.

Mr. Lagoni:

So is it correct when I state that the basis for your declaration is your personal memory of the facts and your report?

M. Sow :

Oui.

Mr. Lagoni:

And for the chart ? Did you use the facts in the log book for the chart?

M. Sow :

Oui.

Mr. Lagoni:

Lieutenant Sow, when did you meet me for the first time?

M. Sow :

A mon arrivée ici, à Hambourg.

Mr. Lagoni:

That was on 7 March.

M. Sow :

Oui, non pas le 7, car c'est après le 7 que nous sommes arrivés ici.

Mr. Lagoni:

After 7 March. It was here in Hamburg?

M. Sow :

Oui.

Mr. Lagoni:

Can you please tell the Tribunal whether we had any direct contact before we met here in Hamburg?

M. Sow :

Non, nous n'avons jamais eu de contact direct.

Mr. Lagoni:

Is the situation with the Agent of Guinea in this case, in the *Saiga* case, the same; did you know him before?

M. Sow :

Oui, je le connaissais avant de venir ici.

Mr. Lagoni:

From where did you know him?

M. Sow :

De mon commandement.

Mr. Lagoni:

Did you meet him personally?

M. Sow :

J'ai dit que j'ai su que je devais me rendre ici à partir de mon commandement, de mes autorités, qui m'ont informé que je devais venir ici répondre.

Mr. Lagoni:

So I understand that you did not know him personally before, but you knew about him when you came here?

M. Sow :

Excusez-moi, je n'ai pas bien compris la question.

Mr. Lagoni:

You did not meet Agent von Brevern personally before you came here to Hamburg?

M. Sow :

Non, je ne l'ai jamais rencontré.

The President:

Professor Lagoni, could I please ask, what is the purpose of the question about the knowledge of the witness vis-à-vis the Agent and you? Is that leading up to something; is it part of the evidence?

Mr. Lagoni:

Yes, it is the introduction to lots of data and facts which will come now, Mr. President; and it should just underline the weight of this evidence, and I would also say the neutrality.

According to your declaration, you are – and I apologize for my poor French – *navigateur du patrouilleur P328 de la brigade des unités flottantes maritimes nationales?*

M. Sow :

Je n'ai pas compris la question.

Mr. Lagoni:

You can confirm that that is your position?

M. Sow :

Oui, je suis de la brigade des unités flottantes de la marine nationale.

Mr. Lagoni:

Can you please tell the Tribunal briefly the function of the *brigade des unités flottantes maritimes nationales*; what are they doing, what is their purpose and function, in your words?

M. Sow :

Oui. La brigade des unités flottantes de la marine nationale est une partie de la marine nationale guinéenne chargée de la gestion des différentes unités que nous avons, des différents navires et vedettes que nous avons à la marine.

Mr. Lagoni:

What are you doing with these ships and launches within the Navy? For which purpose are they used?

M. Sow :

A la brigade, nous avons deux catégories de navires. Nous avons les grands navires pour les interventions militaires et les petites vedettes, le secteur dont je fais partie, uniquement chargé de la surveillance et de l'assistance au maintien de l'ordre dans nos eaux.

Mr. Lagoni:

Am I correct when I understand that you are having a kind of coastguard function, as one would say in other countries?

M. Sow :

Exact.

Mr. Lagoni:

So you are surveying environmental matters, fishing matters, customs matters and other matters on the sea?

M. Sow :

Oui, ces vedettes sont bien basées à la brigade. Quand un des secteurs, que vous venez de citer, la douane par exemple, la surveillance de la pêche, les gens de l'environnement qui luttent souvent contre la pollution en mer, quand ils ont besoin d'une mission en mer, ils passent par nous. Nous sommes chargés de les acheminer vers leurs points de mission.

Mr. Lagoni:

So if you say "they" you refer to Customs administration, for example, Fisheries administration, Environmental administration? Do I understand correctly?

M. Sow :

Oui.

Mr. Lagoni:

You yourself do not execute any of the functions then? This is done by those who come aboard your ships?

M. Sow :

Nous, nous sommes chargés d'acheminer l'un de ces secteurs vers le but de sa mission. Nous ne sommes pas des agents compétents concernant l'environnement ou bien la douane ou la pêche. Chaque secteur envoie ses éléments que nous prenons en compte pour les déposer au lieu où ils veulent faire leur travail. Nous ne connaissons rien de ces secteurs, nous sommes juste un moyen de transport.

Mr. Lagoni:

This was exactly the way I understood your function, and this relates also to my question. Turning to the patrol boats, P328 and P35, you are commander of one or both of these patrol boats?

M. Sow :

Je peux préciser, là, que la vedette P328, un peu plus grande, et la vedette P35, plus petite, exécutent toujours les mêmes missions. Elles exécutent les missions ensemble. Nous avons quatre de ces vedettes : deux petites et deux moyennes, le P300, le P30, le P328 et le P35, qui vont souvent de pair pour les missions compte tenu de certaines raisons techniques que nous avons.

Mr. Lagoni:

So if you are in charge of one of those missions and go to sea with the P328 and the P35, you are the only commander over both. Is that correct?

M. Sow :

Oui, je suis le commandant des deux vedettes pour la circonstance, oui.

Mr. Lagoni:

I have a photograph here showing these boats. Could you indicate whether they are on here? Do you know this? This is from Annex 25 to the Memorial. (*Copy handed to witness*)

M. Sow :

Je vois, là, représenté, plus haut, le P328. Au milieu, le P300 et, en bas, le P30 qui est du même type que le P35.

Mr. Lagoni:

Is the P35 on there?

M. Sow :

Non, mais il est du même type.

Mr. Lagoni:

This is not the P35 but exactly the same type?

M. Sow :

C'est le P30, dont je viens de parler, qui fait les missions avec le P300.

Mr. Lagoni:

Can you give some explanations on the boats, please? What is the maximum speed of the big one?

M. Sow :

La vitesse maximale du P328 est de 24 noeuds, quand il était arrivé à l'état neuf. La vedette P35, au moment où on faisait la mission, c'est-à-dire en 1997, elle venait trois ans plus tard d'avoir de nouveaux moteurs, donc elle pouvait développer sa vitesse jusqu'à 45 noeuds, dans des conditions de mer normales.

Mr. Lagoni:

Of course. What are the maximum speeds now or what were they in 1997? Have you any idea? Are they the same?

M. Sow :

Jusqu'à aujourd'hui, le P35 peut développer ses 45 noeuds, mais le P328 ne peut plus développer sa vitesse de 24 noeuds. Aujourd'hui, sa vitesse varie de 11 à 12 noeuds, compte tenu de l'usure des moteurs et ainsi de suite.

Mr. Lagoni:

When I refer to "the small one" I refer to the P35. When I refer to "the big one" I refer to the P328. How many hours can the small one go at maximum speed?

M. Sow :

A l'état normal, en mer, le P35 peut maximum pendant deux heures de temps tenir cette grande vitesse, pas plus.

Mr. Lagoni:

So the range on one way is about 90 miles from the port? You can go away but then you cannot return to the port?

M. Sow :

J'ai dit que la vedette ne peut pas faire plus de deux heures sur une traite une telle grande vitesse de 45 noeuds, sinon nous aurons des problèmes techniques. C'est d'ailleurs conseillé.

Mr. Lagoni:

Let us come to the armament of the patrol boats. It says here that there were, on each one of both, two 12.7 mm mounted machine guns. Is that correct?

M. Sow :

C'est correct, les deux vedettes ont le même armement.

Mr. Lagoni:

Was that also the situation in October 1997?

M. Sow :

Oui, en octobre 1997, c'était le même type d'armes qui étaient à bord.

Mr. Lagoni:

Who was in control of these machine guns: the Navy who was commanding the boats or those officials who are on board for the Customs, for example?

M. Sow :

Non, les fonctionnaires que nous prenons à bord n'ont rien à voir avec la technique que nous avons. Nous avons, pour chaque secteur à bord du navire, des personnes spécialement affectées aux différents secteurs. C'est ainsi que, dans chaque vedette, nous avons des artilleurs qui s'occupent de ces armes.

Mr. Lagoni:

So the mounted machine guns are under your command and under your control. Is that right?

M. Sow :

Exact.

Mr. Lagoni:

Is there permanent – at all times – ammunition on board for these mounted machine guns, on both patrol boats?

M. Sow :

Il n'y a pas souvent de munitions pour ces armes, pour toutes les deux vedettes. Depuis que les vedettes sortent par paire, nous ne trouvons nécessaire d'armer qu'une seule vedette parce que nous ne partons pas pour un assaut, donc une seule vedette armée suffit pour accomplir une mission.

Mr. Lagoni:

Was there ammunition on board on 27 October 1997?

M. Sow :

A bord du P328, il n'y avait pas de munitions. A bord du P35, il y avait des munitions.

Mr. Lagoni:

Thank you. Now we come to the nautical chart number 31056-G. The chart is also on folio. (*Chart projected on screen*) You recognize this chart, I assume?

M. Sow :

Oui, je la reconnais.

Mr. Lagoni:

Are you using these charts in the Guinean Navy?

M. Sow :

Effectivement, c'est la carte que nous utilisons pour la surveillance.

Mr. Lagoni:

There are different navigational lines on this chart. Who drew these lines?

M. Sow :

C'est moi qui ai tiré ces lignes sur la carte.

Mr. Lagoni:

Did you do it before you came to Hamburg?

M. Sow :

Oui, je l'ai fait en Guinée, au moment de l'exécution de la mission, pour la marche-route, après l'accomplissement de la mission, pour la marche-route du *Saiga*.

Mr. Lagoni:

Do I understand correctly that the geographical positions on the chart with the times noted beside the positions are positions of vessels at certain dates?

M. Sow :

Oui.

Mr. Lagoni:

How do you take geographical positions on patrol boats?

M. Sow :

Je peux vous préciser que pour nous situer en mer, dans la grande vedette, le P328, nous avons deux types de GPS. Dans la petite vedette, un seul type de GPS. Dans la grande vedette deux types de GPS, c'est-à-dire un GPS fixe et un autre portatif, et dans la petite vedette, un GPS portatif d'un autre genre.

Mr. Lagoni:

Could you explain to the Tribunal the acronym GPS? What does it mean?

M. Sow :

GPS, c'est un appareil qui aide le navigateur à n'importe quel moment pour situer sa position.

Mr. Lagoni:

Is the position very precise?

M. Sow :
Oui, bien précise.

Mr. Lagoni:
Who is in charge of navigation on the patrol boats?

M. Sow :
A bord du patrouilleur P328, je suis chargé de la navigation.

Mr. Lagoni:
Are you the only one or is somebody else doing the navigation there?

M. Sow :
Quand nous sommes en mer pour une durée, j'ai un officier qui me seconde pour la navigation, avec lequel je m'échange souvent, mais le contrôle de toute la marche me revient, même s'il me relève.

Mr. Lagoni:
Was this also the situation on 27 and 28 October 1997?

M. Sow :
Du 27 au 28, quand nous sommes sortis, conformément à la longueur du marche-route, je me retire pour me reposer et je laisse le soin à un officier, si je suis sûr que nous ne devons pas changer de cap pour une longue distance, je me retire et je confie la responsabilité à un officier de surveiller la marche du bateau.

Mr. Lagoni:
Thank you. Could you also please explain to the Tribunal: when you take positions at sea, on what occasions are you taking a position in the chart?

M. Sow :
Plus souvent, on note sur la carte quand nous changeons de cap, de direction. Quand un événement important se passe, nous notifions.

Mr. Lagoni:
Do you know possibly about merchant vessels: when do they take positions on the chart?

M. Sow :
Je n'ai aucune idée sur les navires de commerce parce que je n'y ai jamais travaillé. Je connais le principe de fonctionnement de la navigation dans les navires de guerre.

Mr. Lagoni:
Lieutenant Sow, you see on the map which you drew yourself: you put in the positions of the *Saiga* and the positions of the *Saiga* were every four hours on the hour. Why do they do this? Have you any idea?

M. Sow :
Dans un cadre général, ou c'est peut-être une coïncidence ... mais en navigation, en principe, qu'il y ait événement ou pas, à chaque quatre heures on doit noter dans le journal de

navigation pour dire l'influence de l'atmosphère, en tout cas l'état de la mer et pour continuer sa route, en principe.

Mr. Lagoni:

And you write down when you change the watch? Is that correct?

M. Sow :

Oui.

Mr. Lagoni:

How many watches did you have in your small patrol boats? Did you have one watch going through all the hours during the missions or did you change at certain hours?

M. Sow :

Comme je viens de le dire plus haut, dans les vedettes de patrouille, comme le plus souvent nous naviguons pas très loin de la terre, on ne change que quand l'un d'entre nous se trouve un peu fatigué, qu'il a besoin de repos et que l'homme qui doit le remplacer peut tenir la place pour un petit temps, juste pour qu'il puisse se reposer. Il n'y a pas un système de quart installé comme pour les grands navires parce que nous sommes dans de petites vedettes. Nous n'avons même pas tellement le temps de nous reposer.

Mr. Lagoni:

So I understand that you have been practically on watch, at least with responsibility, all the time during the mission of 27th and 28th?

M. Sow :

Je peux vous dire oui, parce que je n'ai pas fait plus de trois heures de sommeil pendant toute la sortie.

Mr. Lagoni:

Yes, but you just took a nap, slept and came back, and the watch was going on in this way?

M. Sow :

Exact, parce que je ne voulais pas que mon second fasse des erreurs. J'avais la responsabilité de deux vedettes à ma charge, donc il fallait que je surveille de près.

Mr. Lagoni:

This is exactly what I wanted to know. All the time, it was your responsibility during this mission for both boats?

M. Sow :

Pas de toute la mission. J'étais responsable des deux vedettes et de leurs occupants, c'est-à-dire de la sécurité des deux vedettes et de leurs occupants jusqu'à la fin de la mission.

Mr. Lagoni:

When you say "not the entire mission", was there any other part of the mission, the preparation of the mission, or what are you referring to?

M. Sow :

Je pensais que vous disiez de la mission en général, c'est-à-dire de l'investigation qui a eu lieu dans le tanker après son immobilisation, et tout, non. Je suis responsable des deux vedettes pour amener les concernés jusqu'à destination et les ramener à bon port.

Mr. Lagoni:

There are other notes and other courses drawn on the map. In a moment we will come to that. The other courses indicate the course of the patrol boat or both boats. From where did you get these notes here? What is the basis for the courses of the patrol boats which you drew into the map?

M. Sow :

Comme je l'ai dit plus haut, souvent, nous faisons des prises de notes quand nous sortons et nous avons souvent la carte à bord, nous marquons nos positions et nos caps.

Mr. Lagoni:

I expected that you would say that, and I think that is correct. Lieutenant Sow, you are an experienced navigator. If I give you the course of a ship and the times when the ship was at one place and the time when it is at another place, can you calculate the speed which the ship makes over ground during this time?

M. Sow :

Oui, pour connaître la vitesse d'un navire, il suffit juste d'avoir la distance qu'il a parcouru à un temps bien déterminé. Là, c'est facile de calculer sa vitesse.

Mr. Lagoni:

This speed is the real speed at which it goes over ground? Is that correct?

M. Sow :

Je n'ai pas compris la question.

Mr. Lagoni:

And this speed is not the speed which the ship indicates on its own instruments but the real speed, as written in its papers it can go, a certain number of miles; this is the real speed which the ship went over this distance?

M. Sow :

C'est la vitesse que le navire a parcouru. Le plus souvent, quand on se réfère aux appareils, il y a d'autres influences qui peuvent amener le navire soit à partir plus vite que ce qu'il constate soit moins vite que ce qu'il constate. Donc là, pratiquement, c'est sur la carte que l'on trouve la vitesse réelle du bateau. C'est à partir de la carte que l'on peut calculer la vitesse d'un bateau, connaissant la distance qu'il a parcouru à un intervalle de temps bien précis.

Mr. Lagoni:

Can you mention, for example, circumstances which can either make the ship faster than shown on the instrument or slower?

M. Sow :

Par exemple, si un navire fait face au vent, il parcourt moins de vitesse qu'il ne pense parcourir parce qu'il y a là une force du vent qui le repousse en arrière. Mais s'il fait dos au vent, il va plus vite que ce qu'il pense.

Mr. Lagoni:

And you agree that it is the same, for example, with currents?

M. Sow :

Oui.

Mr. Lagoni:

Thank you. I come now to the preparation for the mission of 25 October which you described in your declaration. You mention in your declaration that you prepared the patrol boat already on 25 October 1997 for the possible event of a mission. What, according to your memory, was this possible event? Why did you start preparing already on 25 October?

M. Sow :

Comme je l'ai indiqué, comme je l'ai narré dans ma déclaration, effectivement, c'est le samedi 25 octobre que nous avons reçu du commandement les instructions d'apprêter la vedette pour une éventuelle mission.

Mr. Lagoni:

Did you get a reason why you should prepare for a mission? Did they tell you?

M. Sow :

On ne nous a pas précisé la mission, on nous a juste dit de préparer les vedettes pour une éventuelle mission.

Mr. Lagoni:

So your superiors did not mention the *Saiga* as the possible target of the mission at that early date?

M. Sow :

Non.

Mr. Lagoni:

Could you explain: do you have any idea what the telecommunications surveillance of tankers in Guinean waters means? Could you explain that, please, to the Tribunal?

M. Sow :

Pour ce qui est de la surveillance radio des pétroliers dans les eaux guinéennes, je ne peux pas donner des détails parce que nous avons une station à la base qui est chargée de cela.

Mr. Lagoni:

But if you say you have a station on your base, this means the monitoring or surveillance is taking place from the base, not from the ships?

M. Sow :

Dans les navires, nous avons des radios, mais pour ce qui est de la surveillance et de l'écoute des émissions en mer, nous avons une station bien spécifique pour cela.

Mr. Lagoni:

Can you indicate on that map where these stations are for communication on the shore? Is it one or are there more, and what are they doing? You can go to the map. You can show it on the folio, if you like, and then it will be even easier.

M. Sow :

En ce qui concerne les stations radio que nous avons le long de notre côte, nous avons la station mer, ici, à Conakry. La station relais de notre base de Koundindé, à Cap Verga, et une autre station à Kamsar, notre base secondaire de Kamsar.

Mr. Lagoni:

They are monitoring the whole exclusive economic zone of Guinea, is that correct?

M. Sow :

Je n'ai pas bien compris la question.

Mr. Lagoni:

Which area are they monitoring? In which area are they listening?

M. Sow :

Ces bases écoutent toute la zone de la Guinée.

Mr. Lagoni:

Can they even listen beyond Guinean waters, for example in Guinea-Bissau waters?

M. Sow :

Excusez, j'ai des problèmes techniques avec l'appareil, je ne comprends pas.

Mr. Lagoni:

The last question was, can the radio survey stations on your coast monitor areas outside the Guinean waters?

M. Sow :

Bien sûr, elles peuvent entendre.

Mr. Lagoni:

If, for example, the *Saiga* comes from Dakar, the survey stations know that she is, for example, in the waters of Guinea-Bissau?

M. Sow :

Exact.

Mr. Lagoni:

Can you explain how they find out by radio survey where these ships are?

M. Sow :

Le plus souvent, ils déterminent les positions de ces navires à partir des émissions de ces navires qui donnent eux-mêmes leurs positions. Notre station radar se trouvant à cette zone est informée de la position du secteur donné, il surveille et voit le mouvement du navire.

Mr. Lagoni:

Why should a merchant vessel give its position when it is, for example, in transit through a foreign exclusive economic zone? Why should it do this?

M. Sow :

Je ne peux pas parler des navires en général, mais le cas spécifique des pétroliers, souvent ils donnent leur point de rendez-vous avec leurs clients. C'est ainsi que nous avons ces positions. Je ne parle pas des navires de commerce en général, mais pour le cas spécial, ce navire donnait ses positions.

Mr. Lagoni:

You say that in general merchant ships do not do that but that the offshore bunkering takers give these positions. To whom are they giving the positions? You said "their clients". Who are their clients?

M. Sow :

Ce sont les navires de pêche qui se trouvent dans nos eaux qui s'approvisionnent à partir de ces pétroliers.

Mr. Lagoni:

Thank you. Is this the way that you also monitored the bunkering of the [*Giuseppe*] *Primo*, *Kriti* and *Eleni G* by the *Saiga*?

M. Sow :

Exact.

Mr. Lagoni:

When did you first hear about the *Saiga*?

M. Sow :

Personnellement, j'ai entendu parler du *Saiga* quand j'étais déjà en mer. Toute l'écoute était faite comme je l'ai dit déjà plus haut par nos stations.

Mr. Lagoni:

Do I understand that your stations knew in advance that the *Saiga* would come into the Guinean exclusive economic zone?

M. Sow :

Oui, les stations le savaient.

Mr. Lagoni:

Can you tell me anything about the frequency of this radio telecommunication between the *Saiga* and fishing vessels? On which frequency do they usually do that?

M. Sow :

C'est au moment où je devais sortir que l'on nous a communiqué une fréquence que nous avons fixée dans notre radio à bord de la vedette P328, soi-disant que c'est la fréquence du navire que vous allez rechercher. La fréquence 83.20.

Mr. Lagoni:

Are the frequencies changed between the offshore bunkering vessel and the fishing boats, or is it always the same?

M. Sow :

Nous ne savons pas s'ils utilisaient d'autres fréquences, mais nous, on les suivait sur cette fréquence que je viens de vous dire.

Mr. Lagoni:

But they may use other frequencies which are surveyed by your coastal surveying stations, is that correct?

M. Sow :

C'est possible, mais je ne peux pas exactement vous dire s'ils peuvent le faire. Je peux exactement donner la fréquence que moi je peux suivre ou le type de radio que moi je peux utiliser à bord pour suivre les conversations.

Mr. Lagoni:

You just mentioned that you learned about the *Saiga* after leaving the port of Conakry. Do you have any idea where the *Saiga* was then? Could you indicate that on the map?

M. Sow :

La première fois que j'ai entendu le *Saiga* répondre à un appel de Conakry, je ne pouvais pas donner la position exacte de *Saiga*, mais je pouvais donner la direction du *Saiga* parce que c'est à partir du radiogoniomètre que nous avons su la direction de l'émission.

Mr. Lagoni:

Was this before the bunkering operation of [*Giuseppe*] *Primo*, *Kriti* and *Eleni G* or after, and can you please indicate on the map in which area you expected the *Saiga* to be?

M. Sow :

Nous pensions que le *Saiga* se trouvait vers cette zone.

Mr. Lagoni:

You did not have the exact position of the *Saiga* at that date?

M. Sow :

En dehors de la portée de notre radar, nous n'avons aucun moyen de donner une position exacte. Nous pouvons avoir une direction d'un objectif, mais le localiser, nous ne le pouvons pas. Donc, on ne savait pas la position exacte du *Saiga*.

Mr. Lagoni:

Could you tell me about the scope of your radar on board?

M. Sow :

La portée maximale de mon radar à bord est de 75 milles marins.

Mr. Lagoni:

Do you always have it on 75 nautical miles?

M. Sow :

Non, cela était la portée maximale. La portée pratique est de 45 à 50 milles marins.

Mr. Lagoni:

Can you measure the distance of an object from a distance of about 45-50 miles very precisely with the radar or not?

M. Sow :

A 40, 45, jusqu'à 50 milles, à cette échelle de travail, avec notre radar, nous pouvons avoir une position approximative d'un objectif parce que, là, nous avons les images nettes qui peuvent nous situer.

Mr. Lagoni:

Thank you. Lieutenant Sow, could you please come back here? I have an *ordre de mission* number 770/MBRSP/SG/DND before me. Have you seen this *ordre de mission* before?

M. Sow :

On m'a parlé de cet ordre de mission qui est l'ordre de mission de notre but, mais qui est de la douane.

Mr. Lagoni:

So this was not your *ordre de mission*? This was the *ordre de mission* of the Customs?

M. Sow :

Oui.

Mr. Lagoni:

Nevertheless, can you help me with this *ordre de mission*? It says "*Objet de la mission: Recherche et répression de la fraude en mer et à terre.*" Do you have any idea what that means?

M. Sow :

Comme je vous l'ai dit plus haut, nos vedettes sont là pour assister les trois secteurs que je vous ai cités pour assumer leur mission. Donc, si la pêche a des éléments d'information pour aller faire un travail en mer, ils viennent à la marine avec leur ordre de mission et on met à leur disposition une vedette pour aller faire le travail. Cela a été le même cas que la douane, qui a eu une source d'information peut-être de la venue du *Saiga* en Guinée ou de la venue d'un pétrolier en Guinée, donc il fallait sortir rechercher, mais là, assisté par la marine qui a les moyens de déplacement.

Mr. Lagoni:

Is there any explanation why they did not say "*recherché et répression de la tanker Saiga*"? Why did they not mention the *Saiga* in this *ordre de mission*?

M. Sow :

Je peux vous dire que la douane fait souvent des missions de recherche, pas pour un cas spécifique, s'ils ont des doutes sur la présence de quelque chose qu'ils veulent rechercher en mer, ils viennent, nous les amenons. Pour ce cas précis, on n'a pas parlé de *Saiga* ou d'autres.

Mr. Lagoni:

You do not know the reasons why they did not mention the *Saiga* in this case, although they already knew that the *Saiga* would come into the exclusive economic zone?

M. Sow :

Pour ces détails, je peux vous dire que seules mes autorités peuvent répondre à cette question. Moi, j'ai été juste informé, le 27, de sortir avec la douane, qu'il y avait une recherche à faire.

Mr. Lagoni:

So they had at least an idea, they did not send you just on any general search. They had a very specific target which they were looking for?

M. Sow :

Certainement, oui.

Mr. Lagoni:

I come now to 27 October which is referred to in your declaration as well. At 12 o'clock you mention in your declaration that you received your orders for the mission from the Naval Chief of Staff, I understand, of the *brigade des unités flottantes de la marine nationale*, is that correct?

M. Sow :

Le 27, j'ai été convoqué à l'état-major de la marine. Donc, ce sont mes autorités qui m'ont dit qu'il y a une mission à faire avec la douane. Cà, c'est à 12 heures que j'ai donc été informé de la mission, que j'ai fait connaissance de la mission : une mission de recherche avec la douane en mer. Cela, c'était le 27 à 12 heures, on m'a informé.

Mr. Lagoni:

Did the Chief of Staff tell you any more than just "you go out on a mission with the Customs"? Did he also tell you which kind of mission; that you were to look for the *Saiga*?

M. Sow :

Le chef a dit que « vous avez une mission avec la douane, qui doit faire des recherches en mer ».

Mr. Lagoni:

Did you get oral or written orders on this mission on this occasion?

M. Sow :

Le plus souvent, on ne reçoit un ordre de mission écrit de la marine que quand nous faisons nos petites missions entre nos bases, mais quand il s'agit d'un des trois secteurs cités plus haut – la douane, la pêche ou l'environnement –, ils viennent avec leurs ordres de mission, mais nous nous recevons là des instructions verbales de sortir le bateau.

Mr. Lagoni:

When it was a verbal order, you expected that they had a very specific, very particular task?

M. Sow :

Exact.

Mr. Lagoni:

Could you please go again to the chart, Lieutenant. (*Witness goes to the chart*) You mention that on 27 October the small patrol boat, P35, had to go to the north first. Can you demonstrate this on the chart, and can you explain what they did, and why they returned?

M. Sow :

Effectivement, le 27, vers les 13 heures et quelque, la petite vedette est sortie parce que l'information de la présence du *Saiga*, du pétrolier, dans la zone-là, était confirmée. Elle était surveillée par notre station de radar de Cap Koundindé. On a dépêché la vedette la plus rapide pour aller à cette zone. Mais, à mi-chemin, notre radar constate qu'il y a une dispersion du groupe de navire qui étaient à ce local. Donc, les navires se dispersent, ils bougent. On a, par la station, rappelé la vedette de venir se compléter à la grande vedette, le P328, parce que la petite vedette ne peut plus aller à elle seule jusqu'en profondeur, donc elle devait revenir s'ajouter au P328 pour continuer la mission.

Mr. Lagoni:

Thank you. Why did you send only the small patrol boat on that date to the north; why did the big one not go immediately with the small one?

M. Sow :

C'est là une question de temps. On voulait, vu la rapidité de la petite vedette, qu'elle couvre rapidement la distance. En partant avec la grande vedette, qui a moins de vitesse, on allait perdre assez de temps pour arriver au lieu.

Mr. Lagoni:

Could you tell me roughly the distance from Conakry to this area where the assembly of boats was discovered?

M. Sow :

La distance entre Conakry et le lieu où se trouvaient ces bateaux, c'est dans les environs de 100 milles marins et quelque.

Mr. Lagoni:

Would the small vessel reach up there with its fuel; was it close enough to go alone?

M. Sow :

La petite vedette peut faire 120 milles marins avec sa quantité de réservoir plein.

Mr. Lagoni:

Under normal speed, I guess?

M. Sow :

Bien sûr, la vitesse économique.

Mr. Lagoni:

Tell me about the communication between the small vessel and the P328. How do they communicate between each other?

M. Sow :

Entre la vedette P35 et le P328, souvent, nous utilisons les VHF comme moyen de communication.

Mr. Lagoni:

How far can you communicate, the distance between the boats, the maximum distance when the communication ends, under normal conditions?

M. Sow :

Conformément à la hauteur de l'antenne de la petite vedette, cette distance de communication varie entre 15 à 20 milles maximum.

Mr. Lagoni:

So if you have to call the small launch back, you do it via the land station? Do I understand you right? When you had to call it back from the north?

M. Sow :

Pour ce cas spécifique, vu la distance, nous avons contacté notre base où la vedette était plus proche pour lui donner les instructions de retourner sur Conakry.

Mr. Lagoni:

Thank you. You were referring to the time 1455 hours in your report. What did you know about the *Saiga* at that time, 1455 hours on 27 October 1997?

M. Sow :

A ce moment, nous avons eu une information qu'il y a séparation de ce lot de navires qui était là. Chacun partait dans sa direction. Donc, on n'avait aucune information précise sur la position du *Saiga*.

Mr. Lagoni:

But you knew that the *Saiga* was in your exclusive economic zone?

M. Sow :

Nous l'espérons, oui.

Mr. Lagoni:

Did you know that she was also in your customs radius? Do you know what the customs radius is?

M. Sow :

Je ne peux pas répondre précisément sur ce qu'est un rayon douanier. Je ne suis pas informé de ce qu'est un rayon douanier, mais quand nous faisons une mission avec la douane, on nous dit jusqu'à quelle distance partir, quelle distance il ne faut pas dépasser de la côte pour qu'il y ait réussite de la mission ou pas.

Mr. Lagoni:

Which distance must you not exceed when you go on a mission with the Customs?

M. Sow :

On nous donne souvent une distance de 170, 175 milles marins.

Mr. Lagoni:

Thank you. At 1705 your report says that the small patrol boat is pulled into position, if I understand it right. Which position is it? Were you tugging, drawing the small patrol boat, or what did you do after you met her?

M. Sow :

A ce niveau, la petite vedette a reçu des instructions de se replier et de venir se rallier à nous aux Iles de Loos. C'est à ce moment que nous l'avons remorquée parce que si nous devons parcourir une grande distance, pour des raisons économiques et de carburant, nous remorquons la petite vedette, nous ne la lâchons que quand il s'agit là d'aller aborder le navire.

Mr. Lagoni:

Did you tow it behind you?

M. Sow :

Pour cette fois-ci, nous l'avons remorquée de côté.

Mr. Lagoni:

Why did you tow it alongside, is that not unusual?

M. Sow :

Cette manière de remorquer n'était pas habituelle.

Mr. Lagoni:

Why was it not usual; why did you do it if it is not usual?

M. Sow :

Pour des raisons bien fondées, des raisons tactiques. Nous l'avons remorquée de côté parce que déjà notre système de remorquage en flèche était repéré et on nous identifiait rapidement à partir de ce système de remorquage.

Mr. Lagoni:

Could you explain this a little more to the Tribunal? You towed the small *vedette* alongside in order not to be discovered on radar. Discovered by whom?

M. Sow :

Le plus souvent, même si nous sortons avec les gens de la pêche, nous avons même eu des informations à partir des navires de pêche, que souvent, dès que nous sortons de Conakry, à partir du radar, dès qu'ils voient deux petits points qui se suivent, que c'est la marine qui est sortie. C'est pour cela, cette fois-ci, nous avons changé notre système de remorquage pour n'être qu'un seul objectif sur le radar.

Mr. Lagoni:

So you did that in order not to be discovered by fishing vessels, other vessels, possibly the *Saiga*?

M. Sow :

Effectivement, c'est pour cela.

Mr. Lagoni:

You mentioned that you went on a comparatively low speed of 6.5 knots. Is that not a very low speed for the big patrol boat?

M. Sow :

C'est une petite vitesse, mais là aussi c'est un autre point de stratégie.

Mr. Lagoni:

Why do you take this strategy?

M. Sow :

Pour nous confondre à tous ces bateaux qui étaient dans le théâtre marin, dans le secteur de notre mission.

Mr. Lagoni:

So you were at this time looking for the *Saiga*; you did not know where the *Saiga* was in the area but you knew that she was in the exclusive economic zone?

M. Sow :

Oui.

Mr. Lagoni:

In which direction did you expect the *Saiga* to sail: to the north, the south or the west?

M. Sow :

Nous savons souvent que, quand un pétrolier quitte le nord, le plus souvent son marche-route est tracé jusque vers le Libéria. Pour nous, le *Saiga* devait forcément continuer vers le sud parce qu'il venait à peine de quitter Dakar, donc sa cargaison n'était pas complètement livrée.

Mr. Lagoni:

You are talking here about offshore bunkering tankers and you will tell the Tribunal that offshore bunkering tankers go on a kind of regular journey from Dakar to the south and then back to Dakar in order to bunker. Is that correct?

M. Sow :

Exactement.

Mr. Lagoni:

So you knew that the *Saiga* was in the area; you had lost her out of sight, at this time, at least, but you knew that she would come south?

M. Sow :

Nous avions grand espoir que le *Saiga* se dirigeait vers le sud.

Mr. Lagoni:

So what were your tactics then to get into contact with the *Saiga* and to control her?

M. Sow :

Notre tactique, d'abord, c'était de ne pas être identifiés parmi tous ces bateaux qui se trouvaient dans le théâtre marin, de continuer notre recherche jusqu'à être en contact avec l'élément que nous recherchions.

Mr. Lagoni:

So you took these precautionary measures, towing alongside, going slowly like a fishing vessel, I would guess?

M. Sow :

Exact.

Mr. Lagoni:

You refer to 1920 hours in your report. We are still on 27 October in the evening. Could you show the geographical position of 1920 hours on the chart? I think you have marked it on the chart. Is that possible?

M. Sow :

A 19 h 20, nous étions à cette position.

Mr. Lagoni:

And then you went in which direction thereafter?

M. Sow :

De cette position, nous avons pris un cap vers le nord-ouest.

Mr. Lagoni:

Because you expected the *Saiga* to come from there and you wanted to approach her in this way? Is that correct?

M. Sow :

Oui, pour augmenter la probabilité de rencontre, oui.

Mr. Lagoni:

You refer to a conversation between the *Saiga* and other vessels at this time, or any conversation. Can you explain what this conversation was? What did you hear in this conversation?

M. Sow :

A cette position, à 20 heures et quelque, comme je l'ai précisé là-bas, nous avons entendu une conversation entre un monsieur qui a émis à partir de Conakry, parce que notre radiogoniomètre nous a indiqué que l'émission est partie de là et *Saiga*, le goniomètre nous a indiqué aussi que la réponse est venue de ce côté. Donc nous avons l'espoir que *Saiga* était dans ce secteur. Nous ne savions pas à quelle position, à quelle distance, mais nous connaissions que la direction était de ce côté.

Mr. Lagoni:

You knew that she was still, or must be, in the exclusive economic zone at this time?

M. Sow :

Effectivement.

Mr. Lagoni:

Who was this gentleman? Can you give any explanation of the conversation between the gentleman in Conakry and the *Saiga* in your exclusive economic zone?

M. Sow :

Je ne connais pas précisément le monsieur, mais ces informations m'ont dit qu'il a donné une alerte à *Saiga*.

Mr. Lagoni:

What kind of warning was this?

M. Sow :

A partir de la conversation, il y a eu un silence radio absolu.

Mr. Lagoni:

But did you hear the warning, the exact words that he was saying?

M. Sow :

Le monsieur parlait en grec. Je ne dis pas que je comprends le grec, mais cela m'a donné une idée de ce qu'il avait dit parce qu'à partir de ce moment-là, il y a eu un silence radio.

Mr. Lagoni:

Were there gentlemen in your ports warning offshore bunkering and warning fishing boats from police or patrols on the sea?

M. Sow :

Le plus souvent, oui.

Mr. Lagoni:

So this could explain why the *Saiga* got a telex warning that patrol boats left Conakry after you had left Conakry?

M. Sow :

C'est possible.

Mr. Lagoni:

Who are the persons who do that? For what purpose are they doing it?

M. Sow :

Je ne sais pas qui sont ces personnes mais en tout cas, je sais qu'il y a une relation entre ces personnes et *Saiga* parce que si *Saiga*, qui a quitté Dakar, est appelé par un monsieur qui est sur la même fréquence à Conakry, il y a un lien.

Mr. Lagoni:

You also mention at 2019 hours, that you listened to a conversation between *Salvatore Primo* and the *Saiga*. Is that right?

M. Sow :

Oui, c'est exact.

Mr. Lagoni:

Can you show me the position on the chart at 2019 hours, your position?

M. Sow :

La première conversation a eu lieu quand nous étions là, à 19 h 20. La deuxième, à 20 h 19, nous étions à cette position. Quand le monsieur a conversé avec *Salvatore Primo* et *Saiga*, le goniomètre nous a indiqué que les réponses venaient de ce côté. C'est à ce moment que nous avons changé de direction pour augmenter la chance de rencontre.

Mr. Lagoni:

Could you explain how you increased your chances of meeting the *Saiga*?

M. Sow :

Nos chances de rencontrer *Saiga* ont été au nombre de trois :

1. Se confondre aux différents bateaux du théâtre, de la zone, c'est-à-dire en vitesse,
2. Ayant remorqué la petite vedette de côté et,
3. Garder une écoute permanente de radio sur la fréquence.

Mr. Lagoni:

Can you explain what you did thereafter until 24 hours, until midnight? Explain that, please, to the Tribunal.

M. Sow :

Jusqu'à minuit ou après minuit, s'il vous plaît ?

Mr. Lagoni:

Until midnight. Between 20 minutes past 8 p.m. until midnight on the 27th.

M. Sow :

A partir de là, nous avons maintenu notre vitesse. (*Le témoin montre l'endroit sur la carte.*) Nous n'avons pas changé la forme de remorquage et avons gardé une écoute permanente radio. Nous avons fait tout le temps un balayage au radar, surveillé vers notre direction.

Mr. Lagoni:

Where had you been at midnight?

M. Sow :

A zéro heure, nous étions à ce secteur. (*Le témoin indique le point sur la carte.*)

Mr. Lagoni:

Where had the *Saiga* been at midnight?

M. Sow :
Le *Saiga* était là, à minuit.

Mr. Lagoni:
The course of the *Saiga* is indicated with a red line. Is that correct?

M. Sow :
Bien sûr, la ligne rouge représente le marche-route du *Saiga*, c'est-à-dire la route suivie par *Saiga*.

Mr. Lagoni:
Please explain to the Tribunal the events and the geographical positions after that, after midnight?

M. Sow :
Nous étions là à minuit, à zéro heure. Cela, c'était le 27. A 3 h 44, après que nous ayons constaté que quelques objectifs que nous voyions n'étaient que des chalutiers de pêche, nous avons changé notre cap pour un nouveau cap. Mais à 3 h 50, 3 h 47 d'abord, *Saiga* a été appelé par des chalutiers.

Mr. Lagoni:
We will come to that in a moment. Just before that, at midnight, you indicated the positions. How far away was the *Saiga*? Could you please show it again on the chart?

M. Sow :
Nous étions là.

Mr. Lagoni:
And the *Saiga*'s position?

M. Sow :
Il était là.

Mr. Lagoni:
Roughly how far is the distance? How many miles?

M. Sow :
A peu près 70 milles marins.

Mr. Lagoni:
So you had her on the radar?

M. Sow :
Nous voyons des objectifs sur le radar, mais pas avec précision. Nous avons cherché à changer ce cap pour essayer de nous rapprocher de ce secteur pour avoir une netteté sur les objectifs que nous voyons sur le radar.

Mr. Lagoni:

Lieutenant Sow, I remember looking into a radar screen and I saw only little white dots. How can you distinguish that this white dot is *Saiga* and these are fishing boats and this is, for example, another merchant vessel?

M. Sow :

Le plus souvent, les différents objectifs, nous les classifions sur l'écran de notre radar à partir de deux principes fondamentaux :

1. la vitesse de déplacement de l'objectif,
2. les dimensions de l'objectif que nous avons sur l'écran du radar.

Le plus souvent, les minéraliers, les pétroliers, les gros navires de commerce, apparaissent beaucoup plus gros que les chalutiers de pêche sur l'écran du radar.

Mr. Lagoni:

But how can you distinguish between the *Saiga* and other merchant vessels, both going south?

M. Sow :

A partir de la vitesse. Mais, si les deux navires ont la même dimension, on ne peut pas les distinguer.

Mr. Lagoni:

So then you depend on the course and the speed, I guess.

M. Sow :

Excusez-moi, je n'ai pas compris.

Mr. Lagoni:

In this situation where you have two radar dots of the same size, then you need the speed and the course to distinguish between them.

M. Sow :

Bien sûr.

Mr. Lagoni:

To see that one might be the *Saiga* and the other is, for example, a merchant vessel going in another direction?

M. Sow :

Exact.

Mr. Lagoni:

But, at midnight, it is still certain that you had the radar dots, but you did not exactly know which one of these is the *Saiga*? But you knew quite certainly that one of those must be the *Saiga*?

M. Sow :

Effectivement, nous avions l'espoir. Mais le doute planait parce que nous ne savions pas à quelle distance *Saiga* se déplaçait vers le sud. Mais nous avions l'espoir quand même que ce

soit lui. L'unique point qui pouvait maintenant nous aider à avoir la certitude devait être notre deuxième moyen, c'est-à-dire l'écoute radio.

Mr. Lagoni:

But the *Saiga* was silent at that time?

M. Sow :

Depuis la conversation de 20 h 19, comme je l'ai dit plus haut, il y a eu un silence radio absolu.

Mr. Lagoni:

Please go on to explain to the Tribunal what happened at 3.50 in the morning or, let us say, after 3 o'clock. Explain that at the chart, please.

M. Sow :

A 3 h 50, de cette position ... d'abord, à 3 h 47, il y a eu rupture du silence radio qui avait lieu depuis 20 heures et quelque. Tout ce trajet, nous l'avons fait avec un silence radio absolu. A 3 h 47, il y a eu rupture du silence radio. On a commencé à appeler *Saiga* sur la fréquence 8320. Cela, c'étaient des chalutiers : *Poseidon*, *Panormitis* et *Combat*, qui appelaient simultanément : « *Saiga, Saiga, Saiga* ». Donc, nous avons stoppé, mais nous avons réduit encore la vitesse, mais nous avons gardé notre direction parce que nous savions que ceux qui appelaient, le goniomètre nous indiquait qu'ils étaient dans ce parage, donc on s'est rassuré.

Quand maintenant, à 3 h 50, *Saiga* a répondu, à l'aide du radar, nous avons remarqué que le *Saiga* était là, distant de nous à 44,5 milles marins, donc à quelque 1,5 mille de la ligne de la frontière sud. Nous avons immédiatement fait cap vers l'objectif. Mais, compte tenu du mouvement de l'état de la mer, on ne pouvait pas prendre une grande vitesse. A partir de là, nous avons juste changé notre système de remorquage parce que, de côté, on ne pouvait pas tellement augmenter la vitesse. Nous avons pris cette fois-ci la vedette par l'arrière. Nous avons fait le remorquage en flèche et nous avons pris la direction de l'estimé *Saiga*.

Mr. Lagoni:

Excuse me, Lieutenant. Explain to me first: you say 1.5 miles away from the boundary. Which boundary is that?

M. Sow :

La frontière sud entre la République de Guinée et la République de Sierra Leone. Elle est représentée par cette ligne rouge, par ces pointillés rouges. Cela, c'est la frontière entre la République de Guinée et la République de la Sierra Leone.

Mr. Lagoni:

It is the boundary line between their exclusive economic zones, I guess.

M. Sow :

Exact.

Mr. Lagoni:

Not between the territories?

INTERVENTION BY MR. PLENDER
DEPUTY AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/12, E, p. 21]

Mr. Plender:

Mr. President, I have refrained from intervening on this most important point I think about a dozen times this afternoon. Professor Lagoni has repeatedly invited the witness to refer to distinctions between exclusive economic zones, territorial sea, contiguous zones and customs zones. It is rather important that the Tribunal should know or should have known from the witness what these are. There is nothing, I think, that can be done about it at this stage, save that the Tribunal should have its attention drawn to the fact that Professor Lagoni has given that evidence and not the witness.

Mr. Lagoni:

Mr. President, I have within my questions a number of questions concerning the training of Lieutenant Sow. Lieutenant Sow is a member of the Guinean Navy and I think everybody can be quite sure that, as a member of the Guinean Navy, he knows the Law of the Sea. I am not sure whether he knows the customs law of Guinea. Perhaps I should have started with these questions at the beginning but I was asked at the beginning, when I was referring to his knowledge about me, what the purpose of this was and so I stopped with this and immediately went into the matter. I am prepared to ask Mr. Sow now, of course, about his training with respect to the law of the sea.

The President:

Could you please do so.

EXAMINATION OF MR. SOW (CONTINUED)
BY MR. LAGONI (GUINEA)
[PV.99/12, E, p. 21–23; F, p. 30–32]

Mr. Lagoni:

Mr. Sow, do you know what a territorial sea is?

M. Sow :

Oui, je sais ce qu'est une mer territoriale.

Mr. Lagoni:

Can you please explain to me where the territorial sea of Guinea is and how broad it is?

M. Sow :

La largeur des eaux territoriales de la Guinée s'étend à 12 milles marins, juste à partir de la ligne de base, 12 milles marins. Cela, ce sont les eaux territoriales de la République de Guinée.

Mr. Lagoni:

Is it a part of your territory?

M. Sow :

Exactement.

Mr. Lagoni:

Do you have a straight base line or a so-called natural base line? Is the base line drawn between islands and the coast or is it on the low-water line?

M. Sow :

Les lignes de base sont souvent, chez nous, tirées à partir du niveau le plus bas de l'eau et les parties terrestres les plus avancées dans la mer.

Mr. Lagoni:

That is correct. Do you know what a contiguous zone is?

M. Sow :

La zone contiguë s'étend à 24 milles marins.

Mr. Lagoni:

Did Guinea establish a contiguous zone?

M. Sow :

Effectivement, la Guinée a établi une zone contiguë.

Mr. Lagoni:

If you leave Conakry port and go seawards through the territorial sea, through the contiguous zone, in which zone do you then come?

M. Sow :

Après la zone contiguë, je viens à la zone économique exclusive, qui s'étend à 200 milles marins.

Mr. Lagoni:

Measured from where?

M. Sow :

A partir de la ligne de base.

Mr. Lagoni:

Did you get any legal training in your education?

M. Sow :

Je n'ai pas compris la question.

Mr. Lagoni:

Have you studied law before you became a lieutenant of the Navy?

M. Sow :

Non, je n'ai pas fait d'études de droit.

Mr. Lagoni:

Have you learnt these things – the territorial sea, the contiguous zone, the exclusive economic zone – during these days from me?

M. Sow :

Non, je l'ai appris dans mon pays, un peu à l'état-major. Etant un élément qui travaille dans les unités flottantes de la marine guinéenne, il faut au moins que j'aie une notion de ces choses élémentaires.

Mr. Lagoni:

Have we both talked about these matters at all during the few days while we have known each other?

M. Sow :

Non.

Mr. Lagoni:

I can confirm that. Who drew the southern boundary line on your chart?

M. Sow :

La ligne de frontière sud et nord sont souvent établies dans nos bureaux d'opération à l'état-major.

Mr. Lagoni:

Are they usually in charts of this kind?

M. Sow :

Oui.

Mr. Lagoni:
In naval charts?

M. Sow :
Ces cartes sont des cartes que nous utilisons spécialement à la marine. Donc, tous les navires qui se déplacent, se déplacent souvent avec les cartes qui ont ces délimitations.

Mr. Lagoni:
For what purpose are these boundary lines drawn in these charts?

M. Sow :
Pour que nous sachions que c'est là qu'est la limite entre la Guinée et la Sierra Leone et savoir comment agir en cas de mission.

Mr. Lagoni:
Why do you have to know that? Are you not allowed to operate outside your exclusive economic zone?

M. Sow :
Excusez-moi, reprenez la question.

Mr. Lagoni:
Why do you need to know where the boundary lines are? Can you not operate, for example, in the exclusive economic zone of a neighbouring State in general?

M. Sow :
Il y a des points qui peuvent nous donner le droit d'opérer dans des zones économiques des pays limitrophes, par exemple, en Guinée-Bissau, nous avons un accord de poursuite. Là, je crois que si nous sommes venus jusque là, c'est parce que déjà nous avons détecté le navire. Il était encore dans nos eaux. Donc, nous avons continué notre poursuite.

Mr. Lagoni:
I was going to ask you about that. Do you know about the right of hot pursuit?

M. Sow :
Je pense avoir un peu de notion sur le droit de poursuite.

Mr. Lagoni:
Why was it important for you to discover the *Saiga* before she left the exclusive economic zone of Guinea?

M. Sow :
Il était important pour nous de découvrir le *Saiga* avant qu'il ne quitte notre zone économique parce que, déjà, nous avons une information que *Saiga* a fait des opérations illégales, que nous considérons illégales dans notre zone contiguë. Donc nous avons le droit de le poursuivre.

INTERVENTION PAR M. THIAM
CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES
[PV.99/12, F, p. 32–33]

The President:
Maître Thiam ?

M. Thiam :
Encore une fois, Monsieur le Président, nous sommes obligés de constater que les questions posées par M. le professeur Lagoni suggèrent les réponses. Le professeur Lagoni demande au lieutenant Sow pourquoi est-ce qu'il était important, pour lui, de découvrir le *Saiga* avant qu'il ait franchi la limite sud de la zone économique exclusive de la Guinée ? Or, à aucun moment le lieutenant Sow n'a dit que c'était important pour lui. Comme le docteur Plender le faisait remarquer tout à l'heure, c'est bien sûr trop tard, mais nous demandons au Tribunal de tenir compte de ce fait.

The President:
Thank you very much. Both points are going to be in the *procès-verbal* and the Tribunal will, as you have suggested, take account of these facts and draw its own conclusion.

Mr. Lagoni:
Mr. President, allow me to make one remark in reply to the intervention of Maître Thiam. Lieutenant Sow himself started talking about hot pursuit before I did, as far as I remember, and this was the reason why I asked him for further details. I understand how important it is for every naval officer to know exactly whether or not the ship is within his competence, and there was no intention to suggest answers to him.

The President:
Very well. I think the matter is concluded now, so you may proceed.

EXAMINATION OF MR. SOW (CONTINUED)

BY MR. LAGONI (GUINEA)

[PV.99/12, E, p. 23–26; F, p. 33–36]

Mr. Lagoni:

Can we be very precise? We heard the other day about Sir Conan Doyle and the importance of precision. Can we be very precise about the details from 3.50 in the morning? Could you please start again there?

M. Sow :

Comme je l'ai déjà dit, à 3 h 50, quand *Saiga* a répondu aux appels et a donné son nouveau point de rendez-vous, c'est-à-dire quand il a répondu, il a dit à ceux qui l'appelaient que le nouveau point de rendez-vous pour le ravitaillement est à la position 9°00' et 15°00'.

Mr. Lagoni:

Can you please show on the chart this new meeting point?

M. Sow :

Le nouveau point de rendez-vous est là : 9°00'N et 15°00'O.

Mr. Lagoni:

What did you do then?

M. Sow :

Ayant pivoté et constatant sur notre écran de radar une image nette – l'unique – on s'est dirigé vers cette position parce que tous les autres objectifs, nous les avons laissés à une si grande distance et, selon l'heure de rendez-vous, nous ne pensons pas que *Saiga* puisse être là. Donc, nous avons eu une nette idée que c'était *Saiga*. Donc, de là, nous avons commencé la dernière opération de poursuite. En changeant notre cap, en se dirigeant vers lui et en prenant une vitesse de 7,5 noeuds parce que, avec la vedette, le temps était très agité, on était obligé de nous soumettre à cette vitesse, espérant que si –

Mr. Lagoni:

Excuse me, Lieutenant Sow, a very important point is whether you were sure or whether you just roughly estimated that this was the *Saiga*. Maybe it is because of the translation but I did not get it very clear. Could you repeat that?

M. Sow :

On était sûr que c'était le *Saiga* parce que l'unique objectif de grande dimension qui se dirigeait vers ce point de rendez-vous nous a donné la précision, là, que c'était le *Saiga*.

Mr. Lagoni:

Why did you not immediately send the small patrol boat?

M. Sow :

Le plus souvent, la petite vedette, nous ne la lâchons que quand nous sommes à proximité de l'objectif, compte tenu de la faiblesse de réception de la radio qu'elle a à bord, parce que nous ne voulons pas perdre le contact avec la petite vedette.

Mr. Lagoni:

How far away were you from the *Saiga* at that time?

M. Sow :

A ce moment, on était à environ 44,5 milles marins.

Mr. Lagoni:

What did you do then, and what did the *Saiga* do then?

M. Sow :

Quand nous avons repéré, conservé la vedette en remorquage en flèche, pris une vitesse de 7,5 noeuds, et commencé par la grande vedette sur le canal 16 à faire des appels. Parce que nous étions sûrs là que c'était *Saiga*. Nous avons commencé à partir de là à l'appeler sur le canal 16. Nous avons progressé –

Mr. Lagoni:

Excuse me, just to make it clear, do I understand correctly that channel 16 is on the radio? What were you hailing?

M. Sow :

Oui, sur le canal 16. Nous avons commencé à l'appeler. Estimant déjà que c'était lui, il fallait qu'on lui signale notre présence et que nous lui intimions de stopper. Il n'y a eu aucun résultat. Nous avons progressé, progressé. Quand la distance nous a permis d'être en contact avec la petite vedette, sans anomalie de liaison radio, nous avons lâché la vedette. Cela, c'était à 8 h 30. La petite vedette, avec le temps qu'il faisait, la mer était un peu agitée, a continué vers *Saiga*.

Mr. Lagoni:

Thank you, Mr. Sow. Two more questions. Is channel 16 a channel which is usually used in navigation or is it a channel which you used specifically for the Navy?

M. Sow :

Quand nous sommes en mer, pour être en contact avec tout autre navire, nous nous mettons sur le canal 16, qui est le canal international de communication. Mais entre nous, entre les deux vedettes, nous avons un autre canal spécial de travail.

Mr. Lagoni:

What did *Saiga* do then? Could you discover this on your radar screen?

M. Sow :

Bien sûr, on le voyait très bien sur l'écran du radar. C'est la netteté de sa forme qui nous a dit que c'était effectivement *Saiga*.

Mr. Lagoni:

Was the *Saiga* moving? Was she going on sailing?

M. Sow :

Saiga se déplaçait. Quand nous l'avons vu, il se déplaçait vers le lieu de rendez-vous. A un certain moment, nous avons constaté une réduction considérable de la vitesse de *Saiga*, juste après avoir franchi la frontière.

Mr. Lagoni:

What did the *Saiga* do thereafter, and could you see that on the radar screen?

M. Sow :

Souvent, quand nous lâchons la vedette, nous déduisons la portée du radar pour surveiller, non seulement l'objectif que nous suivons, mais la vedette que nous avons lâchée. Donc, nous avons constaté une diminution considérable de la vitesse. On ne pouvait pas affirmer que *Saiga* avait stoppé, mais la vitesse avait considérablement diminué après avoir franchi la ligne de la frontière. Quand la vedette est arrivée effectivement, *Saiga* était stoppé, mais n'avait pas mouillé son ancre. Juste après que la vedette s'est approchée, ils ont lancé les moteurs et ont commencé à faire route vers la haute mer.

The President:

Professor Lagoni, may I please have your attention? It is now exactly 4 o'clock. If you are likely to complete in two minutes, I would ask you to continue but if, as I suspect, it is going to be a little longer, I would suggest that we should close the sitting now and resume on Monday morning.

Mr. Lagoni:

Thank you, Mr. President. I apologize that I did not keep the time in view. At the moment I suggest that we continue on Monday. I will need some more time than two minutes. Thank you very much.

The President:

Thank you very much.

Before we adjourn, I want to draw attention to the problem about time. We had originally scheduled everything for the first stage presentations to be completed today. It is quite clear that we will need the whole of Monday. If we do not complete by Monday, we will have a little difficulty. May I therefore urge all sides to exercise a little restraint. I do so reluctantly because I do not want in any way to put you under any constraint in the presentation of your case. As we have previously agreed, if we are not able to complete in the time that we have set aside, it will have an effect on the time available to you for your final submissions, and we would like to give you as much opportunity for those as possible. I hope that it will be possible for us to organize matters so that we can at least complete the first round by the end of the day on Monday. If not, we will have a little problem, but we will deal with it if and when we have to address it.

Mr. von Brevern, please.

Mr. von Brevern:

Mr. President, it is of course also dependent on the length of the cross-examination of Captain Sow on Monday whether we can come to an end with our statements on Monday. In this connection I would be very grateful if the Tribunal could indicate to us how much time would be left for us compared with the originally offered 12 hours. Thank you.

The President:

Thank you very much. The Registry is keeping an accurate tab of the timing. We will of course inform you about that. I address this appeal to both sides, because as I am sure you understand, the re-examination depends on the cross-examination, and the cross-examination depends on the examination-in-chief. So I think everything is related to every other thing, and

if there is to be restraint it has to be all round. But certainly we will inform you about how much time you have remaining out of the originally allocated time, taking into account the time that you took for cross-examination, which as we have agreed will be taken out of the time originally allocated to you. We also agree that we will be a little flexible about that, but at the end of the day the flexibility that we exercise for the first round will be a restriction on our part vis-à-vis the time allocated to parties for the second round. But we will give you the information, and as I said, if there is mutual restraint on the part of you both we may not need to go into the exact allocation of minutes. On the other hand, if we have to do that, then we have got information on the basis of which we shall do that.

May I then declare the sitting closed. We meet at 10 o'clock on Monday.

(The Tribunal rises at 4.00 p.m.)

Public sitting held on 15 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 15 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Mr. von Brevern, I take it you are continuing with the examination of witness Sow?

Mr. von Brevern:

Yes, Mr. President. Professor Lagoni will do this.

Examination of witnesses (continued)

EXAMINATION OF MR. SOW (CONTINUED)

BY MR. LAGONI (GUINEA)

[PV.99/13, E, p. 4–6; F, p. 4–8]

Mr. Lagoni:

Mr. Sow, we proceed with the questions from yesterday. You remember the chart shown down there?

M. Sow :

Oui, je me souviens.

Mr. Lagoni:

I have some questions relating to the signals given from your patrol boats to the *Saiga*. You mentioned that you were calling the *Saiga* before 4 o'clock on the radio. Is that right?

M. Sow :

J'ai dit que, à 3 h 50, quand nous avons détecté le *Saiga* et avons eu l'assurance que c'était le *Saiga*, immédiatement, dans le grand patrouilleur, nous avons commencé à appeler le *Saiga* sur le canal 16.

Mr. Lagoni:

Did the *Saiga* react to that?

M. Sow :

Non, il n'a pas réagi.

Mr. Lagoni:

You mentioned also that the small patrol boat was the first to arrive at the *Saiga*. Did the small patrol boat use any signals and, if it used signals, please explain which signals?

M. Sow :

Quand j'ai largué la petite vedette, à 8 h 30, à destination de *Saiga*, j'ai donné consigne au patron de la petite vedette, le P35, non seulement de brancher sa radio sur le canal 16 pour commencer les appels, comme je le faisais depuis 3 h 30, mais, en plus, d'augmenter sur ce signal les signaux sonores et lumineux, c'est-à-dire que, sur la petite vedette, il y a un feu tournant bleu plus une sirène. Donc, j'ai demandé de mettre ces deux autres moyens en marche pour ajouter sur les appels qu'ils devaient continuer à faire.

Mr. Lagoni:

Are you sure that the Captain of the small patrol boat switched on these signals?

M. Sow :

Je suis sûr qu'il les a émis. Non seulement je voyais le feu tournant bleu, mais encore, comme j'avais mon VHF sur le canal 16, je l'écoutais en train d'appeler.

Mr. Lagoni:

Are these the signals you usually give in an ordinary police action against a ship on the seas?

M. Sow :

Oui. Que ce soient les bateaux de pêche ou les autres bateaux avec qui nous voulons être en contact, nous utilisons souvent ces signaux.

Mr. Lagoni:

Do you often use them or do you usually use them in this situation, for example, if you want to stop a fishing vessel?

M. Sow :

Si nous voulons arrêter un bateau de pêche, nous utilisons ces signaux.

Mr. Lagoni:

It has been said by another witness that there was ringing of a bell also. What kind of bell was that?

M. Sow :

Dans la petite vedette, il n'y a pas de cloche, mais, dans la grande vedette, nous avons une cloche. Dans mon souvenir, nous n'avions pas besoin d'utiliser cette cloche. Peut-être que le mauvais temps faisait résonner la cloche, mais ce n'était pas là des signaux.

Mr. Lagoni:

The witness was on the big patrol boat. Are there any signs on your patrol boats outside on the hull?

M. Sow :

Oui. En dehors de la coque, nous avons les numéros des différentes vedettes, par exemple la lettre P à côté du chiffre 328 sur la grande vedette et la lettre P plus le chiffre 35 sur la petite vedette. Ce sont là des chiffres réglementaires bien indiqués.

Mr. Lagoni:

Did you fly a flag on the patrol boat, on the big one and on the small one?

M. Sow :

Sur toutes les vedettes, il est obligatoire de porter le pavillon de la couleur nationale, que nous soyons à quai ou en mer.

Mr. Lagoni:

This was the flag of the Republic of Guinea I understand?

M. Sow :

Effectivement.

Mr. Lagoni:

Can you indicate to the Tribunal how big the numbers you were referring to are, just indicate it with your hands?

M. Sow :

Sur la grande vedette, à peu près, la lettre P et les chiffres peuvent avoir cette dimension ... (*Le témoin indique une dimension avec ses mains, environ 50 à 60 cm.*) ... et, sur la petite vedette, c'est un peu plus petit.

Mr. Lagoni:

Now, to take another tack, you mentioned that there are mounted machine guns on both patrol boats. Is it possible that the machine gun of the small patrol boat was used in order to stop the *Saiga*?

M. Sow :

A ma connaissance, non.

Mr. Lagoni:

So you did not get a report on this, did you?

M. Sow :

Quand ils ont été en contact, c'est-à-dire quand la petite vedette a été en contact avec le *Saiga* qui a tenté de fuir, j'ai eu, après mon arrivée, un compte rendu du patron de la vedette P35 qui m'a dit qu'il y a eu usage des armes à bord, des armes individuelles, pour faire la sommation, mais il ne m'a pas rendu compte qu'ils ont utilisé les armes fixes à bord.

Mr. Lagoni:

Who had used their own weapons – the Customs officers or the Navy officers?

M. Sow :

Ce sont les douaniers. Il n'y avait pas d'officier marin dans la petite vedette. Ce sont les douaniers qui ont utilisé leurs armes individuelles avec lesquelles ils étaient venus s'embarquer dans les vedettes.

Mr. Lagoni:

According to your naval rules, can you use the 12.7 mounted machine gun in order to stop a foreign vessel at sea when the foreign vessel resists stopping?

M. Sow :

Pour l'usage des armes à bord des vedettes, nous avons deux types de consignes. La consigne générale donnée pour les vedettes est, en cas d'extrême nécessité, quand l'équipage et la vedette se trouvent exposés à un danger, de faire usage des armes pour faire la sommation et maîtriser la situation. En plus de cela, quand vous sortez avec votre vedette, vous pouvez avoir des initiatives, selon les conditions qui se créent, à donner instruction de faire usage des armes, mais nous avons cette consigne générale qui nous permet d'utiliser les armes devant un navire qui refuse d'obtempérer. Avant, bien sûr, d'utiliser ces armes, il faut être sûr que vous avez été identifié par ce navire et qu'il refuse de stopper.

Mr. Lagoni:

Are you allowed to use the vessel in order to give warning shots or shots in order to break their resistance: which are you referring to, or both, possibly?

M. Sow :

Nous utilisons ces armes pour faire une sommation, pour attirer beaucoup plus d'attention sur nous et pour prouver à l'intéressé qu'il y a une force qui veut qu'il s'arrête.

Mr. Lagoni:

Where are you shooting when you shoot warning shots: in front of the ship, before the bow, or above the ship?

M. Sow :

Il m'est un peu difficile de répondre à cette question parce que c'est la vedette d'abordage, le plus souvent, qui fait les coups de sommation. Donc, cela dépend de la position dans laquelle elle se trouve, le plus souvent à une distance du navire, mais avec les canons pointés vers le haut. Ce sont les consignes générales qui ont été données.

Mr. Lagoni:

Thank you. Can you tell me about the weather conditions when both patrol boats arrived at the *Saiga*?

M. Sow :

Lorsque les deux vedettes sont arrivées, la mer était agitée. Pour la petite vedette, la mer était agitée. On pouvait considérer que le temps était mauvais pour les vedettes, compte tenu de leur dimension.

Mr. Lagoni:

But is it possible that the *Saiga* did not consider it rough?

M. Sow :

Je pense que, pour le *Saiga*, c'était une mer normale parce que, compte tenu de ses dimensions et de sa cargaison, il était quand même stable sur l'eau.

Mr. Lagoni:

Do I understand you correctly that the sea and weather conditions are dependent on the point of view: they may be different as seen from a big boat or seen from a small boat?

M. Sow :

Exactement, c'est bien cela.

Mr. Lagoni:

When you arrived with the big patrol boat at the *Saiga*, did you see any damage on board the *Saiga*?

M. Sow :

Arrivés à bord du *Saiga*, à vrai dire, je n'ai pas pu constater le bateau parce que la mer était agitée, de telle sorte que j'ai eu juste le temps de débarquer le reste des douaniers pour rejoindre l'équipe d'abordage qui était à bord et retirer la vedette parce qu'elle se cognait au *Saiga*; donc, il fallait la retirer pour des mesures de sécurité.

Mr. Lagoni:

Have you been aboard the *Saiga*?

M. Sow :

Non, je ne suis pas monté à bord du *Saiga*.

Mr. Lagoni:

Would you please look at the map? There is a straight line from the position where the patrol boats arrested the *Saiga* towards Conakry. Which course is that?

M. Sow :

Si je me rappelle bien, c'était le cap 66 degrés, en direction de Conakry.

Mr. Lagoni:

I just wanted to know if this was the course that the boat took back to Conakry. I did not want to know the exact geographical course.

M. Sow :

C'était la route suivie par *Saiga* et les deux vedettes pour retourner à la base à Conakry.

Mr. Lagoni:

The *Saiga* went on its own engine to Conakry, is that right?

M. Sow :

Effectivement.

Mr. Lagoni:

Thank you very much, Lieutenant Sow.

Mr. President, this is the end of my questions.

The President:

Thank you very much. Is that the end of the examination?

Mr. von Brevern:

Yes, Mr. President.

The President:

Mr. Plender?

Mr. Plender:

Maître Thiam will put questions to the witness, Mr. President.

The President:

Maître Thiam, please.

CONTRE-INTERROGATOIRE DE M. SOW
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/13, F, p. 8–35]

M. Thiam :

Monsieur le Président, je vous remercie de me donner la parole.

Bonjour lieutenant. Est-ce que nous pourrions commencer par votre formation ?

M. Sow :

Si vous le nécessitez, oui.

M. Thiam :

Vous avez une formation continue dans l'armée, plus précisément dans la marine ?

M. Sow :

J'ai intégré la marine en 1982. De 1982 à 1985, j'ai fait l'Ecole navale du Libéria. De 1987 à 1992, j'ai fait la Grande école navale de Bacou, dans l'ancienne Union soviétique, toujours dans la spécialité de navigation.

M. Thiam :

Est-ce que vos cours intègrent quelques notions de droit ?

M. Sow :

Je n'ai pas suivi de cours de droit dans ces différentes écoles, mais, à mon retour, quand j'ai été embarqué, on nous a donné quelques notions sur le droit en mer.

M. Thiam :

Vous avez dit, samedi, que l'on vous a expliqué un peu quelles étaient les différentes zones maritimes.

M. Sow :

Samedi, je vous ai dit que j'ai eu quelques notions de droit de la mer à partir de mon état-major, mais, pour ce qui est des délimitations, j'ai suivi ces cours depuis l'ancienne Union soviétique.

M. Thiam :

En quelle année, s'il vous plaît ?

M. Sow :

De 1987 à 1992.

M. Thiam :

C'est donc pendant ces cours que vous avez appris à délimiter de manière précise ou imprécise, vous le direz, les différentes zones maritimes ?

M. Sow :

C'est exact.

M. Thiam :

C'était précis ou imprécis ?

M. Sow :

De manière imprécise. On m'a donné une notion des différents types de zones que peut avoir un pays et, d'une façon précise, comment faire cette délimitation. J'ai dit de manière imprécise parce que les différentes zones diffèrent selon les pays.

M. Thiam :

Mais, une fois de retour en Guinée, votre pays, est-ce que vous avez pu déterminer de manière exacte les différentes zones maritimes ?

M. Sow :

Oui, j'ai pu.

M. Thiam :

Indépendamment de cela, est-ce que votre formation vous apprend à distinguer les différentes manières de calculer la vitesse d'un navire par rapport au fond, par rapport à la surface ?

M. Sow :

Oui.

M. Thiam :

Est-ce que vous connaissez les différentes manières de calculer les différentes unités de mesure des distances en mer ?

M. Sow :

Oui.

M. Thiam :

Est-ce que vous pouvez en dire à la cour quelques unes ?

M. Sow :

Les unités de mesure de mer, les unités de vitesse, c'est le nœud.

M. Thiam :

Et pour les mesures de distance, s'il vous plaît ?

M. Sow :

Pour les mesures de distance, nous avons les milles marins, nous avons les encablures, l'encablure étant un dixième de mille marin.

M. Thiam :

Qui vous a enseigné qu'une encablure faisait un dixième de mille marin ?

M. Sow :

Mes professeurs qui me l'ont enseigné.

M. Thiam :

Vos professeurs étaient en Russie ?

M. Sow :

Oui.

M. Thiam :

Un mille marin, cela fait combien de mètres ?

M. Sow :

Un mille marin fait 1 852 mètres. C'est le standard, 1 852 mètres.

M. Thiam :

Et une encablure ?

M. Sow :

Une encablure, c'est un dixième de mille marin. Je crois que ...

M. Thiam :

... que je peux faire le calcul ? Je vous remercie. Mais dites moi, une brasse, c'est quoi ?

M. Sow :

Une ?

M. Thiam :

Une brasse.

M. Sow :

Je ne comprends pas bien le mot « brasse ».

M. Thiam :

Si vous ne connaissez pas bien le mot « brasse », comment pouvez-vous calculer une encablure qui fait 120 brasses ?

M. Sow :

(Pas de réponse)

M. Thiam :

Vous ne pouvez pas répondre ? Vous le dites, il n'y a rien d'extraordinaire.

M. Sow :

Je ne peux pas répondre à cette question.

M. Thiam :

Vous ne pouvez pas répondre à cette question. Je voudrais maintenant en venir, si vous le voulez bien, à votre mission. Vous pouvez nous dire, d'abord, si cette carte, qui est là, c'est vous-même qui l'avez tracée ?

M. Sow :

Oui.

M. Thiam :

En ce qui concerne le trajet du *Saiga*, vous pouvez rappeler à la cour comment vous avez pu faire ce tracé ?

M. Sow :

La route de *Saiga* a été tracée à l'aide du journal du *Saiga*.

M. Thiam :

A l'aide du journal de *Saiga* ?

M. Sow :

Exact.

M. Thiam :

Mais, à aucun moment vous n'avez pu relever vous-même des positions qui vous auraient permis de faire le tracé de la route du *Saiga* ?

M. Sow :

Je ne pouvais pas faire le tracé du *Saiga* parce qu'on ne connaissait pas comment le *Saiga* marchait. Nous avons eu peut-être des positions de *Saiga*, mais comment, de telle à telle autre position, quel cap le *Saiga* a pris, nous ne le savions pas, sauf à partir de son journal.

M. Thiam :

Donc, vous n'avez pas fait cette carte pendant que vous étiez à bord ?

M. Sow :

J'ai établi mon cap et ses différentes heures au cours de ma mission. Le marche-route de *Saiga* a été fait après la mission, après avoir mis la main sur le journal de navigation de *Saiga*.

M. Thiam :

Donc, vous avez lu le journal de navigation du *Saiga* ?

M. Sow :

Exact.

M. Thiam :

Et si vous avez retenu les différentes positions indiquées pour faire le tracé de sa route, c'est donc que vous avez constaté qu'il n'y avait pas de faux dans le journal du *Saiga* ?

M. Sow :

Oui.

M. Thiam :

Le journal était exact ?

M. Sow :

Le journal était exact.

M. Thiam :

Je vous en remercie.

M. Sow :

Mais seulement, vers de zéro heure à 4 heures du matin, dans le journal, la distance parcourue selon la vitesse donnée ... il y a un petit doute, mais nous ne pouvions pas modifier ce que *Saiga* a écrit dans son journal.

M. Thiam :

D'accord, mais le *Saiga* au moins avait un journal de bord. Vous en aviez ?

M. Sow :

Comme je l'ai déclaré, compte tenu de la petitesse de nos vedettes, nous n'avons pas de journal de bord, à bord de nos petites vedettes. Nous avons des fiches de relevé des différents événements, heures et positions, pour pouvoir faire notre compte rendu, parce que le plus souvent nous faisons des missions de courte durée.

M. Thiam :

Est-ce que vous pourriez dire à la cour s'il y a un règlement en République de Guinée spécialement dans ses forces armées maritimes qui précise à partir de quand un navire doit avoir un livre de bord ?

M. Sow :

Je ne dis pas que, dans un ensemble, dans nos navires en Guinée nous n'avons pas de journal de bord. Nous avons, bien sûr, des navires qui ont des journaux de bord.

M. Thiam :

La question était, Monsieur Sow, est-ce qu'il y a un règlement en République de Guinée qui détermine à partir de quelle taille un navire doit avoir un livre de bord et à partir de quelle taille il peut s'en dispenser ?

M. Sow :

Je ne peux pas dire s'il y a un règlement ou non, mais nous, nous recevons des instructions, on nous donne le matériel. Nous avons les plus hauts gradés qui pourront répondre à cette question.

M. Thiam :

Alors, vous avez reçu l'ordre de mission le 26 octobre ou le 27 ?

M. Sow :

Le 27. Je n'ai pas reçu l'ordre de mission. On m'a fait connaissance de l'ordre de mission le 27.

M. Thiam :

Comment est-ce qu'on vous donne connaissance ? On vous a remis l'ordre de mission ?

M. Sow :

On m'appelle, on me montre l'ordre de mission, parce que l'ordre de mission ne reste pas avec moi, il reste souvent avec le chef de mission du secteur qui veut sortir en mer avec nous. Pour la sortie des vedettes, maintenant, on me donne un ordre verbal de sortir. Mais, pour l'ordre de mission, l'application de la mission en question, le but de la mission, bien souvent avec le type de secteur concerné, c'est eux qui détiennent les ordres de mission.

M. Thiam :

Nous gagnerions du temps, Monsieur Sow, si vous vouliez bien écouter mes questions.

M. Sow :

Bien.

M. Thiam :

Nous avons compris que vous n'avez pas reçu ... que l'ordre de mission était détenu par les douaniers. C'est bien cela ?

M. Sow :

Oui.

M. Thiam :

Est-ce que vous vous l'aviez lu ?

M. Sow :

Non.

M. Thiam :

Vos notes du journal de bord, qui vous tiennent lieu de journal de bord, plus exactement, vous les rédigez à partir de notes que vous aviez prises à bord ?

M. Sow :

Oui.

M. Thiam :

Est-ce que vous rajoutez des choses après ? Ce que vous nous avez remis, excusez-moi, je vais être plus précis, c'est ce que vous avez remis au propre ?

M. Sow :

Oui.

M. Thiam :

Ce ne sont pas les notes que vous aviez prises à bord ?

M. Sow :

Non.

M. Thiam :

Les notes que vous aviez prises à bord, vous les avez ?

M. Sow :

Je les ai à Conakry. Nous les prenons sur des feuilles volantes. C'est juste à titre de mémoire.

M. Thiam :

Mais, il ne vous a pas semblé important de les apporter avec vous, alors qu'il vous a semblé important d'apporter ce que vous avez mis au propre ?

M. Sow :

Quand je fais la mission, je reporte les événements de la mission sur quelque chose dont je rends compte. Donc, pour moi, ce compte rendu que j'ai fait à mes autorités me suffit pour venir me présenter et répondre partout.

M. Thiam :

Ce que vous avez remis au propre, il n'y a rien qui ait été rajouté ?

M. Sow :

Rien.

M. Thiam :

Tout ce qui est dans ce journal de bord figure dans les notes que vous aviez prises à bord ?

M. Sow :

Je peux le dire, oui.

M. Thiam :

L'ordre de mission, vous l'avez lu, vous m'avez dit.

M. Sow :

Nous prenons souvent le numéro de l'ordre de mission pour dire que nous étions sortis avec un ordre de mission de tel secteur datant de tel jour et ayant tel numéro, une référence dans les différents comptes rendus que nous faisons.

M. Thiam :

Il se trouve que, dans le cas d'espèce, lieutenant, vous avez mis et le numéro et une date ?

M. Sow :

Effectivement.

M. Thiam :

Est-ce que vous pourriez nous dire où vous avez trouvé la date de l'ordre de mission ?

M. Sow :

Sur l'ordre de mission en question.

M. Thiam :

Sur l'ordre de mission, il figure une date.

M. Sow :

Oui.

M. Thiam :

M^e von Brevern a bien voulu nous remettre une copie de l'ordre de mission, je vais vous la remettre et je vais vous demander d'indiquer au Tribunal où se trouve la date de l'ordre de mission.

M. Sow :

La date de l'ordre de mission est le 26 octobre 1997 parce que, une mission, l'ordre de mission débute le jour du début de la mission.

M. Thiam :

Lieutenant Sow, je vois bien que l'ordre de mission indique que vous deviez partir le 26. Je vais vous demander de me montrer du doigt l'endroit précis où vous voyez la date de l'ordre de mission. S'il vous plaît, vous me le montrez du doigt.

M. Sow :

La date de départ, c'est ce que je considère comme date sur l'ordre de mission.

M. Thiam :

Est-il exact, lieutenant Sow, que vous m'avez montré cette date ? (*M. Thiam montre avec le doigt.*)

M. Sow :

Exact.

M. Thiam :

Moi je lis : « date de départ ». Est-ce que vous considérez que la date de départ est la date de l'ordre de mission ?

M. Sow :

Je le considère.

M. Thiam :

Qu'elle était la mission précise qui vous avez été donnée ?

M. Sow :

La mission précise qui m'a été donnée est de sortir avec une équipe de la douane qui doit faire des recherches en mer.

M. Thiam :

Est-ce qu'on vous avait parlé du *Saiga* ?

M. Sow :

Avant ma sortie, non.

M. Thiam :

Considérez-vous qu'il est normal, si vous êtes le chef de mission, du moins pour la marine, que l'on vous donne une mission qui aurait un but précis sans vous donner la raison et le but de la mission, sans vous expliquer la raison et le but de la mission ?

M. Sow :

La réponse à cette question ... je vous dirais que, comme je l'ai expliqué ici le samedi, souvent quand un des secteurs cités, douane, pêche ou environnement, a un besoin de déplacement pour aller faire une mission en mer, on embarque les intéressés dans les vedettes et on me dit : « Mettez-vous à la disposition de ceux-ci pour telle mission ». Donc, pour la mission spéciale, c'était pour une recherche que la douane devait faire.

M. Thiam :

On ne vous a pas dit qu'il s'agissait du *Saiga* ?

M. Sow :

On ne m'a pas parlé du *Saiga* avant ma sortie et aucun membre de l'équipage du côté marin ne savait que l'on devait rechercher un navire appelé *Saiga*.

M. Thiam :

La douane, est-ce que c'est le même service que les services qui s'occupent de l'environnement en mer ?

M. Sow :

Je n'ai pas compris votre question.

M. Thiam :

Est-ce que, en Guinée, la douane est le service qui s'occupe de l'environnement en mer ? Vous nous aviez expliqué que vous êtes quelquefois requis par la douane, quelquefois par l'environnement, etc. Est-ce que l'environnement et la douane, c'est la même chose ?

M. Sow :

Non.

M. Thiam :

Donc, quelquefois vous êtes requis pour des questions d'environnement ?

M. Sow :

Bien sûr.

M. Thiam :

Et quelquefois pour des questions de douane ?

M. Sow :

Oui.

M. Thiam :

Dans ce cas précis, vous n'étiez pas requis pour des questions d'environnement ?

M. Sow :

Non, pour une poursuite douanière, on m'a dit.

M. Thiam :

Vous n'étiez donc requis que pour une poursuite douanière ?

M. Sow :
Effectivement.

M. Thiam :
Monsieur Sow – excusez-moi, lieutenant –

M. Sow :
Pas de problème.

M. Thiam :
Je vais vous demander de vous approcher de la carte. Il y a un micro sur la table et vous allez pouvoir nous expliquer, je l'espère, un certain nombre de points. (*Le témoin s'approche de la carte.*) Lieutenant Sow, vous voyez cette carte, il y a une ligne bleue. Vous l'apercevez ?

M. Sow :
Oui.

M. Thiam :
Qui part du point 2 et finit au point 6. C'est bien cela ?

M. Sow :
Oui.

M. Thiam :
Est-ce que cela correspond au tracé de la route de votre petite vedette ?

M. Sow :
Le point bleu, excusez-moi, ne finit pas au point 6. La ligne bleue ne finit pas au point 6.

M. Thiam :
Elle finit où ?

M. Sow :
Au point 5, si je vois bien.

M. Thiam :
C'est peut-être une question de couleur, mais est-ce qu'elle touche bien le point 6 ?

M. Sow :
C'est à partir du point 6 que la ligne bleue continue vers le point 5.

M. Thiam :
Mais elle touche bien le point 6 ?

M. Sow :
Oui.

M. Thiam :

Je vous remercie. Est-ce que vous voyez une ligne rouge qui part du point 5 et qui finit au point 11 ?

M. Sow :

Oui.

M. Thiam :

Est-ce que cela correspond au tracé de la route des deux vedettes ?

M. Sow :

Oui.

M. Thiam :

Est-ce que vous voyez une autre ligne qui part du point un peu avant le point A et qui finit à un point G ?

M. Sow :

Oui.

M. Thiam :

Est-ce que cela correspond au tracé de la route du *Saiga*, selon vous ?

M. Sow :

Je voudrais avoir une carte plus précise avec les méridiens et les parallèles.

M. Thiam :

On va vous remettre la carte que vous aviez tout à l'heure. Vous allez pouvoir dire au Tribunal s'il y a une différence entre la route du *Saiga* sur cette carte.

M. Sow :

Je ne dis pas qu'il y a une différence, mais je voudrais avoir cette carte pour avoir des précisions, pour bien répondre.

M. Thiam :

Je vous remercie. Maintenant que vous avez eu cette carte, nous allons vous remettre l'autre carte. Est-ce qu'il y a une différence ?

M. Sow :

Il peut y avoir une différence de précision.

M. Thiam :

Une différence de précision ?

M. Sow :

Oui.

M. Thiam :

Je vous informe qu'il s'agit exactement de la même carte et du même tracé. Alors, Monsieur le lieutenant Sow, la petite vedette part du point 2 et va vers le point 3. Qu'est-ce qu'elle va faire à ce moment-là ?

M. Sow :

Oui. La petite vedette qui est partie du point 2 vers le point 3 devait se rendre au point A.

M. Thiam :

Nous avons un témoin qui nous a dit qu'elle partait simplement en reconnaissance.

M. Sow :

Je ne suis pas informé de cela, mais je sais que la vedette partait vers le point A.

M. Thiam :

Dites moi, vous avez expliqué au Tribunal que lorsque vous êtes parti, c'est-à-dire plus tard que la vedette, vous n'aviez pas une idée précise de la mission. Vous ne saviez pas que vous recherchiez le *Saiga*. C'est bien cela ?

M. Sow :

Exact.

M. Thiam :

Est-ce que celui qui commandait à bord de la petite vedette avait plus d'informations que vous ?

M. Sow :

Comme il est sorti avant moi, il pouvait avoir plus d'informations que moi.

M. Thiam :

Donc, le sous-chef en Guinée a plus d'informations que le chef.

M. Sow :

Evidemment, si le sous-chef est déployé, par rapport au chef il peut avoir plus d'informations.

M. Thiam :

Alors, lui savait qu'il devait aller chercher le *Saiga* ?

M. Sow :

Effectivement.

M. Thiam :

Il le savait ?

M. Sow :

Il le savait.

M. Thiam :

Et lorsqu'il est arrivé au point 3, pourquoi a-t-il fait demi-tour ?

M. Sow :
Arrivé au point 3 ?

M. Thiam :
Je vais être plus précis pour gagner du temps. Nous savons, vous nous l'avez déjà expliqué, que le commandement lui a donné l'ordre de faire demi-tour, mais pourquoi le commandement lui a-t-il donné l'ordre de faire demi-tour ?

M. Sow :
Parce que le commandement a eu des informations que la petite vedette seule ne pouvait plus continuer parce que l'objectif visé du point A avait déjà changé de position.

M. Thiam :
Mais, nous y reviendrons, vous nous avez déjà expliqué que vous espériez que le *Saiga* venait vers vous. Vous l'avez expliqué samedi.

M. Sow :
Oui.

M. Thiam :
Alors pourquoi est-ce qu'on fait faire demi-tour à la petite vedette ?

M. Sow :
C'est parce que, compte tenu de la position initiale, *Saiga* a peut-être progressé plus au large et la petite vedette n'est pas habilitée à aller à une très très grande profondeur.

M. Thiam :
Mais vous nous avez dit qu'elle peut faire la distance.

M. Sow :
Elle peut faire la distance seule le long des côtes et à proximité de nos bases, mais pas en profondeur, seule.

M. Thiam :
Qu'elle est la distance maximale que peut faire la petite vedette ?

M. Sow :
La petite vedette avec son plein de carburant peut faire les 120 milles marins.

M. Thiam :
Donc, vous voulez dire qu'elle peut faire 120 milles marins en restant à proximité des côtes, mais pas au large ?

M. Sow :
Bien sûr.

M. Thiam :

Vous pouvez nous expliquer ce que cela signifie ? Est-ce qu'il y a un risque particulier de faire 120 milles marins le long des côtes plutôt qu'en profondeur, comme vous dites ?

M. Sow :

Oui, compte tenu de ses dimensions, de l'état de la mer, nous ne pouvons pas la laisser partir en profondeur seule. Si, toutefois, c'est au bord, à côté, à vue de la terre, là, nous pensons qu'elle est sécurisée plus qu'en haute mer.

M. Thiam :

Le Tribunal appréciera. Mais, dites moi, de toute façon, vous auriez pu la suivre ?

M. Sow :

Si le commandement a décidé que nous attendions nous ne pouvions qu'attendre. Nous ne recevons que des instructions.

M. Thiam :

Je sais que si le commandement commande vous obéissez, lieutenant, je n'ai pas de doute là-dessus. Ma question était que, si la petite vedette partait, vous pouviez la suivre ?

M. Sow :

Je ne peux pas vous répondre pourquoi je ne suis pas sorti avec la petite vedette à ce moment précis.

M. Thiam :

Est-ce que vous pouviez la suivre, à cela au moins vous pouvez répondre.

M. Sow :

Si je recevais les instructions je pouvais la suivre.

M. Thiam :

Vous auriez pu la suivre.

M. Sow :

Bien sûr.

M. Thiam :

Quelle logique le commandement a suivi en disant à la petite vedette de revenir alors que vous pouviez rester derrière et la suivre ?

M. Sow :

Je ne peux pas répondre à cette question.

M. Thiam :

Je vous remercie. Sur la ligne bleue vous voyez un point 4.

M. Sow :

Oui.

M. Thiam :

Vous voyez devant un point d'interrogation ?

M. Sow :

Bien sûr.

M. Thiam :

Est-ce que vous savez ce que signifie ce point d'interrogation ?

M. Sow :

Non.

M. Thiam :

Voyez vous, lieutenant Sow, je me suis posé une question. A ce point 4, vous avait indiqué un changement de cap de la vedette.

M. Sow :

Bien sûr.

M. Thiam :

Mais cela ne résulte pas de vos notes de bord.

M. Sow :

Bien sûr.

M. Thiam :

Comment est-ce que vous avez su alors que la vedette avait changé de cap ?

M. Sow :

Si je me rappelle bien, j'ai dit qu'à bord de la petite vedette, bien sûr il n'y a pas de journal de navigation, mais elle peut à l'aide du GPS portatif qu'elle a, à n'importe quel moment où elle change de direction, noter au moins les coordonnées de ce point.

M. Thiam :

Vous voulez dire que la petite vedette a donc noté les coordonnées de ce nouveau cap à ce moment-là ?

M. Sow :

Exactement.

M. Thiam :

Donc, il y a des notes de bord sur la petite vedette ?

M. Sow :

Je ne sais pas s'il y a des notes de bord, mais pour ce cas précis la petite vedette m'a indiqué qu'elle a pivoté à partir de ce point pour me rencontrer, parce que le point de rencontre ... elle pouvait bien retourner du point 3 vers le point 2, mais compte tenu du point de rendez-vous, elle a pivoté vers le sud des îles.

M. Thiam :

Lieutenant Sow, de grâce, si nous avons bien compris, la petite vedette avait quand même des notes de bord.

M. Sow :

Je ne peux pas répondre.

M. Thiam :

Mais, vous venez de dire qu'ils notaient quand même leur position.

M. Sow :

Quand elle bouge, ou elle pivote, elle note la position, à quel point elle a pivoté.

M. Thiam :

Elle note sur quoi ? Un document ? Des feuilles volantes ?

M. Sow :

Des feuilles volantes.

M. Thiam :

Ils notent donc sur une feuille volante.

M. Sow :

Bien sûr.

M. Thiam :

Et, ensuite, vous reportez ces feuilles sur votre journal à vous ?

M. Sow :

Oui.

M. Thiam :

A quel endroit de votre document avez-vous noté ce changement de cap ?

M. Sow :

Je n'ai pas noté. Je ne note jamais le marche-route d'une vedette qui est partie seule dans mon journal.

M. Thiam :

Vous venez de dire que vous reportez sur votre journal les notes qui sont prises à bord de la petite vedette. Je vous demande donc, lieutenant Sow, à quel endroit de vos notes de bord vous avez noté ce changement de cap. C'est simple !

M. Sow :

Quand je sors avec la petite vedette, j'utilise ces notes pour faire mon rapport mais, quand elle opère seule –

M. Thiam :

Je suis désolé de vous interrompre, mais essayez de bien comprendre ma question. Nous savons tous ici que vous n'étiez pas à bord de la petite vedette. Donc, je ne vous pose pas une question sur le point de savoir quand vous êtes sur la petite vedette ce que vous faites. Je vous pose la question de ce qui s'est passé ce jour-là. Alors, ce jour-là, vous avez dit que la petite vedette a pris des notes et que ces notes ont été reportées sur votre propre journal. Je vous demande d'indiquer à la cour à quel point de votre journal vous avez indiqué ce changement de cap de la petite vedette.

M. Sow :

Je crois, dans le journal, je note les mouvements de la petite vedette quand nous opérons ensemble. Ici, ce ne sont que des informations rapportées du patron de la vedette, comment ils ont replié du point A et du point 3 vers le point 5 pour nous retrouver et faire la mission ensemble.

M. Thiam :

Je répète la question encore une fois, je suis désolé, Monsieur le Président, mais je voudrais que le témoin nous dise s'il peut répondre ou ne peut pas répondre.

Encore une fois, lieutenant Sow, à quel endroit de votre journal, de vos notes de bord, avez-vous indiqué ce changement de cap, s'il vous plaît. A quel endroit précis de votre journal de bord vous avez indiqué ce changement de cap. Si vous le voulez je vous remets une copie.

M. Sow :

Dans le journal, je n'ai pas indiqué le changement de cap de la petite vedette à partir du point 4.

M. Thiam :

Je vous remercie. Nous allons maintenant du point 1, qui est un point rouge, au point 5, qui est également un point rouge. Le point 5 est le premier point, est le départ de votre ligne de marche de route. C'est bien cela ?

M. Sow :

A 16 h 25, nous sommes sortis du port. Nous sommes arrivés au point 5 seulement à 17 h 05. C'est à 17 h 05 que nous avons remorqué la petite vedette au point 5 où est écrit 16 h 25.

M. Thiam :

Admettons. Alors, pouvez-vous expliquer au Tribunal pourquoi vous n'avez pas marqué la route entre le point 1 et le point 5 ?

M. Sow :

Entre le point 1 et le point 5, d'habitude, nous ne marquons pas de route parce que c'est la sortie sud du port de Conakry. Vous êtes obligé de passer dans un chenal. Donc, nous suivons le chenal.

M. Thiam :

Donc, si j'ai bien compris, la carte ne reflète pas tous vos mouvements ?

M. Sow :

La carte reflète nos mouvements.

M. Thiam :

Bien. Au point 7, il était 19 h 20. C'est à peu près cela ?

M. Sow :

Oui.

M. Thiam :

Vous avez entendu des conversations, c'est bien cela ?

M. Sow :

Oui.

M. Thiam :

Et vous dites que vous avez entendu une voix qui vous était familière à cet endroit ?

M. Sow :

Selon la confirmation de quelques éléments qui étaient à bord de la mission.

M. Thiam :

C'est-à-dire ? Soyez plus précis s'il vous plaît ?

M. Sow :

A bord, quand la radio a émis, nous avons eu les gens de la douane qui ont dit : « Ah, on dirait que je reconnais la voix, là ». Ce n'est pas moi personnellement qui l'ai dit.

M. Thiam :

Donc, quand vous notez sur votre journal de bord que « cette voix nous est familière », vous vous excluez du « nous » ?

M. Sow :

Non, je ne m'exclus pas du « nous ».

M. Thiam :

Est-ce qu'elle vous était donc familière à vous ?

M. Sow :

A partir du moment où elle est familière aux intéressés de la mission, elle m'est familière aussi.

M. Thiam :

La cour appréciera votre réponse, je vous en remercie ! Mais, cette voix parlait grec ?

M. Sow :

Bien sûr.

M. Thiam :

Qui a reconnu que c'était du grec ?

M. Sow :

Je ne parle pas grec, mais, quand on parle grec, je sais que l'on parle grec. Je ne comprends pas le grec, mais, quand on parle grec, je sais que l'on parle grec.

M. Thiam :

Qui, à bord, a reconnu que c'était du grec ? C'était vous ou quelqu'un d'autre ?

M. Sow :

J'ai reconnu, et quelqu'un d'autre l'a reconnu.

M. Thiam :

Quelqu'un d'autre ? Qui ?

M. Sow :

Un membre de la mission.

M. Thiam :

Un douanier ou un militaire, comme vous ?

M. Sow :

Un douanier.

M. Thiam :

Vous étiez donc deux à reconnaître que c'était du grec ?

M. Sow :

Bien sûr.

M. Thiam :

Et qu'est-ce qu'il disait ?

M. Sow :

Je vous dis que je ne comprends pas le grec, mais je sens que l'on parle grec.

M. Thiam :

Vous sentez que l'on parle grec. Est-ce que vous pouvez mieux expliquer au Tribunal ce que c'est que « sentir que l'on parle grec » ?

M. Sow :

J'entends grec, je ne comprends pas grec.

M. Thiam :

Vous ne comprenez rien du grec ?

M. Sow :

Rien.

M. Thiam :

Je vous remercie. Vous décidez, à ce moment-là, de continuer votre cap.

M. Sow :

Bien sûr.

M. Thiam :

Et vous arrivez au point 8.

M. Sow :

Oui.

M. Thiam :

Et, au point 8, il y avait toujours le silence radio ?

M. Sow :

Avant d'arriver, juste aux environs du point 8, il y a eu une autre conversation radio où le même monsieur a conversé avec *Saiga*. C'est ce qui nous a obligés de changer le cap, de monter un peu vers le nord.

M. Thiam :

Donc, il était 20 h 19, comme c'est indiqué sur la carte.

M. Sow :

Bien.

M. Thiam :

Et, à 20 h 20 précises, vous avez changé de cap pour aller vers le nord.

M. Sow :

Oui.

M. Thiam :

Mais pourquoi ? En quoi ces conversations radio étaient-elles différentes des conversations radio que vous aviez écoutées une heure avant ?

M. Sow :

Parce que, là, la recherche que nous sommes sortis faire, l'objectif que nous sommes sortis pour rechercher, quand *Saiga* a émis, déjà connaissant que nous sommes sortis pour une recherche de *Saiga*, quand *Saiga* a émis –

M. Thiam :

Excusez-moi, je suis obligé de vous interrompre parce que vous dites : « Connaissant que vous êtes sortis pour chercher le *Saiga* » alors que, jusqu'à présent, vous nous avez dit que vous ignoriez.

M. Sow :

Je vous dis qu'avant de sortir du port j'ignorais que je sortais rechercher le *Saiga*. C'est quand la vedette a été prête. Nous devons larguer les amarres. L'officier de transmission est venu

me dire : « Voici la fréquence. Fixez-la sur la radio. Vous sortez pour rechercher un navire qui émet sur cette fréquence ».

M. Thiam :

Et on vous a donné son nom ?

M. Sow :

Naturellement.

M. Thiam :

Donc, poursuivez, alors. Pourquoi vous avez changé de cap ?

M. Sow :

Nous avons changé de cap parce qu'après que le monsieur a appelé un chalutier et ensuite *Saiga*, les réponses nous sont venues du nord, direction indiquée par notre radiogoniomètre à bord. Donc, nous avons su que les réponses venaient du nord. C'est pourquoi nous avons changé de cap.

M. Thiam :

Les réponses de qui ? Des chalutiers ?

M. Sow :

Des chalutiers et du *Saiga*.

M. Thiam :

Le *Saiga* avait répondu à 19 h 20 ?

M. Sow :

Oui.

M. Thiam :

Est-ce que cela résulte de votre journal de bord ... enfin, de vos notes de bord, excusez-moi ?

M. Sow :

Le *Saiga* a répondu à 19 h 00.

M. Thiam :

Est-ce que cela résulte de vos notes de bord et de la déclaration que vous avez remise au Tribunal ?

M. Sow :

Je crois que la conversation est notée dans le journal de bord entre le monsieur et *Saiga* et le monsieur et *Salvatore Primo*.

M. Thiam :

Vous avez écrit, 20 h 19 : 9°19,5'N, 14°03,8'O. Encore conversation radio entre le monsieur, *Salvatore Primo* et le pétrolier *Saiga* sur la même fréquence ?

M. Sow :

Oui.

M. Thiam :

Donc, vous voulez dire que, dans cette phrase, nous devons comprendre que le *Saiga* avait répondu ?

M. Sow :

Oui.

M. Thiam :

A votre avis, à ce moment-là, où se trouvait le *Saiga* ?

M. Sow :

Je n'avais pas une position précise, mais je savais que *Saiga* se trouvait vers le nord.

M. Thiam :

A ce moment-là, vous n'aviez pas une idée précise, mais, puisque vous avez relevé la route du *Saiga*, d'après son journal de bord, est-ce que vous pourriez maintenant dire de manière précise où se trouvait le *Saiga* vers 20 h 00/20 h 19 ?

M. Sow :

A 20 h 00/20 h 19, *Saiga* se trouvait vers le nord.

M. Thiam :

Est-ce qu'il y a un point C en bleu sur la carte ?

M. Sow :

Oui, il y a un point bleu.

M. Thiam :

C'est le point C ?

M. Sow :

Oui. A 20 h 00, oui.

M. Thiam :

Est-ce à peu près la position du *Saiga* à 20 h 00 ?

M. Sow :

Peut-être.

M. Thiam :

Vous avez suivi d'abord une route du point 5 au point 8 pour rechercher un navire qui se trouvait dans le nord. Vous pouvez expliquer au Tribunal ?

M. Sow :

Je peux l'expliquer.

M. Thiam :

S'il vous plaît, alors faites-le.

M. Sow :

Du point 8 nous avons suivi la direction vers le point 9.

M. Thiam :

Pourquoi ?

M. Sow :

Parce que –

M. Thiam :

Ce n'était pas ma question. Ma question est que du point 5 au point 8, vous avez suivi un cap. Je vous demande pourquoi vous avez suivi ce cap alors que vous recherchiez un navire qui se trouvait dans le nord ?

M. Sow :

Nous avons suivi ce cap, parce que, à partir du moment où nous avons eu le compte rendu de notre station d'observation, les navires qui étaient au nord ont été détectés et nous avons rappelé la vedette, nous estimions que *Saiga*, dans son mouvement, continuait vers le sud. Donc, nous avons tenté de progresser vers le sud, jusqu'au moment où nous avons su, à partir des conversations radio, que *Saiga* se trouvait encore vers le nord.

M. Thiam :

Vous avez dit que vous espériez – ce sont vos termes – que le *Saiga* qui venait de Dakar allait vers le sud, dans la région du Libéria. C'est ce que vous avez dit samedi ...

M. Sow :

Oui.

M. Thiam :

... en substance. Je n'utilise pas vos termes exacts, mais en substance c'est bien cela ? C'était l'esprit ?

M. Sow :

Oui.

M. Thiam :

Pour quelle raison avez-vous décidé subitement, au point 8, d'aller vers le nord ? Pourquoi avez-vous renoncé à la logique qui vous a poussés à suivre le cap donné entre le point 5 et le point 8 ?

M. Sow :

Parce que, là, nous voudrions rencontrer le *Saiga* avant qu'il ne franchisse nos eaux. C'est pour augmenter cette probabilité de rencontre que nous avons préféré progresser aussi vers le nord pour rencontrer *Saiga* qui se trouve là-bas et que nous estimons progresser vers le sud.

M. Thiam :

Vous avez dit au Tribunal que la Guinée dispose d'une station radar à terre.

M. Sow :

Bien sûr.

M. Thiam :

Où est-elle ?

M. Sow :

Elle est au Cap Verga.

M. Thiam :

Prenez la règle ... expliquez-nous où se trouve la station radar.

M. Sow :

Notre station radar se trouve ici.

M. Thiam :

Quelle est la portée du radar ?

M. Sow :

La portée du radar est de 150 milles marins.

M. Thiam :

C'est ce radar qui vous a indiqué que les navires se dispersaient ?

M. Sow :

Exactement.

M. Thiam :

Et ce radar peut distinguer un pétrolier d'un chalutier ?

M. Sow :

Je ne peux pas le préciser parce que c'est une station terrestre. Je connais les qualités des stations à bord mais je n'ai jamais exploité une station terrestre. Je n'ai jamais exploité un radar d'une portée de 150 milles marins.

M. Thiam :

Mais vos radars à bord ont une portée inférieure.

M. Sow :

Oui.

M. Thiam :

Est-ce que ces radars vous permettent de distinguer un chalutier d'après l'écho, la taille et la vitesse ?

M. Sow :

Oui.

M. Thiam :

D'un tanker ?

M. Sow :

Oui.

M. Thiam :

Alors, si je suppose qu'un radar à terre permet de faire la même distinction, ma supposition serait déraisonnable ?

M. Sow :

Je n'ai pas compris la question.

M. Thiam :

Est-ce que ma supposition serait déraisonnable si je parlais du principe que le radar à terre, qui a une portée supérieure aux radars que vous avez, permet de faire la même distinction ?

M. Sow :

Non, elle ne sera pas déraisonnable.

M. Thiam :

Donc, la station à terre pouvait à tout moment savoir où se trouvait le *Saiga* ?

M. Sow :

Pas forcément, parce que ce n'est pas le *Saiga* seulement qui est un gros navire qui se trouve dans la région. D'abord, il y a la sortie de Kamsar où des minéraliers ou des bateaux de commerce peuvent rentrer ou se mouvoir. Ils ne pouvaient pas avoir la certitude de suivre précisément le *Saiga*.

M. Thiam :

Monsieur Sow, je me flatte d'avoir le plaisir de connaître votre pays. La région de Kamsar, il me semble qu'elle est assez loin de la région de l'île d'Alcatraz.

M. Sow :

Tous les navires qui rentrent ou qui viennent de Kamsar contournent Alcatraz pour prendre les routes internationales, je crois.

M. Thiam :

D'accord. Alors, s'ils suivaient le *Saiga* au point qu'ils ont pu vous dire, à un moment déterminé, qu'ils se sont tous dispersés, est-ce que la dispersion est un motif pour perdre l'écho radar du *Saiga* ?

M. Sow :

Le radar surveillait juste un regroupement de navires à telle position et rendait compte. Donc, s'il a surveillé jusqu'à un moment et qu'il y a eu dispersion, il a rendu compte qu'il y a eu dispersion. On n'a pas dit : « Tel navire est *Saiga*; donc, il faut le suivre ».

M. Thiam :

Par conséquent, vous ne saviez pas que, dans cette concentration de navires, il y avait le *Saiga* ?

M. Sow :

Si, bien sûr on le savait parce que *Saiga* avait donné la position. C'est à partir de cette position que l'on a demandé à la station radar de surveiller.

M. Thiam :

Donc, la station radar surveillait une position précise, c'est cela ?

M. Sow :

Bien sûr.

M. Thiam :

La position était très précise.

M. Sow :

Oui.

M. Thiam :

Et il n'y avait, dans cette position précise, qu'un tanker et des chalutiers ?

M. Sow :

Il peut y avoir aussi des cargos qui viennent s'approvisionner. Ce n'est pas exclu. On ne sait pas.

M. Thiam :

Il peut y avoir aussi des cargos, mais l'écho radar aurait permis de savoir qu'il y avait plusieurs gros bateaux ?

M. Sow :

Peut-être.

M. Thiam :

Est-ce qu'il est indiqué quelque part que l'écho radar a relevé sur cette position plusieurs gros navires ?

M. Sow :

La station radar a surveillé l'attroupement des navires.

M. Thiam :

Jusqu'à présent, Monsieur le lieutenant Sow, nous considérons que, dans cet attroupement, comme vous nous l'avez dit, il y avait le *Saiga*.

M. Sow :

Bien sûr.

M. Thiam :

Et il y avait des chalutiers.

M. Sow :

Bien sûr.

M. Thiam :

Lorsqu'ils se sont dispersés, l'écho radar pouvait-il surveiller le déplacement du *Saiga* ?

M. Sow :

Si l'écho radar pouvait surveiller le déplacement du *Saiga*, je ne peux pas répondre. Si oui, on aurait eu moins de problèmes pour nous rencontrer avec le *Saiga*.

M. Thiam :

Monsieur le lieutenant Sow, je vous demande un petit effort pour permettre au Tribunal de faire la lumière sur cette affaire. Ma question est simple. Vous affirmez que le *Saiga* était suivi depuis la station à terre par un radar.

M. Sow :

Bien sûr.

M. Thiam :

Vous affirmez qu'après un certain moment il y a eu une dispersion.

M. Sow :

Bien.

M. Thiam :

Est-ce qu'il serait déraisonnable pour le Tribunal de considérer que si tout cela est vrai, comme vous l'affirmez, la station radar a pu continuer à suivre le *Saiga* ?

M. Sow :

Je ne peux pas affirmer que la station a continué –

M. Thiam :

Si moi j'affirme, Monsieur le lieutenant Sow –

The President:

Maître Thiam, the witness has said he was not on the radar station, that he has not operated radar before. He has said that he thinks that they might have but he cannot say whether they could or could not. I think perhaps you could move on to another question.

M. Thiam :

Je vous remercie, Monsieur le President.

Vous avez suivi le cap 303 du point 8 au point 9.

M. Sow :

Exactement.

M. Thiam :

Dans un silence radio absolu.

M. Sow :

Oui.

M. Thiam :

Ne sachant pas où se trouvait le *Saiga*.

M. Sow :

Oui.

M. Thiam :

Puis, au point 9 vous avez décidé subitement de prendre le cap 245.

M. Sow :

Oui.

M. Thiam :

Pour quelle raison ?

M. Sow :

Parce que, dans l'écran de notre radar, ayant assez d'objectifs, et à 3 h 44 nous avons vu que la majeure partie des objectifs se trouvaient maintenant à notre gauche. Donc, il fallait prendre un cap qui nous permettrait de nous rapprocher de ces objectifs sans se faire distinguer pour avoir une netteté sur l'écran du radar, toujours continuer notre recherche.

M. Thiam :

Vous avez dit la dernière fois que ... vous n'aviez pas expliqué que la majeure partie des objectifs se trouvaient à gauche. Vous aviez dit qu'ils se trouvaient au nord mais que vous aviez pu distinguer qu'il ne s'agissait pas du *Saiga*.

M. Sow :

Bien sûr.

M. Thiam :

Donc ils n'étaient pas à votre gauche.

M. Sow :

Si.

M. Thiam :

Ils étaient où ? Pouvez-vous prendre la règle et montrer au Tribunal ?

M. Sow :

Si nous sommes là, les objectifs se trouvent de ce côté, cela c'est notre gauche. (*Le témoin montre la carte.*)

M. Thiam :

A cet endroit précis, vous avez vu des chalutiers.

M. Sow :

Oui.

M. Thiam :

Pourquoi n'avez vous pas poursuivi pour prendre ces chalutiers ?

M. Sow :

Parce que nous n'étions pas à ce moment habilités à aborder un chalutier parce que nous n'avions aucun agent de la surveillance des pêches à bord.

M. Thiam :

Si le chalutier a pris en fraude du gasoil importé frauduleusement, est-ce qu'il ne commet pas un délit aussi ?

M. Sow :

Il commet un délit.

M. Thiam :

Pourquoi est-ce qu'il ne vous intéresse pas ? Votre ordre de mission était général d'après ce que je sais ?

M. Sow :

Bien sûr.

M. Thiam :

Pourquoi est-ce que vous n'allez pas vers eux ?

M. Sow :

A cette position, nous n'avons pas vu un chalutier que nous estimions avoir pris du carburant. Nous n'avons pas rencontré les chalutiers qui se sont déjà approvisionnés sinon on les aurait déjà arrêtés mais nous ne les avons pas rencontrés.

M. Thiam :

A 3 h 50, vous changez de cap.

M. Sow :

Oui.

M. Thiam :

Est-ce parce que, comme vous l'avez indiqué, sur vos notes de bord vous aviez eu une réponse du *Saiga* en message radio ?

M. Sow :

Oui.

M. Thiam :

Et que dites vous dans vos notes de bord ? Vous dites que vous avez constaté une réponse, à quel cap ?

M. Sow :

Quand on avait encore le cap 245.

M. Thiam :

Oui, et où aviez-vous situé le *Saiga* ?

M. Sow :

Nous l'avons situé à 24 et à 44,5 milles de distance et approximativement 40 degrés bâbord de notre cap.

M. Thiam :

Si vous êtes sur un cap 245, 40 degrés bâbord, cela vous donne quel cap ?

M. Sow :

Le cap 205.

M. Thiam :

Il y a une ligne verte un peu plus foncée tracée sur la carte. Est-ce que cela peut correspondre à peu près au cap 205 ?

M. Sow :

Oui.

M. Thiam :

Donc, le *Saiga* se trouvait sur cette ligne ?

M. Sow :

J'espère.

M. Thiam :

Pouvez-vous expliquer au Tribunal pourquoi, sur la carte que vous avez transmise au Tribunal, vous n'avez à aucun moment positionné le *Saiga* sur cette ligne ?

M. Sow :

Je voudrais que l'on remette la carte que j'ai tracée sur le projecteur pour expliquer.

M. Thiam :

Bien sûr. (*Projection de la carte*) Sur cette carte, lieutenant, le cap 205 est légèrement à gauche du cap que vous avez suivi, du cap 198 qui est indiqué. Il passe légèrement à gauche. Pouvez-vous montrer au Tribunal où est-ce que vous auriez positionné le *Saiga* sur ce cap 205, à 44,5 milles selon vous, mais nous allons-y revenir, de votre position à 3 h 50 ?

M. Sow :

De notre position, à 3 h 50, quand *Saiga* a émis, nous avons eu une distance nette sur *Saiga*. Une direction sur *Saiga*, qui était environ 40 degrés bâbord, pas précisément 40 degrés, mais environ 40 degrés. Nous avons situé le *Saiga* là. (*Le témoin montre sur la carte.*)

M. Thiam :

Excusez-moi, lieutenant Sow, la question que je vous pose est, me semble-t-il, assez précise, mais je peux peut-être ne pas m'être exprimé correctement. Vous avez évalué la distance du *Saiga* précisément à 44,5 – aujourd'hui vous dites *miles*, nous reviendrons sur l'unité de mesure que vous avez utilisée – 44,5 *miles*. Si nous partons de votre position et que nous suivons le cap 205, à un moment quelconque, et si nous le suivons sur 44,5 *miles*, selon vos affirmations d'aujourd'hui, à peu près où devait se trouver le *Saiga* ? Montrez au Tribunal.

M. Sow :

Le *Saiga* devait se trouver là.

M. Thiam :

En suivant le cap 205 ?

M. Sow :

En direction 205, c'est la direction 205. Nous n'avons pas pris un cap 205.

M. Thiam :

J'ai déterminé le cap 205, Lieutenant. Par rapport à votre cap 245, à 3 h 50, et vous avez dit 40 degrés bâbord.

M. Sow :

Environ 40 degrés bâbord !

M. Thiam :

Cela donne environ le cap 205.

M. Sow :

Plus ou moins.

M. Thiam :

Oui, plus ou moins le cap 205. Alors, pouvez-vous – je vous ai donné un nouvel instrument qui est un rapporteur – pourriez-vous montrer au Tribunal à peu près où se trouvait le *Saiga* ?

M. Sow :

Sur votre permission, est-ce que je peux avoir mes instruments de navigation ?

M. Thiam :

Si vous les avez ici je n'y vois pas d'objection.

M. Sow :

Je les ai dans la cabine des témoins.

M. Thiam :
Monsieur le Président ?

The President:
Do you want this to be done with the instruments?

M. Thiam :
Si le lieutenant a ses propres instruments qui lui permettent de faire des calculs, je ne vois pas d'inconvénient à ce que l'on aille les chercher, ou à ce que l'on aille les chercher pour lui. Peut-être que l'huissier pourrait aller les chercher ?

The President:
Is it possible for somebody to get the instruments for him? Lieutenant Sow, perhaps you could put the receiver either in your pocket or hang it on your jacket pocket. Can you hear when it is in your pocket?

M. Sow :
Oui.

(Une personne apporte les instruments du témoin.)

The President:
It looks as though we are ready now.

M. Thiam :
Lieutenant Sow, pourriez-vous maintenant indiquer au Tribunal où aboutit cette ligne que vous venez de tracer ?

M. Sow :
La ligne que je viens de tracer aboutit là.

M. Thiam :
Est-ce que ce n'est pas tout juste au sud de la frontière sud de la zone économique exclusive ?

M. Sow :
Pas au sud, juste au nord.

M. Thiam :
Regardez bien votre ligne, Monsieur le lieutenant Sow. Est-ce qu'il ne me semble pas, à moi –

M. Sow :
La ligne aboutit, mais la distance, le plus important pour nous ici, c'est la distance.

M. Thiam :
D'accord, mais la ligne que vous avez tracée aboutit juste après la frontière sud ?

M. Sow :
Elle n'a pas abouti parce qu'on n'a pas porté la distance.

M. Thiam :

La ligne que vous, vous avez tracée, là, elle aboutit juste en-dessous de la frontière sud, oui ou non ?

M. Sow :

Je crois –

M. Thiam :

Est-ce qu'elle aboutit, c'est vous qui avait tracé cette ligne.

M. Sow :

Elle touche la ligne de la frontière.

The President:

Mr. von Brevern, please?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/13, E, p. 24]

Mr. von Brevern:

Mr. President, I understand that there are advocates who have temperament and others who have not so much temperament, but I think we all have to accept that the dignity of the witness requires the cross-examiner to be as polite as the cross-examiner expects to be treated by the witness. Therefore, Mr. President, I would like you to ask Maître Thiam to allow the witness to complete his answers without being interrupted. As I have the floor, Mr. President, it is up to individuals to raise their voices when cross-examining, but I think we have to avoid giving the impression of threatening the witness. Finally, I would like you, Mr. President, to ask Maître Thiam to refrain from making comments such as "The Tribunal will have to judge that". That is not a question concerning the facts. Thank you, Mr. President.

The President:

I do not think I need to say anything. Maître Thiam has heard the points that you have made and I think we should continue.

Maître Thiam, please proceed.

CONTRE-INTERROGATOIRE DE M. SOW (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/13, F, p. 36–41]

M. Thiam :

Je vous remercie, Monsieur le Président, mais je voudrais rappeler à Maître von Brevern que le Président Senghor avait expliqué que la raison est hellène – peut-être qu'il a la raison - et que l'émotion est nègre – peut-être que j'ai l'émotion. Je suis persuadé que le lieutenant Sow a la même émotion que moi est qu'il ne s'est pas senti menacé dans mes propos.

Monsieur le Président, la ligne qui vient d'être dessinée par le lieutenant Sow touche la ligne des mouvements du *Saiga* exactement au sud de la frontière sud de la zone économique exclusive de la Guinée. Je voudrais maintenant demander au lieutenant Sow, en suivant la ligne qu'il vient de dessiner, de mesurer une distance de 44,5 *miles*.

Pouvez-vous mesurer une distance de 44,5 *miles* à partir de votre point 11, de votre point où vous étiez à 3 h 50 ?

(Le témoin dessine sur la carte sur le sol.)

Mr. von Brevern:

Mr. President, would it be possible to get a table for the witness, which would ease his task?

The President:

There was a round table there. Where has it gone?

Lieutenant Sow, if you have finished your calculation, could you please give the answer?

M. Thiam :

Est-ce que vous pouvez montrer au Tribunal sur la carte projetée.

M. Sow :

Sur ce que nous venons de faire, la position se trouve au-dessus de la ligne de la frontière sud.

M. Thiam :

Est-ce que vous pouvez montrer au Tribunal où cela se trouve sur la carte qui est projetée ?

M. Sow :

Sur la carte projetée, la position se trouve là, au-dessus de la ligne de la frontière sud.

M. Thiam :

Pardon, vous pouvez reprendre ?

M. Sow :

Elle se trouve au-dessus de la ligne de la frontière sud, au-dessus.

M. Thiam :

M. von Brevern et le Tribunal ont pu constater que le témoin montre un point qui se trouve sur la ligne de déplacement du *Saiga*.

C'est bien cela ? Vous pouvez remonter au Tribunal le point précis, s'il vous plaît ?

M. Sow :
C'est le point, là.

M. Thiam :
Est-ce que sur le document que vous avez fait là, le point que vous avez indiqué touche la ligne rouge qui montre le déplacement du *Saiga* ?

M. Sow :
Le point ne touche pas la ligne du déplacement du *Saiga*, mais le point se situe en dehors, au nord de la ligne de la frontière sud.

M. Thiam :
Donc, pouvez-vous maintenant reprendre sur la carte qui est projetée et indiquer au Tribunal le point exact que vous avez déterminé ici sur cette carte ?

M. Sow :
Sur cette carte, nous trouvons la position du *Saiga*, légèrement à gauche, pardon, à droite de cette ligne, de son marche-route, au-dessus de la ligne de la frontière sud.

M. Thiam :
Lieutenant Sow, pouvez-vous expliquer au Tribunal pourquoi, si ce sont vos constatations ... Pouvez-vous expliquer au Tribunal pourquoi, si ce sont vos constatations, vous avez remis au Tribunal une carte qui ne correspond pas à vos constatations et à vos propres calculs et relevés ?

M. Sow :
Je n'ai pas remis au Tribunal une carte qui ne correspond pas à mes calculs.

M. Thiam :
Vous avez remis au Tribunal une carte où vous avez tracé la route du *Saiga*, vrai ou faux ?

M. Sow :
Oui.

M. Thiam :
La route du *Saiga* qui est sur cette carte est la route que vous avez constatée comme ayant été suivie par le *Saiga* ?

M. Sow :
Oui.

M. Thiam :
Or, vous avez constaté dans votre relevé de notes que le *Saiga* se trouvait à un endroit, au nord, à un moment quelconque, à 3 h 50, d'après vos notes, le *Saiga* se trouvait au nord de la route que vous avez indiquée sur la ligne.

M. Sow :
Bien sûr.

M. Thiam :

Alors, expliquez au Tribunal pourquoi est-ce que vous remettez au Tribunal une carte dont les relevés ne coïncident pas avec vos constatations.

M. Sow :

Mes relevés correspondent à ce qui est mis sur la carte.

M. Thiam :

Le point que nous avons déterminé ensemble, tout de suite, figure-t-il sur la ligne de marche du *Saiga* ?

M. Sow :

Permettez moi, en navigation, avec toute la précision des appareils que nous avons, il faut s'attendre toujours à des erreurs, plus ou moins. Ce sont les erreurs abusées qui sont condamnées en navigation, mais on ne peut pas naviguer sans erreur, quelle que soit l'appareil que vous utilisez. Vous ne pouvez pas avoir une précision nette à 100 pour cent.

M. Thiam :

Cela, j'en suis absolument convaincu, lieutenant, mais ceci dit – sans émotion, Monsieur von Brevern – une carte, on l'établit sur la base de constatations ?

M. Sow :

Bien sûr.

M. Thiam :

Vos constatations vous auraient amené à indiquer que le *Saiga* se trouvait au nord de la route qui figure sur votre carte ?

M. Sow :

Je n'ai pas compris.

M. Thiam :

Les constatations que nous venons de faire ensemble, d'après vos notes, auraient positionné le *Saiga* sur une ligne au nord de celle qui figure sur votre carte ?

M. Sow :

Je ne crois pas.

M. Thiam :

Mais nous venons de le faire ensemble, lieutenant.

M. Sow :

Si *Saiga* ne se trouve pas au nord, plutôt ... *Saiga* se trouve –

M. Thiam :

Excusez-moi, lieutenant, je vous interromps. A 3 h 50, le *Saiga* se trouvait à 40 degrés bâbord ...

M. Sow :

A 44,5 milles marins de distance et approximativement 40 degrés bâbord, approximativement.

M. Thiam :

Vous prenez un compas et vous partez du point auquel vous vous trouviez à 3 h 50, vous tracez un arc de cercle. Est-ce que, à un moment quelconque, cet arc de cercle va rencontrer la ligne que vous indiquez comme étant celle de la route du *Saiga* ?

M. Sow :

Reprenez votre question, s'il vous plaît.

M. Thiam :

Je vais la reprendre, sur la carte.

M. Sow :

Merci.

(M^e Thiam s'approche de la carte.)

M. Thiam :

Vous êtes à 3 h 50 ici.

M. Sow :

Exact.

M. Thiam :

Le cap 205 est environ celui-ci. Il passe à peu près par là ?

M. Sow :

Oui.

M. Thiam :

D'accord. 44,5 *miles* à partir de ce point ci, cela nous mène très exactement ici, excusez-moi, ici, au nord. Au nord de la frontière sud. Regardez votre carte.

M. Sow :

Oui.

M. Thiam :

Donc, cela nous mène ici. D'accord ?

M. Sow :

Oui.

M. Thiam :

Au nord de la frontière.

M. Sow :

Pas sur 15 degrés.

M. Thiam :

J'ai bien dit au nord de la frontière, à peu près ici, 44,5.

M. Sow :

Oui.

M. Thiam :

44,5 *miles*, si j'essaye de prendre avec un compas et de tracer un demi-cercle. Vous pensez qu'à un moment quelconque cela va recouper cette ligne ?

M. Sow :

Avec ... ?

M. Thiam :

Si je prends un compas pour déterminer un rayon de 44,5 *miles*.

M. Sow :

A une heure bien précise ?

M. Thiam :

Oui, à 3 h 50, nous sommes là à 3 h 50, nous sommes d'accord. A partir d'ici, si je détermine un rayon de 44,5 *miles* qui va s'arrêter ici, d'après vos propres calculs, à peu près ?

M. Sow :

Oui.

M. Thiam :

D'accord, ici, si je trace un arc de cercle qui passe par ce point-là, est-ce que vous pensez que cela va rencontrer cette ligne-là ?

M. Sow :

Non.

M. Thiam :

Parfait. Alors pourquoi remettez vous ... le *Saiga* se trouvait, même si vous n'étiez pas très sûr du cap, plus ou moins 40 degrés bâbord, pourquoi remettez vous au Tribunal une carte sur laquelle figure un mouvement d'un navire, c'est-à-dire cette ligne-là, qui n'est pas ce que vous avez constaté ?

M. Sow :

Ce mouvement –

M. Thiam :

Je veux en déduire, Monsieur le lieutenant Sow, que vous avez remis au Tribunal une fausse carte.

M. Sow :

Excusez-moi, ce mouvement du *Saiga* a été relevé du propre journal de *Saiga*.

M. Thiam :

Bien. Lieutenant Sow, vous êtes un officier de marine brillant, vous connaissez la différence qu'il y a entre une encablure et un *mile*. Si je vous disais qu'une brasses cela fait 1,624 mètres ? Cela vous semblerait déraisonnable ?

M. Sow :

(Pas de réponse)

M. Thiam :

J'attends votre réponse, lieutenant.

M. Sow :

Je ne peux pas vous répondre à cette question.

M. Thiam :

On va partir donc de cet a priori. Je vous dis qu'une brasses fait 1 624 mètres.

M. Sow :

Merci.

M. Thiam :

Une encablure, cela fait 120 brasses, cela nous amène à 194,88 mètres. Quatre cent quarante-cinq encablures, cela nous amène à 86,72 kilomètres. Pourriez-vous à partir de la position à laquelle vous étiez à 3 h 50 indiquer un point qui se trouverait sur la carte sur le cap 205 à 71,6 kilomètres ?

M. Sow :

Bien sûr. *(Le témoin prend ses instruments et s'approche de sa carte sur la table.)*

INTERVENTION BY MR. LAGONI
COUNSEL OF GUINEA
[PV.99/13, E, p. 27–28]

Mr. Lagoni:

Mr. President, the chart which is in the hands of Lieutenant Sow is to be deposited as documentary evidence to the Tribunal. I would request that no other lines are drawn on this chart, no spots made on it or holes made in it. This is the chart on which our calculation is based. We have this morning made photocopies, so perhaps we may use them?

The President:

Thank you very much.

M. Thiam :

Je n'ai pas demandé au lieutenant Sow de trouver la carte.

The President:

I was just about to say that the Lieutenant must ensure, in using the equipment, that he does not make any dents or holes in the chart. Is it the same chart as the one that we have here? Is it on the same scale?

Mr. Lagoni:

No.

(Professor Lagoni provides photocopies)

(Witness draws on chart)

The President:

We would like to have a chart on the same scale, the Tribunal would very much like to have it, because the small-scale one that we have is not as helpful.

However, Lieutenant Sow, please go ahead and answer the question. *(After a discussion, off microphone, between Mr. Thiam and the witness)* May we have the conclusion of that tête-à-tête?

CONTRE-INTERROGATOIRE DE M. SOW (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/13, F, p. 42–50]

M. Thiam :

Monsieur le Président, je suis persuadé que le témoin va vous montrer le point qui a été déterminé sur la carte qui est projetée.

The President:

Please, Lieutenant Sow.

M. Sow :

Les 71,6 kilomètres se situent approximativement là.

M. Thiam :

Alors, lieutenant Sow, quand vous disiez dans votre rapport que vous comptiez en encablures, est-ce que vous comptiez en encablures ou en *miles* ?

M. Sow :

Je comptais en milles marins et encablures.

M. Thiam :

Ce n'est pas une réponse. On ne peut pas compter à la fois dans l'un et dans l'autre. Est-ce que vous comptiez en encablures ou en *miles* ?

M. Sow :

En encablures.

M. Thiam :

En encablures, selon vous le navire se trouvait beaucoup plus au nord du point qui est indiqué sur la carte ?

M. Sow :

Je ne peux pas affirmer que le navire se trouvait beaucoup plus au nord parce que, là, nous avons fait cette mesure en kilomètres. Les unités de mesure en mer ne sont pas des kilomètres, ce sont des milles marins ou des encablures.

M. Thiam :

Bien, lieutenant, prenons maintenant le parcours du *Saiga*, je vais vous projeter la carte avec mes différents points. (*Projection d'une carte*) Sur le parcours du *Saiga*, vous voyez un point B.

M. Sow :

Oui.

M. Thiam :

Le *Saiga* s'y trouvait à 16 heures, c'est exact ?

M. Sow :

Oui.

M. Thiam :

Vous voyez un point C, le *Saiga* s'y trouvait à 20 heures.

M. Sow :

Je ne peux pas l'affirmer.

M. Thiam :

Ce sont les relevés de son journal de bord qui vous ont servis à vous. Vous pouvez nous concéder qu'ils peuvent nous servir à nous également.

M. Sow :

Sur la carte je n'ai pas situé la position du *Saiga* à 20 heures.

M. Thiam :

Vous allez supposer, je vous dis que d'après le relevé du journal de bord qui vous a servi aussi – et vous souffrirez qu'ils nous servent aussi – qu'à 20 heures le *Saiga* se trouvait au point C. Vous semblerait-il raisonnable, lieutenant, pour déterminer la distance que le *Saiga* a parcouru en une heure, de diviser cette portion de ligne entre B et C, en quatre, puisqu'il s'est passé 4 heures ?

M. Sow :

Je ne sais pas sur quelles bases diviser cette portion en quatre, parce que je n'ai pas mentionné la position du *Saiga* à 20 heures.

M. Thiam :

Alors, lieutenant, je vais vous donner une autre précision. Supposons que le navire ait navigué à vitesse constante. Vous semblerez-il raisonnable de diviser la portion de ligne du point B au point C, en quatre, pour savoir ce qu'il fait à peu près, quelle est la distance ?

M. Sow :

Oui, parce qu'effectivement 4 heures de temps se sont écoulées, oui.

M. Thiam :

Donc, on peut estimer que si nous divisions ces portions de ligne par quatre, nous aurions la distance que le *Saiga* fait en une heure ?

M. Sow :

Oui.

M. Thiam :

Voyez-vous des petits segments de ligne rouge sur cette ligne ?

M. Sow :

Oui, je les vois.

M. Thiam :

Je les ai faits très approximativement, lieutenant, mais cela vous semble-t-il à peu près faire une division de ce segment de ligne en quatre ? Il y a trois segments de ligne rouge, est-ce que cela divise à peu près le point B au point C en quatre morceaux égaux ?

M. Sow :

Effectivement.

M. Thiam :

Par conséquent, on peut considérer que du point B jusqu'au premier segment de ligne rouge c'est la distance que le *Saiga* pouvait faire en une heure ?

M. Sow :

Oui.

M. Thiam :

Vous voyez, du point B au point G, il y a d'autres segments de ligne rouge.

M. Sow :

Oui.

M. Thiam :

Qui sont également de la même distance.

M. Sow :

Oui.

M. Thiam :

Pouvez-vous dire pour le Tribunal l'heure que représente chaque segment de ligne rouge ?

M. Sow :

Si nous avons admis, pour ce premier partage, que chaque intervalle ici correspond à une heure, donc sur ce point E, *Saiga* devait être là, 23 heures moins.

M. Thiam :

Exact. Poursuivez. A minuit il était ?

M. Sow :

Là !

M. Thiam :

A 1 heure du matin ?

M. Sow :

Là !

M. Thiam :

A 2 heures ?

M. Sow :
Là !

M. Thiam :
A 3 heures ?

M. Sow :
Là !

M. Thiam :
Cette ligne est donc en dessous de la frontière ?

M. Sow :
Oui.

M. Thiam :
Mais cette carte, Monsieur le lieutenant Sow, c'est vous qui l'avez produite ?

M. Sow :
C'est moi qui ai produit cette carte, je n'ai pas fait ces répartitions, je n'ai pas estimé la vitesse de *Saiga*, je n'ai pas mentionné cette position à 20 heures.

M. Thiam :
Lieutenant Sow, vous avez dit que vous êtes absolument sûr que les mouvements du *Saiga*, sur ce navire, sont ceux que vous avez relevés sur son journal de bord ?

M. Sow :
Effectivement.

M. Thiam :
Il n'y a rien dans le journal de bord qui vous a fait penser que c'était faux ?

M. Sow :
Si, parce que la vitesse de *Saiga* est mentionnée dans le journal de bord. Nous n'avons pris que ces deux positions et la position de détection ensuite jusqu'à l'immobilisation. Cette position de 20 heures ou la répartition de ces secteurs, je ne l'ai pas fait.

M. Thiam :
Vous ne l'avez pas faite, d'accord. Mais montrez-nous exactement les positions que vous avez prises ?

M. Sow :
Cette position, celle là, et cette position.

M. Thiam :
Cela c'est ce que vous avez pris dans le journal de bord ?

M. Sow :
Oui, du *Saiga*.

M. Thiam :

De toute façon, lieutenant, si nous considérons le point B et le point E, en excluant le point C, est-ce qu'il y aurait une différence ?

M. Sow :

Une différence de, s'il vous plaît, je n'ai pas bien compris ce que vous voulez dire.

M. Thiam :

Sur le déplacement du navire, vous avez pu contrôler sa vitesse.

M. Sow :

Vous voulez dire une différence de ... ?

M. Thiam :

Sur ces petits segments.

M. Sow :

Je n'ai aucune idée sur ces segments.

M. Thiam :

Je vous demande, lieutenant Sow, d'ignorer le point C et je vous demande maintenant de considérer le point B et le point E. Si nous devons diviser la ligne entre le point B et le point E, en différents segments égaux, est-ce que cela présenterait une différence sur la carte ?

M. Sow :

Une légère différence.

M. Thiam :

Une légère différence. Très bien. Cette différence nous amènerait à 3 heures du matin, où cela exactement ?

M. Sow :

A 3 heures du matin, un peu en haut du point G.

M. Thiam :

Le Tribunal aura noté qu'il montre un point qui est en-dessous de la frontière sud de la zone économique exclusive, à 3 heures du matin. Et à 3 h 50 ?

M. Sow :

3 h 50, c'est là.

M. Thiam :

Donc, il était là à 3 h 50, le navire.

M. Sow :

Trois heures 50, c'est là que vous avez mentionné.

M. Thiam :
Oui.

M. Sow :
Je n'ai pas mis 3 h 50 la position de *Saiga*.

M. Thiam :
Est-ce qu'à 3 h 50 le *Saiga* était là ?

M. Sow :
Non.

M. Thiam :
Il était où ?

M. Sow :
A 3 h 50, le *Saiga* était encore au-dessus de la ligne de la frontière sud, au nord de la ligne de la frontière sud.

M. Thiam :
Sur cette ligne ?

M. Sow :
Au-dessus. La ligne de la frontière sud, à 3 h 50, *Saiga* était au nord de cette ligne.

M. Thiam :
Mais sur cette ligne quand même ?

M. Sow :
Au nord de la ligne.

M. Thiam :
Excusez-moi, je vais me déplacer. Pouvez-vous montrer au Tribunal, de ce point-là, à ce point-là, où était exactement le *Saiga* à 3 h 50, selon vous ?

M. Sow :
Selon moi, à 3 h 50, *Saiga* était au-dessus de cette ligne, là.

M. Thiam :
Lieutenant Sow, si vous calculez la vitesse du *Saiga* qui était constante, d'après son journal de bord, et son point de déplacement du point B au point E –

M. Sow :
Je n'ai pas calculé –

M. Thiam :

Je n'ai pas terminé ma question. Voyez, Maître von Brevern aura noté que cette fois-ci c'est vous qui m'avez interrompu ... Si vous notez le temps de déplacement du point B au point E, est-ce que vous pourriez faire des sections qui correspondent à une heure de déplacement ?

M. Sow :

Du point B au point E, je peux le faire.

M. Thiam :

Qu'est-ce que cela donnerait à peu près ? Vous avez dit tout à l'heure que ce serait légèrement différent.

M. Sow :

Ce serait légèrement différent ou peut-être cela peut correspondre, je ne sais pas parce que je ne l'ai pas fait encore.

M. Thiam :

Cela peut correspondre ou ce serait légèrement différent ?

M. Sow :

Je ne sais pas parce que je ne l'ai pas fait encore.

M. Thiam :

Si c'est légèrement différent, on peut négliger la différence. Si nous négligeons la différence, parce qu'elle est légère, selon vous, et c'est mon point de vue aussi, Monsieur le lieutenant Sow, eh bien, quand on compte les sections, est-ce qu'on n'arrive pas à 3 heures du matin, au sud de la frontière sud de la zone économique exclusive de la Guinée ? Recompter les sections, s'il vous plaît.

M. Sow :

Selon ce que vous avez fait, *Saiga* se trouve en-dessous de la ligne de la frontière sud à 3 h 50, selon votre schéma.

M. Thiam :

Reprenez. Voyez-vous sur ma carte à 3 h 50, il était arrêté ou presque. Alors reprenez les sections une par une, à partir du point B.

M. Sow :

Excusez, Maître, je ne peux pas donner des explications sur un travail que je n'ai pas fait. Je voudrais faire mon propre travail et l'expliquer, présenter –

M. Thiam :

Je ne vois pas d'inconvénient à ce que –

The President:

May I interrupt both of you? Maître Thiam, I understand that you wish the witness to tell us at which point the *Saiga* would be at a particular time. You are also asking him about the speed and he says he has not calculated the speed. I think if you could perhaps ask a specific question about the location or if you could ask the question if he calculated the speed, what

would he get, but he says that up to now he has not calculated the speed and maybe your questions should be slightly different. In any event I note that it is only three minutes to 12 and I was wondering whether you could complete or whether we will have to adjourn and come back.

M. Thiam :

Monsieur le Président, d'abord sur votre première question. Peut-être qu'il y a des difficultés de traduction ou peut-être que j'ai mal compris, mais il me semble que le témoin a reconnu que le navire se déplaçait à une vitesse constante, d'après son livre de bord en tout cas. Par conséquent, peu importe qu'elle était vraiment la vitesse, ce qui m'intéresse, c'est de savoir s'il peut calculer le déplacement du navire sur une heure. Cela, c'était pour répondre à votre première question.

La deuxième question, je voudrais vous dire que, bien évidemment, il y a d'autres points sur lesquels je voudrais interroger le témoin et cela me prendra plus de trois minutes.

The President:

Mr. von Brevern, please?

Mr. von Brevern:

Mr. President, I would like to give to the protocol that the witness did not say that the *Saiga* went at a constant speed. This was the assumption of Maître Thiam.

The President:

Yes, I think I was going to make the same point. You have not yet asked the witness to either agree or disagree that the vessel was at a constant speed.

M. Thiam :

Peut-être pour la matinée, je vais terminer sur ce point. Est-ce que le témoin peut nous dire s'il sait que le navire allait à une vitesse constante ou s'il pense que la vitesse a varié entre le point B et le point E ?

M. Sow :

Pour ce qui est de cette question, je ne peux pas dire que le navire partait sur une vitesse constante. J'ai juste relevé différentes positions du navire que j'ai situées sur la carte.

M. Thiam :

Est-ce que vous pourriez dire le contraire ? Est-ce que vous pourriez affirmer qu'il n'allait pas à une vitesse constante du point B au point E ?

M. Sow :

Selon ce qui est écrit dans son journal de bord, le navire se déplaçait à une vitesse de 7 nœuds et quelque.

M. Thiam :

Constante ou pas constante ?

M. Sow :

La vitesse ne pouvait pas être constante parce qu'il y avait les influences peut-être de la mer, je ne sais pas, mais en tout cas ce qui est écrit sur le journal c'est ce que nous avons considéré ici.

M. Thiam :

C'était 7 nœuds et quelque et à aucun moment il n'est indiqué qu'il y a eu une variation dans cette vitesse ?

M. Sow :

Non.

M. Thiam :

Donc, nous pouvons partir raisonnablement de l'hypothèse qu'entre le point B et le point E la vitesse était constante ?

M. Sow :

S'il n'y a pas eu des indications dans le journal du *Saiga*.

M. Thiam :

Vous voulez parler d'indications contraires ? S'il n'y a pas eu d'indications contraires on peut –

M. Sow :

Et s'il n'y a pas eu des signalements d'influences du courant ou des vents, pour en tenir compte.

M. Thiam :

Il serait donc raisonnable de diviser la distance entre le point B et le point E par le nombre d'heures écoulées pour que le navire parte du point B pour arriver au point E ?

M. Sow :

Pas forcément.

M. Thiam :

Pourquoi ce ne serait pas forcément ?

M. Sow :

Parce que, après la vitesse que l'on marque dans le journal et que nous estimons nous déplacer, il peut y avoir des influences qui modifient cette vitesse.

M. Thiam :

Mais est-ce que cela donnerait au Tribunal une indication approximative ?

M. Sow :

Je ne sais pas.

M. Thiam :

Je crois, Monsieur le Président, que pour la matinée nous pouvons nous arrêter là.

The President:

We will break at this point and resume at 2 o'clock. The meeting is suspended.

(The Tribunal adjourns at 12.00 noon.)

Public sitting held on 15 March 1999, 2.00 p.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 15 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

Audition des témoins (suite)

CONTRE-INTERROGATOIRE DE M. SOW (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/14, F, p. 4–6]

The President:

Yes, Maître Thiam, you may proceed.

M. Thiam :

Je vous remercie infiniment, Monsieur le Président. Je vais redemander au témoin de tracer sur cette carte le cap 205.

(Le témoin trace des points sur la carte.)

Mr. von Brevern:

Mr. President?

The President:

Yes, Mr. von Brevern?

Mr. von Brevern:

Mr. President, we thought that for all the Honourable Judges it would be convenient to demonstrate at this chart here. I do not know why that should be over there. Also for us it is too far away.

M. Thiam :

Monsieur le Président, on peut peut-être rapprocher le tableau, mais je souhaiterais que les deux cartes soient visibles en même temps.

The President:

Could we move this table a little forward?

(Le tableau portant les cartes est déjà déplacé.)

M. Thiam :

Le témoin demande, Monsieur le Président, si l'on peut placer la carte sur la table. Je n'y vois pas d'inconvénient.

Vous pouvez poser la carte sur la table.

The President:

Are you ready?

M. Thiam :

Pouvez-vous montrer au Tribunal la ligne que vous venez de tracer ?

M. Sow :

C'est cette ligne que je viens de tracer.

M. Thiam :

Qui correspond donc au cap 205 ?

M. Sow :

Deux cent cinq.

M. Thiam :

Monsieur le Président, je dois présenter des excuses au Tribunal ainsi qu'au témoin parce que, ce matin, j'ai fait une erreur dans les calculs que je vous ai livrés à propos des encablures. Quatre cent cinq encablures font environ 86 kilomètres et non pas 71. Je voudrais donc demander au témoin s'il peut mesurer avec son compas une distance d'environ 86 kilomètres sur la carte qui est sur la table pour la rapporter, ensuite, sur la carte qui est sur le tableau.

M. Sow :

Quelle distance ?

M. Thiam :

Quatre-vingt-six kilomètres. *(Le témoin s'exécute.)*

Monsieur le Président, comme vous avez pu le constater, je n'avais pas de micro. Je ne vous l'annonce que maintenant. A l'aide du compas du témoin, j'ai tracé un arc de cercle qui part du point que nous avons défini sur l'autre carte comme étant le point 10 et qui fait 86 kilomètres de rayon. Je voudrais demander au témoin qu'il explique à la cour où est-ce que cet arc de cercle touche le trajet du *Saiga*.

M. Sow :

Cet arc de cercle touche le *Saiga* hors de la ligne de la frontière sud.

M. Thiam :

Mais, plus précisément, cela le touche où ?

M. Sow :

Pratiquement, cela ne le touche pas ici. (*Le témoin montre sur la carte.*)

M. Thiam :

Pourriez-vous montrer sur la carte lumineuse ce point où passe l'arc de cercle ?

M. Sow :

Le point au-dessous duquel passe l'arc de cercle est ce point.

The President:

Maître Thiam, maybe you could ask the witness to give us some more information on the coordinates because all that the people who are writing the précis hear from the witness is "here". They cannot indicate where it is. Perhaps you could do it by way of the coordinates.

M. Sow :

La position d'immobilisation du *Saiga* ... vous me permettez de voir dans le journal pour me rappeler précisément ... 8°58', 14°50'.

M. Thiam :

Monsieur Sow, pouvez-vous voir ici l'arc de cercle ?

M. Sow :

Je vois l'arc de cercle.

M. Thiam :

Il passe par ici et par-là. Pouvez-vous montrer ces deux points au Tribunal et, ensuite, vous donnez les coordonnées, selon les vœux de M. le Président ?

M. Sow :

L'arc de cercle passe au-dessous de ce premier point bleu ou vert et ce deuxième point rouge.

M. Thiam :

Par conséquent, Monsieur Sow, si le *Saiga* était bien sur le cap 205, à 86 kilomètres de distance, 445 encablures, il devait être en dessous du point bleu que vous avez indiqué tout de suite ?

M. Sow :

Le *Saiga* était à une distance de 44,5 encablures. Une mesure en kilomètres, en mer, nous ne l'utilisons pas. Nous utilisons la distance en milles marins, en encablures, mais en kilomètres, non.

M. Thiam :

Monsieur Sow, vous avez dit dans votre rapport que le *Saiga* se trouvait à 445 encablures. Est-ce 445 ou 44,5 ?

M. Sow :

Bien sûr.

M. Thiam :

Alors, 445 encablures, nous avons déterminé que c'est juste en dessous de ce point bleu.

M. Sow :

La mesure que nous venons de faire, pour faire cet arc de cercle, nous n'avons pas utilisé les 44,5 encablures. Nous avons utilisé les unités de mesure en kilomètres.

M. Thiam :

J'ai converti, Monsieur Sow, les encablures en kilomètres.

M. Sow :

Je n'ai aucune notion sur cette conversation.

M. Thiam :

Selon vous, pouvez-vous –

The President:

Mr. von Brevern?

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/14, E, p. 5–7]

Mr. von Brevern:

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

The President:

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

Mr. von Brevern:

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

The President:

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

Mr. von Brevern:

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

The President:

Thank you. Please proceed.

M. Thiam :

Monsieur le Président, je voudrais d'abord faire observer que, ce matin, le professeur Lagoni ne voulait pas que l'on fasse des trous sur la carte originale. Maintenant, s'il préfère que nous fassions des trous sur cette carte, je n'y vois pas d'inconvénient. En ce qui concerne la deuxième observation de M^e von Brevern, le témoin a fourni des documents sur lesquels il mesure les distances non pas en milles marins, mais en encablures. J'aurais souhaité qu'il nous soit permis de faire les calculs selon les encablures. S'il y a un autre moyen de convertir sur cette carte les encablures en milles marins, je ne vois aucun inconvénient à ce que le témoin fasse ses calculs sur la base d'encablures converties en milles marins. Je n'y vois pas d'inconvénient. Je demanderais au témoin de nous calculer 445 encablures en *miles*.

The President:

Sorry.

Mr. von Brevern?

Mr. von Brevern:

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

The President:

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

M. Thiam :

Je le fais avec plaisir pour le Tribunal. Je disais ce matin qu'une brasse fait 1,624 mètre et une encablure 120 brasses, soit 194,88 mètres. 445 encablures font donc 86 721,6 mètres. Je peux répéter ... une brasse fait 1,624 mètre –

The President:

Yes, Mr. von Brevern?

Mr. von Brevern:

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

M. Thiam :

Juste avant que M. von Brevern ne m'interrompe, j'étais en train de dire que j'allais répéter. Donc, je répète. Une brasse est égale à 1,624 mètre. Une encablure fait 120 brasses. Ce qui m'amène, si mes calculs ne sont pas faux, à 194,88 mètres. Quatre cent quarante-cinq encablures font donc 86 721,6 mètres, ce qui m'amène à 86 kilomètres. Il y a peut-être une erreur.

The President:

Mr. von Brevern, have you followed the calculation?

Mr. von Brevern:

I have heard the figures but I have not been able so far to check whether they are correct. We are still working on it. Will you give us one minute, please? (*Pause*) Mr. President, can I ask for permission for my colleague and counsel for the delegation, Mr. Diallo, to explain our view as to the figures which we have just heard from Maître Thiam?

The President:

Yes, he may.

M. Diallo :

Merci, Monsieur le Président. Pour la navigation, pour la circonstance, nous n'avions pas utilisé les brasses. C'est utilisé pour mesurer la profondeur de l'eau. Si nous voulons convertir en kilomètres, il faut multiplier la distance par 1,852 pour trouver la distance en kilomètres. Donc, en multipliant, si je ne me suis pas trompé, on trouve 82 kilomètres au lieu de 86. Donc, il y a une erreur quelque part. Je vous remercie.

Quarante-quatre virgule cinq milles marins multipliés par 1,852 kilomètre, cela doit donner la distance en kilomètres. Mais toute autre méthode peut conduire à des erreurs. Je vous remercie.

The President:

Thank you very much.

Maître Thiam, does that makes sense to you?

M. Thiam :

Monsieur le Président, moi, je travaille sur la base des documents qui me sont fournis par la Guinée. Et la Guinée nous a donné des documents où les distances sont mesurées en encablures. Je suis heureux de voir qu'ils font, comme moi, une distinction entre l'encablure et le mille marin. Si les documents fournis au Tribunal avaient mentionné des distances calculées en milles marins, j'aurais fait exactement comme M. Diallo : j'aurais multiplié 1 852 mètres par 445 ou 44,5, et peut-être que j'aurais obtenu le chiffre qu'il a obtenu. Mais la partie guinéenne ne peut pas nous reprocher de calculer les distances comme ils l'ont indiqué eux-mêmes dans leurs documents. Et, dans leurs documents, on parle d'encablures.

Je suis très désolé pour ceux d'entre vous qui sont anglophones, car je crois que cette mesure n'existe pas; du moins, je n'en ai pas une certitude absolue. Peut-être que cela ne correspond à rien en anglais, mais, en français, une brasse fait 1,624 mètre. Une encablure fait 120 brasses. Donc, 194,88 mètres et 445 encablures nous donnent 86,7 kilomètres.

Je suis désolé que la Guinée ne veuille pas que l'on travaille sur la base des chiffres qu'ils ont eux-mêmes indiqués, mais qu'ils souffrent que, pour l'instant, nous le fassions. Donc, mesuré en encablures, nous arrivons à 86 kilomètres de distance.

CONTRE-INTERROGATOIRE DE M. SOW (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/14, F, p. 9–11]

M. Thiam :

Cette distance-là, si nous prenons un arc de cercle, Monsieur Sow, par rapport au cap 205 que vous avez indiqué, c'est après ou avant la frontière de la zone économique exclusive de la Guinée ?

M. Sow :

C'est après.

M. Thiam :

Alors, expliquez-nous maintenant, Monsieur Sow, pourquoi, après avoir indiqué que, dans vos documents, vous avez pris des mesures en encablures, vous voulez absolument nous faire croire que l'on doit calculer en milles marins ?

M. Sow :

Comme je vous l'ai déjà dit plus haut, en mer, nous utilisons deux types d'unités de mesure : le mille marin et l'encablure. Donc, un mille marin est égal à 1 852 mètres et une encablure, c'est 1/10ème d'un mille marin. Ce sont les unités de mesure que nous avons l'habitude d'utiliser pour déterminer la distance entre nous et un objectif.

M. Thiam :

Monsieur Sow, vous avez écrit dans vos notes à 3 h 50, l'unique objectif parmi les sept que nous visionnons sur notre écran radar proche et se dirigeant vers cette position se trouvait à 445 encablures de nous et approximativement à 40 degrés bâbord. »

Lorsque vous dites « 445 encablures », vous visiez des milles ou des encablures ?

M. Sow :

Excusez ... pour tout marin, dès que l'on dit « 445 encablures », il comprend directement 44,5 milles.

M. Thiam :

Alors, si vous multipliez, Monsieur Sow, 445 par 1 852 mètres, qu'obtenez vous ? Ou bien est-ce qu'il faut multiplier par 44,5 ?

M. Sow :

Je ne comprends pas votre question.

M. Thiam :

Je veux vous expliquer, Monsieur Sow, que je suis obligé de travailler avec les documents que vous nous avez fournis. Si vous avez employé le terme « encablures », je mesure en encablures et, en encablures, 445, cela représente exactement 86 kilomètres. Ces 86 kilomètres sur le cap 205, cela nous mène après la frontière de la Guinée pour la zone économique exclusive. Sommes-nous d'accord au moins là-dessus : 86 kilomètres ?

M. Sow :

Je ne peux pas être d'accord sur la mesure en kilomètres de cette distance. Je ne peux pas être d'accord.

M. Thiam :

Je pars de la supposition qu'il s'agit bien de 86 kilomètres. C'est une supposition. Je ne vous demande pas d'approuver ou non. Je vous demande si les 86 kilomètres, cela nous mène bien au-delà de la frontière de la Guinée pour sa zone économique exclusive ?

M. Sow :

Avec cette supposition, la position nous mène au-delà de la ligne de la frontière.

M. Thiam :

Et, comme par hasard, elle nous mène exactement au point G que j'ai indiqué sur la carte et qui est la position où se trouvait le navire. C'est un hasard. Est-ce que vous voulez expliquer au Tribunal que c'est par hasard qu'en suivant le cap que vous avez indiqué, en mesurant les encablures que vous avez indiquées, on arrive presque exactement au point G où se trouvait le navire ? Est-ce que vous voulez expliquer au Tribunal que c'est un hasard ?

M. Sow :

Nous n'avons jamais travaillé avec le hasard.

M. Thiam :

En tout cas, en prenant vos mesures, aussi bien pour le cap que pour la distance, nous arrivons, comme par hasard, exactement au point G où se trouvait le navire à 3 h 50.

M. Sow :

Le premier tracé, nous l'avions fait sur cette carte et le hasard ne nous a pas conduits au-delà.

The President:

Excuse me.

Mr. von Brevern, please.

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/14, E, p. 8–10]

Mr. von Brevern:

Mr. President, again for the sake of clarification, of course Maître Thiam could continue asking the consequences of a distance of 86 kilometres. We could go on with this forever, but this is not the figure which is the equivalent to 44.5 miles. I followed this, because I wrote it down: When Maître Thiam said "How much is a cable?" he did not say, and did not calculate, that it is one-tenth of a mile. He said that one cable is 120 fathoms. He came up with an amount of 194.88, and this he multiplied with 44.5 miles; one-tenth of a mile, corresponding to one cable, is less than that and is only 1,852. Therefore, the figure corresponding to 44.5 miles is 82.414 in kilometres and not 86 kilometres. Therefore, I think that all further questions should be based on the figure of 82 kilometres, if we continue in kilometres. Thank you.

The President:

Thank you. I think that the issue is fairly complicated but we could make it simpler. Maître Thiam states that on his calculations he comes to 86 kilometres. On the calculation that you have suggested, which is also the calculation that has been given to me by Members of the Tribunal, the figure is less than 86 kilometres. But the question Maître Thiam has asked now is this: assuming that the distance is 86 kilometres, where would the ship be? If the answer is that it is at point X, if the Tribunal comes to the conclusion, on the basis of objective facts – and these facts are objective, they are not the opinion of anybody – that the distance should be less than 86 kilometres, we will draw our own conclusion. If it was more than 86, we draw our conclusion. But the question that Maître Thiam is asking now, regardless of whether the witness agrees with him or not, is if, in fact, it was 86 kilometres, where would that point be?

Mr. von Brevern:

Mr. President, for the relevance of such a question, does Maître Thiam still calculate the corresponding of 44.5 miles in kilometres to be 86 and something kilometres?

The President:

That is what he said.

Mr. von Brevern:

Then I accept that his question may be relevant. Otherwise, it would not be relevant. Perhaps we could obtain a clarification from Maître Thiam about his question.

The President:

Maître Thiam, please?

M. Thiam :

Monsieur le Président, je suis au regret de devoir dire qu'il me semble que la partie guinéenne tente de créer des incidents là où les choses sont parfaitement claires. J'ai expliqué qu'il y a un mode de calcul qui pourrait être fait en milles marins mais les dictionnaires français sont assez clairs en ce qui concerne l'encablure et une encablure, ce n'est pas un mille marin, une encablure, ça fait 194,88 mètres, tandis qu'un mille, cela fait 1 852 mètres.

Si la partie guinéenne nous produit des documents où les calculs sont faits en français et en utilisant le terme « encablures », nous n'avons aucune raison de supposer que cette

partie ignore le français et, partant donc de l'hypothèse que le lieutenant Sow connaît parfaitement la langue dans laquelle il s'exprime aujourd'hui, nous avons déduit que les calculs ont été faits en encablures. Les calculs étant faits en encablures, M^e von Brevern ne peut pas m'empêcher, aujourd'hui, de faire mes calculs moi-même en encablures. Et, lorsque je traduis les calculs, 445 encablures en mètres, j'arrive très exactement à 86,7 kilomètres. Maintenant, la Guinée, dans le contre-interrogatoire qu'elle fera tout à l'heure pourra toujours expliquer comme est-ce que l'encablure peut, en français, être assimilée à un mille marin.

Pour l'instant, moi, je travaille sur la base de la connaissance que j'ai de la langue française, et cette connaissance-là m'interdit formellement, Monsieur le Président, de confondre une encablure et un mille marin. Partant de cette base, j'ai demandé au témoin –

The President:

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

M. Thiam :

C'est exactement ce que j'ai fait, Monsieur le Président, lorsque M^e von Brevern m'a interrompu. Je parlais d'une hypothèse et M^e von Brevern a considéré que mes calculs étaient inexacts, mais il ne s'est pas contenté de dire, comme vous l'avez fait, que l'on peut vérifier après la distance que j'ai indiquée comme étant celle d'une encablure. Cela peut se vérifier. Il veut nous imposer. Il a voulu m'imposer de faire des calculs en milles marins. Je lui réponds et je vous réponds également, Monsieur le Président, que nous faisons nos calculs en encablures et, jusqu'à ce qu'il ait fait la démonstration de ce qu'une encablure ne correspond pas à 194,88 mètres, jusqu'à ce qu'il ait apporté la preuve du contraire, moi, je considère que 445 encablures, cela nous mène à 86,7 kilomètres.

CONTRE-INTERROGATOIRE DE M. SOW (SUITE)
PAR M. THIAM (SAINT-VINCENT-ET-LES-GRENADINES)
[PV.99/14, F, p. 13–31]

M. Thiam :

Alors, je voudrais demander au témoin quand est-ce qu'il a remis sa carte à l'état-major ?

M. Sow :

Dès après la mission, nous rendons compte à l'état-major.

M. Thiam :

Comment pouvez-vous expliquer, alors, que nous n'ayons eu une copie contenant les mouvements de votre vedette il n'y a que quelques jours, lorsque vous êtes arrivé pour témoigner ?

M. Sow :

Reprenez, s'il vous plaît, la question.

M. Thiam :

Comment pouvez-vous expliquer que le Gouvernement guinéen n'ait pas été en mesure, jusqu'à votre arrivée ici comme témoin, de fournir une carte qui comporte tous les détails que vous avez indiqués ?

M. Sow :

Je ne peux pas répondre à cette question.

M. Thiam :

Mais vous êtes absolument certain que vous avez remis votre carte à l'état-major depuis votre arrivée, le 28 octobre, à Conakry ?

M. Sow :

Nous sommes arrivés à Conakry le 29 octobre.

M. Thiam :

Donc, depuis le 29 octobre ?

M. Sow :

Depuis la fin de la mission, le 29 octobre, nous avons fait le compte rendu avec les documents nécessaires.

M. Thiam :

Donc, on parlait bien de l'année 1997 ?

M. Sow :

Bien sûr.

M. Thiam :

Cette affaire est importante pour la Guinée ?

M. Sow :
Bien importante.

M. Thiam :
C'est l'état-major qui vous a dit que vous deviez venir témoigner ici ?

M. Sow :
Bien sûr.

M. Thiam :
Alors, l'état-major a considéré que c'était important que vous veniez témoigner, mais a gardé cette carte par devers lui jusqu'à ce que vous veniez témoigner ?

M. Sow :
Je ne comprends pas ce que vous voulez dire par-là.

M. Thiam :
Nous n'avons jamais vu cette carte avant que vous n'arriviez. Voici la question : pourquoi l'état-major ne l'a-t-il pas transmise au Gouvernement de la République de Guinée pour que cette carte soit produite devant ce Tribunal avant que vous n'arriviez ?

M. Sow :
Je ne peux pas répondre à cette question. Je ne sais pas.

M. Thiam :
Alors, je voudrais terminer avec l'analyse de la carte en reprenant la vitesse du navire *Saiga*. Pourriez-vous diviser la section entre les points B et E ou, plus facilement peut-être, la section entre le point B et le point C en quatre parties égales ?

M. Sow :
Est-ce que je peux le faire ?

M. Thiam :
Oui.

M. Sow :
Oui.

M. Thiam :
Vous pouvez le faire et, ensuite, on rapportera sur le reste.

(Le témoin s'exécute.)

M. Sow :
Je n'ai pas le point E sur ma carte.

M. Thiam :
Prenez donc le point B.

M. Sow :

Je voudrais que vous me situiez ce point ici. Je ne l'ai pas sur ma carte.

M. Thiam :

Vous avez sur votre carte le point E, qui est l'endroit exact où le *Saiga* a changé de cap.

M. Sow :

Bien.

M. Thiam :

Je vais vous donner les coordonnées exactes du point E. (*M. Thiam recherche des documents*)
Monsieur Sow, nous allons vous donner les coordonnées exactes du point C, mais vous avez les coordonnées du point E. Alors, vous pouvez faire le calcul à partir du point B et du point E.

M. Sow :

Vous me permettez de prendre ma petite machine ?

M. Thiam :

Allez-y, je vous en prie ... Monsieur Sow, excusez-moi, je peux vous donner maintenant la position exacte du *Saiga* : 9°50'N, 15°51'O. C'est le point E.

(*Le témoin trace sur la carte.*)

M. Sow :

Excusez, s'il vous plaît ?

M. Thiam :

Le point C : 9°50'N, 15°51'O.

Mr. Plender:

Mr. President, it may shorten matters if I remind the witness that according to the log book the position was 10°17.8'N, 15°49.5'W. Mr. President, the evidence that the court has seen from the log book was 10°17.8'N, 15°49.5'W. Those are the coordinates measured in the log book shown in previous evidence at 2000 hours.

M. Sow :

Donc, ce n'est plus la position que vous avez donnée.

M. Thiam :

Prenez la position du livre de bord, s'il vous plaît.

M. Sow :

Reprenez, s'il vous plaît.

Mr. Plender:

The figure that I gave was 10°17.8'N, 15°49.5'W.

The President:

That is at what time?

Mr. Plender:

Mr. President, that is my mistake. I was reading from one line above from where I should have been reading, and I do apologize. It is 15°51.6'W, that is clearly legible; 9°53.7'N at 2000 hours.

M. Sow :

Je ne comprends pas laquelle des coordonnées il faut prendre.

M. Thiam :

C'est exactement celle que je vous ai donnée, à peu près

Mr. Plender:

I repeat for the witness, I was wrong the first time. I was reading the wrong line. 9°53.7'N, 15°51.6'W. That was position 7 of the positions that I gave to the Tribunal earlier.

(Le témoin trace sur la carte.)

M. Sow :

Voilà la position : 9°57,7'Nord, 15°51,6'Ouest.

M. Thiam :

Est-ce que vous pourriez montrer au Tribunal sur la carte qui est sur le tableau ?

M. Sow :

La position est approximativement de 11 milles de la ligne –

M. Thiam :

Pourriez-vous vous mettre de côté s'il vous plaît pour que les membres du Tribunal puissent voir ?

M. Sow :

Cette position se trouve approximativement là.

M. Thiam :

Est-ce sur le marche-route que vous avez indiqué ?

M. Sow :

Non.

M. Thiam :

Vous avez dit au Tribunal, pourtant, que vous aviez fait ce marche-route à l'aide du livre de bord.

M. Sow :

Effectivement, mais en partant d'un point connu, c'est le point de départ, que nous avons joint au point de 0 heure, sachant que, entre, nous avons tracé directement ... L'essentiel, pour nous, était d'avoir la position. Comme le navire a changé de cap, nous avons pris des positions à des moments bien précis.

M. Thiam :

Est-ce que vous voulez expliquer au Tribunal, maintenant, que vous n'avez pas établi cette carte uniquement sur le livre de bord, mais que vous avez également utilisé des suppositions ?

M. Sow :

J'ai tracé cette route à partir des coordonnées du livre de bord du *Saiga*.

M. Thiam :

Alors, pourquoi le point que je vous ai demandé de déterminer comme supposé être la position du navire à 20 h 00 ne figure-t-il pas sur votre carte ? Si vous avez utilisé le livre de bord, pourquoi ce point ne figure pas sur votre carte ?

M. Sow :

Parce que nous ne l'avons pas porté.

M. Thiam :

Est-ce que vous reconnaissez que vous n'avez porté sur cette carte que ce que vous vouliez porter alors ?

M. Sow :

Nous avons porté sur cette carte ce qui nous intéressait et que nous avons tiré du journal de navigation du *Saiga*.

M. Thiam :

La ligne qui représente la route du *Saiga* n'est donc pas exacte par rapport au livre de bord ?

M. Sow :

Elle est exacte par rapport au livre de bord.

M. Thiam :

Mais le point où le navire était à 20 h 00 n'est pas sur cette ligne.

M. Sow :

Je ne disconviens pas que le point ne se trouve pas sur la ligne, mais cette ligne a été établie à partir du livre de bord du *Saiga*.

M. Thiam :

Lieutenant Sow, si vous vouliez informer objectivement votre état-major, n'étiez vous pas obligé de tracer une ligne qui part du point B, là-haut sur la carte, et qui aille jusqu'à ce point où le *Saiga* a noté sur son livre de bord qu'il était ?

M. Sow :

Nous n'avons pas trouvé nécessaire de reporter toutes les positions de *Saiga* sur cette route. Nous pouvions presque ne porter ici que la position de détection et l'arraisonnement du *Saiga* et la position où *Saiga* avait déjà avitaillé des navires.

M. Thiam :

Donc, vous admettez devant le Tribunal que votre carte ne reflète pas fidèlement la vérité telle que vous l'avez constatée sur le livre de bord ?

M. Sow :

Ma carte reflète la réalité du marche-route de *Saiga*.

M. Thiam :

Mais alors, pourquoi est-ce que le point dont nous parlons n'est pas sur cette route ?

M. Sow :

Parce que c'est un point que nous avons considéré moins important. Nous ne l'avons pas porté sur la carte.

M. Thiam :

Le Tribunal appréciera. Voyez-vous, effectivement, le livre de bord contient une erreur.

M. Sow :

Je n'ai pas compris. Quel livre de bord ?

M. Thiam :

Le livre de bord que M^e Plender vous a lu contient une erreur sur cette position du navire à 20 h 00. J'aurais voulu savoir comment vous avez su que c'était une erreur, si vous l'avez su. Apparemment, vous ne l'avez pas su puisque vous dites que vous avez négligé ce point qui ne vous paraissait pas important sur la route du *Saiga*.

M. Sow :

Je ne peux pas dire que le livre de bord du *Saiga* contient une erreur. Je ne peux juger ici la position du *Saiga* et l'affirmer qu'à partir du moment où j'ai détecté *Saiga* et j'ai commencé la poursuite de *Saiga*. Là, ce sont des points que je peux affirmer, mais le reste revient de la compétence du commandant du *Saiga* qui a rempli son journal.

M. Thiam :

Monsieur Sow, vous dites que la position du navire à 20 h 00 n'était pas importante. Si le *Saiga* était parti de ce point-là – c'est une hypothèse qui est la mienne – et qu'il ait dû se dérouter jusque-là à peu près, qui est le point que vous avez indiqué à 20 h 00, pour revenir ensuite à ce point-là et faire après tout cela, il aurait pris quand même beaucoup plus de temps pour arriver au point G. Nous sommes d'accord ?

M. Sow :

Je ne peux pas l'affirmer parce que je ne savais pas à quelle vitesse il se déplaçait.

M. Thiam :

Supposons qu'il ait eu la même vitesse. S'il se dérouta de là jusque là avant de revenir là et, ensuite, de continuer sa ligne jusqu'au point G, est-ce que vous êtes d'accord avec moi qu'il aurait mis beaucoup plus de temps pour arriver au point G puisqu'il aurait fait ce trajet en plus ? Il aurait mis plus de temps ?

M. Sow :

Plus de temps par rapport à quel temps ?

M. Thiam :

Pour arriver de ce point-ci à ce point-ci. S'il s'était détourné pour arriver là et repartir ensuite sur sa ligne, il me semble que cela lui aurait fait perdre du temps.

M. Sow :

S'il en est ainsi, oui.

M. Thiam :

S'il avait perdu du temps, il serait arrivé ici beaucoup plus tard que nous l'affirmons. Nous affirmons qu'il est arrivé ici à 3 h 35. Vous, vous affirmez qu'il est arrivé bien après. Si le navire s'était dérouté, cela aurait appuyé votre thèse. Donc, c'était un point important. Alors, puisque c'était un point important, pourquoi vous ne l'avez pas noté, Monsieur Sow ?

M. Sow :

Reprenez, Maître, votre question.

M. Thiam :

Je crois, Monsieur Sow, que vous avez parfaitement compris. Si vous ne voulez pas répondre, j'en prendrai acte. Je ne répéterai pas ma question.

M. Sow :

Je n'ai pas compris.

M. Thiam :

Je ne répéterai pas ma question car je n'ai pas envie de faire perdre du temps au Tribunal. J'en ai terminé en ce qui concerne l'examen de la carte ... sincère de M. Sow, sauf que, peut-être, vous n'avez toujours pas défini des sections qui pourraient représenter la marche du *Saiga* pour une heure. Pouvez-vous le faire ?

M. Sow :

Non.

M. Thiam :

Alors, le Tribunal va peut-être se contenter du document que nous avons produit et qui montre que, si l'on applique des sections égales, le *Saiga* avait franchi la ligne peut-être même avant 3 h 00.

Je vais en terminer avec vous, Monsieur Sow, en examinant les questions relatives à l'arraisonnement du *Saiga*. Donc, vous dites que la petite vedette est partie alors qu'elle se trouvait au point 11, là-bas ?

M. Sow :

Oui.

M. Thiam :

Vous avez déterminé la marche de la vedette. Ce sont vos lignes qui apparaissent là-bas ?

M. Sow :

Les pointillés.

M. Thiam :

Il y a ensuite une ligne courbe au sud.

M. Sow :

Là, c'est le marche-route avec *Saiga*.

M. Thiam :

Comment avez-vous fait pour déterminer cela ? Cela n'apparaît pas dans vos documents ?

M. Sow :

C'est juste une description des manoeuvres que la petite vedette et *Saiga* ont faites du début du contact jusqu'à l'immobilisation.

M. Thiam :

Sur quels documents probants vous êtes vous fixé pour établir cette ligne ?

M. Sow :

Sur les observations que l'on faisait à partir de la grande vedette.

M. Thiam :

Du point 11 où vous étiez, vous pouviez apercevoir la vedette et faire des observations ?

M. Sow :

Oui.

M. Thiam :

Il y a combien de distance, cette fois-ci en milles marins ?

M. Sow :

De 10 à 11 milles marins.

M. Thiam :

Vous pouvez observer les mouvements de la vedette de 10 à 11 milles marins ?

M. Sow :

Bien sûr, avec le radar.

M. Thiam :

Avec le radar, et c'est à partir des observations du radar que vous avez pu tracer cette ligne ?

M. Sow :

Bien sûr.

M. Thiam :

Vos observations sur le radar ne figurent pas sur votre document, ce que vous appelez vos notes de bord ? Bien ... peu importe. Alors, la vedette est partie avec des feux allumés ?

M. Sow :

Bien sûr.

M. Thiam :

Vous avez dit qu'elle n'avait pas de cloche ?

M. Sow :

La petite vedette n'a pas de cloche. La grande vedette a une cloche.

M. Thiam :

Et vous pensez que la direction du vent pouvait amener le son de la cloche de votre grande vedette jusqu'au *Saiga* ?

M. Sow :

Je n'ai pas parlé de signal par cloche à partir de la grande vedette.

M. Thiam :

Je sais que vous n'en avez pas parlé, Monsieur Sow.

M. Sow :

Les cloches ne sont pas faites pour donner des signaux à un bateau que nous voulons. Nous avons des signaux encore beaucoup plus performants que la cloche. Il y a le feu tournant bleu, la sirène, il y a la trompe.

M. Thiam :

Donc, vous avez envoyé une vedette qui avait une sirène, qui avait des hommes à bord, des douaniers ?

M. Sow :

Oui.

M. Thiam :

Et également des marins ?

M. Sow :

Oui.

M. Thiam :

Est-ce qu'ils vous ont expliqué comment s'est passé l'arraisonnement ?

M. Sow :

Quand nous avons lâché la vedette, elle s'est dirigée vers *Saiga*. Arrivée à proximité de *Saiga*, qui était au stop, *Saiga* a commencé immédiatement à lancer ses moteurs. Le patron de la vedette m'a rendu compte que, quand ils sont arrivés à côté de l'objectif qui était stoppé, qui n'était pas à l'ancre, il venait de lancer ses moteurs et tentait de partir.

M. Thiam :

Est-ce qu'ils vous ont dit qu'ils ont tiré ?

M. Sow :

Effectivement.

M. Thiam :

Ils ont tiré où ?

M. Sow :

Ils ont tiré en l'air pour une sommation.

M. Thiam :

Combien de fois ?

M. Sow :

Ils ne m'ont pas précisé le nombre de tirs. Ils m'ont dit qu'ils avaient utilisé les armes pour faire une sommation.

M. Thiam :

Ils vous ont dit que l'on a tenté de les renverser ?

M. Sow :

Ils me l'ont dit après.

M. Thiam :

Comment vous ont-ils expliqué la manoeuvre du *Saiga* pour tenter de les renverser ?

M. Sow :

Quand ils sont arrivés à côté du *Saiga* qui avait déjà lancé ses moteurs, *Saiga* a bougé au moment où la vedette faisait des contours. Peut-être, le départ du *Saiga*, avec le mouvement de l'eau, compte tenu de la taille de la vedette, ils ont pensé que le *Saiga* a voulu les renverser.

M. Thiam :

Qu'en pensez-vous aujourd'hui ? Croyez-vous que le *Saiga* a tenté une manoeuvre pour volontairement renverser la petite vedette ?

M. Sow :

C'est un compte rendu que j'ai eu et que j'ai fait répercuter à l'autorité. Je ne peux pas nier parce que je n'étais pas dans la vedette. Je ne peux pas dire si c'est vrai ou faux parce que je n'y étais pas.

M. Thiam :

Monsieur Sow, vous avez produit une déclaration écrite au Tribunal, dont je vous lis un passage à la page 3, fin du quatrième paragraphe. Vous avez écrit :

SAIGA reste indifférent aux appels, aux signaux et aux différentes manoeuvres de la vedette qui tournait autour de lui après avoir échappé par deux fois à des collisions avec SAIGA.

M. Sow :

Selon un compte rendu qui m'a été fait.

M. Thiam :

Monsieur Sow, tout à l'heure, M. von Brevern souhaitait que je ne vous interrompe pas. Alors, pouvez-vous, à votre tour, souffrir d'attendre que j'aie terminé mes questions ?

M. Sow :

Excusez-moi.

M. Thiam :

Vous avez prêté serment de dire au Tribunal toute la vérité, et c'est dans ce cadre que vous affirmez au Tribunal que la vedette a tourné autour de lui, en parlant du *Saiga*, après avoir échappé par deux fois à des collisions avec le *Saiga*. Puisque vous en témoignez devant ce Tribunal, je vous pose la question de savoir comment est-ce que le *Saiga* a essayé d'entrer en collision avec la vedette par deux fois ?

M. Sow :

Je dis que, pour cette histoire de collision, je ne peux pas vous apporter des précisions parce que je n'étais pas dans la vedette. C'est un compte rendu que l'on m'a fait. J'ai retracé ce compte rendu dans mon compte rendu général.

M. Thiam :

Mais, lieutenant Sow, il y avait à bord des douaniers.

M. Sow :

Oui.

M. Thiam :

Qui ont poursuivi le capitaine du *Saiga* pour divers délits douaniers, mais vous étiez responsable de la vie de vos hommes ?

M. Sow :

Bien sûr.

M. Thiam :

Si quelqu'un essaie d'attenter à la vie de vos hommes, est-ce qu'il vous semble normal que le parquet de Conakry soit saisi pour des poursuites contre ceux qui essaient de porter atteinte à la vie de vos hommes ?

M. Sow :

Oui.

M. Thiam :

Alors, si le commandant du *Saiga* –

The President:

Maître Thiam, I think the points that you are putting to the witness do not actually come out of the statement because he did not say that it was the *Saiga* that was trying to do that. He said that the *vedette* went round twice and escaped a collision but he did not say that the *Saiga* was trying to do so.

M. Thiam :

Votre réflexion est pertinente, Monsieur le Président.

Vos hommes vous ont rapporté que le *Saiga* aurait tenté d'entrer en collision avec eux.

M. Sow :

C'est ce qu'ils m'ont dit.

M. Thiam :

C'est ce qu'ils vous ont dit.

M. Sow :

Volontairement ou involontairement, je ne sais pas, mais ils l'ont dit.

M. Thiam :

Donc, ils vous ont dit que le *Saiga* a voulu volontairement –

M. Sow :

Ils ont échappé par deux fois à une collision avec *Saiga*.

M. Thiam :

Est-ce qu'ils vous ont dit que le *Saiga* a essayé d'entrer en collision avec la vedette ?

M. Sow :

Non. Ils m'ont dit qu'ils ont échappé par deux fois à une collision avec *Saiga*. Ils n'ont pas dit que *Saiga* a foncé pour les renverser volontairement. Ils ont échappé par deux fois à une collision.

M. Thiam :

Par conséquent, si, dans un document quelconque, il était écrit que le *Saiga* a essayé par deux fois de renverser la petite vedette et même la vôtre, ce document contiendrait donc une fausse information ?

M. Sow :

Je ne peux pas dire que l'information est fausse parce que, comme je vous l'ai déjà dit, c'est un compte rendu que l'on m'a fait. Je n'étais pas présent. Si j'avais été présent dans la petite vedette, je vous l'aurais affirmé, mais je n'étais pas présent dans la petite vedette. Donc, j'ai rapporté ce que l'on m'a dit.

M. Thiam :

Mais essayez de comprendre que je veux simplement savoir ceci : est-ce qu'on vous a dit que le *Saiga* a tenté une manoeuvre pour renverser volontairement la vedette ou est-ce qu'on ne vous l'a pas dit ?

M. Sow :

Le patron de la vedette m'a dit qu'ils ont échappé –

M. Thiam :

Vous pouvez revenir ici, Monsieur Sow. Excusez-moi de vous avoir interrompu ... Vous serez plus à l'aise là. Qu'est-ce qu'on vous a dit exactement à ce propos ?

M. Sow :

Le patron de la vedette m'a dit que, par deux fois, ils ont échappé à une collision avec *Saiga*.

M. Thiam :

Donc, ils ne vous ont jamais dit que c'était une manoeuvre volontaire de la part du capitaine du *Saiga* pour percuter la vedette ?

M. Sow :

Ils ne me l'ont pas dit.

M. Thiam :

Par conséquent, si, dans un document, il était écrit que le *Saiga* a tenté une manoeuvre pour renverser volontairement la vedette, ce document contiendrait une fausse information sur ce point ?

M. Sow :

Je ne peux pas l'affirmer.

M. Thiam :

Pourquoi vous ne pouvez pas l'affirmer, puisque personne ne vous l'a dit ?

M. Sow :

C'est un compte rendu que j'ai eu. Ceux qui l'ont vécu peuvent l'affirmer.

M. Thiam :

Alors, est-ce que vos hommes sont montés à bord du *Saiga* ?

M. Sow :

Les marins ?

M. Thiam :

Oui.

M. Sow :

Non.

M. Thiam :

Vos hommes ne sont pas montés ?

M. Sow :

Non.

M. Thiam :

Est-ce qu'ils ont pu voir un peu ce qui se passait quand même ?

M. Sow :

Oui.

M. Thiam :

Qu'est-ce qu'ils ont constaté ? Est-ce qu'ils ont constaté que l'on a tiré à bord du *Saiga* ?

M. Sow :

Je ne sais pas. Parmi ces hommes, personne n'est là pour le dire s'il a constaté.

M. Thiam :

Aucun de vos hommes ne vous a dit qu'il a entendu des coups de feu à bord du *Saiga* ?

M. Sow :

Je vous ai dit que, bien avant mon arrivée, j'ai eu un compte rendu du patron de la vedette qu'ils étaient passés par l'usage des armes pour faire la sommation. Donc, il y a eu des coups de feu en l'air pour une sommation.

M. Thiam :

Les coups de feu pour la sommation ...

M. Sow :

Je ne sais pas s'ils ont tiré à bord ou avant qu'ils ne soient à bord. Il y a eu une sommation en tout cas.

M. Thiam :

Vous ne savez pas si la sommation avec usage d'armes a été faite à bord du *Saiga* ou avant ?

M. Sow :

Je ne sais pas.

M. Thiam :

Vous ne le savez pas. Vous n'avez pas demandé à vos hommes d'explications sur ce point ?

M. Sow :

Je n'ai pas demandé de précisions.

M. Thiam :

Vous avez vu des blessés ?

M. Sow :

Oui.

M. Thiam :

Vous avez demandé comment ils avaient été blessés ?

M. Sow :

Oui.

M. Thiam :

Vous dites, dans votre déclaration au Tribunal, qu'il s'agissait de blessés légers.

M. Sow :

Oui.

M. Thiam :

Vous confirmez ?

M. Sow :

Oui.

M. Thiam :

Pourquoi est-ce que, dans votre rapport qui tient lieu de livre de bord, vous n'avez pas mentionné que c'étaient des blessés légers ?

M. Sow :

J'ai mentionné dans le livre de bord jusqu'à leur accompagnement à l'hôpital. J'ai mentionné.

M. Thiam :

Vous avez mentionné ...

M. Sow :

A partir de 12 h 30.

M. Thiam :

Vous avez mentionné quelque part dans vos notes ... Avez-vous vos notes ?

M. Sow :

Oui.

M. Thiam :

Est-ce que vous pouvez lire le passage où vous auriez mentionné qu'il s'agissait de blessés légers ?

(Le témoin regarde ses notes.)

M. Sow :

Dans le journal de bord, j'ai mentionné le cas des deux blessés : un Sénégalais et un officier en second russe par suite des brisures de vitres, selon les informations que j'ai reçues.

M. Thiam :

Donc, il n'y a, à aucun moment, dans ce document un endroit où vous avez précisé qu'il s'agissait de blessés légers ?

M. Sow :

Dans ce document, oui.

M. Thiam :

Pourquoi avez-vous dit, ensuite, qu'il s'agissait de blessés légers puisque vous avez fait votre document sur la base de vos notes ?

M. Sow :
Oui.

M. Thiam :
Pourquoi avez-vous dit, ensuite, puisque ce n'était pas mentionné dans vos notes, qu'il s'agissait de blessés légers ?

M. Sow :
Je ne l'ai pas mentionné dans ce journal parce qu'il fallait avoir d'abord la confirmation de la gravité des blessures, et notre premier souci a été d'envoyer les blessés à l'hôpital. C'est à partir de là que nous avons su qu'ils n'étaient pas gravement blessés.

M. Thiam :
Donc, vous avez rajouté dans votre document des choses qui ne figuraient pas sur votre rapport ... sur votre livre de bord – excusez-moi d'employer ce terme – sur vos notes de bord, alors ?

M. Sow :
Je n'ai pas augmenté quelque chose qui n'existait pas.

M. Thiam :
Vous vous êtes renseigné sur l'état des blessés pour savoir qu'ils étaient des blessés légers ?

M. Sow :
Oui.

M. Thiam :
Pendant que vous les rameniez à Conakry, avez-vous tenté de les soigner ?

M. Sow :
Ils avaient eu les premiers soins avant que l'on ne bouge même du lieu d'arraisonnement. L'officier en second a eu un premier pansement à bord du *Saiga* même avant que l'on ne bouge.

M. Thiam :
Vous avez regardé la blessure ?

M. Sow :
Non. La main était bandée. Je n'ai pas vu la blessure.

M. Thiam :
Je vais vous montrer la photographie de deux des blessés. (*Projection des photographies*)
Est-ce que vous les reconnaissez, Monsieur Sow ?

M. Sow :
Oui, je les reconnais.

M. Thiam :
Est-ce qu'ils étaient dans cet état-là ?

M. Sow :

Oui.

M. Thiam :

Est-ce qu'il vous a semblé que c'étaient des blessures légères ?

M. Sow :

Pour moi, ce sont des blessures légères. J'étais inquiet quand j'ai entendu qu'il y avait eu usage des armes. Donc, si je vois des gens blessés de ce genre, pour moi, ce sont des blessés légers alors qu'il y a eu usage d'armes.

M. Thiam :

Il y a eu usage d'armes pour ces blessures ?

M. Sow :

Quand il y a eu usage d'armes et que l'on m'a parlé de blessés, j'ai pensé que c'était plus grave que cela. C'est pour cela que j'ai constaté que –

M. Thiam :

Vous avez pensé que c'était plus grave, mais est-ce que vous pensez que cela reste des blessures légères, ce que vous voyez là ?

M. Sow :

C'est ce que je pensais.

M. Thiam :

Est-ce que, maintenant, ce que vous voyez là vous pensez que ce sont des blessures légères ?

M. Sow :

Je ne peux pas répondre parce que je n'ai pas vu encore les blessés, après tout ...

M. Thiam :

Regardez bien les yeux du Sénégalais ...

M. Sow :

Oui.

M. Thiam :

Est-ce que vous considérez qu'il a là des blessures légères dans ses yeux ?

M. Sow :

(Pas de réponse)

M. Thiam :

Répondez à la question, Monsieur Sow.

M. Sow :

Je considère que ce sont des blessures légères.

M. Thiam :

Même en voyant ces photos ?

M. Sow :

Oui.

The President:

Mr. von Brevern?

Mr. von Brevern:

Mr. President, can we ask Maître Thiam whether we will be provided with this photograph? I do not think it is in the bundle of pictures relating to the vessel. We would like to have the picture. Thank you.

The President:

That can be arranged.

M. Thiam :

C'est tout à fait évident, Monsieur le Président.

Autre chose, vous avez, dans votre déclaration produite devant le Tribunal, page 2, septième paragraphe, écrit :

A 20.19, de notre position L=9°19[,5]N, l=14°03[,8]O nous écoutons de nouveau une conversation radio entre le même monsieur, mais cette fois avec le chalutier SALVATOR PRIMO et le tanker SAIGA ...

Dans vos notes de bord, il n'est pas écrit que c'était le même monsieur. Si vous avez écrit votre document sur le souvenir de vos notes de bord, comment est-ce que vous avez pu rajouter qu'il s'agissait du même monsieur ?

M. Sow :

En tout cas, dans mes notes de bord, c'est encore précis.

M. Thiam :

Vous pouvez lire au Tribunal l'endroit de vos notes de bord où vous avez indiqué qu'il s'agissait du même monsieur ?

M. Sow :

Oui.

M. Thiam :

Oui, lisez.

M. Sow :

19 h 20 : la position 9°22,0'N, 13°56,3'O, nous écoutons une conversation radio en langue étrangère entre un monsieur se trouvant à Conakry dont la voix nous est familière et un chalutier se trouvant en mer.

A 20 h 19, encore conversation radio entre le monsieur, *Salvatore Primo* et le pétrolier *Saiga*.

M. Thiam :

Est-ce que vous voyez le terme « même » ?

M. Sow :

J'ai parlé une fois d'un monsieur. Si je dis « le monsieur », c'est que c'est du monsieur dont j'ai parlé plus haut.

M. Thiam :

Si vous dites « le monsieur *Salvatore Primo* » ... peut-être que la copie que j'ai ... je n'y vois pas de virgule ... Alors le monsieur, pour vous, c'est le même monsieur ?

M. Sow :

Oui.

M. Thiam :

Parfait.

M. Sow :

Salvatore Primo est le nom du chalutier avec lequel le monsieur converse.

M. Thiam :

Parfait. Je voulais juste en terminer en vous demandant : avez-vous souvent procédé à des arraisonnement de navire ?

M. Sow :

Oui.

M. Thiam :

Pour le compte de la douane aussi ?

M. Sow :

Une fois pour le compte de la douane, beaucoup de fois pour le compte de la pêche.

M. Thiam :

Et pour la douane, une seule fois ?

M. Sow :

Oui.

M. Thiam :

Est-ce qu'il s'agissait d'un tanker ?

M. Sow :

Oui.

M. Thiam :

Qu'est-ce qu'il avait fait ?

M. Sow :
Le même cas.

M. Thiam :
Comment il s'appelait ?

M. Sow :
Africa.

M. Thiam :
C'était avant ou après le *Saiga* ?

M. Sow :
Avant.

M. Thiam :
Et le *Napetco*, cela ne vous dit rien ?

M. Sow :
J'ai entendu l'arraisonnement du *Napetco*, mais ce n'est pas moi qui ai fait cette mission.

M. Thiam :
C'était quelqu'un d'autre.

M. Sow :
C'était une autre vedette.

M. Thiam :
Et systématiquement on va arraisonner les tankers qui avitaillent les bateaux de pêche ?

M. Sow :
Reprenez la question, s'il vous plaît.

M. Thiam :
Est-ce que systématiquement vous allez arraisonner, vous ou vos collègues, des tankers qui avitaillent les navires de pêche ?

M. Sow :
Si la loi nous dit de les arrêter, nous les arrêtons.

M. Thiam :
Je vous demande si vous le faites régulièrement.

M. Sow :
Nous patrouillons régulièrement dans nos eaux.

M. Thiam :
Est-ce que souvent ... je vais reprendre ma question. En dehors du *Napetco*, dont vous avez entendu parler, de l'*Africa*, qui est une mission à laquelle vous avez participé et du *Saiga*, est-ce que d'autres tankers ont été saisis à votre connaissance ?

M. Sow :

J'ai appris la saisie d'assez de navires, une fois j'ai appris la saisie d'un navire du nom de *Napetco*, je n'étais pas là, j'étais en congé, un collègue a fait la mission dans le P300. Ce n'est pas la première fois, ce n'est pas les seuls navires qui ont été arraisonnés en Guinée à ma connaissance.

M. Thiam :

Pour des questions de *bunkering* ?

M. Sow :

Oui.

M. Thiam :

D'autres navires ont été arraisonnés ?

M. Sow :

Je crois, oui.

M. Thiam :

Mais vous ne sauriez donner des exemples ?

M. Sow :

Non.

M. Thiam :

C'est bien dommage.

Monsieur le Président, je crois que j'en ai terminé avec ce témoin et je vous remercie.

QUESTIONS PUT TO MR. SOW
BY THE PRESIDENT
[PV.99/14, E, p. 20]

The President:

Thank you very much.

Before you re-examine, I would like to put a couple of questions to the witness on behalf of the Tribunal:

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

M. Sow :

Non, à bord des bateaux nous n'avons pas le moyen de faire des enregistrements. Les enregistrements se font à la base.

The President:

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

M. Sow :

Je ne peux pas répondre précisément à cette question, mais, seulement, ce que je peux préciser, c'est que les enregistrements des conversations des navires en mer se font à la base, pas à bord des unités, pas à bord des vedettes qui sont en mer.

The President:

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

M. Sow :

Je n'ai pas vérifié cela. Je suis revenu de la mission, j'ai rendu compte, je n'ai plus cherché à connaître ce qui se passe.

The President:

Mr. von Brevern, Professor Lagoni, do you have any re-examination?

Mr. Lagoni:

Thank you, Mr. President, Members of the Tribunal, looking at the time, I shall be very brief.

RE-EXAMINATION OF MR. SOW
BY MR. LAGONI (GUINEA)
[PV.99/14, E, p. 20–22; F, p. 31–34]

Mr. Lagoni:

Lieutenant Sow, coming back to one question which was put to you at the end by Maître Thiam, you were present when the tanker *Africa* was arrested. Is that right?

M. Sow :

Reprenez la question, s'il vous plaît.

Mr. Lagoni:

If I understood you correctly, you said that you were participating in the arrest of the tanker *Africa*?

M. Sow :

Oui.

Mr. Lagoni:

Did the *Africa* refuse to stop when you called it to stop?

M. Sow :

Non.

Mr. Lagoni:

Was there any use of force against the *Africa*?

M. Sow :

Non.

Mr. Lagoni:

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

M. Sow :

Il y a souvent des navires qui refusent d'obtempérer, mais pour le cas spécial d'*Africa*, juste quand il a vu nos signaux, il a stoppé, nous l'avons abordé et nous lui avons intimé et il nous a suivis.

Mr. Lagoni:

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

M. Sow :

Non.

Mr. Lagoni:

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

M. Sow :
Oui.

Mr. Lagoni:
Can you tell me how many cables are in one mile?

M. Sow :
Comme je l'ai expliqué, une encablure est égale à 1/10ème de mille. Donc, dans le mille, il y a au moins 10 encablures.

Mr. Lagoni:
So one cable is 185.2 metres?

M. Sow :
Oui.

Mr. Lagoni:
Do you still have your calculator with you?

M. Sow :
Elle est là-bas.

Mr. Lagoni:
Would you please get it? (*Witness leaves witness stand and returns.*) Could you please calculate 445 cables times 185.2 metres. How many kilometres do you get?

M. Sow :
82,325.

Mr. Lagoni:
Thank you very much. My calculator says the same. Lieutenant Sow, the speed of the *Saiga* is indicated in the log book. I will show you the log book. Can you tell me the entries in the log book according to the average speed of the *Saiga* on 26 October?

M. Sow :
La vitesse qui est mentionnée ici est de 7,4 noeuds.

Mr. Lagoni:
On the 26th?

M. Sow :
Le 26, la vitesse était de 8,12 noeuds.

Mr. Lagoni:
Then it goes on to say, below that, "bc, bc". Can you explain that? What does it mean? Have I read it correctly?

M. Sow :
« bc » est une abréviation en russe qui veut dire « la même chose ».

Mr. Lagoni:

So they just make the entries, "the same, the same, the same", going on at the same speed?

M. Sow :

Oui.

Mr. Lagoni:

Do you measure in fathoms or *brasses* in the Guinean Navy?

M. Sow :

Non.

Mr. Lagoni:

You certainly will not measure in fathoms because it is a measure for the depth. How do you take the depth in the Guinean Navy?

M. Sow :

Dans la marine, tous nos bateaux sont équipés des appareils que l'on appelle les échosondeurs, qui nous donnent la profondeur. Pour les mesures avec les câbles numérotés, nous ne les utilisons pas.

Mr. Lagoni:

So you measure the depth in metres with the echo-sounders?

M. Sow :

Oui.

Mr. Lagoni:

You do not use *brasses* or fathoms?

M. Sow :

Non.

Mr. Lagoni:

The date of the mission: Maître Thiam showed you the mission. Indicated there is *date de départ* on the 26th. Does it mean that the patrol boats were supposed to leave on the 26th?

M. Sow :

Effectivement, elle devait bouger le 26. C'est pour cela, toujours, que la date de signature correspond à la date de départ pour la mission. Mais pour des raisons techniques, nous n'avons pas pu bouger ce jour.

Mr. Lagoni:

Thank you. Could you explain briefly what a goniometer is? You were referring in the discussion to radio direction finder. Could you explain this to the Tribunal, please?

M. Sow :

Un goniomètre, c'est un type de radio que nous avons à bord des navires qui nous permet, à partir des émissions radio que font d'autres bateaux, de connaître leur direction, de connaître de quel côté ces navires se trouvent.

Mr. Lagoni:

Thank you. Could you please, for the last time, go again to the map. Could we have the map on folio again, please? (*Map projected on screen*) Can you generally explain where the shipping routes are in that area? Just explain to the Tribunal the usual shipping routes for international shipping and coastal shipping.

M. Sow :

Pour la zone nord, Kamsar est un grand port minier, nous avons souvent le mouvement des grands navires. La route recommandée est représentée là. (*Le témoin montre sur la carte.*) Là, c'est du port de Kamsar; du port de Conakry, la sortie des navires qui descendent et remontent encore pour rejoindre cette route internationale. A part cela, il y a souvent des mouvements de bateaux de pêche dans cette zone.

Mr. Lagoni:

Are there permanent currents, stable currents, in this area?

M. Sow :

Le courant, nous l'avons de façon permanente dans cette zone, notre frontière avec la Guinée-Bissau, compte tenu du nombre d'îles, le courant est très fort. Sur cette zone, le courant n'est pas tellement considérable.

Mr. Lagoni:

Outside, in the exclusive economic zone, are there permanent north-south currents or something like that?

M. Sow :

Non, pas tellement.

Mr. Lagoni:

Depends on the tide, I assume.

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

The President:

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

Mr. von Brevern:

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

The President:

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

Yes, Professor Lagoni, please.

Argument of Guinea (continued)

STATEMENT OF MR. LAGONI
COUNSEL FOR GUINEA
[PV.99/14, E, p. 23–27]

Mr. Lagoni:

Mr. President, Members of the Tribunal, I start my presentation this afternoon a little late. I shall try to do my best without overstressing the interpreters.

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

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

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

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

My first point relates to the textual interpretation of the provision. According to the first alternative of article 58, paragraph 1, of the Law of the Sea Convention, all States enjoy in the EEZ the freedom of navigation referred to in article 87 of the Convention.

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

- Moreover, if one would consider bunkering as an aspect of navigation, as it is submitted by Saint Vincent and the Grenadines, one would confuse the sailing of a ship with the particular activities for the purpose of which this ship is being operated. The Law of the Sea Convention itself provides ample evidence for the distinction between the sailing of a ship and other activities related to its particular purpose – and I venture to say that the

applicant State had this distinction in view when he conceded that supplying fishing vessels with fishing gear in the EEZ might affect the jurisdiction of the coastal State.

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

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

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

The President:

Mr. Lagoni, could you go a little slower.

Mr. Lagoni:

I am sorry, I apologize. That bunkering is by its very nature a commercial activity, whereas navigation is a means of communication, has been explained in our pleadings. Therefore it seems to be sufficient at this stage of the dispute to recall briefly some organizational details which characterize offshore bunkering as a commercial activity. They are contained as documentary evidence in the log book of the *Saiga* and in the telex communication between the Master of the ship and its operational centre ABS in Geneva. They have also been confirmed by the witnesses presented by both parties to this Tribunal.

There we learn that the *Saiga* left Dakar on its twelfth bunkering voyage on 24 October 1997 with a cargo of 6.391,435 metric tons of gas oil and supplied one fishing vessel off Senegal, five fishing vessels off Guinea-Bissau, and the three fishing vessels *Guillermo [sic] Primo*, *Kriti* and *Eleni G* in the contiguous zone of Guinea before it was arrested on 28 October 1997. We can read the overall amount of gas oil, and occasionally also of fresh water, supplied to fishing vessels on this voyage was 458.203 metric tons of gas oil. And we take notice of other meetings which were planned for the coming days and the scheduled meeting points.

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

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

My second point of interpretation relates to the context of the freedom of navigation in article 58, paragraph 1, of the Convention.

Saint Vincent and the Grenadines submits that bunkering in the EEZ is admissible, because it is also admissible on the high seas under article 87 of the Convention to which article 58, paragraph 1, refers.

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

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

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

My third point on the interpretation of article 58, paragraph 1, relates to the object and purpose of this provision. Article 58, paragraph 1, of the Convention shall make sure that third States enjoy the so-called communication freedoms in the EEZ. These are freedoms of navigation and overflight and the laying of submarine cables and pipelines. This object and purpose does on its face not require that offshore bunkering in the EEZ is included in these communication freedoms. The flag State of the *Saiga* would not be affected in its communication freedoms if offshore bunkering is prohibited in the Guinean exclusive economic zone.

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

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

Therefore I conclude my fourth point of interpretation that the second alternative of article 58, paragraph 1, does not apply here. Offshore bunkering by the *Saiga* in the Guinean EEZ was not an internationally lawful use of the sea related to the freedom of navigation and associated with the operation of ships.

In my fifth point of interpretation I turn briefly to the preparatory work of the 1982 Convention and the circumstances of the conclusion of article 58, paragraph 1, although the meaning of the provision is unequivocal and clear.

The *travaux préparatoires* illustrate that coastal States in West Africa were well aware of the problem of the "control and regulation of customs and fiscal matters related to

economic activities" in the EEZ, as the proposal of 18 States at the second session of the LOS Conference and an earlier proposal by Nigeria demonstrate. Although they have not expressly been included in the Convention, it would be misleading to conclude from this, as Saint Vincent and the Grenadines does, that the coastal States do not have jurisdiction to control and regulate customs and fiscal matters related to economic activities in its EEZ.

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

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

Third, when the regime of the EEZ was emerging as part of an overall compromise between coastal States and shipping nations, there was little room at UNCLOS III for further discussion about details. Discussions on such marginal details as the question of the control and regulation of customs and fiscal matters could easily have jeopardized the consensus of the regime of the EEZ. This does not mean, however, that the coastal States are prevented once and forever from regulating customs and fiscal matters related to economic activities in their EEZ. Whether or not they may do this depends obviously upon the circumstances of each case.

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

The President:

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

(The Tribunal rises at 4.05 p.m.)

Public sitting held on 16 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 16 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Professor Lagoni, you may continue your submissions.

Mr. Plender:

Before he does so, may I raise a translation point, which I shall make good by written notice in due course. It arises from yesterday. For much of yesterday afternoon the French word "*encablure*" was translated as "cable". In the literal sense, denoting a rope or strand, that is a correct translation. *Encablure* is a measure of distance; cable is a measure of distance, but one *encablure* does not equal one cable. That, it appears to us, has given rise to a very substantial misunderstanding in the course of yesterday afternoon. We shall supply the appropriate dictionaries, French and English, to show that one *encablure* does not equal one cable. I would suggest that throughout the English version the word "cable" is substituted for "*encablure*" wherever "*encablure*" was used.

The President:

Thank you very much.

Mr. Plender:

I invite no comment at this stage. I thought it right, however, to mention the translation point at the earliest opportunity.

The President:

Thank you very much, indeed.

Professor Lagoni, please continue.

Argument of Guinea (continued)

STATEMENT OF MR. LAGONI (CONTINUED)

COUNSEL FOR GUINEA

[PV.99/15, E, p. 4–15]

Mr. Lagoni:

Thank you, Mr President. Mr. President, Members of the Tribunal, I shall proceed with my speech from yesterday afternoon. The question of the speech was whether or not bunkering is considered as navigation in the legal sense. For this purpose, I have interpreted article 58, paragraph 1, of the Law of the Sea Convention. I think that I have shown by now that, according to the textual interpretation of this provision, bunkering is not navigation. The context of article 58 shows that bunkering is also not navigation. The object and purpose does not require including bunkering in navigation, and the bunkering of fishing vessels in the EEZ is not to be considered as another lawful use of the sea related to the communication rights.

Finally, I think I have shown that the *travaux préparatoires* of article 58 of the Convention do not say anything about the provision itself, but show that at least African States, especially West African States, were well aware at UNCLOS III about the problem of the extension of the customs laws over the exclusive economic zone.

Now I shall proceed with State practice. The last words lead on to my sixth and last observation on the interpretation of article 58, which is the State practice. According to the customary rules of interpretation, I might be very brief here. Any subsequent practice in application of the treaty which established the agreement of the parties regarding the interpretation of article 58 shall be taken into account. This is stated in Article 31 of the Vienna Convention on the Law of Treaties. But there is no such agreement between the parties.

Nevertheless, the State practice relating to offshore bunkering in the exclusive economic zone is of interest in our case because it sheds light on the economic and fiscal policies behind this practice. Many States allow ships to purchase fuel free of taxes and customs duties in their ports. This will make their ports attractive for foreign ships and reduces the transport costs of exports from and imports into the country. Similarly, if a State is interested to attract foreign fishing vessels into its EEZ, it will allow the fishing vessels to bunker in its ports free of taxes and customs duties. States following such shipping or fishing policies will not prevent offshore bunkering because this activity does not affect their customs policy and fiscal income.

Other States require a licence for offshore bunkering in order to regulate this activity for other reasons. Apart from fiscal, special environmental considerations may give rise to such regulations because offshore bunkering in the EEZ is normally more susceptible to accidents than bunkering in a port.

On the other hand, it is a sovereign policy decision of the Republic of Guinea that fishing vessels fishing with a licence in its EEZ are required to pay customs duties on fuel in the port of Conakry. In order to prevent circumvention of its customs laws, the coastal State can prohibit offshore bunkering in such situation – or make it at least subject to a licence as it has been envisaged for the future in the draft Joint Decree of 1998. Otherwise all ships, including vessels employed in coastal trade, would probably try to get fuel by way of offshore bunkering in the EEZ. This would severely affect the fiscal interests of the coastal State. I will come back to this fiscal interest in a moment.

Keeping these different economic and fiscal policies of States in mind, it is hardly surprising that States are treating offshore bunkering in different ways. But this would not mean that the practice of coastal States prevailing until now – and I would agree, vastly prevailing until now – to avoid the regulation of offshore bunkering is an expression of a general practice accepted as law. Neither would it mean that the Guinean solution is against international law.

In conclusion, a careful interpretation of article 58, paragraph 1, of the Convention shows that offshore bunkering of fishing vessels by the *Saiga* in the Guinean exclusive economic zone does not constitute an aspect of freedom of navigation or an internationally lawful use of the sea related thereto. Therefore, the Republic of Guinea submits that the applicant State's interpretation of article 58, paragraph 1, of the Convention is not tenable.

Having said this, I turn now to the legal basis upon which Guinea is justifying its jurisdiction to prohibit offshore bunkering in its EEZ.

Not being an aspect of navigation, offshore bunkering neither constitutes a sovereign right of the coastal State. Offshore bunkering conducted by the *Saiga* is ancillary to fishing – but it is not fishing. Accordingly, the Republic of Guinea does not rely on the first alternative of article 56, paragraph 1(a), of the Convention. Offshore bunkering, however, is, by its very nature, a commercial activity. Therefore, the question could arise: is it another activity for the economic exploitation and exploration of the zone such as the production of energy from waters, currents and winds as the second alternative of article 56, paragraph 1(a), reads? Being aware that the text of the provision gives rise to doubt on this point, the Republic of Guinea, nevertheless, invites the court to assume this.

Notwithstanding the foregoing submission, the Republic of Guinea maintains that the legal basis in international law for prohibiting offshore bunkering of fishing vessels in the EEZ is the customary principle of the protection of its public interest against gross infringement. That customary principles apply in the EEZ as well is made clear by the Convention itself. It affirms, in the last operative sentence of its preamble:

... matters not regulated by this Convention continue to be governed by the rules and principles of general international law.

Moreover, article 56, paragraph 1(c), confirms that, in the EEZ, the coastal State has also other rights and duties provided for in this Convention, which include the principles and rules of general international law mentioned already in the preamble. And, according to article 58, paragraph 3, of the Convention, third States shall in the EEZ comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention "and other rules of international law" insofar as they are not incompatible with Part V. This means that the legal regime of the EEZ is not a closed regime; it is open to customary principles and to new developments.

Turning to the application of the customary principle of the protection of the Guinean public interest, we invite the Tribunal to take into account that, for three reasons, the issue in dispute here is a very narrow and specific one.

First, the Republic of Guinea has not generally extended its customs law to its EEZ. Guinea does not regard its EEZ as a part of its customs territory. It does not levy customs duties within its EEZ. Instead, the Republic of Guinea, trying to prevent the refuelling – that means bunkering of fishing vessels and of other vessels in transit to Conakry in its waters – has established for this purpose by article 33 and 34 of the Customs Code a customs radius. This is a customs surveillance zone of 250 km (which is about 135 nautical miles) off the Guinean coast. This zone overlaps with the Guinean contiguous zone and partly with the EEZ.

While the measures of the Guinean Customs authorities in the customs radius rest in the domestic law upon the Customs Code and other Guinean laws, they find their justification in international law in the customary principle of protection of its public interest against grave disadvantages.

Second, the Republic of Guinea does not generally prohibit all bunkering activities whatsoever within its EEZ or in its customs radius. Bunkering of ships in transit to other States is not prohibited because it would not affect Guinean fiscal interests.

Third, the Republic of Guinea does not invoke the mentioned principle as a justification for a single isolated act against a single ship, but as a basis for the adoption of its laws and regulations with which foreign tankers supplying fishing vessels in the EEZ with fuel shall comply pursuant to article 58, paragraph 3, of the Convention.

It has been submitted that the protection of its public interest is the cogent reason and moving force for the Republic of Guinea. The general principle of international law at the basis of its measures against offshore bunkering is the principle of self-protection. The existence of this principle in customary international law and the related doctrine of necessity has been elaborated in the Counter-Memorial in paragraphs 112 and 113. I may take liberty to refer to this here in order to avoid repetition.

I would like to point out here, however, that the measures taken against the *Saiga* were not an isolated incident of necessity justifying an act of self-help, but an application against the ship of Guinean customs laws which prohibit offshore bunkering in the EEZ. Therefore we submit that the case of the *Gabčíkovo-Nagymaros Project* decided by the International Court of Justice in 1997 and article 33 of Professor Ago's draft on State Responsibility, which Maître Thiam invoked in his speech of 11 March, are of no relevance in this case. They relate to the state of necessity as justification for a single act violating an international obligation. In the case of the *Gabčíkovo-Nagymaros Project*, this international obligation was a bilateral agreement relating to a water reservoir between Hungary and Slovakia. This is quite another situation than invoking the protection of the public interest with respect to the extension of its customs laws in a narrow and carefully balanced manner over a part of the EEZ. In the latter situation there was no direct legal connection between the parties and the vessel could have avoided bunkering in the zone.

It has also been submitted that the principle of self-protection forms the basis of several provisions of the Law of the Sea Convention, for example article 109, paragraph 4, on unauthorized broadcasting or article 221 on marine casualties. Unauthorized offshore bunkering is certainly of another nature than the effects of unauthorized broadcasting. But the effects on the fiscal interests of a small country can nevertheless be important, and they are important in the case of the Republic of Guinea.

The grave effects of the illegal offshore bunkering on the public interests of the Republic of Guinea are set forth in the Statement of Purpose of the Proposed Joint Decree of 1998. It says they are "regulating the activity of refuelling ships in the Republic of Guinea." According to the figures mentioned there, hardly 10 per cent of the fishing fleet operating in the Guinean exclusive economic zone is presently receiving fuel from the *Société Guinéenne des Pétroles* in Conakry. It is further estimated that almost 150 fishing vessels per month with

an average consumption of 100 metric tons per vessel would have been able to refuel regularly in Guinea. This would amount to customs revenues of about 696 million FG, this is equivalent to US\$ 499,000 per month, which is a considerable amount for a small developing country. It is also stated that customs revenues on oil products represent at least 33 per cent of the total customs revenues destined for the Guinean public treasury.

That the loss of revenue might be regarded as an essential interest of a State has been conceded by Saint Vincent and the Grenadines, which is itself a small developing country, in the Reply. Maître Thiam confirmed this in his speech of 11 March.

At this point, however, I ask for your understanding, Mr. President, that I have to refuse before this Tribunal the unwarranted allusions and allegations made in that speech with respect to purported interests of officers and soldiers or other officials of the Republic of Guinea in the arrest of the *Saiga*.

Turning back to my topic, I wish to state that the Republic of Guinea submits that the prohibition of offshore bunkering was necessary in order to protect its public interests. There were no other means available in order to prevent unwarranted offshore bunkering in the Guinean zones of national jurisdiction. Prohibition of such activity was the only solution to protect the public interests of the Republic of Guinea.

In the light of the prevailing circumstances the prohibition of offshore bunkering was also reasonable. It did not exclude the offshore bunkering industry for all future from the Guinean waters. Instead it paved the way to develop a legal regime which would reconcile the interests of the coastal State with the interests of the bunkering industry by introducing a licensed regime for offshore bunkering. Such regime is envisaged in the already mentioned Proposed Joint Decree of 1998. Article 1 of this Joint Decree would make offshore bunkering subject to approval by the competent minister and Article 5 charges customs duties upon the fuel and the lubricants destined for fishing boats and other ships in transit to Conakry.

But not only the prohibition of offshore bunkering was necessary and reasonable in order to protect the public interest of the Republic of Guinea. Also the arrest of the *Saiga* was necessary and reasonable.

The ship had violated the respective prohibition. Prohibitions that are not enforced lose their practical significance. In the United States one would say they become moot. Moreover, the arrest of the ship was not unreasonable after several incidents of the violation of the Guinean prohibition by foreign tankers had been reported before. The *M/V Saiga* was not the first ship arrested and escorted into the port of Conakry. But it was the first tanker which refused to accept the procedure provided in the Guinean Customs Code for the release from the arrest.

From this I conclude that the Republic of Guinea prohibited offshore bunkering in order to protect its public interest. The Republic of Guinea has a public interest in levying customs duties on fuel for fishing vessels operating in its EEZ. Illegal offshore bunkering grossly affects this public interest, because fishing vessels operating in the Guinean EEZ and other ships in transit to Conakry avoid purchasing fuel in the port of Conakry.

Therefore it is submitted that the Republic of Guinea may prevent offshore bunkering in its customs radius which is a part of its contiguous zone and its EEZ. And that is in conformity with the United Nations Convention on the Law of the Sea.

Turning to another legal topic, which is the question of the hot pursuit, I proceed with my speech, Mr. President, Members of the Tribunal. It is common ground between the parties of this dispute that the *Saiga* was stopped and searched by two patrol boats of the Guinean Customs authorities within the EEZ of Sierra Leone, and that the ship was escorted thereafter to Conakry. Guinea is justifying the exercise of its jurisdiction over the *Saiga* in Sierra Leone's EEZ on the basis of the right of hot pursuit. Under the conditions laid down in article 111 of the Law of the Sea Convention, the right of hot pursuit extends the enforcement

jurisdiction of the coastal State over a foreign ship which violated the laws of this State within its zones of national jurisdiction and which has been pursued from there into the EEZ of another State.

Hot pursuit of the *Saiga* by the Guinean patrol boats gives rise to two principal issues.

First, has the *Saiga* violated laws and regulations of Guinea by bunkering foreign fishing vessels? This is article 111, paragraphs 1 and 2, of the Convention.

Second, was the pursuit of the *Saiga* in conformity with the conditions laid down in article 111, paragraphs 1, 2 and 4, for the beginning of the hot pursuit?

The answer to the first question presupposes that Guinea actually applies its relevant laws and regulations to offshore bunkering, and that these laws and regulations are legally opposable to the *Saiga*. Thus we have to indicate which laws are applicable to offshore bunkering in the Guinean EEZ and whether they could be applied to the *Saiga*.

But, before coming to that question, I would like to make a brief observation on the extent to which the Guinean laws are relevant before this Tribunal at all. According to article 293 of the Law of the Sea Convention, the International Tribunal shall apply the Convention and other rules of international law to the dispute. This means that rules and regulations of domestic law are only of relevance before this Tribunal if and to the extent that this is required by international law. Domestic rules and regulations are facts which, of course, have to be presented by the parties.

This means also that measures of national authorities or decisions of domestic courts applying the domestic laws and regulations are not subject to legal scrutiny under the national law of one party before this Tribunal. In other words, the International Tribunal is no court of appeal which reviews decisions of domestic courts in accordance with national law.

The Guinean laws and regulations relevant in this dispute are indicated in article 58, paragraph 3, and likewise, for the purpose of hot pursuit, in article 111, paragraph 2, of the Convention.

By article 58, paragraph 3, the *Saiga* should comply in the Guinean EEZ "with the laws and regulations" that the Republic of Guinea adopted in accordance with the Convention and other rules of international law, and pursuant to article 111, paragraph 2, the right of hot pursuit shall apply to violations in the EEZ "of the laws and regulations of the coastal State applicable in accordance with this Convention" to the EEZ.

Saint Vincent and the Grenadines have submitted that the customs laws and regulations upon which Guinea's actions were based are nowhere in its own legislation said to apply beyond its territorial waters. This was submitted in the Memorial, paragraphs 17 and 91 and also in paragraphs 106-110, and similarly in the Reply in paragraphs 108 and 122-126.

The Republic of Guinea submits that this view is not correct. As set forth in our Counter-Memorial, in paragraphs 8-9, Guinea prohibits offshore bunkering on the basis of its law No. 94/007/CTRN of 15 March 1994 in a customs radius of 250 km or about 135 miles off its coast. This customs radius was established by articles 33 and 34 of the Guinean Customs Code no. 094/PRG/SGG of 28 November 1990.

According to information given by Guinean sources, Customs officials may enter ships within the customs radius. They also may use force in order to stop vessels that refuse to follow their orders to stop.

The customs radius is not a special zone of international law, as I have already stated. It is a functional zone established for the purposes of customs administration in the domestic law of the Republic of Guinea. It overlaps with the Guinean territorial sea and the contiguous zone as well as with large parts of its EEZ. The violations of Guinean laws by the *Saiga* took place within this customs radius and the pursuit of the ship had commenced within the customs radius, as will be shown later.

I will not go any further into the details of Guinean domestic law here. Instead, I will briefly address the question of the Guinean enforcement jurisdiction, which has also been contested by the applicant State.

The Republic of Guinea does not only apply its relevant customs laws to its EEZ within its customs radius. It also enforces the respective provisions against foreign vessels. The enforcement jurisdiction of the Republic of Guinea follows in international law also from the customary principle of the protection of the public interest, which I have expounded earlier. This principle includes the idea of taking the necessary and appropriate measures in order to enforce the applicable rules.

In the domestic law of Guinea, enforcement is provided by the law 94/007/CTRN of 1994 and the Customs Code of 1990. Both laws regulate expressly the question of enforcement.

As regards the violation of the relevant Guinean laws, may I invite your attention to the fact that the *Saiga* supplied the foreign fishing vessels [*Giuseppe*] *Primo*, *Kriti* and *Eleni G* on the morning of 27 October 1997 at 10°25.3'N and 15°42.6'W with fuel. This position is about 22.5 and 22.9 nautical miles off the coast of the Guinean island of Alcatraz. Accordingly, it is within the Guinean contiguous zone and the Guinean EEZ and the customs radius as well. It violated the prohibition of offshore bunkering within the customs radius contained in the Guinean customs laws.

My last point, Mr. President and Members of the Tribunal, in this context is the applicability of Guinean customs laws to the *Saiga*.

According to article 300 of the Convention, States Parties "shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".

The applicant State alleges that invoking the provisions against the ship would constitute an abuse of rights because the Master of the *Saiga* was purportedly never informed that bunkering fishing vessels inside the exclusive economic zone of Guinea was prohibited. This is stated in the Memorial at paragraph 112.

This statement of Captain Orlov was obviously not true. There is sufficient documentary evidence that the Master of the *Saiga* knew that offshore bunkering in the EEZ of Guinea was prohibited and that the Guinean authorities enforced this prohibition against foreign ships.

M. Marc Albert Vervaeet, the Regional Manager of the *M/V Saiga's* charterer, confirmed in a statement of February 1998, which has been submitted by the applicant State as a document in the Memorial, that the charterer knew that "Guinea was another regime than the other jurisdictions in the area". M. Vervaeet reports also of measures of two patrol boats against the tanker *Alfa I* in the Guinean EEZ in May 1996. The *Alfa I* was chartered by the same company as the *Saiga*. This knowledge of the situation in the Guinean EEZ also explains why the charterer instructed the Master of the *Saiga* "to try to remain at least 100 miles off the coast of Guinea".

The relevant orders of the Master in the bridge order book of the *Saiga*, which is provided as documentary evidence before this Tribunal, are further evidence for this. On 26 October 1997 off Guinea the Master wrote into the bridge order book:

3. Please keep sharp look-out and observe by radar all time. If you notice any fast moving target towards our vessel call me at once.

On 27 October 1997 off Guinea again he wrote: "2. [unreadable] the radar all the time". Apparently it means "observe" the radar at all time. "Pay attention for fast moving targets call me at once."

Finally, the knowledge of the Guinean prohibition to supply fishing vessels with fuel in the EEZ is documented in the telex communication between the Master of the *Saiga* and the AOG in Geneva. On 27 October 1997 at 1622 hours the Master telexed: "will not proceed closer than 100 miles of Guinea-Conakry".

That confirms that he knew that he should not go close to the coast.

Particularly clear documentary evidence is the telex of 27 October 1997 at 1842 hours. In this telex the Master is informed that the envisaged meeting point with Greek fishing vessels at 09°50'N and 16°15'W, which is within the Guinean EEZ, is "not safe". The Master was advised in the telex to proceed to another meeting point at 09°00'N and 15°00'W, which is within the EEZ of Sierra Leone, slightly south of the boundary line of Guinea. This meeting point was obviously considered safe.

The relevant sentences of this telex read:

Understand port authorities from Conakry are sending out patrol boats tonight and we advise you that above position is not safe repeat not safe.

Here the above position was the original meeting point envisaged before a new meeting point south of the boundary was given. I proceed with the quotation:

We hereby give you instruction not to deviate from this meeting point as alternative meeting point could be unsafe.

What does that mean? He was advised that he should immediately leave the exclusive economic zone of Guinea in order to have a safe meeting point slightly south of the boundary.

Finally, the quotation goes on:

Furthermore please keep a watch day and night on your radar without interruption to check any vessel which could approach (normally fast navy speed boat).

I think this evidence speaks for itself.

Captain Orlov answered Dr. Plender, however, that, according to his belief, he was not in breach of any law when he bunkered the fishing vessels on 27 October 1997. He also pretended to think, to the best of his knowledge, that the ship worked legally and did not make any breach of any legislation of any country.

It would be surprising if a master of a ship in his situation were to give any other answer. The story about piracy involving soldiers and State officials in West African waters is, on its face, unbelievable. Captain Orlov has admitted himself that he had discovered soldiers on the approaching patrol boats and that he had no personal experience with pirates. And, as his information came from the tales of the ominous Chinese translator, Mr. Li, the story of the pirates obviously aims to divert from the truth.

From all of this evidence presented here, it follows that the Master of the *Saiga* and the operators in Geneva knew very well that bunkering in the Guinean exclusive economic zone was prohibited and would not be tolerated by the Guinean authorities. It is therefore submitted that it was by no means an abuse of the right to apply the relevant Guinean customs laws prohibiting offshore bunkering in the EEZ to the *Saiga* and to enforce them against the ship.

Mr. President, Members of the Tribunal, I now turn to the question of whether or not the hot pursuit of the *M/V Saiga* was justified.

Hot pursuit of the *Saiga* could be undertaken when the competent authorities of Guinea had good reason to believe that the *Saiga* had violated the laws and regulations of Guinea. The Customs authorities are the competent authorities in Guinea to survey the customs radius and to enforce the Guinean customs laws. They had not only good reason to believe, but positive knowledge that the *Saiga* had violated the Guinean customs laws within the contiguous zone when she supplied the foreign fishing vessels, [*Giuseppe*] *Primo*, *Kriti* and *Eleni G*. The system of radio and radar monitoring by which this was made possible has been explained by Lieutenant Sow to the Tribunal.

The pursuit must be commenced when the *Saiga* was still within the zone where she violated Guinean laws.

As to the pursuit of the ship, one has to distinguish different phases of Guinean action. The *Saiga* had been expected, as we know from the taped conversations with different fishing vessels, before she entered Guinean waters. The Customs authorities had issued an *ordre de mission* on 26 October 1997. The measures against the *Saiga* were to be conducted by the Customs authorities with the help of a special unit of the Guinean Navy which has patrol boats for such purposes.

During the morning of 27 October 1997, the Guinean authorities discovered the violation of the customs laws by the *Saiga*. At 1330 hours, the small and fast patrol boat P35 left the port of Conakry to the north in order to stop the *Saiga*. But it got orders to return to the south and join the big patrol boat P328 when it was discovered that the *Saiga* was leaving the contiguous zone in order to sail to another meeting point for fishing vessels.

At 2019 hours the *Saiga* received a warning by radio from Conakry in Greek language. Thereafter, the tanker did not communicate any more with fishing vessels until the next morning, at 0350 hours on 28 October 1997. At that time, the *Saiga* communicated by radio the envisaged new meeting point at 9°N and 15°W to the fishing vessels *Poseidon*, *Panormitis* and *Combat*.

It should be kept in mind that the patrol boats were searching for the *Saiga* during the whole night. There was at no time any intention of the Guinean authorities to give up this pursuit. The commanding officer of the patrol boats, Lieutenant Sow of the Guinean Navy, has given convincing evidence about the tactics that the patrol boats used and the measures that were taken in order to rediscover the pursued vessel before she would have left the Guinean EEZ. He was well aware of the legal importance of this point. Lieutenant Sow demonstrated every course on the basis of a report that he had written for his superiors and a naval chart that he had prepared. On the basis of the log book of the *Saiga*, which has remained in the possession of the Guinean authorities since the arrest of the ship, he convincingly demonstrated before this Tribunal the movements of both the Guinean patrol boats and the *Saiga* during the night of 27/28 October 1997.

These measures of the Guinean patrol boats included radio observation, radar and the use of radio direction finders (goniometers) on board the patrol boat P328. As Lieutenant Sow has explained, he had watched a group of vessels on the radar during part of the night and in the early morning. He recognized some of them as merchant vessels, while others were fishing vessels. Both types of vessel could and can be distinguished by their speed and course.

When at 0350 hours the *Saiga* took up radio conversation with the mentioned fishing boats, he could pinpoint the *Saiga* on his radar screen in combination with the radio direction finder and the indicated meeting point for which the *Saiga* was heading. The *Saiga* itself gave to the fishing vessels *Poseidon*, *Panormitis* and *Combat* the new meeting point. At that moment the *Saiga* was at a distance of 44.5 nautical miles away from the patrol boat P328. The distance was exactly measured by radar. Knowing the position of the patrol boat P328 by means of the general position finding system (GPS), Lieutenant Sow could assure himself by

"such practical means as may be available" that the *Saiga* was still within the EEZ and correspondingly the customs radius of Guinea. This is in accordance with the first sentence of article 111 of the Convention.

Lieutenant Sow maintained these facts on 16 March 1998 during what I would describe as a severe cross-examination of more than three hours by Maître Thiam before this Tribunal in an impressive manner. His evidence is in conformity with calculations undertaken on the basis of geographical positions and times contained in the log book of the *Saiga*. According to the entries relating to the positions of the *Saiga* on 28 October 1997 at midnight and 0400 hours, and taking into account the calculated speed that the tanker made over the ground, the *Saiga* had crossed the boundary between the exclusive economic zones of Guinea and Sierra Leone after 0350 hours on 28 October 1997. At that time she had been discovered by the Guinean patrol boats.

From that moment on, the pursuit was not interrupted until the vessel was arrested shortly after 9 o'clock. The fact that the *Saiga*, feeling safe, lay drifting between 0424 hours and about 0830 hours on the morning of 28 October 1997 has no legal relevance to the pursuit conducted in the meantime by the patrol boats. The details of this pursuit were also convincingly explained by Lieutenant Sow to this Tribunal.

Mr. President, Members of the Tribunal, I now turn to my last point, which is the necessary signals. According to article 111, paragraph 4, the second sentence, of the Convention:

The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

Lieutenant Sow has given evidence that he called the *Saiga* on the radio when he discovered the ship at 0350 hours. The call was made by the use of channel 16, which is the usual communication channel for this purpose. In addition to this, several witnesses confirmed that the small patrol boat P35, which actually stopped the *Saiga*, had its blue signal lights switched on and gave sounds by way of a siren. Besides that, warning shots had been fired above the ship, which attempted to escape. Therefore, the use of signals is amply proven.

The legal question, however, is whether these signals are sufficient to fulfil the conditions of article 111, paragraph 4, second sentence, of the Convention. There are some writers who take the traditional view that the electronic signals are not sufficient. Against this, one has to recognize that in our days electronic signals between ships are not any more exchanged by way of Morse code. Signals given by radio, as in this case, are auditory signals.

On the bridge of a ship, usually channel 16 is permanently switched on so that calls cannot be overheard. This view is shared by eminent writers like McDougal and Burke.

The President:

Professor Lagoni, may I just ask a question of clarification? When you say "may not be overheard", do you mean so that they may be heard?

Mr. Lagoni:

Yes.

The President:

So that they may not go unheard or may not be overlooked?

Mr. Lagoni:

I apologize for my poor English, Mr. President. "Overheard" in this context means "they must be heard in any case on the bridge."

The President:

That is right. Thank you.

Mr. Lagoni:

This view that signals given by radio are sufficient for hot pursuit is shared *inter alia* by eminent writers such as McDougal and Burke. I must stress, of course, that we share this view as well.

In support of this view I should like to point to the fact that the practical means available for satisfying that the ship pursued is still within the relevant zone have been developed extensively since 1958. To make sure that the signals mentioned in the second sentence of this paragraph can keep pace with this technical development, one has to assume that signals given by radio are sufficient for hot pursuit as well. Besides that, considering the breadth of exclusive economic zones, the coastal State would not have any chance to commence hot pursuit in the outer parts of the EEZ in the time of radar because perpetrators would discover police forces long before these could come close enough to give a visual or auditory signal. I should add that not every small coastal developing country has aeroplanes to give signals to perpetrators in fishing matters, for example.

In conclusion, Mr. President, Members of the Tribunal, Dr. Plender mentioned the other day in this place the importance that the great Irish writer Sir Arthur Conan Doyle attributed to details. May I remind you that according to an old saying in the western world, the devil is supposed to sit in the detail.

But after you heard the impressive, precise and convincing evidence given by the young naval officer Lieutenant Sow, who was present at the scene on the early morning of 27 October 1997 and who was aware of the importance of all decisions he had to take, I prefer to quote Aby Warburg, the famous cultural anthropologist and great son of this city. He once wrote: "The good Lord sits in the detail." From the point of view of Guinea, I fully agree with him in this case.

Mr. President, Members of the Tribunal, that brings me to the end of my presentation of legal issues involved in the *Saiga* saga. In conclusion, the Republic of Guinea submits that the pursuit and arrest of the *Saiga* was justified under the Convention. Thank you very much.

The President:

Thank you, Professor Lagoni.

Mr. von Brevern?

Mr. von Brevern:

Mr. President, the next speaker for the Republic of Guinea will be Mr. Askia Camara, Head of Customs Legislation, on questions of customs legislation.

EXPOSÉ DE M. M.A. CAMARA
CONSEIL DE GUINÉE
[PV.99/15, F, p. 21–27]

M. M. A. Camara :

Monsieur le Président du Tribunal, Messieurs les Juges, après les explications des témoins des deux parties au présent procès, il me revient le grand privilège de vous présenter une brève communication relative aux bases légales de l'action douanière ayant abouti à l'immobilisation, à Conakry, le 28 octobre 1997, du navire *M/V Saiga*, ainsi que les procédures qui ont été suivies devant les tribunaux guinéens pour le règlement de cette affaire.

Mais, pour vous permettre de bien comprendre la position guinéenne dans ce problème, nous attirerons votre haute attention sur ce que la douane représente l'une des sources principales du budget de la Guinée. L'essentiel de ses recettes provient des perceptions opérées sur le commerce des produits pétroliers : essence, gasoil, pétrole. En d'autres termes, dès que la fraude se développe sur ces produits, une bonne partie des recouvrements douaniers se trouve être compromise. C'est pour ces raisons que l'Etat guinéen s'est doté d'une nouvelle législation adaptée aux impératifs du moment.

A propos du *M/V Saiga* dont il est question, il faut signaler que ce navire a été poursuivi pour avoir, en pleine connaissance de cause, avitaillé dans la zone contiguë, tout près de l'île guinéenne d'Alcatraz, des navires de pêche détenteurs de licences de pêche délivrées par les autorités guinéennes. Ces navires s'appelaient *Kriti*, *Giuseppe Primo*, *Eleni G*, et ont été avitaillés le 27 octobre 1997.

De telles opérations constituent des atteintes à la loi n° 007/CTRN du 15 mars 1994 en ses articles 6, 4 et 8, ainsi qu'au code des douanes en ses articles 33, 34 et 317. Ces textes vous ont déjà été certainement communiqués. Ces articles montrent ainsi clairement que le *M/V Saiga* a effectivement enfreint la loi guinéenne en distribuant du gasoil, le 27 octobre 1997, à la position qui était la sienne dans la mer. Conformément aussi aux dispositions de l'article 4 de la loi n° 007/CTRN du 15 mars 1994, les trois navires précités, à savoir *Kriti*, *Giuseppe Primo* et *Eleni G*, auraient dû s'avitailler à quai parce que tous étaient détenteurs de licences de pêche délivrées par les autorités guinéennes. C'est dire qu'à tous égards le *Saiga* et ses clients avitaillés ont incontestablement violé la loi guinéenne.

Si, à un certain moment des débats, dans cette salle, une certaine confusion a failli s'installer autour de la notion de rayon des douanes et territoire douanier, nous précisons qu'il s'agit de réalités dans lesquelles il n'y a aucune limitation à l'action douanière régulière.

Le territoire douanier comprend l'ensemble du territoire national, les îles situées le long du littoral et les eaux territoriales.

Le rayon des douanes correspond à une bande définie aux frontières d'un pays et dans laquelle doit s'exercer de manière permanente l'action de surveillance des services douaniers. Sa largeur varie selon les Etats. Il comprend toujours une zone terrestre et une zone maritime, pour les pays, bien entendu, ayant des frontières avec les océans. Dans le rayon des douanes, ceux qui détiennent ou transportent des marchandises destinées à être importées ou exportées doivent observer les diverses législations de police, de santé et de douane. Par rapport aux législations douanières, les marchandises, une fois dans le rayon des douanes, doivent être conduites par les voies légales vers les bureaux frontaliers des douanes pour y être déclarées. Au risque d'être saisies par les douanes, des marchandises dans le rayon des douanes ne peuvent s'écarter des voies légales ou faire l'objet de dépôt ou de vente sans autorisation préalable des autorités compétentes.

Tant que la circulation de la marchandise s'effectue sous le respect des législations nationales diverses, il ne peut se produire une saisie. Mais, à la moindre intention de fraude,

les risques de saisie naissent. Il convient de retenir que l'action douanière dans le rayon des douanes est à la fois préventive et répressive, selon la conduite des usagers.

Ce sont ces considérations que le *Saiga* a ignorées ou négligées pour commettre son infraction, en comptant peut-être sur l'état de sous-équipement matériel en mer des brigades de douane de Guinée.

Mais cela a été une erreur ou une mauvaise appréciation de la qualité du terrain. Grâce à l'assistance des Etats-Unis, depuis quelque temps, avec l'octroi de quatre vedettes de patrouille en mer, les chances de succès des contrebandiers sont réduites.

S'agissant de la poursuite qui a permis d'immobiliser, le 28 octobre 1997, le navire *M/V Saiga* alors fugitif, on peut remarquer que cette action a été faite en conformité avec les exigences de l'article 111 de la Convention des Nations Unies sur le droit de la mer. En effet, pour une infraction commise dans la zone contiguë, la poursuite a commencé au moment où le navire contrebandier *M/V Saiga* avitailait dans ladite zone et n'a pas été interrompue jusqu'à l'immobilisation effective dudit *Saiga*, le 28 octobre 1997. Le navire et sa cargaison ont été acheminés vers le bureau douanier compétent le plus proche pour l'accomplissement des autres formalités requises dans les cas de saisies. Le procès-verbal a été correctement rédigé et signé par les saisissants. Les juridictions guinéennes saisies ont jugé conformément aux lois en vigueur. La cargaison et le navire ont été confisqués. Des amendes ont été prononcées en vertu de l'article 8 de la loi n° 007/CTRN du 15 mars 1994.

De toute manière, rappelons qu'il existe légalement deux voies de règlement des affaires contentieuses en douane : la voie judiciaire et la voie transactionnelle.

C'est la voie judiciaire qui a jusqu'ici été utilisée dans le règlement de l'affaire *Saiga*.

La transaction, par contre, est une méthode dans laquelle les parties conviennent, à des conditions acceptées de part et d'autre, de terminer administrativement un conflit. Elle peut intervenir dans une affaire avant, pendant ou après jugement. La base légale de la transaction douanière en Guinée est le code des douanes en son article 251.

Dans l'affaire *M/V Saiga*, il n'y a eu ni transaction, ni mainlevée du moyen de transport, attendu que le carburant, objet de fraude, fait partie de la catégorie de marchandises prohibées, en référence à l'article 29 du code des douanes. Le carburant fait partie des produits fortement taxés en Guinée.

Le représentant des armateurs, M. Laszlo [Merényi], qui avait librement sollicité par écrit, le 25 novembre 1997, auprès de la direction nationale des douanes, le bénéfice de cette faveur de mainlevée pour récupérer son *Saiga*, avec abandon de la cargaison, n'était point revenu pour connaître la suite réservée à sa demande. De toute manière, une telle démarche de sa part constitue la preuve irréfutable que l'armateur était ainsi bien conscient et convaincu de l'infraction commise en Guinée par son bateau, le *Saiga*.

Nier aujourd'hui, devant un tribunal, tout fait d'atteinte à la législation douanière guinéenne relève du droit absolu de M. Laszlo [Merényi], mais, à la lumière des faits accablants et irréfutables exposés en toute objectivité plus haut, aucune juridiction ne saurait être dupe. Les lois guinéennes ont été bien violées par le *M/V Saiga* au courant du mois d'octobre 1997. L'immobilisation du *Saiga* à la douane a été légalement faite le 28 octobre 1997.

A propos de la mainlevée du *Saiga*, conformément à la décision de votre juridiction, Monsieur le Président, à l'issue de sa première audience en décembre 1997, permettez-nous de rappeler que la mise en application de cette mesure avait été subordonnée à la remise, à la République de Guinée, d'une lettre de garantie acceptable par les parties pour un montant de caution de 400 000 dollars des Etats-Unis. C'est le fait que la rédaction initiale de cette lettre de garantie n'avait pas été jugée satisfaisante par les autorités guinéennes que ladite mainlevée ne fut pas donnée. Les anomalies qu'elle contenait étaient les suivantes :

1) Le délai de validité de l'acte d'engagement expirait avant même la date de signature dudit document. C'est comme si quelqu'un signait, le 15 mars 1999, un document d'engagement dont la durée de validité expire le 31 décembre 1998.

2) Il existait une expression ambiguë, à savoir : « prétendue violation des lois guinéennes ».

3) La fonction, la qualité et les noms complets, donc l'identité du signataire de ladite lettre au sein de la Banque de Crédit Suisse n'étaient pas bien précisés.

Il est évident qu'aucun Etat ne saurait accepter de qui que ce soit un document d'engagement comportant de pareilles imprécisions. Mais, dès qu'elle fut correctement reprise par la banque concernée, la mainlevée du *Saiga* fut aussitôt donnée.

Après la saisie du *M/V Saiga* et sa conduite au bureau spécialisé, une requête de vente avant jugement fut présentée au tribunal de première instance, le 14 novembre 1997.

Le 20 novembre 1997, l'ordonnance de vente avant jugement n° 675 fut rendue par ledit Tribunal, conformément à l'article 289 du code des douanes. Aux termes de cette ordonnance, le denier provenant de la vente avait été confié au receveur spécial des douanes pour être disposé ultérieurement ainsi que de droit.

C'est seulement à la suite de l'expiration des délais de recours contre l'arrêt n° 12 du 3 février 1998 qui a prononcé la confiscation au profit de la douane de la cargaison du *M/V Saiga*, que le montant de cette vente fut acquis au trésor public.

De l'emploi de la force pendant la poursuite. L'article 1 du code de procédure pénale guinéen dispose :

L'action publique est celle qui appartient à la société pour le maintien de l'ordre public pour la poursuite des infractions pénales. Elle est engagée et exercée par les magistrats ou le fonctionnaire que la loi désigne à cet effet ...

Dès lors, quelques dispositions permettent d'apprécier que le législateur guinéen, en organisant la répression des infractions à la loi pénale, s'est préoccupé de l'éventuel dérapage imputable aux détenteurs de ces pouvoirs, à quelque niveau que ce soit, en les mettant sous le coup de la même loi. Dans le cas d'espèce, il ne faut pas s'égarer, ce ne sont pas les douaniers qui sont poursuivis, ils n'ont fait que leur devoir.

Pour ce qui est des navires qui se sont fait avitailler par le *Saiga* le 27 octobre 1997 dans la zone contiguë guinéenne, il faut dire que, contrairement à l'affirmation selon laquelle aucune poursuite n'a été engagée contre eux, une correspondance n° 839 du 21 novembre 1997 du procureur de la République près le tribunal de première instance de Conakry a été adressée à l'état-major de l'armée de mer en vue de rechercher et immobiliser lesdits navires et leurs capitaines pour l'infraction reprochée à *Saiga*. Ils sont également poursuivables en vertu de l'article 4 de la loi n° 007/CTNR du 15 mars 1994.

Cette poursuite peut être exercée dans un délai de trois ans à compter de la date de constatation de la violation (cf. article 252 du code des douanes relatif aux prescriptions des actions). Il n'y a donc aucune volonté d'impunité de l'autorité à l'égard des contrebandiers en fuite.

Au plan de la procédure devant la juridiction guinéenne, l'affaire *Saiga* a fait l'objet de deux jugements : le premier par le tribunal de première instance de Conakry et le deuxième par la cour d'appel de Conakry lorsque le 18 décembre 1997 M^c Richard Bangoura, avocat du capitaine du *M/V Saiga*, relevait appel du jugement rendu par la première juridiction. Sur cet appel du prévenu, le dossier fut formalisé et transmis à la cour d'appel où il fut enrôlé à l'audience correctionnelle du 12 janvier 1998. A cette date, les avocats du prévenu demandèrent un renvoi.

The President:

Mr. Camara, would you go a little more slowly.

M. M. A. Camara :

Merci.

Sur cet appel du prévenu, le dossier fut formalisé et transmis à la cour d'appel où il fut enrôlé à l'audience correctionnelle du 12 janvier 1998.

A cette date, les avocats du prévenu demandèrent un renvoi au motif qu'ils n'avaient pas eu le temps de préparer leur défense. Ils avaient, pour ce faire, invoqué l'article 138 du code de procédure pénale. La cour accéda à cette demande et renvoya l'affaire pour l'audience du 19 janvier, puis 22 janvier. Les débats devant la chambre correctionnelle ont eu lieu à cette dernière date en présence constante du prévenu et de ses deux avocats. Le délibéré eut lieu à l'audience du 3 février 1998.

La cour avait infirmé le jugement déféré en toutes ses dispositions. Elle avait rendu l'arrêt n° 12 du 3 février 1998. La cour avait ensuite rappelé aux parties les dispositions pertinentes de l'article 87 de la loi organique L/91/008 du 23 décembre 1991 concernant la cour suprême. Ces dispositions sont celles relatives au recours en cassation en matière pénale.

Article 87 :

Lorsque la décision en dernier lieu a été rendue contradictoirement, le ministère public et toutes les parties en cause ont six jours après celui du prononcé pour se pourvoir en cassation.

La loi confère à cette haute juridiction le pouvoir d'ordonner sursis à l'exécution de l'arrêt ou de la décision contestée par l'une des parties si cette exécution doit provoquer un préjudice irréparable. C'est dire que le capitaine du *M/V Saiga* n'a pas eu à épuiser toutes les voies de recours qui lui étaient offertes par la loi en Guinée. Il aurait pu très bien saisir la cour suprême comme il l'a fait pour la cour d'appel.

C'est ici l'occasion de préciser que la production par l'Etat de Saint-Vincent-et-les-Grenadines d'une copie d'une cédula de citation le désignant comme Etat du pavillon de *Saiga* civilement responsable des agissements pénaux causés par le capitaine de ce navire a fait l'objet d'une sanction par l'annulation de la décision du premier juge.

L'arrêt de la cour n'a fait, quant à lui, aucune référence et, dès lors, les griefs articulés par Saint-Vincent-et-les-Grenadines n'existent plus.

Enfin, Monsieur le Président, Messieurs les Juges, j'espère qu'avec la communication que je viens de faire, la confusion qui a été semée ici par des intervenants en parlant du vide juridique en Guinée est maintenant balayée. Je vous remercie.

The President:

Thank you, Mr. Camara.

Mr. von Brevern, please.

STATEMENT OF MR. VON BREVERN
AGENT OF GUINEA
[PV.99/15, E, p. 18–27]

Mr. von Brevern:

Mr. President, Honourable Judges. I intend to deal with four issues, and then this will be the end of our presentation. I would like to deal with the question of excessive force; very shortly with the question of prompt compliance with your judgment, and then with the *cédule de citation* shortly, and finally with damages. In total, Mr. President, I think I need about one hour.

The applicant State has concluded on the basis of the testimony given by its witnesses that the Guinean Customs authorities have used excessive force when arresting the *M/V Saiga*. Guinea would like to emphasize strongly that this was not so. From the Guinean perspective, the events surrounding the arrest and detention of the *Saiga* present themselves quite differently. The witnesses called by the applicant State did not give the evidence they were supposed to give.

Captain Orlov's statement that Guinean soldiers on the patrol boats would have fired at the *Saiga* without warning is not credible. The testimony given by the Senegalese painter Niasse contradicts the Master's statement. Niasse described very clearly that Captain Orlov ordered the crew to go into the engine room at a moment when the small patrol boat P35 had not yet reached the *Saiga* and before any shots were fired. This statement serves as proof that the allegation that the Guinean soldiers fired without a warning is incorrect. Before the order to flee to the engine room, Mr. Niasse was on the deck of the *Saiga*. It can clearly be assumed that he would have heard any shots being fired if this had really been so. This is also indicated by the fact that Captain Orlov did not see himself that anyone on board the patrol boat fired with machine guns.

Further contradiction lies in the fact that Captain Orlov said that he had put the alarm on before he sent the crew down to the engine room. This is not confirmed by Mr. Niasse who said that he only heard and saw Captain Orlov's order but did not perceive any ringing of the alarm.

Moreover, Captain Orlov's statement that he located two targets on the radar that would have moved fast towards the *Saiga* at a distance of about 11.5 miles does not conform with the uniform testimony given by the three Guinean witnesses, Mr. Bangoura, Mr. Camara and Mr. Sow, that at a distance of about 11 miles only one of the Guinean patrol boats, namely P35, was moving fast towards the *Saiga*.

In Guinean perspective Captain Orlov was not a credible witness. The statement does not conform with the testimony given by the Guinean witnesses that the small patrol boat, after having separated from the bigger one, switched on the blue warning light and the siren and called the *Saiga* on channel 16.

Captain Orlov knew that the approaching boat was an official navy boat. This is clearly demonstrated by the telex from ABS Geneva to the Captain, dated 27 October, which warned the *Saiga* that the authorities in Conakry had sent out patrol boats in search of the bunkering oil tanker. In this telex, as you know, the *Saiga* was ordered to a new position which lay outside the Guinean EEZ because the old meeting point was considered to be unsafe.

Guinea does not find Captain Orlov's allegation to be credible that he feared a piracy attack. There was no mention of any piracy attack in the telex to which I just referred. Quite the opposite; the Master was warned to look out for fast navy speed boats. Guinea holds that the *M/V Saiga* knew that she was being pursued by official Guinean forces. It should not be regarded as a coincidence that the new meeting point that was supposedly safe lay just

outside the Guinean EEZ. It is obvious that pirates would not let themselves be stopped by a borderline some 60 miles off the West African coast. Only for official forces would such borderline be of importance in order to act in conformity with article 111 of the Convention.

Captain Orlov tried hard to give another impression when he was cross-examined some days ago. His answer to the question on his understanding of the expression "fast navy speed boats being sent out" as mentioned in the telex was not satisfactory. He replied that he "was tending to think that these were pirates", thereby completely ignoring the contents of the telex. Captain Orlov was not credible as regards his fear of a piracy attack. He admitted that he had never had any experience with pirates. He also said that he recognized that he was being approached by a navy boat and that he saw soldiers in uniforms on board.

In light of what I have just said, I invite this Tribunal to conclude that Captain Orlov knew very well that patrol boats of the Guinean Navy were approaching the *Saiga* in order to stop the tanker for unwarranted bunkering activities in the waters off the Guinean coast.

The reason for Captain Orlov having ordered the crew to go to the engine room lies in the fact that the Guinean authorities had asked the *Saiga* via channel 16 to stop and that the Master saw the patrol boat approaching, on radar and through his binoculars.

The Master's order that the crew should hide in the engine room was neither justified nor reasonable. The only reasonable reaction in this situation would have been to stop the tanker and to speak and perhaps negotiate with the Guinean Customs authorities. Such a reaction would have avoided any damage to the vessel and any injury to the crew.

Guinea submits that the damages and injuries incurred during the arrest of the *Saiga* were caused by Captain Orlov's unreasonable and inexcusable refusal to stop his tanker, although he was being asked to do so. At any rate, if this Tribunal puts responsibility on Guinea for the damages and injuries sustained, the refusal of the Master to stop should be seen as a contribution to the damage in the form of a provocation of the Guinean enforcement actions.

Mr. Mangué Camara was the only witness who gave testimony on the exact circumstances when the small patrol boat approached and arrested the *Saiga*. He stated that the patrol boat had its siren and blue light switched on and that the *Saiga* was repeatedly asked to stop on channel 16. He also stated that the patrol boat went twice around the *Saiga* to make it halt, but the tanker did not stop. After the unsuccessful manoeuvre, one shot was fired into the air with the submachine gun. This happened at a time when the *Saiga* should have already proceeded at full speed. Mr. Camara explained in a very credible way that the crew of the patrol boat was afraid that the waves caused by the *Saiga* would capsize the small boat. He also said that the Guinean authorities feared that it would still take a lot of time to make the *Saiga* stop. This situation was perceived to be dangerous for the small patrol boat with a very high consumption of petrol, which might have run out, without there being the bigger patrol boat assisting it.

When trying to assess the situation, it should always be borne in mind that the patrol boat, P35, was an open-air boat with a length of only 6 meters. The boat was like a nutshell in comparison to the big oil tanker *Saiga*. Furthermore, there were six people on board, three of them with arms, which means that the crew felt confined and was consequently more susceptible to fear. It is not too surprising that in this situation a shot was fired above the *Saiga*. This can and should not be called excessive force.

When the Customs officers were finally successful in boarding the *Saiga*, they found no-one on board. Mr. Camara has very credibly described his feelings when he boarded. It was his first mission of that kind. He was afraid. He did not know the vessel and he did not know the reaction of the crew of the *M/V Saiga*. It could not be excluded that he would be welcomed with weapons.

In these circumstances, it was understandable and also tolerable that another shot was fired in the direction of the bridge where a crew member of the *Saiga* was seen to spot at him. Mr. Camara felt threatened and acted in self-defence, which is also in accordance with Guinean law.

Moreover, Mr. Camara convincingly stated that the other shot into the engine room was necessary in order to immobilize the vessel. At that time the bigger patrol boat had not yet arrived. The *Saiga* was still going at full speed and the crew of the small patrol boat was afraid that their petrol would run out. In this situation, the Customs officers had to make the *Saiga* stop, if necessary by the use of force. So, when Mr. Camara finally found an entrance into the engine room, he saw no other possibility to make the vessel stop quickly than by damaging a part of the engine, and he was successful.

The Customs officers wanted to inspect the vessel and crew but the crew had hidden and the cabin doors were closed. It is clear that the inspecting Customs officers had to use force in this situation to open them. As was made clear last week, they were not opened with guns.

To conclude, the Guinean actions might be regretted but they do not constitute excessive use of force. In the circumstances at that time, as I have just portrayed them, these were reasonable, necessary and adequate police measures against a tanker that had violated Guinean laws and refused to comply with Guinean orders.

Now, Mr. President, only two sentences with respect to another submission of Saint Vincent and the Grenadines. As you know, Saint Vincent and the Grenadines claims that Guinea violated the provisions of the Law of the Sea Convention concerning prompt compliance with the Judgment of your Tribunal of 4 December 1997 by not releasing *M/V Saiga* and its crew upon posting of a bank guarantee of Crédit Suisse of 10 and 11 December 1997.

Guinea has extensively replied to the allegations of the applicant State in the Counter-Memorial and the Rejoinder. Since no new arguments have been made so far in the presentation of the applicant State, Guinea considers it is sufficient at this stage to refer to her pleadings and requests that the claim be dismissed for the reasons already given.

The next short part of my statement today concerns the *cédule de citation* or schedule of summons issued by the *procureur de la République de Guinée* on 12 December 1997. Saint Vincent has asked you, Honourable Judges, in submission No. 5, to adjudge and declare that the citing of Saint Vincent and the Grenadines as flag State of the *M/V Saiga* in the criminal courts and proceedings instituted by Guinea violates the rights of Saint Vincent and the Grenadines under the Convention.

Saint Vincent and the Grenadines has failed, however, to describe which of her rights under the Convention were violated. I do not see any. The *cédule de citation* is a purely administrative document preparing the holding of the hearings in the criminal proceedings against the Master of the *M/V Saiga*. It was addressed and serviced solely to the Master. The mention in the *cédule de citation* of the State of Saint Vincent and the Grenadines did not have any legal effect, particularly not the effect that the State of Saint Vincent and the Grenadines was made jointly liable for any charges imposed on the Master of the *Saiga*.

The mention in the *cédule de citation* was undertaken because Saint Vincent and the Grenadines as flag State of the *Saiga* stood behind the Master and his vessel and would support the position of the accused Master. The *procureur de la République* called, or one could say invited, representatives of Saint Vincent to appear in the criminal proceedings against the Master because the *procureur* thought that Saint Vincent might have an interest in attending and contributing to the hearings in the proceedings. Neither the *procureur* nor the Guinean courts regarded the State of Saint Vincent and the Grenadines as a party to the proceedings against the Master. This is apparent if one takes a look at the judgments of

17 December 1997 and 3 February 1998, which are solely directed towards the Master of the *Saiga*. There is not one word that mentions any civil liability of the State of Saint Vincent and the Grenadines, nor did anything happen after delivery of the judgments that might support such an assumption.

To be quite clear, Guinea does not hold the State of Saint Vincent and the Grenadines liable for the violation of her customs laws, nor did Guinea ever do so previously.

To conclude on this point, I would like to state very clearly that Guinea finds submission No. 5 of Saint Vincent and the Grenadines completely unfounded and that it should be rejected.

Mr. President, I would now like to deal with the last issue and that is with reference to damages. Besides interest and legal costs, Saint Vincent and the Grenadines claims compensation and damages under four heads:

- the claim on behalf of the loss or damage to the vessel arising from the detention and arrest and its subsequent treatment, with a total of more than US\$ 1 million;
- the claim for the benefit of the Master and crew, including personal injury and deprivation of liberty, with a total of about US\$ 276,000;
- the claim in respect of the removal of the cargo from the vessel, in the amount of US\$3 million; and
- the claim in respect of both material and immaterial damages suffered by the State of Saint Vincent and the Grenadines in the amount of US\$ 1 million.

Guinea submits that these claims are unjustified and excessive.

As a legal basis for damages, Saint Vincent and the Grenadines relies on article 111, paragraph 8, of the Convention, which implies an unlawful hot pursuit of the *M/V Saiga* by the Guinean Customs authorities. As Professor Lagoni, Mr. Camara and I have previously pointed out, Guinea has lawfully exercised its right of hot pursuit in accordance with article 111, paragraph 2, of the Convention and did not violate any other rule of international law. The Republic of Guinea requests you, Honourable Judges, to dismiss the claims advanced by Saint Vincent and the Grenadines. The following statements concerning damages are made on an entirely auxiliary basis in case this Tribunal does not follow the Guinean assumptions and conclusions with respect to the lawfulness of the Guinean acts. Guinea is only arguing on damages now because the parties agreed in the 1998 Agreement that the proceedings before this Tribunal should be limited to one single phase dealing with all aspects of the merits, including costs and damages.

Before dealing with the specific claims advanced, some general remarks concerning all claims need to be made.

The first concerns the applicability of article 111, paragraph 8, of the Convention. Guinea notes that Saint Vincent and the Grenadines has not responded to the arguments made in the Guinean Rejoinder. There, Guinea had contended that a comparison of the wording of article 106 on the one hand and article 111, paragraph 8, of the Convention on the other hand would indicate that article 111, paragraph 8, would only serve as a legal basis for damages incurred to shipowners and/or charterers of the arrested ship and only for damages sustained as a result of the pursuit and arrest and not of subsequent actions, for example, the removal of the cargo.

My second general point is that any compensating award, if such an award is to be granted at all, should consider the fact that the *Saiga* entered the Guinean contiguous and exclusive economic zone in the knowledge that bunkering activities were considered by Guinea to be illegal and that the *Saiga* by doing so would run the risk of being pursued and arrested. This behaviour may be called a contribution in the form of either a provocation of

the Guinean enforcement actions or, at least, in the form of negligence, because the *Saiga* should have known that enforcement actions would follow her bunkering activities off the Guinean coast. Guinea submits that it is a well-established principle in assessing damages in international law that any contribution, provocation or negligence with respect to the sustained damages reduces the amount of compensation that may be awarded.

Before the opening of the hearings, Mr. President, you invited the parties to further address the issue of moral damages. Guinea has given quite a detailed account of this topic in both the Counter-Memorial and the Rejoinder. Nevertheless, she perceives some misconception of the issue on behalf of the Applicant which should be commented upon.

In his opening statement for the applicant State, the Attorney General and Minister of Justice of Saint Vincent and the Grenadines did not seem to draw a distinction between moral damages sustained by individuals and subsequently claimed by their nation State and those sustained by a State in its own right. Guinea is aware of the statement expressed by the Permanent Court in the *Mavrommatis* case that a State is, in reality, asserting its own right when it seeks reparation for loss suffered by its nationals. But this statement does not mean that pecuniary compensation will automatically be granted for moral damages that are not sustained by individuals but a State in its own right, for example as a result of a breach of an international obligation.

The applicant State has argued that individuals have suffered moral damages in the present dispute, yet Guinea assumes that Saint Vincent and the Grenadines is seeking moral damages in its own right, not just as a consequence of moral damages sustained by individuals but also as a result of a breach of the Convention or a violation of its national honour. Otherwise, it would have to be concluded that Saint Vincent and the Grenadines would try to seek double compensation for the moral damages which were claimed to have occurred to individuals. This would not be in accordance with international law.

As this Tribunal will be aware, there is a lot of academic controversy with regard to whether substantive pecuniary compensation or, in other words, satisfaction, may be granted to moral damages sustained by a State without injury to individuals. In their pleadings, the parties have been discussing three potential precedents for such an award. Guinea has argued that these cases do not constitute compelling authority for such an award and that such an award would not be covered by customary international law. The only direct comment that the applicant State made on the Guinean arguments was to criticize the date of publication of the cited literature. One sentence after this comment, the applicant State cited from Professor Schwarzenberger's treatise on international law, with a publication date about 30 years before the publication date of the research mainly cited by Guinea.

Guinea submits that there is no legal basis for the claim advanced by Saint Vincent and the Grenadines in its own right for moral damages. Neither article 111, paragraph 8, of the Convention covers such a claim, nor is the claim warranted by customary international law. The observations and comments of the Governments to article 45, paragraphs 1 and 2(c), of the Draft Articles on State Responsibility by the International Law Commission clearly indicate that State practice only allows for moral damages as compensation for mental shock and anguish suffered by individuals. The granting of substantive monetary satisfaction for direct moral injuries of States would suggest a punitive function for satisfaction which clearly would be contrary to international law.

The most that may be said is that article 45 of the ILC draft indicates the development of public international law. But even if it was applied in the present case the claim by Saint Vincent and the Grenadines would be groundless. Article 45, paragraph 2(c), of the ILC draft only provides that substantive pecuniary satisfaction is to be awarded in cases of gross infringement of the rights of the injured State. In its commentary, the International Law Commission has pointed to the exceptional character of this remedy and mentions the

Rainbow Warrior case as an example for a gross infringement.²⁷ Yet Guinea submits that the *Rainbow Warrior* case is not comparable with the present case. It concerned the sinking of a ship in Auckland harbour by two French agents who had used forged Swiss passports to enter New Zealand. The incident involved a violation of the territorial integrity and State sovereignty of New Zealand, as well as the entry into that country by fraudulent means. One crew member was killed. The French actions caused serious public outrage both in New Zealand and the rest of the world.

The President:

Mr. von Brevern, may I interrupt you? It is now almost 12 o'clock. Unless there is any difficulty, I suggest that we should proceed until about 12.30, by which time I am sure you will have concluded your submissions, which means that we will be spared the ordeal of coming back for the afternoon session.

Would that be acceptable to you, Mr. Plender?

Mr. Plender:

Entirely acceptable, Mr. President.

Mr. von Brevern:

Very well. Thank you, Mr. President.

The President:

You may proceed.

Mr. von Brevern:

The situation in the present case is completely different. The Guinean authorities did not violate the territorial sovereignty of Saint Vincent and the Grenadines. In the light of the rather loose link between the *Saiga* and the alleged flag State of Saint Vincent and the Grenadines, it is not justified to equate the *Saiga* with a piece of Saint Vincentian territory. Moreover, the Guinean authorities did not deceive the *Saiga* in any way. As has been shown, the *Saiga* was well aware that she was being pursued and that bunkering activities in the Guinean maritime zones were regarded as illegal. The *Saiga* was merely arrested and detained, whereas the *Rainbow Warrior* was sunk. No crew member died in the present case. Moreover, the applicant State has not indicated that any public arousal was caused by the arrest of the *Saiga* either in the country or anywhere else.

Guinea invites this Tribunal not to follow the argument of the applicant State that the present case involves more serious violations of international law than the *Rainbow Warrior* affair. As has been shown, the Guinean authorities were simply enforcing Guinean laws in the maritime zones off the Guinean coast with respect to an activity prohibited under Guinean law and which has not been expressly regulated by the Convention.

Guinea submits that the present case does not involve a gross infringement of the rights of Saint Vincent and the Grenadines. In fact, Guinea maintains that there is no infringement at all. At any rate, Guinea submits that she did not insult the dignity and honour of Saint Vincent and the Grenadines in a way that could justify pecuniary satisfaction for immaterial damage suffered.

The claim by the applicant State in its own right should also be dismissed insofar as material damages are claimed. Guinea notes that the Attorney General and Minister of Justice

²⁷ Note by the Registry: Reference given in the written text of the statement: *ILC Yearbook*, 1993, Vol. II, p. 79-80.

seems to have withdrawn the claim on the basis of costs entailed by devotion of public servants of Saint Vincent and the Grenadines to the *Saiga* affair. Guinea also notes that her argument with respect to both the non-existence of any loss of registration and the missing connection between any loss of registration and the Guinean enforcement actions have not been met by any statement of the Applicant.

Guinea submits that the claim should be dismissed. The claim is completely speculative and no proof or estimation has been given whatsoever as to the amount of any material damage.

Mr. President, besides claims in its own right, the applicant State has advanced a variety of claims on behalf of individuals and/or companies. The first of these claims concerns the damages and losses sustained by the shipowner or by the charterer arising from the arrest and detention of the *Saiga*. By submitting extensive further material, the applicant State has positively responded to the criticism made in the Guinean pleadings that the damages had not been fully and comprehensively documented. The Attorney General and Minister of Justice of Saint Vincent and the Grenadines has called this material "a detailed account explaining the basis for each cent of the claim." Guinea takes this statement as confirmation on behalf of the applicant State that only those damages or losses could be compensated that have fully been proven by documentary evidence.

Guinea finds that proper documentary evidence also includes information as to which company of the several interested parties has suffered which concrete damages. Mr. Stewart, the witness, has stated that arbitral proceedings are pending with respect to the payment of the damages now claimed. Guinea also submits that any payment by insurance companies should be taken into account, be it hull insurers or P&I clubs.

The claimed amount is a total of more than US\$ 1 million. Guinea does not contest that some smaller damages have been caused to the *Saiga* as a result of the arrest by the Guinean Customs authorities. Nevertheless, Guinea has serious doubts about the claimed amount and consequently also about the submitted documentary evidence.

As I have already said, Guinea rejects the assumption that her Customs authorities applied any excessive force and thereby caused excessive damage. The photographs presented some days ago do not prove the case of the applicant State. Neither the cause of the damages, nor their time and location, are explained. What credit can be given to a picture of a vessel at a far distance which shows some spots of white colour on the bridge? It must also be mentioned that the vessel is old. Could some of the damages not have occurred at a later stage?

The witnesses called by Guinea did not testify any greater damages. Also, the witness Captain Merenyi, when he explained his attempts to come to an agreement with the Guinean Customs authority in accordance with article 251 of the Guinean Customs Code, did not refer to any damages.

In this context it should be asked why there has not been any examination of the damages on the basis of a contradictory survey while the vessel was still in Conakry. It is to be remembered that the Master and the vessel were represented by several lawyers in Conakry. The Guinean authorities could have inspected the vessel at the same time and the present argument would have been avoided. Another question is why the damages to the vessel have not been recorded in the Deed of Release.

The Guinean answer is that the damages have obviously not been as serious as they are now being portrayed. Guinea requests the Tribunal – in case it finds Guinea responsible to compensate pursuant to article 111, paragraph 8, of the Convention – to take the Guinean doubts into consideration and to scrutinize with a sharp eye the material provided by the applicant State.

As regards the claims for the benefit of the Master and crew of the *Saiga*, in particular because of deprivation of liberty and personal injury, Guinea submits that there is no sufficient basis for such an award. Neither the Master nor any crew member were illegally detained.

It is not in dispute that the Master was held in Conakry in the course of criminal proceedings which had been instituted against him. Guinea contends that it is incorrect to speak of an illegal detention in the present case. The Master was held in the country in the course of criminal proceedings. The Conakry Court of First Instance and the Conakry Court of Appeal confirmed in their judgments that it was not unlawful to hold him in the country. Both courts sentenced the Master to a criminal fine on the grounds of contraband.

Similarly, no compensation for detention of the crew should be awarded in the present case. Compensation requires either material or immaterial damage. I see neither here. It lies in the nature of the duty of a crew of a ship that it stays on board the ship, in particular while it is sailing. There is no significant difference as regards the freedom to move between a situation in which the crew stays on board while the ship is detained in a foreign port and the situation in which the ship is sailing.

There is no material damage. The crew members continued to receive their salary. Their contracts had not expired and they would have remained on board the sailing ship anyway. In fact, the 14 crew members that voluntarily stayed on board the *Saiga* after 17 November 1997 received a bonus payment of 20 per cent of their salary. Furthermore, accident insurance was provided for the crew members, as can be seen from the documentary evidence provided by Saint Vincent and the Grenadines.

Neither is there moral damage, since the crew was not forced to stay on board. As has been stated by the witness Mr. Bangoura, the crew was allowed to leave both the *Saiga* and the Guinean territory. Guinea submits that the crew stayed on board of the *Saiga* for financial and logistical reasons. This was confirmed by the superintendent of the *Saiga*, Captain Merenyi, who stated that he did not want any crew member to leave the vessel during the initial time in the port of Conakry. From the Guinean perspective, the crew could have left the vessel. It could also have been exchanged.

There is, neither, any justification for any moral damages arising from an excessive use of force. As I have shown before, the Guinean measures were necessary and appropriate police measures in order to stop the unwarranted bunkering activities and to exercise the right to search and detain the vessel.

With regard to the injuries suffered by the painter Niasse, the applicant State tried to give evidence of the seriousness of his injuries. Guinea regrets strongly if any injuries should have been caused by her officials; yet doubts remain, in particular with regard to the seriousness of the injuries sustained.

The applicant State tried to prove that Mr. Niasse was hit by a ricochet by producing an X-ray photo of a chest with a projectile. Guinea submits that this X-ray photo does not prove anything. It could be of anyone. Furthermore, the applicant State did not explain the reason why there was so much confusion about the actually sustained injuries. We still wonder how Mr. Niasse could have survived with a metal projectile in his chest and with only receiving first aid a long time after the attack of the *Saiga*. I also wonder why Captain Orlov did not record the seriousness of the injuries in his memoranda of 29 October and 4 November 1997 which have been produced as documentary evidence.

The total of the claims for the benefit of the Master and crew is US\$ 267,150. Guinea requests this Tribunal to dismiss these claims.

Mr. President, this brings me and the delegation of Guinea to the end of our submissions in this first round. Thank you, Mr President.

The President:

Thank you very much, Mr. von Brevern. As you say, that brings us to the end of the first round. The Tribunal and the parties have already agreed that there will be no sitting tomorrow. There will be a sitting on Thursday. I would like to have an arrangement that enables the parties to prepare their case sufficiently but also enables us to make a much more rational use of the time available. For this purpose, the Tribunal has a suggestion which I should like to discuss with the Agents briefly for about five minutes after the sitting. The time for the sitting on Thursday will then be determined. For the meantime, the sitting is adjourned. We will sit again on Thursday at a time to be agreed between the Tribunal and the parties.

(The Tribunal rises at 12.15 p.m.)

Public sitting held on 18 March 1999, 2.00 p.m.

Tribunal

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Registrar* CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 18 mars 1999, 14 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

As agreed, at this session we are going to hear the commencement of the submissions of Saint Vincent and the Grenadines. I take it, Mr. Howe, that you are going to start for Saint Vincent and the Grenadines.

Mr. Howe:

I am, Mr. President.

The President:

You may proceed, please.

Reply of Saint Vincent and the Grenadines

STATEMENT OF MR. HOWE
COUNSEL FOR SAINT VINCENT AND THE GRENADINES
[PV.99/16, E, p. 4–7]

Mr. Howe:

Mr. President, Members of the Tribunal, today it is my pleasure to address you on two matters: the Applicant's further submissions as to why it is not open to Guinea to challenge admissibility, and the delay in releasing the *M/V Saiga*. I shall also comply with the request made by the Tribunal and Mr. von Brevern to supply more information about the relevant insurance arrangements.

I start with the challenge to admissibility. In my speech on the first day of these hearings, I reminded the Tribunal that your jurisdiction in this case is based on the Exchange of Letters dated 20 February 1998, which I shall refer to as "the February 1998 Agreement". I explained how, objectively, it could be seen that Guinea had waived their rights to raise objections to the admissibility of the case. I pointed out that if Guinea relied on a special meaning to have been attributed to the word "merits" by the parties, the burden would be on Guinea to show that it was the common intention of the parties to give them that special meaning.

In his response on Thursday, 11 March, Mr. von Brevern stated that there was indeed such a common intention between the parties in February 1998. It followed from this that Guinea found my objective interpretation of the February 1998 Agreement to be "rather sly and unfair conduct consciously misinterpreting and ignoring what has been agreed upon in February last year." It is true that, unfortunately, I was not myself directly party to each and every one of the oral discussions which took place leading up to the conclusion of the February 1998 Agreement. Another counsel also acting for Saint Vincent and the Grenadines at that time also conducted a number of these discussions. However, I was more closely involved in those discussions than anybody else on the Vincentian side of this dispute at that time. For this reason, I am the person best qualified to comment on the common intention of the parties when concluding the February 1998 Agreement.

As Mr. von Brevern has pointed out, earlier discussions concerning a proposal to transfer jurisdiction to this Tribunal were substantially recorded in writing for the first time in my fax of 29 January 1998. That fax makes it clear that for such an agreement to be acceptable to Saint Vincent and the Grenadines, it would have to include a number of provisions. The third such provision was that "the proceedings be limited to a single phase dealing with all aspects, including the merits and any jurisdictional issues that may arise". The reference to "any jurisdictional issues that may arise" was included because Guinea had raised a jurisdictional defence in their Statement of Response dated 30 January 1998. However, that jurisdictional defence had been raised in response to the fact that:

The Tribunal in its judgement in case number 1 of 4th December 1997 has qualified the dispute in question as one which concerns the interpretation or application of the provisions of the Convention with regard to fisheries.

Guinea had submitted at the application for the prompt release of the vessel that the *Saiga* had been guilty of customs offences. Clearly if Guinea believed that the *Saiga* was guilty of customs offences, we should not be too surprised that she should want to question the jurisdiction of this Tribunal in the event that you were to continue to categorize this

matter in terms of a fisheries offence. That jurisdictional defence was clearly to be expected at that time.

Of course, it was also open to Guinea to raise other jurisdictional objections at that time. Had they done so, these would have been discussed. Depending on the outcome of such discussions, it may well have been that the February Agreement would have incorporated references to those objections as well. The reason that no such objections were included was because no such further objections were ever raised.

The Agent for Guinea says the accuracy of the Guinean position is clearly illustrated by the fact that she put forward the objection concerning the non-exhaustion of local remedies during the hearings in the provisional-measures proceedings on 24 February 1998. He points out, quite correctly, that "this was only four days after the conclusion of the 1998 Agreement" – he says we "concluded on 20 February and this was on the 24th – which is now claimed to exclude the raising of the objections". Why would Guinea seek to raise objections to admissibility on 24 February if indeed she had consciously intended to waive them only four days earlier?

Of course it often happens that two parties conclude an agreement believing that they have a common intention only to find out at a later date that they did not in fact see eye to eye on all aspects. Courts in every jurisdiction are frequently asked to review such agreements in those circumstances to determine the respective rights and obligations of the parties notwithstanding their misunderstandings. But I do not believe that this is such a case. Indeed, I shall submit that in this case Guinea did consciously waive her right to raise objections of admissibility or, at best, was completely uninterested in preserving any such rights that she might have had at the time of concluding the February 1998 Agreement. To do this, it is necessary for us to seek to go back in time to the circumstances leading up to the 20 February Agreement. I propose to do this in some detail and shall deal with the delays in the release of the vessel and the insurance position in the process.

With regard to the background, I do not propose to spend more than a brief moment discussing the earlier attack on the *Alfa 1* in May 1996 because I know that this is not a matter before the Tribunal today. The position of Guinea with regard to that attack has always been and remains today unclear. Marc Vervaet has explained in paragraph 7 of his statement the ambiguous position adopted by Guinea in response to the investigations made after that attack. In paragraph 13 of their Rejoinder, Guinea – the first time that they addressed this issue in these proceedings – denied any involvement in the attack on the *Alfa 1*. However, as recently as this Tuesday, 16 March, Professor Lagoni cited the attack on the *Alfa 1* in support of the proposition that

there is sufficient documentary evidence that the Master of the *Saiga* knew that offshore bunkering in the EEZ of Guinea was prohibited and that the Guinean authorities enforced this prohibition against foreign ships.

I attended the *Alfa 1* in Dakar a few days after that attack and met with the Master and crew members who had been shot at and left on board the burning vessel. As set out in the statement of Marc Vervaet, the investigations conducted at that time included visiting Conakry and speaking with Guinean lawyers. The Guinean officials who were spoken to denied being involved in that attack. The Guinean lawyers who were spoken to could not identify any provisions of Guinean law that the *Alfa 1* had been infringing. Most importantly for me, I advised my clients that they were not doing anything unlawful in accordance with the United Nations Convention on the Law of the Sea which Guinea had ratified. The Addax and Oryx Group's determination to continue with their bunkering operations off Guinea, albeit exercising additional caution in doing so, was made taking into account this advice.

Against that background, I turn to discuss the insurance position. The earlier attack on the *Alfa I* is material to the insurance position regarding the *Saiga* –

The President:

Mr. Howe, could you kindly go a little slower?

Mr. Howe:

I am sorry, Mr. President.

The earlier attack on the *Alfa I* is material to the insurance position regarding the *Saiga* upon which the Tribunal has sought additional information and to which Mr. von Brevern alluded in his closing speech on Tuesday. He said, "Guinea also submits that any payment by insurance companies should be taken into account, be it hull insurers or P&I clubs"; I repeat, "be it hull insurers or P&I clubs."

The fact is that we live and operate in the real world. In the real world, insurance companies charge their clients premiums calculated on the basis that if a claim is to be paid in due course, the underwriter will be able to step into the shoes of the assured to seek to recover that claim from any party truly at fault. In England, the country in which most of the relevant insurance policies were taken out, the underwriter may proceed as if he were the assured, pursuant to his rights of subrogation. Any proceedings will continue to be taken in the name of the assured, and the underwriter may call upon the assured to give all reasonable assistance in the pursuit of such proceedings, for example, in the production of documents and making available witnesses of fact. It is for this reason that the insurance position of a party is not regarded as relevant to a claim for damages before the English courts. I understand that the rules of legal procedure can be different in other jurisdictions. For example, in some jurisdictions a claim may be brought in the name of the underwriter after he has paid the claim. However, I would imagine that the general position is broadly similar, in that an underwriter may expect to be able to recover at least some of the sums paid to it from the other party in the same way that its assured would have been able to recover had that payment not been made.

Certainly that an assured should not do anything to prejudice the ability of the underwriter to recover the maximum amount of losses in due course. I remind the Tribunal that the premium earned by the underwriter is calculated on this basis. I respectfully submit that it would be quite wrong for an underwriter to have to pay the claim of an assured and then be told that he could not recover sums pursuant to his rights of subrogation because the assured had not truly suffered a loss by virtue of the underwriter's own payment. I venture to suggest that, if this were the case, no underwriter would ever pay a claim again until after all conceivable litigation had been concluded.

But perhaps I digress. The fact is, as I have said above, that we live in the real world. In the real world underwriters do not pay claims until they have been properly investigated and the situation has been clarified. The Master of the *Alfa I*, Captain Dimitros Exarchos, came to Hamburg to offer his assistance to the Tribunal at the hearing of the application for the prompt release of the vessel in November 1997. He came willingly, together with a representative of the owners, to explain precisely what had been done to him and his crew and his vessel. My understanding is that at that time – and I simply do not know what has happened since – their underwriters had still not made any payment in respect of the damage to that vessel some 18 months earlier, or the loss of hire that they had suffered while the repairs had had to be effected. Their underwriters could not understand the reasons for the attack and so delayed making any payment.

Under vigorous cross-examination from Mr. von Brevern, Mr. Stewart, on behalf of the owners of the *Saiga*, explained the position with regard to the dispute between the owners

and the charterers. Mr. Stewart confirmed that it is not yet finally decided whether the owners will accept the behaviour of the charterers in not paying hire for the period of the detention. Earlier today we lodged with the court a small bundle of additional documents evidencing this dispute between the owners and the charterers and how this impacts on their respective insurance arrangements. I should explain that the bundle has been prepared chronologically. This has been done for ease of reference to demonstrate the nature of the ongoing discussions. These may be broadly summarized as follows.

Representative examples of the correspondence passing between representatives of the owners and the charterers appear at pages 1-2, 4-5, 19-25 and 30-38. This line of correspondence ended with the message from Seascot on 23 February 1998 which, amongst other things, commented on the situation in which the Master had been obliged to discharge the cargo. In that fax they also chose to comment on my previous message as follows, quoting from the fax: "In the words of England's most celebrated writer 'methinks he doth protest too much'". Frankly, I do not think that anybody who chooses to misquote Shakespeare in writing deserves a response. Suffice to say that, as Mr. Stewart has confirmed, this dispute may yet have to be resolved in arbitration.

As can be seen from pages 4-5, 20, 30-31 and 36-38 of this correspondence, owners' P&I club maintain that charterers should pay the bulk of the losses. I understand that they have not made any payment to the owners for this reason. Owners are also seeking to effect some sort of recovery in respect of the physical damage to the vessel from their war-risk underwriters. However, I also understand that, as of today, these underwriters have still not accepted that the loss falls within the policy terms. This was confirmed by Mr. Stewart. Further proceedings are doubtless being contemplated in this regard.

Perhaps not surprisingly, the view of the owners' P&I club is not shared by the underwriters of charterers or the cargo owners. As could be anticipated in the light of the fax from brokers Henrijean, appearing at pages 26-28, charterers' liability underwriters have taken the view that this matter does not come within their area of responsibility. Charterers can have no objection with this position until any liability to owners has been established.

The President:

Mr. von Brevern, please.

INTERVENTION BY MR. VON BREVERN
AGENT OF GUINEA
[PV.99/16, E, p. 7–8]

Mr. von Brevern:

Mr. President, I wonder whether the document Mr. Howe is referring to in the bundle of documents could perhaps also be made available to this side of the proceedings. I see that you, Honourable Judges, have something before you. We have not received anything, or is the idea that we should not get anything?

The President:

Thank you, Mr. von Brevern. No, the bundle will be made available to you. It is not yet available to the Judges.

Mr. Howe:

I have a spare copy, Mr. President, which I will be happy to give to Mr. von Brevern now.

The President:

Mr. von Brevern, are you speaking about the text of Mr. Howe's statement, or the bundle which he is referring to?

Mr. von Brevern:

No, I meant the bundle Mr. Howe is referring to. He has been referring to page 1, 20 etc., and I could not follow, because I have not got it before me.

The President:

That bundle, I understand, has just been made available to the Tribunal. It is not available to the Judges, and in accordance with normal practice copies will be made available to you as soon as possible.

Mr. von Brevern:

Just a remark. It is of course difficult for us to understand when the speaker refers to page 2, 3 or 4, which we do not have before us. Of course we would be in a better position to understand what is said if what is in those pages is quoted or described. Thank you, Mr. President.

The President:

Thank you very much. I think perhaps a compromise could be, as Mr. Howe has suggested, that he gives you a copy of the text he is reading, so that you can at least have the references correctly, so when you get the bundle you will be able to check them. That is, I take it, a copy of the statement. The bundle will be made available to you in due course. Thank you very much.

Mr. Howe, you may proceed.

STATEMENT OF MR. HOWE (CONTINUED)
COUNSEL FOR SAINT VINCENT AND THE GRENADINES
[PV.99/16, E, p. 8-13]

Mr. Howe:

- Thank you, Mr. President. I believe I had just finished discussing the position of the charterers' liability underwriters. I intend to discuss, which is perhaps of more interest, the position adopted by the cargo insurers at Lloyd's with whom the assured deals through the brokers Lloyd Thompson. The cargo insurers' comment of 29 December 1997 was:

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- On their initial analysis of the information including the fact that the Guinean Tribunal have now ruled that the assured were in breach of local customs regulations, underwriters are not convinced that they would be liable in the event of a loss in these circumstances. Although underwriters do not wish in any way to pre-judge any issues in this very complex case, you will appreciate that they must, and hereby do, reserve all of their rights, and in particular with regard to any breach of any warranties in the policy.

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- I also invite the Tribunal in due course, when the bundle is to hand, to read these underwriters' further comments of 2 June 1998 appearing at pages 42-43. They say that they are not clear on the consequences of the findings of this Tribunal. Additionally they question whether or not the cargo has been lost as a result of the seizure. The implication from this is that further litigation may be necessary between the cargo owners and these underwriters whatever the Tribunal decides in the present case. If this Tribunal were to find that Guinea did act unlawfully, it is still possible that an English court may subsequently hold that these underwriters are right that the cargo has not yet been lost as a result of the seizure. In this event the cargo owners will additionally have to commence further litigation to exhaust their tracing rights against the oil companies in Conakry, as was anticipated near the outset of this matter in a fax appearing at pages 6-17 of the bundle. This course of action they would have to undertake before they would be able to recover any sums under the policy on the basis postulated by those underwriters.

- In conclusion, as at today's date, we are not aware of any hull insurers or P&I Clubs that have yet paid so much as a cent in respect of the physical losses or detention time suffered by the interests in the *Saiga* under the terms of any relevant policies of insurance. Indeed, the only insurance claim that has been accepted to date is in respect of the injuries to the crew which was covered by the owners' medical insurance. However, the payment made by those underwriters only represents a very small proportion of the expenses actually paid by the owners due to the extent of the deductible. As I have outlined, it seems quite likely that there will have to be a good deal more litigation in domestic courts before the position between the various interests in the vessel and their respective underwriters can be resolved.

- I turn to discuss the detention of the *Saiga* and the delay in releasing the crew.

- Over the last two weeks we have had the benefit of seeing the *Saiga* matter from a full perspective for the first time. On Tuesday, Mr. Camara explained to the Tribunal how customs revenue represents one of the principal sources of income for the budget of Guinea, and how fraudulent activity with petrol, diesel and oil puts a large part of this income for the customs in danger. Under cover of a letter dated 12 March 1999 we were provided with a copy of the *ordre de mission* stating as its object, and I give a loose translation, "locating and prevention of fraud at sea and on land". We have heard from Mr. Bangoura and Lieutenant Sow how they undertook their actions against the *Saiga* in accordance with this

mission. We have heard Mr. Niasse, a very impressive witness, report how one of the first things that the detaining officers said to him was that "you Senegalese are crooks".

As we know, the vessel was detained on the morning of 28 October and brought into Conakry that evening. Unfortunately, upon its arrival at Conakry and only a few days later Mr. Vervaeet was initially only able to communicate with the Master by making hand signals to the vessel from the shore. As he told you when giving evidence at the prompt-release hearing, the Guinean officials that they were able to speak to, and I quote from his evidence, "quite simply said that we were smugglers engaged in contraband activities and that they had all of the evidence but they did not want to give us any of it". Representatives of the Governments of Saint Vincent and the Grenadines and the Ukraine, as well as representatives of the owner, charterers, cargo owners and crew, had similar difficulties in making contact with the vessel and her crew or the Guinean officials responsible for the arrest.

It was in these circumstances that Saint Vincent and the Grenadines determined to make an application for the prompt release of the vessel by an Application filed on 13 November 1997. That Application appeared entirely appropriate at that time in view of the urgency of the situation and the very limited information being received about the reasons for the detention. That same day, but after the filing of that Application, the Customs *procès-verbal* was made available. The *procès-verbal* talked of customs offences but, by reference to provisions of Guinean law, did not, at least to representatives of Saint Vincent and the Grenadines, appear even on their face to be applicable to the detention of the *Saiga*. The application for prompt release was accordingly maintained.

As you know, the hearing took place over 27 and 28 November 1997. Guinea throughout maintained their position that the *M/V Saiga* was guilty of customs offences. I have counted from the verbatim records that the representatives of Guinea used the expression "smugglers" in relation to the bunkering activities on no less than 16 occasions over the course of that hearing.

I need hardly remind the Tribunal that, by your Judgment of 4 December 1997, you unanimously found that the Tribunal had jurisdiction under article 292 of the Convention. You further found that the application was admissible and ordered that Guinea shall promptly release the *M/V Saiga* and its crew from detention and that the release shall be upon the posting of a reasonable bond or security. You further decided that the security shall consist of: (1) the amount of gas oil discharged from the *M/V Saiga*; and (2) the amount of US\$ 400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form. The guidance that we are given as to the form of the bond comes from article 113, paragraph 1, of the Rules of the Tribunal. This provision talks of the "posting of a reasonable bond".

The subsequent correspondence concerning the bond appears at tab 38 of the annexes to the Memorial. As you know, a bond was initially issued on 10 December 1997 and a copy faxed to the Agent of Guinea that same day. The contemporaneous notes of my telephone conversations with the Agent of Guinea on the following day and the day after appear at tab 14 of the annexes to the Reply. I spoke with the Agent of Guinea on the morning of 11 December before seeing a fax that he had sent to me that morning. We agreed that I could overcome a number of concerns that he had by procuring a further fax to be sent directly to him by Crédit Suisse in agreed terms, including attaching a translation of the bond. That was done in accordance with our agreement. I do not suggest that in doing this the Agent of Guinea agreed that Guinea would be irrevocably bound to accept the bond and would immediately release the vessel. It was made clear that he would need to speak to somebody in Guinea before this could happen. However, I do suggest that, in the light of our agreement, it was clear that the Agent of Guinea himself considered that the bond was reasonable in the form in which it had been provided with his ambiguities clarified by the subsequent fax from

Crédit Suisse. In these circumstances, and absent a clear mistake on the part of the Agent of Guinea, which is not evidence in this case, it is difficult to see how it can be open to Guinea to suggest that the bond was not reasonable in this form on 11 December 1997. Such a suggestion would be contrary to the advice of the professional advisers that they have retained to advise on precisely such issues.

But Guinea did not release the vessel. Instead, the very next day, on 12 December, they issued the citation. The *cedule* to that citation cited the Master as the person charged and Saint Vincent and the Grenadines as a party to be civilly liable. The judgment of the Court of First Instance was given in Conakry only five days later, on 12 December. This found the Master guilty of customs offences. As you know, Mr. President, at this time Saint Vincent and the Grenadines were contemplating making an application for interpretation of your Judgment of 4 December 1997 under article 126 of the [Rules] when it transpired that an application for provisional measures might be more expeditious

In these circumstances, and to protect the Master from imprisonment, an appeal was lodged with the Court of Appeal in Conakry. Judgment was again fast and the judgment of the Court of Appeal in Conakry was handed down on 3 February 1998, confirming that the Master was guilty of customs offences.

Moreover, over this period Guinea continued to take steps against other vessels for breaches of its customs laws. You have seen in the statement of Marc Vervaeke, appearing at Annex 10 to the Memorial, that at least two fishing trawlers were attacked in the months after the *Saiga* had been detained but before 12 February: the *Poseidon* and the *Xifias*.

The Agent of Guinea now tries to suggest that the delay in releasing the vessel over this period was largely due to communication difficulties he experienced in sending faxes to Guinea, but there is a wealth of evidence that Guinea knew precisely what had happened at this stage with regard to the bond. Captain Merenyi was clear in his evidence that the authorities in Guinea with whom he was talking "wanted to make us understand that everything was legal". He also said: "They considered the \$400,000 as not a bond but a cash payment".

At the hearing of the application for provisional measures the Agent of Guinea advised the Tribunal that the Minister of Economy and Finance of Guinea had "advised the release of the vessel immediately if US\$ 400,000 under the guarantee were paid by Crédit Suisse". So far as Guinea was concerned, the *M/V Saiga* had been found guilty of customs offences and was now obliged to pay the appropriate fine of US\$ 400,000 in accordance with your ruling.

At the hearing of the application for provisional measures, Counsel for Saint Vincent and the Grenadines suggested that by categorizing this matter as one relating to fisheries in the prompt-release Judgment, this Tribunal had "offered Guinea a perch on which to develop an argument". However, "rather than seize that perch, it chose to ignore the views of the majority and persist with its claims to be entitled to enforce customs and criminal laws". Why was that? Mr. President, Members of the Tribunal, I have tried, with the benefit of the more complete information that we now have, to demonstrate why it was so clear at the beginning of the hearing on the application for provisional measures on 23 February 1998 that Guinea genuinely considered that they had acted lawfully in detaining the *Saiga*. This is what they had maintained steadfastly since the vessel had first been detained back in October 1997. At no stage up until that time in February did Guinea seek to change their position one iota from that which they had maintained from the outset. Their conviction in the position that they had undertaken stood as firm, if I may say so, as the rock of Alcatraz.

That explains why the desire to preserve arguments questioning the admissibility of the claims of Saint Vincent and the Grenadines was not important to Guinea at any time prior to 20 February when they concluded the February Agreement. Mr. President, Members of the

Tribunal, this Tribunal is an extremely public forum. Our proceedings have been monitored on video tapes; our words are published every evening to the world at large on the Internet. Guinea did not agree to transfer jurisdiction to this Tribunal under the watch of the whole world in the knowledge that she had done wrong and with the hope that she might be able to get away with this because of some legal technicality – of course not. She, like Saint Vincent and the Grenadines, was absolutely convinced at that stage of the correctness of her acts. Here was an opportunity to prove this to the world, to collect the US\$ 400,000 due to her, but perhaps even importantly to show what happens to smugglers operating off Guinea to help stamp out fraud offshore and inland.

I indicated before that I would seek to explain why it was that Guinea sought to raise objections to admissibility on 24 February when she had intended to waive them only four days earlier. As you know, this was not *any* four days. The hearing of the application for provisional measures commenced on Monday, 23 February and was concluded the following day. A lot of work was done in respect of that application by both sides. Captain Orlov indicated to this Tribunal how the Saint Vincent and the Grenadines team was up until at least four o'clock in the morning of Monday, 8 March preparing this application before you. I know that the Guinean side have been working equally as hard, and so it was on the application for provisional measures. I well remember burning the midnight oil on that occasion to make our case, and so, I have no doubt, did Guinea.

What is remarkable is that in the whole of their answering submissions – in two rounds of written pleadings and in the first round of oral pleadings taking place on the afternoon of Monday, 23 February – there was not one single mention of any of the three technical objections to admissibility Guinea now seeks to raise. It is true that they developed their argument that this Tribunal lacked jurisdiction in view of your earlier categorization of this matter as a fisheries matter, but that was made by way of a defence to the immediate application being made for provisional measures. There is no doubt that they wished the subsequent substantive hearing to concentrate on the customs offences alleged to have been committed by the *Saiga* as, indeed, was to be expected. That was their case.

What changed? I venture to suggest that during the course of those four days it became apparent to the Guinean side, as it did to the Tribunal, that the *Saiga* had not been engaged in any form of smuggling or other illegal activity. On the contrary, it was clear that she had done nothing contrary to Guinean law. Four further days after the hearing, on 28 February 1998, Guinea released the *Saiga* without having received payment under the bond following nearly four months of detention. Only a few days later, on 11 March 1998, this Tribunal prescribed the most important of the provisional measures sought, and did so unanimously. Moreover, the National Director of Customs in Guinea has since acknowledged that there is "a current loophole in the area of the refuelling of boats" in the customs legislation of Guinea.

Maître Thiam will shortly address you on whether or not the Proposed Draft Decree overcomes the problems identified, but it is sufficient for my purposes to note that Guinea accepted that there is a loophole.

It is against the background that I have described above that the Agent of Guinea first raised the failure of Saint Vincent and the Grenadines to exhaust legal remedies in Guinea as a further defence to the application for provisional measures. He did that in his closing submissions on the afternoon of 24 February. It was correctly pointed out that he could not then raise this matter for the first time after not having mentioned it at all in two rounds of written proceedings and the first round of oral arguments. That was an end to the point. It could equally have been said that this was contrary to the February Agreement, but this would have involved a more detailed examination of the February Agreement which would have been neither appropriate nor necessary at that stage.

Mr. President, Members of the Tribunal, there was no special agreement between the parties at the time of concluding the February Agreement, whether to preserve Guinea's rights to raise objections of admissibility or otherwise. Indeed, I can state quite categorically that the intention of Saint Vincent and the Grenadines at least was quite the contrary: we did not wish to be burdened with the additional work and costs of arguing questions of admissibility. The interpretation of the agreement that I have put forward is neither sly nor unfair conduct. It is exactly how it happened between the parties.

Finally in this regard I would remind you of the submissions I have already made concerning the fact that Guinea is out of time to make this application. I do not propose to repeat those submissions here.

Mr. President, Members of the Tribunal, that completes my submissions before you today and, in all likelihood, for ever in the *Saiga* saga. It has been my great pleasure to appear before you in all three hearings in this matter together with my colleague, and now good friend, Maître Thiam, and Mr. von Brevern, for whom I have developed the utmost respect. I have also greatly enjoyed working with Dr. Plender and Professor Lagoni and learnt a great deal from both of them. Who knows whether or not I shall ever have the honour to appear before this esteemed body again? In some ways I hope so, but in others I hope not. Certainly, I hope that with your judgment in this matter, you can help to prevent further attacks being made along the lines of the one made upon the *Saiga*, so that such an incident never arises again. I thank you once again for your indulgence throughout these hearings.

The President:

Thank you, Mr. Howe. Thank you very much for your kind words.

Mr. Plender?

STATEMENT OF MR. PLENDER
DEPUTY AGENT FOR SAINT VINCENT AND THE GRENADINES
[PV.99/16, E, p. 13–20]

Mr. Plender:

Mr. President, Members of the Tribunal, in case the Tribunal should judge it appropriate to consider Guinea's objections to admissibility, despite the agreement reached on 20 February and notwithstanding the late stage at which those objections were raised, Saint Vincent and the Grenadines will submit that those objections have no substance; they should be dismissed.

The first objection to admissibility is based on the Certificate of Registration. Guinea contends that the *Saiga* was not validly registered on 28 October 1998 because the Provisional Certificate had expired during the preceding month.

The Agent for Guinea does not conceal his enthusiasm for the point. On the afternoon of Thursday, 11 March he told the Tribunal that once he had drawn attention to the so-called "problem", the claimant State seemed to realize that there might be a really serious issue and took the problem seriously (p. 10, lines 1-6, and p. 12, lines 25-30).

Since the Agent for Guinea has told the Tribunal that we appear very much impressed by his point, I hope that I shall be acquitted of discourtesy if I respond. It is incorrect. The submissions made by the respondent State on the basis of Vincentian law would be dismissed without hesitation by a Vincentian court.

Just as a person does not become stateless when his passport expires, so a vessel does not cease to remain on the Vincentian register when the provisional certificate expires. A provisional certificate, like a passport, is evidence of a national status. It is not the source of that status.

The position under Vincentian law is very simple. It is governed by section 36(2) of the Merchant Shipping Act 1982 which will be found at tab 6 of the annexes to our Reply. This reads as follows:

The provisional certificate of registration issued under subsection (1) shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue.

I emphasize the mandatory words that it *shall have the same effect for one year*.

The effect of a provisional certificate of registration can be shortened in one case only. By section 37, registration ceases at the end of 60 days if the applicant fails to provide, during that time, sufficient evidence that the vessel has been removed from its former register and has been duly marked. In the case of the *Saiga*, that evidence was supplied within the 60-day period so the vessel did not cease to be registered. The effect of a provisional certificate was the same as that of an ordinary certificate until the expiry of one year; that is, until 11 March of the following year.

Within the first year of a vessel's registration, an applicant must supply to the Vincentian authorities evidence of several matters. They are all set out in section 36(3) of the 1982 Act. This includes not only such matters as evidence of the seaworthiness of the vessel, but also proof of payment of the "annual fee for one year in respect of the ship." I repeat: "annual fee for one year". Obviously, the time taken to satisfy the Vincentian authorities of these matters varies from case to case. That is why provision is made for the issuance of two successive certificates, each of six months. If the applicant satisfies the Vincentian authorities of all the statutory matters within the first six months, the provisional certificate is replaced by an ordinary one. If the paperwork has not been completed within the first six months,

another provisional certificate can be issued. It is replaced by an ordinary certificate once the Vincentian authorities have been satisfied of all the matters set out in section 36(3).

To a common lawyer, at least, this is obvious from the text of the statute. To a native speaker of the English language, at least, it appears with equal clarity from the brochure appended at Annex 5 to the Memorial. This provides that registration is governed by the Act of 1982; that the issuance of a provisional registration certificate is contingent on payment of "registration and annual fees"; and that a provisional certificate is issued for six months and can be extended for a further six months.

Not only is this clear from the statute and from the brochure; it is also consistent with the practice of many other States. There were appended to my speech, and will no doubt be copied and supplied to each of your Lordships in due course, extracts from the third edition of *Ship Registration* by N.P. Ready. This describes the procedures for registration in a variety of jurisdictions. You will find extracts from the sections dealing with The Bahamas, Barbados, Cyprus, Malta and Panama, as well as Saint Vincent and the Grenadines. In all these cases, initial registration is provisional; the period is commonly six months; the period can be extended; during the period of provisional registration, the applicant is required to satisfy the authorities of the flag State of certain statutory matters; and once this is done, the provisional certificate becomes definitive or is replaced by a definitive certificate. One searches the book in vain to find a single case of any jurisdiction in which a vessel becomes stateless in the interval between the expiry of the provisional certificate and the issuance of a new certificate.

Moreover, the Tribunal has heard evidence that the Vincentian law on the subject is well understood and known by those whose business it is to register vessels on the Vincentian registry. Allan Stewart gave evidence that he had experience of registering numerous vessels on the Vincentian registry, not only the *Saiga*. On the afternoon of Wednesday, 10 March he stated (p. 23, beginning at line 43):

Usually, the initial, provisional registry document is issued for six months. You can get another extension of six months if the ship happens to be in a place and you cannot finally get all the bits and pieces together within the six months for permanent registration, or issuance of a permanent registration document, as they call it, because obviously, once you fill in the application form and the ship is accepted for the registry, it remains on the register until or unless it is deleted for some reason or other ...

His understanding of the procedure, which is correct and consistent with that of other jurisdictions, is also consistent with the letter dated 1 March 1999 from the Deputy Commissioner for Maritime Affairs. She states:

In my experience it is very common for Owners to allow the validity period of the initial Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate (as was the case here).

At paragraph 17 of the Rejoinder, the Republic of Guinea observed that "an inspection of the Ship Registry of St. Vincent and the Grenadines would eliminate any doubt that the M/V 'SAIGA' was not registered on 28 October 1997." It was presumably in the light of that comment that the President invited us to produce, at a meeting on 2 March this year, the appropriate extract from the register. That was done. In complying with the Guinean comment and the President's suggestion, we failed to satisfy the Guinean Agent. In his speech

of 11 March at page 12 he complained that the extract had been produced only very shortly and declared that the production of this material was evidence that "Saint Vincent and the Grenadines [realized] that they might be still in a grave problem."

For convenience, I have asked that a further copy of the extract from the register should be appended to the copy of my speech delivered to your Lordships. As you have seen and will conveniently see again, the Vincentian register is not an old-fashioned handwritten log but a computerized database. On 15 April 1997, a copy of the relevant extract was printed from the registry book. You will see the date in the top left-hand corner. This shows that on that date the vessel had been granted provisional registration, valid until 12 September 1997. That is exactly what one would expect. On 15 April 1997, it was impossible to predict whether the necessary formalities would have been completed before 12 September. If the formalities had been completed within that period, registration would have become permanent within the first six months. Section 36(2) of the 1982 Act would not have come into play. In the event, the formalities were not completed within the six month period, so section 36(2) did come into play. In accordance with that sub-section, the Provisional Certificate continued to have the same effect as an ordinary certificate for one year, measured from 12 March 1997.

The Agent for Guinea invites you to conclude that on 13 September 1997 the registration had expired and the vessel had become stateless. That submission, as I have explained, ignores the effect of section 36(2) of the 1982 Act. It also ignores the extract from the register dated 24 February 1999, a copy of which was also supplied to the Registry and should be distributed to each of your Lordships. This shows that the *Saiga* held a Permanent Certificate of Registration *beginning on 12 March 1997*. This Certificate, I suggest, is conclusive even if all the rest is not conclusive. If the provisional registration had expired on 13 September, it would obviously have been necessary to register the vessel again and a different date of registration would have appeared on the registration certificate. The Permanent Certificate confirms that the registration was effective from 12 March 1997 and continuously thereafter.

In the same context, the Agent for Guinea declared himself to be "a little astonished that the Maltese deletion certificate was not exhibited" and "not happy" with the statement declaring that the owners had produced alternative evidence to show that the Maltese registration had been closed. Indeed, as we entered the Tribunal building today we received a letter asking us to elaborate on just this point. There is no cause for astonishment nor for unhappiness. Section 37(a) of the Merchant Shipping Act provides for the registration of a vessel where the applicant has produced either a certificate issued by the government of the last country of registration or "other acceptable evidence" to show that the registration had been closed. In the case of the *M/V Saiga*, it met the second of those conditions. Since there has never been any suggestion that the *Saiga* remains on the Maltese register, we have judged it unnecessary to trouble the Tribunal with details of her history under a different name and a different flag years before the events which have given rise to this litigation. The Tribunal may judge that it has enough questions to answer in this case without enquiring into the history of a differently named vessel under a different flag which was never the subject of any arrest.

I shall not labour further the question of the Certificate of Registration, for, although the Agent of Guinea declares that he cannot understand our submission (page 10, line 46), we submit that Vincentian law is simple, clear, consistent with other States' practice and widely understood in the industry. Before leaving the subject, however, I should say something about the letter from the Commissioner for Maritime Affairs, Mr. Dabinovic, dated 27 October 1997. This will be found at Annex 7 to our Reply. So far as relevant, it reads as follows:

I hereby confirm that m.t. "SAIGA" ... was registered under the St. Vincent and the Grenadines Flag on 12th March, 1997 and is still ... validly registered.

Mr. von Brevern commented on that letter on 11 March, at page 12 of the transcript. He suggested that the letter was silent about a gap in registration from 12 September to 28 November 1997. If that had been the case, the letter would certainly have been both misleading and improper. In the language used by Mr. von Brevern elsewhere in his speech (page 5, lines 15-16) it would have been "sly and unfair conduct consciously misinterpreting and ignoring" the relevant facts. We owe it to Mr. Dabinovic to repudiate any such construction of his letter.

By irresistible implication, the letter states that the *Saiga* was registered on 28 October 1997. It is consistent with the words of the Merchant Shipping Act and with extracts from the register. It is confirmed in the letter written by his Deputy and daughter. It is consistent with the practice described by Mr. Stewart, and it is correct.

The respondent State's second objection to admissibility is based on article 91, paragraph 1, of the United Nations Convention. This provides that "There must exist a genuine link between the State and the ship". In my opening address, I proposed that if the Tribunal thought it right to deal with this objection at all, it should dispose of it on the basis of the evidence.

As is well known, the words "genuine link" owe their origin to the judgment of the International Court of Justice in the *Nottebohm Case (Second Phase)*. For convenience, I have had a copy supplied to the court, though I have to add that this had to be from the *International Law Reports* rather than the *International Court of Justice Reports*. The Court there held that it was not open to Liechtenstein to espouse the claim of Mr. Nottebohm against Guatemala, in the absence of a genuine link between that man and the principality. The Court pointed out that his actual connections with Liechtenstein were extremely tenuous. He had paid no more than a short visit to the principality, and in the Court's words:

the application ... confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay.

The Court added:

There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein.

In the case of the *Saiga*, by contrast, the links between the State and the vessel are far from transient; and there *is* evidence of economic activities exercised in the flag State. The ship is now, and at all material times has been, represented in Saint Vincent by a Vincentian company formed, managed and present in Saint Vincent. She is subject to the supervision of the Vincentian authorities to secure compliance with the various conventions to which Saint Vincent and the Grenadines are a party. Effective supervision of her seaworthiness is secured by regular inspections conducted by classification societies nominated by Saint Vincent and the Grenadines. Preference is given to Vincentian nationals in respect of her manning. Saint Vincent and the Grenadines has been vigorous in attempting to secure her protection at the international level both before and throughout this litigation.

There is also supplied to the Tribunal with a copy of my speech an extract from the latest edition of *Oppenheim's International Law*, Volume I, p. 732. At that point the eminent editors, Sir Robert Jennings and Sir Arthur Watts, give some indication of the meaning of the "genuine link" for the purposes of the United Nations Convention. After acknowledging that the point is not without difficulty, they use the following words, and I quote:

The 1982 Convention sets out duties of the flag state such as maintaining a register; assuming jurisdiction under its internal law over its flag ships, master, officers and crew 'in respect of administrative, technical and social matters concerning the ship'; measures concerning construction and seaworthiness; manning, training and labour conditions; signals and communications; regular survey; appropriate qualifications; conversance with international regulations; reports and inquiries.

Each one of these links, without exception, is established between the applicant State and the *Saiga*.

It is therefore unnecessary to enquire what the effects would be if these links were absent. Professor Lagoni invites the Tribunal to consider that question, nevertheless. There is, I believe, a German word apt to describe this sort of legal speculation. It is *Professorenrecht*. I am content to consider what the law would be, on the hypothesis that a genuine link were absent in the present case; but I do so in the same spirit as that in which Meister Eckhart asked whether angels could fly if they did not have wings.

In his speech on 11 March, at p. 15 of the transcript, Professor Lagoni argued that if there had been no genuine link between the applicant State and the *Saiga*, Guinea would not have been bound to recognize claims relating to the vessel advanced by Saint Vincent and the Grenadines. I beg to differ.

The United Nations Convention does not deprive a flag State of competence to advance a claim in respect of a vessel, in the absence of a genuine link. On the contrary, in 1958 there was a proposal to insert such wording into the High Seas Convention. It was expressly rejected. In an earlier incarnation, article 29 of the 1958 Convention provided that there must be a genuine link between the State and the ship, and continued with the following words: "for the purpose of recognition of the national character of the ship by other States".

As Professor Brown points out in *The International Law of the Sea*, Vol. I, 1994 at p. 288, copy also supplied to the Tribunal:

The formulation would have provided a basis for challenging the exclusive discretion of a State to grant its nationality and for refusing to recognise the nationality of a ship considered to lack a genuine link with its flag State. This proved too much for UNCLOS I and, in the end, the clause ... was omitted.

This was, of course, well known to the International Law Commission and to the negotiators when the 1982 Convention came to be drafted. Neither the Commission nor the parties sought to reinstate the language omitted from the corresponding provision in 1958.

Some might perhaps regret that what had been proposed in 1958 did not mature into international law. Others, no doubt, would vigorously take the opposing view. This Tribunal can only interpret the Convention as it is, consistently with its object and purpose, taking account of the intentions of the parties. Such an interpretation will lead to the conclusion that the function of the genuine link is not to limit the opposability of international claims. It is to secure the effective discharge of the supervisory functions entrusted to flag States under the

Convention, by ensuring that they do not place on their register vessels which they are unable to administer. So even if the *Saiga* had not been genuinely linked to Saint Vincent and the Grenadines, Guinea's objection to admissibility would not be further advanced.

Guinea's third objection to admissibility concerns alien seamen. Guinea has now abandoned her argument that the flag State cannot advance claims in respect of the shipowner and the cargo owner (transcript, p. 17, line 11), and she has abandoned the argument advanced in the Counter-Memorial (paragraphs 73–78) that a flag State is in principle unable to advance a claim in respect of alien crew. Instead, Guinea advances a narrower argument (p. 16, line 12). Professor Lagoni submits that the rule whereby a flag State can advance claims in respect of alien crew does not apply in the case of a so-called "open register". I note in passing that no workable definition is given to distinguish between those registers which do not permit flag States to espouse claims of alien seamen, and those which do enable the flag States to do so. The proposition advanced by Professor Lagoni is not supported by any judicial authority or any academic writing, or any evidence of State practice. In the authorities that we have cited, there is much support for the proposition that a flag State may protect alien crew; but no suggestion that the rule is subject to an exception in the case of certain types of register.

Professor Lagoni builds his case on a question. He asks (p. 16, line [43]) "Why should foreign seamen be in a better position than foreign workers who live in the country?" The answer to that question has been given by international courts and tribunals many times. It is the same in the case of open registers – however these may be defined – as in the case of other registers. Indeed, it is the same as in the case of alien seamen and alien members of a State's armed forces. Foreign seamen, like foreign members of a State's armed forces, are subject to the discipline of the State under whose flag they serve. They are commonly subject to the flag State's criminal jurisdiction. This is the case, for example, under the law of Saint Vincent and the Grenadines as it is in the United Kingdom. They owe the State a duty of loyalty and can expect its protection in return. This is the *duplex ligamen* or double bond to which some writers refer.

There are also practical considerations. Diplomatic intercourse would be hugely complicated if each seaman had to look for protection to his own State of nationality when questions arose about the treatment of a vessel. The same would be true of litigation before this Tribunal. On Professor Lagoni's thesis, the number of parties in proceedings before this Tribunal could be at least as great as the number of nationalities represented on board the vessel. That cannot be right.

Guinea's final objection to admissibility is the claim that the Master failed to exhaust local remedies. He did not pursue his appeal to the Supreme Court. Instead, Saint Vincent and the Grenadines seized this Tribunal in prompt-release proceedings. I anticipated that argument in my speech on 8 March. I then submitted that the rule requiring exhaustion of local remedies applies only when the alien has created a voluntary, conscious and deliberate connection between himself and the flag State whose actions are impugned. That was not the case with the *Saiga*.

As to the effectiveness of local remedies, we heard from Professor Lagoni that another member of the Guinean delegation will deal with that in due course. We shall, of course, listen to him with interest. At this stage I can only question whether a person who complains that a State has exercised within its exclusive economic zone powers which it does not enjoy under the United Nations Convention truly has an effective remedy where the effect of exercising it is to submit to the law of the State to which he maintains he is not subject, particularly where that law provides for the detention of the vessel and the payment of a bond, this detention to continue throughout the exhaustion of the proceedings.

On that aspect of the case, since it has yet, I understand, to be developed, I have simply attached to the text of my speech an extract from the book by A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*.

It is, however, unnecessary for this Tribunal to decide this issue on the effectiveness of the remedy. Before any question of effectiveness of a remedy can arise, the Tribunal must first determine whether the Master was under an obligation to exercise any remedy, effective or otherwise. On that question, Professor Lagoni makes submissions that take the Tribunal to the heart of this case. He maintains that the necessary jurisdictional connection is established "in any case where the coastal State's sovereign rights in the exclusive economic zone are affected" (p. 17-18). From this I infer that Professor Lagoni and I are *ad idem*, we are agreed. If the United Nations Convention conferred on coastal States the sovereign right to prohibit the bunkering of vessels within their exclusive economic zone for the purpose of raising revenue and if the coastal State made and proclaimed such a prohibition, a jurisdictional connection would be established between that State and the vessel where the vessel enters for the purpose of bunkering. Conversely, if the United Nations Convention did not confer such a right upon coastal States, and if the coastal State did not make and proclaim such a prohibition, no jurisdictional connection would be established.

It is our case that the Republic of Guinea has not made and proclaimed such a prohibition and that, even if she had done so, such a law could not be invoked in relation to the other States, since it would exceed the competence accorded to States by the United Nations Convention.

My learned friend Maître Thiam will now develop the first of those contentions, and I will then address the second.

The President:

Thank you, Mr. Plender.

In view of the arrangements that this session will last for three hours, I propose we break for 15 minutes and return at 3.50, at which point Maître Thiam will then continue the submission. Thank you very much.

The session is suspended

(The Tribunal adjourns from 3.30 until 3.50 p.m.)

EXPOSÉ DE M. THIAM
CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES
[PV.99/16, F, p. 29–38]

M. Thiam :

Monsieur le Président, Messieurs les Juges du Tribunal, permettez-moi, d'abord, de m'adresser à M. le professeur Lagoni.

Monsieur le professeur, je devrai vous citer à plusieurs reprises dans mes propos. Avant de le faire, je tiens à vous faire souffrir quelque peu dans votre modestie. Les circonstances nous ont amenés à soutenir des thèses opposées, mais j'ai toujours eu plaisir à vous écouter et j'ai pu apprécier, comme le Tribunal, votre talent et vos qualités qui forcent le respect. Vos étudiants peuvent être fiers d'être dirigés par vous et, quelle que soit la décision qui sera rendue par le Tribunal, l'Etat guinéen pourra se flatter d'avoir été défendu par vous. Quant à moi, je suis heureux que cette affaire m'ait donné l'opportunité de faire votre connaissance.

Mais il faut que je vous contredise en de nombreux points de vos exposés. Aussi vais-je maintenant m'adresser au Tribunal pour lui parler du domaine d'application de la loi guinéenne en droit interne.

Monsieur le Président, en traitant du droit de poursuite, le professeur Lagoni a dit, je le cite :

En ce qui concerne l'infraction aux législations guinéennes pertinentes, je voudrais attirer votre attention sur le fait que le *Saiga* avait avitaillé en carburant les bateaux de pêche [*Giuseppe*] *Primo*, *Kriti* et *Eleni G* le matin du 27 octobre à la position 10°25,3'N et 15°42,6'O.

Cette position est à environ 22,5 et 22,9 milles marins au large de la côte de l'île guinéenne d'Alcatraz. Il en résulte que ceci se trouve dans la zone contiguë, la zone économique exclusive et le rayon douanier de la Guinée. Elle enfreint l'interdiction d'avitaillement en mer à l'intérieur du rayon douanier contenue dans la législation douanière guinéenne. (Cf. verbatim, page 14, lignes 8 à 16²⁸).

Il y a, dans cette déclaration, deux affirmations qui méritent une réponse : La première est relative à la zone contiguë de l'île d'Alcatraz –

The President:

Maître Thiam, please, slow down.

M. Thiam :

La première est relative à la zone contiguë de l'île d'Alcatraz et la seconde est relative à la législation douanière guinéenne.

Rassurez-vous, je ne vois pas la nécessité de m'étendre longuement sur la première affirmation relative à la zone contiguë de l'île d'Alcatraz car, en effet, l'Etat demandeur a déjà expliqué, sans être sérieusement contredit, qu'il ne pourrait y avoir une zone contiguë pour cette île que si la Guinée avait déposé les instruments nécessaires au Secrétaire général des Nations Unies. Par ailleurs, il avait été fait remarquer que la Guinée a déjà déclaré que le droit de poursuite exercé contre le *Saiga* n'était pas fondé sur l'existence d'une zone contiguë pour l'île en question (contre-mémoire, paragraphe 37). Par conséquent, j'en aurai terminé

²⁸ Note du Greffe : Interprétation de l'exposé en anglais.

avec cette question en me contentant de faire remarquer au Tribunal que les débats oraux qui viennent d'avoir lieu devant lui n'ont pas permis à la Guinée d'apporter des éléments nouveaux relativement à la prétendue zone contiguë de l'île en question.

En ce qui concerne la législation guinéenne applicable au *Saiga* dans la zone économique exclusive, le professeur a dit, je le cite : « Les règles et réglementation internes constituent des faits qui doivent être présentés par les parties » (verbatim n° 15, page 12, lignes 19 à 20²⁹). Sur cette affirmation, je reste d'accord avec lui et c'est pourquoi, comme le Tribunal, j'attendais de la Guinée qu'elle présente des lois pertinentes qui auraient été prises par le législateur guinéen pour être appliquées à la zone économique exclusive de la Guinée. Connaissant la faiblesse, sur ce point, des lois guinéennes présentées au Tribunal comme des faits, le professeur Lagoni s'est empressé d'ajouter que, et je le cite :

des mesures prises par des autorités nationales ou des décisions de juridiction interne appliquant des lois et règlements internes ne doivent pas faire l'objet d'un examen juridique à la lumière d'une législation nationale d'une des parties devant le Tribunal.

En d'autres termes, le Tribunal international n'est pas un tribunal d'appel qui réexamine des décisions de juridiction interne conformément à la législation nationale (verbatim, page 12, lignes 21 à 26³⁰).

Il est incontestablement vrai que votre Tribunal n'est pas une juridiction d'appel des décisions des juridictions guinéennes. Mais la question n'est pas là. La question est celle-ci : il appartient à la Guinée d'alimenter et de justifier sa thèse devant votre juridiction. Il lui appartient de produire des faits, ses lois étant considérées comme tels, comme éléments de preuves et elle ne peut se fonder sur les décisions de ses propres juridictions pour justifier devant votre juridiction de la prétendue pertinence de ses lois.

En d'autres termes, elle ne peut prétendre que votre Tribunal serait lié par l'appréciation et par l'interprétation de ses lois par ses propres juridictions. Elle ne peut pas imposer à la communauté internationale un tracé unilatéralement établi par elle pour ses frontières en violation du droit international, pas plus qu'elle ne peut vous imposer les décisions de ses juridictions prises en violation du droit international.

Pour ne pas allonger mon discours, je ne reviendrai pas sur la pratique jurisprudentielle des juridictions internationales. Vous la connaissez parfaitement. Mais permettez au petit avocat de province que je suis d'interpeller humblement la conscience de la toute jeune juridiction qui est la vôtre. Permettez-moi de vous demander ce que nous ferions ici si la Guinée avait la possibilité de vous imposer ses lois et, surtout, l'interprétation manifestement erronée et partisane qu'elle en fait ? Si tel était le cas, qu'en serait-il des espoirs que la communauté internationale place, à juste titre, sur les juridictions internationales comme les vôtres ? En vérité, il vous appartient de juger, dans les faits et en toute indépendance, par rapport aux juridictions guinéennes, si les lois guinéennes présentées et invoquées par la Guinée pendant ce procès ont été prises ou n'ont pas été prises dans l'esprit du législateur guinéen pour être appliquées dans la zone exclusive économique de la Guinée.

Or, la Guinée, au cours des débats oraux qui viennent de se dérouler devant vous, n'a apporté aucun élément nouveau. Certes, l'un de ses témoins, M. Bangoura, a évoqué un prétendu arrêté ministériel qui aurait, en Guinée, étendu le territoire douanier jusqu'aux

²⁹ Note du Greffe : Interprétation de l'exposé en anglais.

³⁰ Note du Greffe : Interprétation de l'exposé en anglais.

limites du rayon douanier (verbatim n° 10, page 19, lignes 5 et 8). Mais ce prétendu arrêté ministériel n'a pas été produit.

Certes, encore, la Guinée a produit pendant les débats une copie de sa loi fondamentale, c'est-à-dire sa constitution, mais on n'y découvre aucune disposition nouvelle qui permettrait de conclure que, à l'endroit où il se trouvait et au moment où il avitailait des navires, le *Saiga* violait une interdiction légale guinéenne pour le bunkering dans la zone économique exclusive.

Bien au contraire, on y trouve des éléments qui prouvent davantage encore que, comme l'a toujours soutenu l'Etat demandeur, même au regard du seul droit interne guinéen, la Guinée ne pouvait pas appliquer une loi hors des circonstances expressément envisagées par son législateur pour l'application de cette loi. Les articles 9 et 22 de cette constitution sont particulièrement clairs à cet égard puisqu'ils stipulent que :

- pour l'article 9 : « Nul ne peut être arrêté, détenu ou condamné que pour les motifs et dans les formes prévus par la loi ... »;
- pour l'article 22 : « La loi garantit à tous l'exercice des libertés et des droits fondamentaux. Elle détermine les conditions dans lesquelles ils s'exercent ... ».

Il est clair, ainsi, qu'en Guinée, quels que puissent être son grade, ses fonctions et ses motivations, aucun fonctionnaire ne peut se croire autorisé à combler de lui-même un vide législatif en appliquant une loi hors des cas spécialement prévus par le législateur. Au lieu d'apporter des éléments législatifs ou réglementaires nouveaux, la Guinée s'est contentée d'invoquer toujours les mêmes textes. Et le professeur Lagoni dit, je le cite :

La Guinée interdit l'avitaillement en mer en se fondant sur la loi n° 94/007/CTRN du 15 mars 1994 dans un rayon douanier de 250 kilomètres (environ 135 milles marins) au large de son territoire. Ce rayon douanier a été établi par les articles 33 et 34 du code douanier guinéen qui porte le n° 094/PRG/SGG du 28 novembre 1990 (verbatim n° 15, page [13], lignes 10 à 14³¹).

Le professeur Lagoni le dit, alors qu'il a déjà été fait observer :

- qu'aucun des articles de la loi précitée de 1994 ne crée une incrimination contre les armateurs ou les capitaines des navires avitailleurs et, donc, que cette loi a été appliquée hors les cas spécialement prévus par le législateur à un navire avitailleur;
- que, de toute évidence, le rayon de surveillance douanière ne saurait se confondre avec le territoire douanier et, donc, que l'on a appliqué la loi précitée de 1994 et le code des douanes guinéen pour une importation dans un rayon douanier au lieu de l'appliquer, comme le voulait le législateur guinéen, pour une importation dans le territoire douanier guinéen.

Il n'est pas excessif de dire que les réponses attendues se devaient d'être précises. Le Tribunal ne peut pas se contenter de simples litanies. Au lieu de répétitions, nous sommes en droit d'exiger qu'il soit clairement établi que la loi de 1994 crée une incrimination contre les armateurs des navires avitailleurs dans la zone économique exclusive de la Guinée. Nous sommes en droit, après avoir été sévèrement et injustement condamnés, d'exiger qu'il soit clairement établi que la loi guinéenne avait étendu le territoire douanier de la Guinée à la zone économique exclusive. En attendant de savoir si cette extension serait ou ne serait pas légale, par rapport au droit international, est-il excessif de demander à la Guinée qu'elle daigne, au moins, expliquer clairement, à la face de la communauté internationale, en quoi sa législation interne aurait été violée ? Or, le professeur Lagoni ne répond pas à cette question pour l'Etat demandeur.

³¹ Note du Greffe : Interprétation de l'exposé en anglais.

M. Mamadi Askia Camara, quant à lui, ne fait pas mieux. Il cite exactement les mêmes textes, sans rapporter aucun élément nouveau et il précise que, selon ces textes, je le cite :

Par rapport aux législations douanières, les marchandises, une fois dans le rayon des douanes, doivent être conduites par les voies légales vers les bureaux frontaliers des douanes pour y être déclarées. (verbatim n° 15, page 23, lignes 10 à 12).

Mais cette affirmation est extraordinaire ! Elle est parfaitement contraire aux dispositions très claires et très précises du code des douanes guinéen.

M. Mamadi Askia Camara omet de mentionner que la conduite des marchandises en douane fait l'objet du titre 3 de son code des douanes. Au sein de ce titre 3, on trouve un chapitre premier qui est relatif à l'importation des marchandises et qui contient lui-même une section 1 relative aux marchandises importées par la voie maritime. Cette section 1 contient les articles 53 à 58. Or, de ces articles, seul l'article 54 contient une obligation spécifique pour le capitaine d'un navire qui entre dans le rayon des douanes puisqu'il stipule :

Le capitaine d'un navire arrivé dans la zone maritime du rayon des douanes est tenu, à première réquisition

- (a) de soumettre l'original du manifeste au visa « ne varietur » des agents des douanes qui viennent à son bord;
- (b) de leur remettre une copie du manifeste.

Qui, dans cette salle prestigieuse, pourrait prétendre de bonne foi que ce texte permet de justifier l'affirmation purement gratuite de M. Mamadi Askia Camara selon laquelle, je le cite, « Les marchandises, une fois dans le rayon des douanes, doivent être conduites par les voies légales vers les bureaux frontaliers des douanes pour y être déclarées » ? Personne, assurément ! Les marchandises qui entrent simplement dans le rayon douanier maritime sans rentrer dans le territoire douanier ne sont pas soumises au régime des déclarations et ne doivent même pas faire l'objet de la déclaration sommaire visée par l'article 57 du code des douanes qui vise les navires qui sont entrés dans le port.

Tout juste est-il permis à la douane lorsqu'elle s'intéresse à la cargaison d'un navire qui se trouve en dehors du territoire douanier, mais dans le rayon des douanes, de se déplacer, de monter à bord et d'adresser des réquisitions au capitaine pour qu'il soumette le manifeste de cargaison au visa *ne varietur*. Encore faudrait-il que les agents des douanes qui montent à bord dans ces circonstances le fassent sans abus de droit et avec la courtoisie qu'impose leur uniforme.

Or, qui a jamais prétendu dans ce prétoire que le *Saiga* avait été recherché pour qu'il soumette son manifeste de cargaison à un quelconque visa *ne varietur* ? Personne ! Qui a jamais prétendu, dans ce même prétoire, qu'une réquisition avait été présentée au capitaine Orlov du *Saiga* pour qu'il soumette son manifeste à un tel visa ? Personne ! D'ailleurs, dans la déclaration qu'il a présentée au Tribunal, le témoin Bangoura a donné la liste des documents qu'il a réclamés au capitaine Orlov. Le manifeste de cargaison, sauf erreur de ma part, ne s'y trouve pas. Bien sûr, le capitaine a essayé de s'échapper, mais l'on n'a jamais prétendu qu'il l'aurait fait pour ne pas présenter un manifeste de cargaison.

C'est le lieu ici, bien que ce ne soit pas exactement mon propos, de répliquer brièvement à une affirmation du professeur Lagoni qui, pour rejeter la thèse de l'abus de droit, a dit en substance que le capitaine Orlov ne pouvait pas ignorer l'existence d'une législation guinéenne parce que des mesures avaient été prises contre le navire *Alfa I*. Je fais

ici référence aux propos du professeur rapporté dans le procès-verbal n° 15 à la page 15, lignes 4 à 7, et à la page 16, lignes 28 à 29.

Mais cette thèse, loin de renforcer la position de la Guinée, renforce au contraire celle de l'Etat demandeur. En effet, il faut rappeler que le navire *Alfa 1* a été attaqué par des vedettes qui ont été reconnues par le capitaine de ce navire comme étant des vedettes de la marine guinéenne. Le navire *Alfa 1* a été lâchement abandonné en mer avec tous ses hommes d'équipage alors qu'il était en flamme, alors que les assaillants pensaient qu'il allait sombrer, et alors qu'ils n'ont rien fait pour porter secours à l'équipage. Lorsque l'armateur a interrogé les autorités guinéennes, celles-ci ont nié les faits et affirmé qu'elles n'avait envoyé aucune vedette en mer ce jour-là.

Jamais le navire *Alfa 1* n'a été conduit au port de Conakry. Jamais son capitaine n'a été traduit devant les tribunaux guinéens pour une prétendue violation des lois guinéennes. Dès lors, l'armateur était fondé à penser que son navire avait été l'objet d'une attaque perpétrée, soit par des pirates ayant pris l'aspect de militaires, soit par des militaires guinéens ayant échappé au contrôle de leurs chefs.

En tout cas, l'armateur n'avait aucune raison de penser que l'*Alfa 1* avait été attaqué parce qu'il aurait violé une loi guinéenne sur le bunkering. Par suite, cet armateur n'avait aucune raison de penser qu'une telle loi existait.

Pour clore mon propos sur les dispositions de l'article 54 du code des douanes, je dirai que le débat n'a jamais tourné autour d'une prétendue violation de ce texte par le capitaine Orlov. Le litige a été créé simplement parce que l'on a voulu étendre le territoire douanier de la Guinée hors de la volonté du législateur guinéen. Si le législateur guinéen n'a jamais voulu étendre l'application de son code des douanes pour la zone maritime au-delà de la mer territoriale de la Guinée, c'est qu'il n'a jamais voulu que son pays se singularise en s'octroyant des droits dans la zone économique exclusive que la communauté internationale ne lui reconnaît pas et qu'aucun autre Etat dans le monde n'a eu la prétention de s'octroyer.

C'est aussi parce que ce législateur sait que la Guinée, en ratifiant la Convention de 1982, a confirmé, comme tous les autres Etats de la communauté internationale, qu'elle ne pouvait avoir quelque prétention fiscale que ce soit dans la zone économique exclusive, prétention qui ne serait pas conforme aux dispositions de la Convention.

Nous avons dit qu'aussi loin que nos recherches nous avaient amenés, nous n'avions trouvé aucun exemple d'un Etat qui aurait interdit l'activité de bunkering dans la zone économique exclusive.

Nous avons dit que la Guinée, c'est-à-dire son législateur, n'avait pas fait exception à la règle, mais on nous avait affirmé le contraire. Nous attendions donc les preuves du contraire. Elles ne sont pas venues. Nous attendions des textes nouveaux, ils n'ont pas été produits. Nous attendions des experts annoncés par la Guinée, ils se sont dérobés.

Puisque le professeur Richard Plender et le professeur Lagoni ont tous deux cité l'écrivain Sir Conan Doyle, je vais le faire à mon tour. Dans son roman intitulé *Le chien des Baskerville*, l'écrivain rapporte un dialogue imaginaire entre ces personnages imaginaires. Sherlock Holmes dit au docteur Watson : « *It is illuminating to take account of the curious incident with the dog in the night* ». Le docteur Watson répond au fameux détective : « *But the dog did nothing in the night* ». Et le détective répond : « *That, my dear Watson, is the curious incident* ». Je m'excuse pour ma prononciation.

Ce qui est curieux, Monsieur le Président, dans cette affaire, c'est précisément le silence de la Guinée lorsqu'elle est invitée à produire un nouveau texte pertinent qui aurait été pris par son législateur pour y être appliqué dans la zone économique exclusive.

Ce qui est aussi curieux, c'est que lorsqu'elle rompt le silence, la Guinée le fait simplement pour contredire des évidences, comme par exemple pour affirmer que le projet de

texte préparé par elle pour combler la question relative au bunkering en Guinée n'a pas été fait pour combler un vide législatif.

En réalité, tout – et absolument tout – dans cette affaire porte à croire que des fonctionnaires guinéens ont étendu d'eux-mêmes le champ d'application de deux lois guinéennes alors que, pourtant, ce champ d'application avait été parfaitement délimité par le législateur guinéen au seul territoire national. Peu importe les motivations réelles ou supposées de ces fonctionnaires, comme certains témoins ont pu le dire.

Pas plus que le professeur Lagoni, je ne reviendrai sur une question qui ne peut être qu'embarrassante pour le Gouvernement guinéen et je ne cherche pas à embarrasser le gouvernement d'une république soeur de la République sénégalaise à laquelle j'appartiens. Mais je ne peux pas omettre de m'interroger sur un point. En effet, si les fonctionnaires guinéens ont réellement puisé dans la loi guinéenne la motivation de leurs poursuites contre le *Saiga*, mais alors, pourquoi n'ont-ils pas poursuivi également les navires que le *Saiga* a avitaillés ? Hélas ! Sur ce point, il semblerait que nos questions aussi resteront sans réponse.

Certes, la Guinée a toujours prétendu que les navires avitaillés par le *Saiga* ont fait l'objet de poursuites. Mais la preuve de l'exactitude de cette affirmation n'a toujours pas été rapportée ici. Alors la Guinée a fini par reconnaître que des poursuites n'avaient pas encore été exercées, en précisant toutefois, sur les affirmations de M. Mamadi Askia Camara, je cite :

Une correspondance n° 839 du 21 novembre 1997 du procureur de la République près le tribunal de première instance de Conakry a été adressée à l'état-major de l'armée de mer en vue de rechercher et immobiliser lesdits navires et leurs capitaines pour l'infraction reprochée à *Saiga*. Ils sont également poursuivables en vertu de l'article 4 de la loi n° 007/CTRN du 15 mars 1994. (verbatim, version française, page 26, lignes 8 à 13)

Je crois qu'il a voulu viser la loi 94/007/CTRN du 15 mars 1994.

Mais force est de constater que :

- d'abord, la lettre du procureur de la République n'a pas été produite aux débats;
- ensuite, seulement accessoirement, l'on ne voit pas d'ailleurs comment le procureur de la République aurait pu donner des ordres pour des arrestations qui, même en Guinée, sont de la seule compétence d'un juge d'instruction;
- enfin, et surtout, l'on ne voit pas comment et pourquoi, depuis 1997, les prétendues instructions du procureur de la République n'ont pas été exécutées.

La Guinée ne s'explique même pas sur ce point et ne dit pas au Tribunal qu'elle aurait rencontré des difficultés pour l'exécution des instructions du parquet.

Je dois dire ici que l'inaction du parquet de la République en Guinée est d'autant plus surprenante que l'un des navires visés dans les fameuses notes de bord remises au propre par le capitaine Sow, le navire *Combat*, appartient à un armement guinéen.

Puisque comme beaucoup d'autres choses, c'est au cours des débats oraux des tout derniers jours que nous avons entendu parler pour la toute première fois du navire *Combat* pour cette affaire, je ne peux pas en toute dernière minute vous apporter la preuve de ce que j'avance. Mais nous connaissons très bien le propriétaire de ce navire, il vit en Guinée et y exploite son navire.

Quoi qu'il en soit, il appartenait à la Guinée de rapporter la preuve, soit qu'elle a exercé des poursuites contre les navires avitaillés par le *Saiga*, soit qu'elle a été empêchée de le faire pour des raisons indépendantes de sa volonté ou de la négligence des agents chargés des poursuites. Or ces preuves n'ont pas été rapportées aux débats.

Face aux grandes difficultés que la Guinée a rencontrées pour justifier la thèse selon laquelle ces agents auraient agi conformément à la volonté du législateur, l'Etat défendeur essaie de réduire la portée de son affirmation en soutenant en substance que, en fait, l'extension de l'application de ses lois et règlements dans la zone économique exclusive ne concernerait que l'activité de bunkering pour les navires de pêche ayant des licences de pêche guinéenne. Elle le fait, je le crois, en visant spécialement sa loi n° 94/007/CTRN du 15 mars 1994. Mais le Tribunal ne manquera pas d'observer :

- en fait, que même les prétendues licences de pêche guinéennes accordées aux navires dont il s'agit n'ont pas pu être produites aux débats et que donc l'argumentation de la Guinée manque nécessairement, en fait;

- en droit, qu'il n'a toujours pas été produit un texte qui établit que le territoire douanier visé par l'article premier de cette loi aurait été étendu au rayon douanier et donc l'argumentation de la Guinée manque totalement, en droit également.

Ceci termine, Monsieur le Président, Messieurs les Juges du Tribunal, mon exposé sur la prétendue extension de la loi guinéenne à la zone économique exclusive.

Je vais maintenant céder la parole au docteur Plender.

The President:

Thank you very much, Maître Thiam.

STATEMENT OF MR. PLENDER
DEPUTY AGENT FOR SAINT VINCENT AND THE GRENADINES
[PV.99/16, E, p. 26–32]

Mr. Plender:

Mr. President, Members of the Tribunal, although Maître Thiam has shown that Guinean law does not prohibit bunkering in the exclusive economic zone, and although Maître Bangoura of the Conakry Bar advised at an earlier stage that this was so, and although the Guinean Government has been unable to produce any text of a law which purports to prohibit that activity, and although the Guinean *projet de loi* confirms that there is no such current prohibition, we do not ask the Tribunal to rely on these facts when determining whether the Guinean authorities acted within the scope of their authority.

As Mr. Mamadi Askia Camara rightly observed in the course of his short presentation, the central issue for this Tribunal is whether it would have been open to Guinea to apply and enforce against other States and their nationals a prohibition on bunkering in her exclusive economic zone. In other words, the question is whether such a prohibition, had it existed, would have been opposable against other States.

It is elementary that a State is entitled to apply its legislation to the person or property of aliens only when it has jurisdiction under public international law to do so. As the Permanent Court of International Justice put it in the “*Lotus*” case (at page 19³²) it is “required of a State ... that it should not overstep the limits which international law places upon its jurisdiction”.

I do not say that jurisdiction is co-extensive with sovereignty, but the connection between them is close. To quote the words of the Permanent Court in the “*Lotus*” case once more, “A State's title to exercise jurisdiction rests on its sovereignty.”

The exercise of a State's jurisdiction beyond the area over which it is sovereign is apt to entail an infringement of the rights of other States. That is particularly so when it involves the application of force to foreign vessels over whom the flag State exercises sovereign jurisdiction. So when a State claims to exercise extra-territorial jurisdiction in relation to a foreign vessel, it must demonstrate that it has a firm basis for the claim.

Guinea's claim to exercise extra-territorial jurisdiction in relation to the exclusive economic zone was expressed with admirable and customary clarity by Professor Lagoni on the afternoon of Monday, 15 March (see p. 26). The claim is that Guinea is entitled to prohibit the bunkering of one foreign vessel by another outside her territorial waters but within her exclusive economic zone for fiscal purposes, so as to encourage fishing boats to buy their supplies of oil in Conakry.

In vain does one search the United Nations Convention to find any support for that assertion. The rights and jurisdiction of the coastal State in the exclusive economic zone are regulated by article 56 of that Convention. This sets out, in careful and measured terms, the sovereign rights that coastal States enjoy, for the purpose of exploring and exploiting, conserving and managing the natural resources of the zone. The rights and duties of other States in the exclusive economic zone are set out in article 58. This provides that other States enjoy the right of navigation and other related freedoms, associated with the operation of ships. Neither in article 56 nor in article 58, nor in the *travaux préparatoires* does one find the faintest scintilla of a hint of an inkling of an insinuation of a ghost of a suggestion that a coastal State has the right claimed by Guinea in these proceedings.

At page 26 of the transcript for the afternoon of 15 March, Professor Lagoni offered three explanations for the absence from the Convention of any provision authorizing a coastal

³² Note by the Registry: Reference given in the written text of the statement: *Series A, No. 10*.

State to prohibit commercial activities generally, or bunkering in particular, within the exclusive economic zone.

First, he stated that the jurisdiction on customs and fiscal matters in the EEZ is already implied in the sovereign rights of coastal States. If I may respectfully say so, that does not meet the objection. Since coastal States have sovereign rights for the purposes of exploring and exploiting the natural resources of the water in the exclusive economic zone, they can of course impose customs duties or fiscal charges on the exploitation of those resources. They may for instance charge for the issuance of fishing licences. That is not this case. The *Saiga* was not exploiting the natural resources of the zone. The jurisdiction asserted by the Guinean authorities was not jurisdiction in relation to fisheries. That is a point to which I shall revert.

Secondly, Professor Lagoni stated that there was no need to regulate comprehensively the customs and fiscal jurisdiction with the EEZ, at least at that early stage of development, before most EEZs had been established. On the contrary, one of the principal purposes and achievements of the Convention was to regulate the rights and duties of coastal States and others within the exclusive economic zone. Where a number of specific rights are conferred and defined, it is to be presumed that no others are conferred: *expressio unius exclusio alterius*.

Thirdly, he asserted that when the regime for the exclusive economic zone was emerging, as part of an overall compromise between coastal and shipping States, there was little room for discussion about details; but, he said, West African States were well aware of the problem of extending customs duties to the exclusive economic zone. In a conference, as in a courtroom, details can be overlooked; but it would be misleading to suggest that delegates had it in mind to confer on coastal States the right to impose taxes on any activity other than the exploration, exploitation, conservation and management of the exclusive economic zone. There was indeed a concern on the part of some West African States to ensure that they would be in a position to levy licence fees for the exploitation of the zone. That is not at all the same as the desire to extend customs duties to the exclusive economic zone generally. The preoccupation of African States at the time is accurately and succinctly described by Dr. Akintoba in his book *African States and Contemporary International Law: A Case Study of ... the Exclusive Economic Zone*. An appropriate extract from the book has been circulated with the text of my speech. At p. 121 he writes as follows:

African governments ... proposed and actively campaigned for the establishment in international law of an exclusive economic zone. This was a prudent move designed, in the short term, to protect their coastline from overfishing and exploitation by distant water fishing fleets. Over the long term, the intention was to catalyze diverse efforts to establish national fishing industries. From an African perspective, the EEZ concept was couched in terms of sovereignty over resources, rather than complete sovereignty over areas that potentially threatened maritime movement and other customary rights such as laying of pipelines and cables.

There ends the quotation. It is precisely that distinction that the Guinean argument seems to overlook, or to elide. The Tribunal cannot have failed to notice how frequently the respondent State's witnesses spoke of the exclusive economic zone as though it were an area of Guinean waters, subject to Guinean sovereignty.

For instance, on the afternoon of Saturday, 13 March, Lieutenant Sow gave evidence about his work which was in his words, p. 7, line 2, "to maintain order in our waters". He referred consistently to "our waters" until Professor Lagoni (at p. 12, line 19) asked whether

the Guinean radar bases monitor "the whole exclusive economic zone of Guinea." Lieutenant Sow answered "I did not understand the question." He was again asked which area was monitored and he replied: "These bases listen to the entire zone of Guinea." Thereafter Professor Lagoni reminded the witness that the relevant area was termed "the exclusive economic zone". He did so again at p. 13, line 13, p. 14, line 38, p. 16, line 22, p. 18, line 23, and p. 18, line 27. Then at p. 21, line 8, a question was put to the witness about a line on the chart. He was asked: "Which boundary is that?" He answered "It is the southern boundary between the Republic of Guinea and the Republic of Sierra Leone". Professor Lagoni corrected him, saying "It is the boundary line between their exclusive economic zones, I guess". At that stage, as you will remember, I raised an objection, and Professor Lagoni put questions to the witness about his knowledge of maritime zones. Even in answer to those questions, the witness described the relevant line as "the border line between Guinea and Sierra Leone".

I do not for a moment suggest that Professor Lagoni intended to coach his witness, and it is no part of my case to raise the slightest suggestion of that character; nor is it necessary to enquire whether the witness was familiar with the existence and extent of the various maritime zones. My point is different. What I deduce from his answers is that he regarded the whole exclusive economic zone as part of the Guinean waters within which he had general authority to maintain order, and that this was, in his words, an area where Guinean law applied as part of the Republic of Guinea. Indeed, it appears from his answer at p. 23, line 14, that he either understood at the time, or now believes, that it was important to locate the *Saiga* while she was in the exclusive economic zone in order that she could be arrested for an offence committed within what is said to be the contiguous zone much earlier.

He was not alone. Mr. Bangoura took the view that Guinea's customs legislation applied throughout the customs zone. (See his answers when cross-examined by me on 12 March, morning session, pages 17, line 40, and 18, line 7.) The views of both of these witnesses about the extraterritorial effect of Guinean law are consistent with the submissions made on the morning of 16 March by Mr. Camara.

Whatever may be the position under Guinean law, it would be plainly incorrect to assert that a State may extend its customs legislation to foreign vessels within the exclusive economic zone. One need hardly say that a State's exclusive economic zone is not subject to its sovereignty.

As the Tribunal will know, some writers take the view that the exclusive economic zone is part of the high seas in which a coastal State has jurisdiction in respect of resources; others, like Professor Lagoni, take the view that it is a region *sui generis* within which certain rules relating to the high seas are to be applied. The controversy over that question explains the extraordinary and tortured wording of article 86 of the Convention. The Tribunal is not asked to resolve that dispute in this case. All that matters is that the exclusive economic zone is not subject to the coastal State's sovereignty.

The rules relating to the high seas are, however, of present relevance. That is so because the second paragraph of article 58 of the Convention provides that virtually the whole of the rules relating to the high seas shall apply within the exclusive economic zone in so far as they are not incompatible with Part V. The provisions thus applied to the exclusive economic zone include not only article 89 – which provides that no State may validly purport to subject any part of the high seas to its sovereignty – but also article 87, which defines freedom of the high seas in the broadest of terms.

We cannot therefore accept Professor Lagoni's assertion made on 15 March, afternoon session, p. 25, line 23, that it is confusing or irrelevant to refer to the rules relating to the high seas. Since those rules have been largely incorporated into the part of the Convention dealing with the exclusive economic zone, they are highly relevant.

By article 73 of the Convention, a coastal State may enforce its laws in the exclusive economic zone only to the extent that they relate to the exploration, exploitation, conservation and management of the natural resources. A customs law designed to augment the revenues of the coastal State, by encouraging vessels to buy fuel there, does not relate to any of the matters covered by article 73.

It is true that by your Judgment dated 4 December 1997, a majority of your members expressed the view that the rights conferred on coastal States might include the right to prohibit the bunkering of fishing vessels. At paragraph 57 of your Judgment you said:

Arguments can be advanced to support the qualification of "bunkering of fishing vessels" as an activity the regulation of which can be assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone.

The majority that expressed that view was not, of course, announcing its conclusion. The majority took the view that, for the purposes of the application for prompt release, it was sufficient that there was an arguable allegation that the arrest was made in enforcement of the coastal State's laws governing the exploitation of the natural resources of the exclusive economic zone.

The difficulty in which the Republic of Guinea finds herself is that she steadfastly and persistently refuses to adopt and advance the argument that the majority of this Tribunal considered to be arguable or defensible. She insists that the arrest was not effected in connection with the exploitation of fisheries but in the interests of maximizing receipts from customs. On this she is emphatic. M. Bangoura said, in response to one of my questions (12 March, morning, p. 21, line 28³³): "The object of the mission was to look for and to combat fraud. ... I am talking about smuggling fuel." Lieutenant Sow confirmed that this was a Customs operation, not a Fisheries operation (13 March, afternoon, p. 7, lines 8-15). These witnesses have confirmed by their evidence the situation as it appeared previously to you, Mr. President, and to Vice-President Wolfrum and Judge Yamamoto. At paragraph 27 of your Dissenting Opinion dated 4 December 1997, Mr. President, and at paragraph 11 of the Dissenting Opinion of your two colleagues, you emphasized that the action taken by the Guinean authorities was not based on the Code of Maritime Fishing but on the Customs Code. In the words of Judges Wolfrum and Yamamoto:

The arrest of the *Saiga* ... was executed by customs authorities and there is no indication of an involvement of the respective institutions concerning the management of living resources.

That was the situation as it appeared. Now it is the situation as it has been confirmed and reaffirmed by witnesses on behalf of the Republic of Guinea.

It is therefore the submission of Saint Vincent and the Grenadines that the application and enforcement of Guinean customs law within the exclusive economic zone entailed a breach of the Convention. It was an excessive exercise of jurisdiction or, as we say in English, an *excès de pouvoir*. For that reason, it was a breach of the claimant State's freedom of navigation and related freedoms. The propositions are two sides of one coin.

Professor Lagoni contends, however, that bunkering is not navigation, nor even a use of the sea related to those freedoms, such as those associated with the operation of ships

³³ Note by the Registry: Interpretation of the statement in French.

(15 March, afternoon session, p. 25). He asserts that the contrary proposition confuses freedom of navigation with other matters not expressly mentioned in article 87 of the Convention and emphasizes that commercial bunkering on the high seas is not expressly mentioned in article 87.

It is very clear that the draftsmen of the Convention did not intend to imbue the word "navigation" with a narrow and literal meaning. In the words of *Oppenheim's International Law*, at p. 729:

The list of freedoms contained in Article 87 of the Convention on the Law [of the Sea], as the wording clearly indicates, is not restrictive. Not only are there freedoms here other than those specified, but they must change form time to time, for example with the development of new technologies.

The editor's words reflect those of the International Law Commission when commenting on the draft for article 2 of the High Seas Convention of 1958. The Commission said:

The list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but is aware that there are other freedoms.

It would utterly frustrate the intentions of the draftsmen if freedom of navigation were read so restrictively as to exclude bunkering. That is so whether one relies upon the Latin origins of the word "navigation", as Professor Lagoni did, or on the alternative argument based upon the economic interest of the coastal State. A vessel is engaged in navigation when bunkering another at sea. Generally the bunkering vessel and the vessel receiving the supply are in motion, at slow speed, so that the fuel pipes remain taut. In any event, when a vessel is drifting at sea – not at anchor or in port – it is engaged in navigation. I venture to suggest that the same is true of the verb "*navigare*". It adds nothing to the debate.

Professor Lagoni argues that bunkering is not navigation or a related activity because it is commercial and may be inconsistent with the economic interests of the coastal State. It will not escape the Tribunal's attention that this contention is inconsistent with the language in which article 58 is expressed. That is so whether one fixes attention on the word "navigation" or on the phrase "lawful uses of the sea related to navigation, such as those associated with the operation of ships". Nor will it escape the Tribunal's attention that article 56 does not confer on the coastal State a general right to prohibit within the exclusive economic zone commercial activities which it considers injurious to its fiscal interests. It confers defined rights for defined purposes. A coastal State cannot, for instance, prohibit the sale of duty-free goods on foreign vessels within its exclusive economic zone on the premise that passengers might otherwise buy similar goods within the coastal State and so contribute to its resources. Professor Lagoni asserted that "such commercial activities do not affect the interests of the coastal State" (15 March, afternoon, p. 24, line 31). That, I respectfully suggest, is incorrect. A coastal State's fiscal interests may be affected by the sale at sea of duty-free goods – or in the case of Germany, by the offshore sale of butter – in just the same way as it may be affected by the sale of dutiable fuel.

There is a further objection to Guinea's claim that she is entitled to prohibit bunkering in her exclusive economic zone for the purpose of increasing her customs revenue. There is literally no State practice on which she can rely as evidence of such a right. We have conducted extensive surveys of State practice, supplemented by further reports produced on

2 March. Not one single State maintains legislation of the kind that Guinea claims to be able to enforce.

Indeed, as the hearing has proceeded, the press has reported a fresh development suggesting that States cannot prohibit such bunkering. A major oil company has announced its entry into the market in providing offshore bunkers in the Gulf of Guinea off the Nigerian coast. According to press reports, the decision to enter into the market followed a legal examination of the question in view of these present proceedings, upon which the press reports. So, even as we speak, others who consider their position very carefully take the view that bunkering within the exclusive economic zone is a lawful activity.

Mr. President, Members of the Tribunal, the freedoms enjoyed by all States in the exclusive economic zone are expressed in the broadest of terms in article 58 of the Convention. They include the freedoms referred to in article 87 of navigation and of overflight and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships. The breadth of that language is, if I may respectfully say so, inadequately expressed in Professor Lagoni's phrase when he characterized these as "communication freedoms". Gidel describes the principle of the freedom of the high seas as "*multiforme et fugace*". It would be regrettable indeed if this Tribunal were to support a reversion to the days of *mare clausum*, the very antithesis of the tract by Grotius from which modern international law has developed.

In his address tomorrow morning, Maître Thiam will present our comments on the respondent State's witnesses. I shall then close our case by reverting to questions of damages and costs.

The President:

Thank you very much, Mr. Plender. That brings us almost to the minute to the time for closing. I adjourn the sitting and we will resume tomorrow morning at 10 o'clock.

(The Tribunal rises at 5.00 p.m.)

Public sitting held on 19 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 19 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 11 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 11 mars 1999, 10 h 00]

The President:

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

Mr. Plender:

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

The President:

Thank you very much. The Tribunal is pleased to welcome His Excellency, the Agent. We look forward to hearing from him at the appropriate time.

Mr. Plender:

Maître Thiam will now address the Tribunal on questions of evidence.

Réplique de Saint-Vincent-et-les-Grenadines (suite)

EXPOSÉ DE M. THIAM

CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES

[PV.99/17, F, p. 4–22]

M. Thiam :

Monsieur le Président, Messieurs les Juges du Tribunal, ayant à vous parler des témoignages fournis par la Guinée, je commencerai par vous dire qu'ils ne valent pas, en qualité et en crédibilité, ceux produits par l'Etat demandeur.

D'abord, en ce qui concerne les pièces produites par les témoins de la Guinée, vous aurez remarqué, comme nous, de graves anomalies qui les rendent très peu crédibles. Il s'agit, en premier lieu, de l'ordre de mission n° 770 signé du directeur national des douanes à Conakry. Cet ordre de mission n'est pas daté, mais la partie guinéenne tient à vous faire croire qu'il aurait été établi le 26 octobre 1997, alors qu'il vise une mission qui devait débiter le jour-même. Même si cela est possible, force est d'admettre que cela est très peu probable, tant il est évident que lorsqu'on veut organiser une mission qui implique le déplacement d'unités différentes de la douane et de la marine, il faut au moins laisser à ces unités le temps de coordonner leur action.

De plus, il n'y avait aucune réelle urgence pour mettre ces unités en action puisque le *Saiga*, le 26 octobre 1997, n'était pas encore dans la zone économique exclusive de la Guinée. En tout cas, la date de l'ordre de mission ne va pas être considérée comme ayant été établie de manière pertinente.

La partie guinéenne voudrait également vous faire admettre que cet ordre de mission a été délivré spécifiquement en vue de la recherche du *Saiga*, mais il a été émis avant que le navire n'entre dans les eaux guinéennes – je viens de le dire – et, surtout, il a été établi avec cette mention, je cite, « recherche et répression de la fraude en mer et à terre ». S'il s'agissait réellement d'une manière de définir une mission spécifique, il y aurait lieu, alors, de se demander comment, en Guinée, sont définies les missions générales. Et, s'il ne s'agissait que de rechercher le *Saiga*, qui n'était certainement pas à terre, on ne voit pas pourquoi le rédacteur de l'ordre de mission aurait pris la peine de demander, en plus, une recherche et une répression d'une fraude « à terre », à moins qu'il ait pu croire que le navire pouvait se déplacer à terre.

Certes, nous nous souvenons tous de cette chanson qui a bercé notre enfance et qui commence comme ceci : « Maman, les petits bateaux qui vont sur l'eau, ont-ils des jambes ? » Mais nous sommes tous persuadés, ici, que le directeur national des douanes en Guinée a quitté l'adolescence depuis longtemps et que, par conséquent, il n'a pas pu donner un ordre spécifique de recherche du *Saiga* en visant des fraudes commises à terre. D'ailleurs, la preuve est faite que le *Saiga* n'était pas spécifiquement recherché. Cette preuve a été rapportée par le lieutenant Sow lui-même. En effet, aux lignes 25 et 26, le procès-verbal des débats n° 13, version française, rapporte le dialogue suivant entre le lieutenant et moi-même, à propos du radar à terre qui était censé suivre le navire :

- M. Thiam : D'accord. Alors, s'il suivait le *Saiga* au point qu'ils ont pu vous dire, à un moment déterminé, qu'ils se sont tous dispersés, est-ce que la dispersion est un motif pour perdre l'écho radar du *Saiga* ?

- M. Sow : Le radar surveillait juste un regroupement de navires à telle position et rendait compte. Donc, s'il a surveillé jusqu'à un moment et qu'il y a eu dispersion, il a rendu compte qu'il y a eu dispersion. On n'a pas dit « Tel navire est *Saiga*; donc, il faut le suivre ».

Le Tribunal retiendra la réponse particulièrement éloquente du lieutenant Sow, qui a ainsi témoigné de ce que le radar à terre surveillait tout « juste un attroupement de navires » et qu'ils n'avaient aucune mission particulière de surveiller le *Saiga*. Dès lors, peut-on encore croire que l'ordre de mission produit visait spécialement le *Saiga* ?

D'ailleurs, toujours à propos de cet ordre de mission, il faut noter que la partie guinéenne a soigneusement attendu pour le produire que le Tribunal et la partie adverse ne puissent plus interroger un témoin susceptible de répondre aux questions relatives à ce document.

Le seul témoin qui aurait pu, peut-être, répondre à de telles questions, est le Sieur Bangoura. Or, le document n'a été produit qu'après le témoignage de celui-ci et pendant le témoignage du Sieur Camara. Ce dernier, lorsqu'il a été interrogé sur l'ordre de mission, a répondu :

Quand l'ordre de mission est établi, on dit seulement aux agents concernés, ceux qui vont à la mission : « Rendez-vous à tel lieu, à telle heure. » (Procès-verbal n°11, page [21], lignes 17 et 18)

Il signifiait, par-là, qu'il ne savait rien de l'ordre de mission.

De son côté, le lieutenant Sow a dit, en parlant de l'ordre de mission : « Pour ces détails, je peux vous dire que seules mes autorités peuvent répondre à cette question » (Procès-verbal n° 12, page 20, lignes 4 et 5). Il signifiait, par-là, qu'il ne connaissait pas les circonstances de l'établissement de l'ordre de mission.

Par respect pour votre Tribunal, je ne dirai pas que la manière de procéder consistant à produire un document au moment où plus aucun témoin ne peut expliquer les circonstances de son établissement est sournoise et déloyale, comme malencontreusement Maître von Brevern l'a dit en parlant de la partie demanderesse. Mais on ne peut pas s'empêcher de penser qu'il y a une certaine malice. Le Tribunal considérera donc qu'il n'a pas été rapporté la preuve pertinente qu'un tel document a été établi en vue spécialement de rechercher le *Saiga*.

Pour les pièces produites par les témoins de la Guinée, il s'agit, en second lieu, des fameuses notes du lieutenant Sow. La partie demanderesse voudrait nous faire croire que la marine guinéenne serait la seule marine militaire au monde à ne pas employer des livres de bord pour une vedette aussi importante que le P328, alors, surtout, que cette vedette est l'une des plus importantes dont elle dispose pour les missions de surveillance côtière !

Sur ce point, le lieutenant Sow s'est perdu dans des contradictions que le Tribunal ne manquera pas de relever. Tel est le cas, par exemple, lorsque, sur une question du professeur Lagoni, le Lieutenant répond :

Sur la petite vedette, nous n'avons pas de livre de bord. Sur la grande vedette, à chaque fois que nous devons sortir, on nous donne des fiches où nous pouvons faire des prises de notes pour faciliter, avoir la mémoire.

Tandis que ce même lieutenant Sow me répond, sur une de mes questions à propos de la petite vedette, « Je ne sais pas s'il y a des notes de bord », et qu'il précise, plus loin, que la petite vedette disposait, finalement, de feuilles volantes. (Procès-verbal n° 13, page 21, lignes 15 à 26). Dans tout cela, Monsieur le Président, Messieurs les Juges du Tribunal, où est la vérité ?

Et puis, même s'il avait été vrai qu'il n'y avait pas de livre de bord sur l'un des plus importants navires de guerre guinéens, le capitaine Sow ne pouvait-il pas produire ici

l'original de ses prétendues fiches de bord ? Pourquoi n'a-t-il pas produit le prétendu original qu'il avait à bord ? Pourquoi n'a-t-il pas fait la même chose pour les fiches de bord, alors qu'il a produit l'original de la carte ? Mystère !

Le lieutenant Sow s'est présenté avec un rapport qu'il aurait établi selon des fiches remises au propre. Mais ce document soigneusement et joliment calligraphié, sans rature ni surcharge, alors que même les douaniers de Conakry, à l'aide d'une secrétaire et d'une machine, n'ont pas réussi une telle prouesse pour rédiger leur procès-verbal contre le capitaine Orlov, ne contient aucune mention, aucun cachet, aucun reçu prouvant qu'il aurait été déposé et soumis à l'état-major de la marine. Rien ne prouve qu'il a été approuvé par ledit état-major. Il n'est constitué que de feuilles volantes qui auraient aussi bien pu recevoir les calligraphies qu'elles contiennent juste avant le début du procès. Rien n'établit avec pertinence le contraire.

Et puis, il contient le numéro de la carte qui avait été utilisée à bord, détail aussi surprenant qu'inutile pour un marin qui ne sait pas qu'il devra comparaître devant un Tribunal. Si c'est l'état-major qui lui a remis la carte, c'est que l'état-major connaissait le numéro de la carte. Il n'était pas nécessaire de rappeler ce numéro dans un rapport destiné au seul état-major. En vérité, le numéro d'une carte ne peut avoir une utilité qu'en cas de contestation devant un Tribunal. Le lieutenant Sow savait-il à l'avance qu'il y aurait une contestation sur sa mission ? Malgré la réponse qu'il a donnée au Tribunal à cette question, qui lui avait été posée à l'avance d'ailleurs par le professeur Lagoni, nous devons sans cesse nous poser la même question. Alors qu'il contient ce détail surprenant relatif au numéro de la carte, le document ne contient, par contre, strictement aucun détail sur la direction et la force des courants et des vents, informations bien plus utiles pour un marin.

Le document ne contient aucun renseignement sur le cap et la vitesse suivis par la vedette P328 depuis le port de Conakry jusqu'au point de ralliement avec la vedette P35. Il ne contient pas, non plus, les renseignements relatifs au cap et à la vitesse pour les déplacements de la vedette P35 à partir de 8 h 30 le 28 octobre 1997. Il ne contient pas davantage les renseignements sur le cap et la vitesse suivis par la vedette P328 à partir du même moment. Comme par hasard, il ne contient que des renseignements sur des points que la Guinée n'a jamais pu établir faute de livre de bord depuis 1997, alors que nous en sommes à la troisième procédure. Comme le Tribunal n'aime pas les hasards, pas plus qu'il n'aime les mystères que j'évoquais au début de la phase orale de ce procès, il ne retiendra pas le prétendu rapport du lieutenant Sow comme élément probant dans cette affaire.

Il y a, en dernier lieu, la carte originale sur laquelle le lieutenant Sow prétend avoir tracé les marches-routes des trois navires en cause. Cette carte n'a jamais été produite au cours des deux procès précédents. Elle n'a jamais été produite pendant la phase écrite du présent procès. On a attendu la seconde moitié de la première phase orale du procès pour la sortir, comme le prestidigitateur fait s'envoler les belles colombes des chapeaux, mais une carte qui prend l'apparence d'une colombe est nécessairement suspecte, si belle que puisse être la colombe. De plus, le lieutenant Sow a affirmé qu'il aurait rédigé le marche-route du *Saiga* par rapport au livre de bord du navire. Mais ce livre de bord avait été saisi par la douane, dès que les agents de celle-ci ont mis le pied sur le *Saiga*, ainsi que cela résulte de toutes les pièces produites au débat. Les parties n'ont jamais été contraires sur ce point.

La douane n'a pas prouvé, ni même déclaré, qu'elle se serait dessaisie à un moment quelconque de ce document au profit de la marine, ce qu'elle n'aurait d'ailleurs pas pu faire sans violer gravement la loi. Dès lors, à quel moment le lieutenant Sow qui, selon ses dires, n'est jamais monté à bord du *Saiga*, aurait pu prendre connaissance d'un document qui avait été saisi et, en principe, placé sous scellés ?

Tout porte à croire que le livre de bord qui se trouvait entre les mains de la douane, non de la marine, n'a pas pu servir de base à l'établissement de la carte produite devant votre

juridiction par le lieutenant Sow. De plus, le lieutenant Sow a affirmé qu'il aurait rédigé le marche-route du *Saiga* sans modification par rapport au livre de bord de ce navire. Il a dit, je le cite : « Mais nous ne pouvions pas modifier ce que *Saiga* a écrit dans son journal » (Procès-verbal n° 13, page 12, lignes 5-6), ce qui implique nécessairement que le tracé de la route du *Saiga* a été fait sans aucune espèce de modification par rapport aux inscriptions du livre de bord du capitaine Orlov. Cependant, plus tard, à propos du point de coordonnées 09°57,7'N et 15°51,6'O, il a fini par avouer qu'il n'avait pas tenu compte de la marche du *Saiga* telle qu'elle résultait réellement du livre de bord du navire et il a dit cette phrase terrible, qui permet de mesurer toute la conscience avec laquelle un officier de marine exerce ses fonctions, je cite : « Nous avons porté sur cette carte ce qui nous intéressait et que nous avons tiré du journal de navigation du *Saiga* ».

Chacun a compris qu'en réalité, comme nous le supposons dans le paragraphe précédent, le lieutenant Sow a établi sa carte sans jamais avoir lu personnellement le livre de bord du *Saiga* saisi par la douane. En tout cas, chacun a compris que, malheureusement, même si le lieutenant Sow avait véritablement établi sa carte au vu du livre de bord du *Saiga*, il n'avait cependant tiré de ce livre que ce qui l'intéressait, et rien que ce qui l'intéressait. Chacun a compris, dès lors, que cette carte n'a pas été sincèrement établie.

Un autre élément présente de l'intérêt à cet égard : il s'agit de la position à laquelle le *Saiga* aurait été détecté par le radar à 3 h 50 dans la matinée du 28 octobre 1997. Le lieutenant Sow mentionne dans son rapport que, de sa position 09°00,0'N et 15°00,0'O, il aurait détecté le *Saiga* à 445 encablures sur un cap présentant une différence approximative de 40° bâbord par rapport au sien, c'est-à-dire approximativement sur le cap 205. N'entrons pas dans un débat de sémantique et considérons, pour l'heure, que le lieutenant ait réellement voulu dire que le *Saiga* se trouvait à 44,5 milles marins.

De toute façon, ce point ne figure pas, selon la carte produite par le lieutenant, sur la route suivie par le *Saiga*. Pourtant, à propos du point de coordonnées [09]°57,7'N et 15°51,6'O, où le *Saiga* était supposé se trouver, d'après son livre de bord, à 20 h 00 le 27 octobre 1997, alors qu'il ne s'y trouvait pas, le lieutenant Sow a pris la liberté de rectifier lui-même le marche-route du navire en se basant sur une simple déduction, c'est-à-dire sur une simple supposition.

Alors, pourquoi n'a-t-il pas pris la même liberté pour le point auquel le *Saiga* était supposé, d'après son livre de bord, se trouver à 3 h 50 le lendemain matin, d'autant que, pour rectifier le marche-route du *Saiga* une seconde fois, il n'aurait plus eu besoin de se fonder sur de simples suppositions, mais sur des constatations qu'il aurait réellement pu faire lui-même ? Mais pourquoi, donc, ce lieutenant a établi une carte sur laquelle il ne mentionne pas les positions du *Saiga* selon ses propres relevés ? Est-ce parce qu'il n'est pas sûr de ses propres constatations ? En tout cas, en produisant une carte qui retrace un tracé sur la route du *Saiga* conforme aux affirmations de l'Etat demandeur, la Guinée admet *ipso facto* que ce tracé est exact.

Comme on le dit en droit interne, « l'aveu est indivisible ». La Guinée ne peut pas prendre, dans les déclarations du capitaine Orlov, ce qui l'intéresse et rejeter ce qui ne l'intéresse pas. Ou elle prend toutes les déclarations du capitaine Orlov qui ne résulteraient pas d'une simple erreur d'écriture, ou elle les rejette en bloc.

Si elle écarte elle-même les prétendues constatations de son lieutenant au profit du livre de bord du *Saiga*, elle doit prendre en compte également toutes les indications figurant sur ce livre de bord, c'est-à-dire les mentions qui prouvent incontestablement qu'à 3 h 50, heure à laquelle le *Saiga* aurait été détecté, le navire se trouvait déjà dans la zone économique exclusive de la Sierra Leone.

Il me faut ajouter que le procès-verbal des débats n° 13, à la page 12, lignes 1 et 2, rapporte l'échange de propos suivant entre le lieutenant Sow et moi-même au sujet du livre de bord du *Saiga* : « Question : Le journal était exact ? Réponse : Le journal était exact. » Il n'y avait aucune espèce de réserve dans cette réponse. Il n'y avait aucune nuance qui permettrait de dire que le lieutenant a mis en doute la sincérité des écritures du capitaine Orlov. Il n'y a eu aucune poursuite en Guinée pour faux contre le capitaine Orlov. Si le journal de bord du *Saiga* était donc exact, c'est qu'il était exact en tous ses points, à l'exception, bien sûr, d'une erreur matérielle que le lieutenant a corrigée lui-même et qui concerne l'endroit où le navire se trouvait à 20 h 00 le 27 octobre.

Il ne fait plus aucun doute, dès lors, que la poursuite du *Saiga* n'a pas pu commencer avant qu'il ait franchi les limites sud de la zone économique exclusive de la Guinée, ainsi que cela résulte de son livre de bord.

Mais il est tout à fait remarquable que l'on arrive exactement à la même conclusion par deux autres méthodes. En effet :

La première méthode est la suivante : lorsque le lieutenant Sow a été invité à tracer le cap 205 par rapport à la position qu'il occupait à 3 h 50 le 27 octobre, il l'a fait. Or, la ligne qu'il a tracée rejoint le tracé du *Saiga* à un point qui se trouve très exactement sur la limite sud de la zone économique exclusive de la Guinée, mais en dessous de cette limite. Il a certes mis du temps à le reconnaître. En effet, on relève dans le procès-verbal n° 13, page 35, ligne 24, le dialogue suivant :

- M. Thiam : La ligne que vous, vous avez tracée, là, aboutit juste après la frontière sud, oui ou non ?
- M. Sow : Je crois.

Donc, si le tracé de la route du *Saiga* est exact, ce qui n'est plus contestable puisque le lieutenant l'a reconnu, et si, de la position à laquelle il prétend qu'il se trouvait, le lieutenant a réellement vu le *Saiga* sur le cap 205, c'est que, sans aucune contestation possible, le *Saiga* venait tout juste alors de franchir la limite sud de la zone économique exclusive de la Guinée.

A ce point de mon exposé, je voudrais anticiper sur un argument qui pourrait vous être présenté. J'en doute, mais sait-on jamais ... Le lieutenant a dit dans son rapport que le cap sur lequel il a déterminé la position du *Saiga* était approximatif. Par contre, la distance, elle, était sûre. Mais comment peut-on être sûr d'une distance et pas d'un cap alors que c'est le même instrument, le radar, qui permet de calculer l'un et l'autre ? Et puis, qui allez-vous croire ? Allez-vous croire un officier de marine qui ose vous regarder dans les yeux pour vous faire croire qu'il commande un bâtiment de guerre sans livre de bord et qui omet en tout cas de vous produire l'original des prétendues fiches qu'il aurait remplies à bord ? Allez-vous croire un officier de marine qui ose vous regarder dans les yeux pour vous dire qu'il a retenu uniquement ce qui l'intéressait dans le livre de bord d'un navire, par lui, arraisonné ? Allez-vous croire un officier de marine qui, après avoir prêté serment de ne dire que la vérité, remet une carte marine à une juridiction aussi prestigieuse que la vôtre en affirmant qu'il a établi les tracés figurant sur la carte sans avoir modifié le livre de bord du navire arraisonné et qui se rétracte, ensuite, sans sourciller, sans un mot d'excuse ? Enfin, allez-vous croire celui qui, après avoir reconnu sur une photographie ceux-là même que ses hommes ont blessés, insultés et pillés, ceux à qui il n'a apporté aucun secours, ose vous regarder dans les yeux pour vous dire en substance : « Je considère que leurs blessures ne sont que légères, parce que j'avais eu peur qu'elles n'aient été plus graves » ? Je connais votre réponse, celle qui se trouve dans votre cœur et qui, donc, ne peut être différente de la mienne.

Pour ma part, je pense que le monde a besoin de diplomatie, mais je me refuse à croire que les intérêts supérieurs de la vraie justice doivent systématiquement céder le pas à

ceux de la diplomatie, car un monde sans justice est appelé à vivre dans le chaos et la brutalité sans limite. Edith Piaf disait à son amant : « La terre n'est pas assez ronde pour m'étourdir autant que toi ». Les exigences de la diplomatie, si lourdes soient-elles, ne sont pas assez lourdes pour nous étourdir. Je sais donc que vous saurez trouver la bonne méthode, le bon équilibre pour répondre aux questions que je vous ai posées.

La seconde des autres méthodes permettant d'arriver à la conclusion que le *Saiga* n'a été détecté qu'après avoir franchi les limites sud de la zone économique exclusive de la Guinée est la suivante : Le professeur Lagoni préfère voir Dieu dans les détails. Soit ! Examinons donc, ensemble, ce que, de l'autre côté de la barre, on voudrait faire passer pour un détail : il s'agit des mesures de distance prises par le lieutenant Sow pour localiser le *Saiga* le 27 octobre 1997 à 3 h 50. Le lieutenant l'a fait en parlant d'encablures, et il a dit que le navire se trouvait sur le cap 205 à une distance de 445 encablures. Aujourd'hui, évidemment, on voudrait nous faire admettre que l'encablure représenterait obligatoirement le dixième du mille marin. On s'est écrié en substance : « Mais comment pourrait-on calculer des distances marines en kilomètres alors qu'elles se mesurent en milles marins ? »

Mais on feint de n'avoir pas constaté que la carte marine produite par la partie guinéenne elle-même n'a pas été graduée en milles marins, mais en kilomètres. Je voudrais que l'on me pardonne, dès lors, de dire que je ne puis accepter que ceux qui produisent eux-mêmes des cartes marines graduées en kilomètres puissent me reprocher d'avoir prié le Tribunal de vérifier leurs propres calculs et leurs relevés dans cette même unité de mesure.

Si l'on devait considérer une mesure prise en encablures comme étant une mesure prise en dixième de milles marins, il y aurait des incohérences manifestes dans les faits soumis à l'appréciation du Tribunal. Et, ces incohérences seraient incontestablement dues aux éléments que la partie guinéenne tente d'introduire dans le dossier. En effet, ces incohérences ne pourraient pas venir du livre de bord sur lequel s'appuie l'Etat demandeur puisque, comme je vous l'ai dit, ce livre de bord a été reconnu comme exact par tous les témoins produits par la Guinée.

Les incohérences viendraient alors de ce que la Guinée voudrait nous faire admettre que le navire se serait dérouté pour se retrouver à 3 h 50, le 28 octobre, bien plus au nord que ne le voulait son capitaine. Les incohérences viendraient de ce que le navire aurait été détecté à un endroit où il n'a jamais pu se trouver puisqu'il ne se situe pas sur la ligne de marche définie par les Guinéens eux-mêmes.

Dans le dossier, rien ne permet de conclure que le capitaine Orlov a volontairement voulu se déporter. Rien ne permet de penser qu'il ait été si mauvais marin qu'il aurait laissé son navire se dérouter sans le savoir. Aucune constatation fondée sur des mesures de la vitesse et de la direction des courants marins à cette époque ne permet d'affirmer que le navire aurait pu être dérouté par des courants.

Si, donc, l'on devait considérer que le mot « encablure » aurait été utilisé par le lieutenant guinéen pour représenter le dixième du mille marin, il serait parfaitement incompréhensible que les calculs déterminent un point géographique où le navire n'a jamais été, tant selon son livre de bord que selon la carte produite par la Guinée elle-même.

Il est tout à fait remarquable, par contre, que, si l'on retient la définition française du mot « encablure » et la distance de 194,88 mètres qu'elle implique, les constatations du lieutenant Sow seraient parfaitement conformes au livre de bord du *Saiga*.

M^e Howe a eu la gentillesse de transmettre au Tribunal, pour moi, la preuve que l'encablure ne représente pas le dixième du mille marin. Si elle représente 120 brasses et si sa mesure varie, selon que l'on parle de la brasse anglaise ou de la brasse française, il est cependant tout à fait certain qu'elle ne saurait représenter une distance inférieure à celle que

j'ai indiquée au Tribunal, c'est-à-dire 194,88 mètres, puisque toutes les autres mesures vont jusqu'à 200 mètres, y compris en Allemagne, selon les encyclopédies que j'ai pu consulter.

Il me faut ajouter que si, comme on l'a dit en m'interrompant, la brasses est généralement utilisée pour mesurer des profondeurs, tel n'est pas le cas pour l'encablure, bien qu'elle représente 120 brasses. En effet, on dit couramment en français qu'un navire se trouve à tant « d'encablures du rivage », ce qui n'a rien à voir avec la profondeur, on en conviendra.

A ma connaissance, dans le monde francophone, seule la marine canadienne a pu fixer deux longueurs différentes pour l'encablure, selon qu'il s'agit d'une mesure de profondeur ou d'une mesure de distance en surface. Mais la marine guinéenne n'emploie pas, que je sache, les méthodes de la marine canadienne.

Certes, le mot « encablure » se traduit littéralement en anglais par le mot « *cable* », mais il n'a pourtant pas la même signification. Dès lors, je demande aux interprètes de ce Tribunal qui nous ont aidés, et dont je salue le travail, de bien vouloir ne plus traduire le mot « encablure » en anglais par le mot « *cable* » lorsqu'ils traduisent mes propos. Je préférerais qu'ils retiennent la traduction germanique qui parle du mot « *kabel* » et qui le définit comme étant une mesure de distance sur 200 mètres.

Ces précisions étant faites, rien, en dehors des déclarations peu fiables du lieutenant Sow, ne permet de conclure qu'il avait été réellement dans son intention de se référer aux milles marins lorsqu'il a noté ses mesures de distance en encablures. Tout porte à croire, au contraire, qu'ayant utilisé la langue de Voltaire, cet officier a voulu faire référence très précisément à la définition française du mot, même s'il a fait ses études en Union Soviétique.

C'est la seule manière de faire coïncider les indications du livre de bord du *Saiga* avec les prétendues constatations de la marine guinéenne du 28 octobre 1997 à 3 h 50. Cela permet de conclure qu'à ce moment-là, le navire se trouvait déjà hors de la zone économique exclusive de la Guinée.

Pour en terminer avec les documents produits par les témoins de la défense, je dois mentionner que, lorsqu'il le faisait, je me demandais pourquoi le professeur Lagoni prenait tellement de précautions pour faire dire au témoin Sow qu'ils ne s'étaient jamais rencontrés ni parlé avant l'arrivée du témoin à Hambourg et pour lui faire dire que les documents apportés par le témoin avaient été préparés à Conakry. Je me faisais très sincèrement la réflexion qu'un homme jouissant de la réputation du professeur n'avait pas besoin de perdre du temps à essayer de convaincre le Tribunal de ce qu'il n'aurait jamais pu être le complice de la fabrication de documents.

Poursuivant péniblement mes réflexions sur ce point, j'ai fini par en conclure que, comme nous tous, le professeur avait été particulièrement perturbé et troublé par l'extraordinaire apparition, au cours de la procédure, de documents établis à Conakry ... Cette dernière réflexion termine l'analyse des pièces produites par les témoins de la partie défenderesse.

J'en viens maintenant, brièvement, à l'analyse des autres aspects des témoignages. Voyons, d'abord, le témoignage du Sieur Bangoura, l'expert devenu témoin. Si je l'examine en premier, ce n'est certes pas parce qu'il serait le plus intéressant pour le Tribunal, mais c'est le premier témoin que la Guinée a fait comparaître. Il est édifiant de constater que, dans son exposé de clôture de la première partie de la phase orale du procès, le professeur Lagoni n'a pas cru devoir s'appuyer une seule fois sur un tel témoignage. Comment pourrait-il en être autrement pour un témoin qui n'a pas vu d'impacts de balles sur le *Saiga* ?

Comment pourrait-il en être autrement pour un témoin qui a lui-même reconnu implicitement s'être rendu coupable d'une inscription de faux sur un document officiel de l'Etat, en reconnaissant notamment avoir mentionné dans son procès-verbal que le *Saiga* avait tenté de renverser des vedettes de la marine, alors qu'il a fini par reconnaître que l'une des vedettes était arrivée sur les lieux seulement après que le *Saiga* se soit immobilisé et que

l'autre vedette n'avait été perturbée que par les mouvements de vagues, en disant « les vagues causées par le navire ont essayé de jouer sur la petite vedette » ? Comment pourrait-il en être autrement pour un témoin qui refuse, devant vous, de reconnaître des trous qui lui ont été montrés sur des photographies ? Comment pourrait-il en être autrement pour un témoin qui refuse de reconnaître qu'il a gardé l'équipage du *Saiga* prisonnier à bord de ce navire, mais qui dit « Oui, nous avons mis des hommes de garde à bord pour la sécurité des membres de l'équipage et du navire lui-même », comme s'il était possible, Messieurs, de s'imaginer que l'équipage avait besoin d'être protégé ?

Comment est-il possible de croire un témoin qui affirme que la petite vedette n'était pas armée, alors qu'il a été démenti par celui-là même qui commandait la vedette ?

Comment croire celui qui, après avoir dit qu'il n'y avait eu qu'un coup de feu de sommation, a fini par dire « Je ne sais pas combien d'hommes tiraient. Ils ont fait deux ou trois coups de sommation » ? Comment croire celui qui affirme qu'une marchandise doit « obligatoirement » – ce sont ses termes – être déclarée dès qu'elle entre dans le rayon douanier maritime ? Comment croire celui qui refuse de reconnaître ce que même les enfants savent, c'est-à-dire qu'un tanker ne peut pas aller plus vite qu'une vedette rapide de la marine nationale ?

Il serait trop fastidieux de relever toutes les incohérences et toutes les inexactitudes du témoignage du Sieur Bangoura. Le Tribunal, donc, ne s'appuiera, pas plus que le professeur Lagoni, sur ce témoignage.

S'agissant, maintenant, du témoignage du Sieur Camara, je ne m'étendrai pas davantage. Le professeur Lagoni ne l'a pas cité une seule fois non plus. Je le comprends. Voilà donc un témoin qui vous a dit sans sourciller qu'il avait réussi à avoir peur ... de « personne » ! Il ne faudrait pas confondre mes propos parce que je n'ai pas dit qu'il n'avait peur de personne. Il y a, en français, une petite nuance. Il vous a dit : « On s'est senti agressé parce que nous avons fait le tour du bateau par deux fois, on n'a vu personne. On a fait la sommation en tirant en l'air, on n'a vu personne » (Procès-verbal n° 11, page 15, lignes 12 et 13). N'est-il pas singulier, Messieurs, de prétendre que l'on se soit senti agressé alors que l'on n'a vu personne ?

Relevons encore, sans commentaire, cette singulière réflexion du témoin : « Je ne peux pas dire ici que quand on tire en l'air cela peut être précis ». Pas de commentaires, mais une question : sur quelle cible précise peut-on tirer lorsque l'on tire en l'air ?

Ce témoin a affirmé qu'il a signé un procès-verbal de douane sans l'avoir lu et qu'il ne pouvait rien dire de son contenu. Il a reconnu avoir signé un procès-verbal qui contenait des mentions relatives à des faits qu'il n'avait pas personnellement constatés. C'est tout dire ...

Gémissons en silence pour notre pauvre Afrique et n'ajoutons pas d'autres commentaires. Ce témoignage ne sera, pas plus que l'autre, retenu par le Tribunal. Relevons tout de même qu'à une question de M. Lagoni relative au libre passage du navire à travers le rayon des douanes, le témoin a répondu « Il n'y a pas de contrôle », ce qui contredit les affirmations erronées de son chef, qui prétend faire peser une obligation générale de déclaration pour toute marchandise entrant dans le rayon des douanes par la voie maritime.

Soulignons également qu'interrogé sur le point de savoir à quelle heure le *Saiga* a été repéré, le témoin répond « Je ne sais pas ce moment » (Procès-verbal n° 11, page 22, ligne 10). Je me refuse à croire que celui qui, depuis le départ – puisqu'il était sur la petite vedette au moment où elle se dirigeait seule vers l'île de Soro au début de la mission – a été désigné pour diriger l'équipe d'abordage et d'arraisonnement du navire, n'ait pas été tenu au courant dès l'instant où le navire a été repéré.

Venons-en, à présent, au témoignage du lieutenant Sow. Ce témoignage est intéressant sur un point puisqu'il confirme que, dans cette affaire, la Guinée n'a jamais

entendu agir en vertu de ses lois sur la protection de l'environnement marin et sur la pêche. En effet, le témoin a dit qu'il n'avait pas été requis par les services d'environnement ou de pêche, mais par des services de douane. Il n'y avait, d'ailleurs, je crois, aucun débat sérieux sur la question. La déclaration du témoin est également intéressante en ce qu'il a, à plusieurs reprises, confirmé que la vedette P35 disposait bien de munitions pour ses mitrailleuses (Procès-verbal n° 12, page 11, lignes 13 et 14). Pour le reste, la déclaration de ce témoin n'est pas plus cohérente que les autres.

Notons, d'abord, pour le début de la mission, que le témoin a affirmé n'avoir su qu'il devait rechercher le *Saiga* qu'une fois en mer, après avoir quitté le port de Conakry. En effet, répondant à une question de M. Lagoni relative au moment où il avait entendu parler du *Saiga* pour la première fois, il a dit : « Personnellement, j'ai entendu parler du *Saiga* quand j'étais déjà en mer » (Procès-verbal n° 12, page 17, lignes 24 et 25).

Nous avons tous compris qu'il avait déjà quitté le port de Conakry à ce moment-là, puisque le professeur Lagoni lui-même lui a fait cette réflexion : « Vous venez d'indiquer que vous avez entendu parler du *Saiga* après avoir quitté le port de Conakry » (Procès-verbal n° 12, page 18, lignes 15 et 16³⁴).

Et pourtant, plus loin, le témoin a déclaré exactement le contraire sur l'une de mes questions. Voici le dialogue :

- M. Sow : Je vous dis qu'avant de sortir du port j'ignorais que je sortais rechercher le *Saiga*. C'est quand la vedette a été prête. Nous devions larguer les amarres. L'officier de transmission est venu me dire : « Voici la fréquence. Fixez-la sur la radio. Vous sortez pour rechercher un navire qui émet sur cette fréquence ».

- M. Thiam : Et on vous a donné son nom ?

- M. Sow : Naturellement.

(Procès-verbal n° 13, page 25, lignes 27 et 28, et page 26, lignes 1 à 4)

Le lieutenant s'est donc parjuré.

Sur ce même point, encore, le témoin a déclaré :

On ne m'a pas parlé du *Saiga* avant ma sortie et aucun membre de l'équipage du côté marin ne savait que l'on devait rechercher un navire appelé *Saiga*.

(Procès-verbal n° 13, page 15, lignes 27 et 28)

Mais, plus tard, il a répondu « effectivement » à la question de savoir si celui qui commandait la vedette P35 savait qu'il allait rechercher le *Saiga* et, pour répondre à mon étonnement, il a ajouté : « Evidemment, si le sous-chef est déployé, par rapport au chef, il peut avoir plus d'informations » (Procès-verbal n° 13, page 18, lignes 22 et 23). Donc, le témoin a prétendu qu'aucun membre de l'équipage marin de la mission n'avait été informé du nom du navire recherché avant d'avoir quitté le port, puis il a dit que celui qui pilotait la plus petite des vedettes avait été néanmoins informé.

Le témoin s'est encore parjuré.

Le témoin a affirmé que la petite vedette avait été envoyée à 13 h 14 vers l'île d'Alcatraz, alors que les douaniers ont seulement affirmé, dans leur procès-verbal, qu'ils étaient partis en reconnaissance vers l'île de Soro. Puisque la mission était pour eux, douaniers, et que la marine ne faisait que les aider en les transportant, je ne vois pas pourquoi

³⁴ Note du Greffe : Interprétation de l'exposé en anglais.

le lieutenant Sow pourrait prétendre qu'il avait envoyé la petite vedette à Alcatraz alors que les douaniers, eux, qui dirigeaient la mission, voulaient s'arrêter à l'île de Soro. C'était exactement comme si je demandais à un taxi de m'amener à Brême et qu'il vienne prétendre qu'il veut absolument m'amener à Francfort ...

Le lieutenant Sow prétend que l'on aurait fait revenir la petite vedette au motif que :

... nous ne pouvons pas la laisser partir en profondeur seule. Si, toutefois, c'est au bord, à vue de la terre, là, nous pensons qu'elle est sécurisée plus qu'en haute mer.

(Procès-verbal n° 13, page 20, lignes 1 à 3)

Mais l'île d'Alcatraz est à plus de 48 milles marins de la côte !

De plus, la vedette venait de faire un trajet aller-retour de plus de 100 milles marins qui l'avait amené à s'éloigner des côtes de près de 21 milles marins. Du point de vue de la sécurité, il n'y a strictement rien qui change pour la vedette selon qu'elle se trouve à 21 milles marins ou plus loin par rapport aux côtes.

Le lieutenant Sow n'a donc pas dit la vérité au Tribunal sur les véritables motifs de la sortie en mer de la vedette P35 à 13 h 14 le 27 octobre.

Le lieutenant Sow reconnaît qu'il ne comprend pas le grec, mais affirme qu'il peut comprendre une alerte donnée en grec. Et lorsqu'il pense qu'un pétrolier a été alerté et qu'il va tenter de s'échapper par le sud, c'est alors qu'il choisit ce moment pour aller, lui, au contraire, vers le nord. Le lieutenant Sow prétend que lorsqu'il a repéré le *Saiga* à 3 h 50 le 28 octobre, il n'a pu augmenter sa vitesse au-delà de 7,5 noeuds, compte tenu de l'état de la mer. Mais nous avons produit aux débats les bulletins météo prouvant que le temps était calme à ce moment-là.

Le lieutenant Sow prétend que, au même moment, il aurait appelé le *Saiga* par la radio. Il n'y aurait plus eu aucune raison donc de se camoufler. Mais, lorsqu'il parle de la raison pour laquelle il aurait changé de système de remorquage, pour prendre la petite vedette en flèche, il ne dit pas qu'il n'y avait plus de nécessité de se camoufler. Il justifie sa décision d'une manière totalement différente. Il dit : « A partir de là, nous avons juste changé notre système de remorquage parce que, de côté, on ne pouvait pas tellement augmenter la vitesse » (Procès-verbal n° 12, page 29, lignes 24 à 26).

En votre âme et conscience, Monsieur le Président, Messieurs les Juges du Tribunal, vous ne pourrez pas retenir un témoignage donné avec beaucoup d'habileté, certes, mais une habileté qui n'a pas permis à un témoin d'éviter de se contredire et donc de se parjurer. Vous considérerez que le *Saiga* n'a été poursuivi qu'après qu'il soit sorti de la zone économique exclusive de la Guinée. Vous considérerez qu'il a fait l'objet d'une attaque menée avec une brutalité injustifiée alors que tous ses hommes d'équipage s'étaient cachés et qu'ils ne représentaient aucunement une menace pour les agents guinéens.

Je vais terminer en évoquant une conversation que j'ai eue en Guinée au plus haut niveau, puisqu'un témoin a cru devoir faire référence à ce contact. J'ai effectivement été reçu par une très haute personnalité dont je me plais ici à souligner l'extrême courtoisie. J'ai déjà eu l'occasion de le remercier pour toute sa sollicitude. Il m'a prêté une oreille attentive et lorsque j'ai évoqué avec lui la brutalité parfaitement injustifiée, gratuite, dont l'équipage du *Saiga* avait été victime, il m'a répondu : « Que voulez-vous que je vous dise, Maître, alors que nous-mêmes, ici, nous avons été sauvagement bombardés ? »

Il est grand temps que, en Afrique, nos Etats et nos peuples cessent d'être les otages de leurs fonctionnaires. C'est pourquoi nous attendons de vous la justice qui, en définitive, si l'on y regarde de plus près, rendra service à la Guinée beaucoup plus qu'on n'y pense.

Je voudrais, pour terminer, vous remercier, Monsieur le Président, Messieurs les Juges du Tribunal. Les débats ont été de qualité grâce à vous. Cela a été un réel plaisir pour moi de faire votre connaissance après que mon père m'ait souvent parlé de la plupart d'entre vous en des termes qui blesseraient votre modestie. Je prie pour que Dieu, le tout-puissant, vous aide à rendre la décision la meilleure. Je prie pour qu'il nous accorde à tous, ici, la possibilité de vivre longtemps dans un monde fait de justice et de droit.

Je voudrais saluer la délégation guinéenne qui va repartir dans son pays, ce pays qui est un peu le mien puisque trois de mes enfants y ont la moitié de leurs ancêtres. Puissent-ils repartir en paix dans leur pays natal, le coeur léger, sachant que tout ce qui s'est dit ici n'avait pas d'autre objectif que de faire avancer la cause du droit et celle de la justice.

Ayant salué hier le professeur Lagoni, je veux aussi saluer Maître von Brevern, qui a donné le meilleur de lui-même pour un dossier où il n'avait certainement pas la tâche la plus facile. Son pays est accueillant et sympathique; j'y reviendrai avec plaisir.

Cette affaire m'a donné l'occasion de rencontrer aussi deux Britanniques, Maître Howe et le docteur Plender. Quel plaisir cela a été pour moi de travailler avec eux et de profiter de leur expérience ! Docteur Plender, Excellence, je ne vous dirai jamais assez merci pour m'avoir donné l'occasion d'écouter vos exposés, aussi brillants que percutants, devant ce Tribunal. Docteur, je vous cède la parole, merci.

The President:

Thank you very much, Maître Thiam.

Mr. Plender, please.

STATEMENT OF MR. PLENDER
DEPUTY AGENT FOR SAINT VINCENT AND THE GRENADINES
[PV.99/17, E, p. 16–22]

Mr. Plender:

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

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

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

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

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

Article 106 deals with the liability of a State for the wrongful seizure of a vessel on suspicion of piracy. Since the *Saiga* was not seized on suspicion of piracy, the article has no direct relevance. The Agent for Guinea points out, however, that article 106 speaks of the duty to compensate the flag State whereas article 111, paragraph 8, speaks of the duty to compensate the ship in the event of the wrongful exercise of hot pursuit. This, as the

philosophers say, is "true but not interesting". Since the ship can be represented only by the flag State, no significance is attached to the fact that article 111, paragraph 8, says that "it", meaning the ship, "shall be compensated for any loss or damage." The result is the same: the flag State claims the compensation.

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

I accept that it is, in each case, a question of fact and degree to determine whether a particular loss has been occasioned by the unlawful stopping of a vessel. In the circumstances of the present case it will be absurd to maintain that the removal of the cargo was not effected by the stopping of the *Saiga*. The Guinean Customs officers could not take 5,000 tons of gas oil aboard their patrol boats. In order to seize the oil, they had to stop the *Saiga* and take her into Conakry. The owners suffered the loss of the cargo by the stopping of the vessel. Similar arguments apply *mutatis mutandis* to the detention of the crew and the attack on the vessel dated 30 January 1998. Had the vessel not been stopped, these losses would not have been suffered. The losses were the consequence of the arrest.

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

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

It is the Guinean case that the claim for damages on behalf of the injured crew is excessive. The Agent for Guinea did not appear to advance that argument on the premise that we had applied an incorrect scale when assessing the sum to be awarded in respect of an identified injury, but rather on the premise that the extent of the injuries was unproven. Thus, in the case of Mr. Niasse, he expressed scepticism about the provenance of the X-rays presented to the Tribunal suggesting that these might not record injuries actually suffered by that witness. We invite the Tribunal to conclude that the X-rays were certainly those of Mr. Niasse's injuries, as he confirmed and as appears from the medical reports. We further invite the Tribunal to conclude that Mr. Niasse suffered severe physical and psychological

injuries which demand substantial reparation. In reaching its conclusion on that point, the Tribunal should bear in mind Mr. Niasse's own account; that of the Captain and the second mate; two medical reports; the photograph taken in Dakar; the X-rays and the visible evidence of his condition when he appeared as a witness.

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

The assessment of damages to be paid in respect of the vessel should not, in my submission, present the Tribunal with difficulties. There is now in evidence an accurate record of the sums paid by way of repair and the revenue lost when the vessel was off hire. The record has not been challenged.

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

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

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

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

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

I trust that if the Tribunal reads the Attorney General's speech, it will receive a different impression. He did indeed acknowledge the point that some writers have doubted the availability of moral damages, exactly as was pleaded by the Republic of Guinea. His response was that the great majority of modern writers now accept that such damages are available. Reference to the relevant literature set out more extensively than in the Attorney General's speech will be found at paragraphs 192-198 of our Reply. On this point

public international law has developed rapidly in recent years, particularly under the influence of three modern decisions: the two *Rainbow Warrior* awards and *Letelier - Moffitt*.

As the Attorney General showed, however, the view held by modern writers has a respectable pedigree, which may be traced at least back to the "*I'M ALONE*". That is why the Attorney General considered it appropriate to cite an older publication by Schwarzenberger, as well as a modern one by Brownlie, the latest edition of his *Principles of [Public] International Law* published in 1998.

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

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

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

This Tribunal was seized of the case. It ordered the prompt release of the vessel. The vessel was not promptly released. It was attacked again in the port of Conakry. The Agent of the flag State was denied access to the vessel and crew. The representatives of the P&I Club also failed to gain access. The Ambassador of the State of nationality of the Captain and some of the crew gained access to them only with difficulty and after a delay. Eventually,

with diplomatic effort and the intervention of this court, the vessel was released and was able to limp to Dakar for repairs.

This was not an isolated incident. There has been a course of such attacks previously and subsequently. These are not undertaken to defend national security or to protect life. They are undertaken for economic reasons. In the present case, the seizure yielded revenue in excess of \$3 million. The Republic of Guinea does not apologize. She does not undertake to refrain from similar attacks in the future. On the contrary, she proclaims before this Tribunal her determination to persist in such conduct.

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

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

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

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

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

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

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

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

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

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

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

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

The President:

Thank you.

STATEMENT OF MR. DOUGAN
AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.99/17, E, p. 22–23]

Mr. Dougan:

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

- (1) the actions of Guinea (*inter alia* the attack on the m/v “Saiga” and her crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of cargo of gas oil, its filing of charges against St. Vincent & the Grenadines and its subsequently issuing of a judgment against them) violate the right of St. Vincent & the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention;
- (2) subject to the limited exceptions as to enforcement provided by article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely *inter alia* Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the *code des douanes*, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;
- (3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v “Saiga” and is liable to compensate the m/v “Saiga” pursuant to Article 111(8) of the Convention;
- (4) Guinea has violated articles 292(4) and 296 of the Convention in not releasing the m/v “Saiga” and her crew immediately upon the posting of the guarantee of US\$400,000 on 10 December 1997 or the subsequent clarification from Crédit Suisse on 11 December;
- (5) the citing of St. Vincent & the Grenadines as the Flag State of the m/v “Saiga” in the criminal courts and proceedings instituted by Guinea violates the rights of St. Vincent & the Grenadines under the 1982 Convention;
- (6) Guinea immediately return the equivalent in United States Dollars of the discharged gasoil;
- (7) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and
- (8) Guinea shall pay the costs of the proceedings and the costs incurred by St. Vincent & the Grenadines.

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

The President:

Thank you very much, Your Excellency.

Mr. Plender, I take it that that brings you to the conclusion of all your submissions?

Mr. Plender:

Yes, Mr. President, that concludes the submissions on behalf of the applicant State.

The President:

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

(The Tribunal rises at 11.37 a.m.)

Public sitting held on 20 March 1999, 10.00 a.m.

Tribunal

Present: President MENSAH; Vice-President WOLFRUM; Judges ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; Registrar CHITTY.

For Saint Vincent and the Grenadines: [See sitting of 8 March 1999, 10.00 a.m.]

For Guinea: [See sitting of 8 March 1999, 10.00 a.m.]

Audience publique du 20 mars 1999, 10 h 00

Tribunal

Présents : M. MENSAH, *Président*; M. WOLFRUM, *Vice-Président*; MM. ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE, *juges*; M. CHITTY, *Greffier*.

Pour Saint-Vincent-et-les-Grenadines : [Voir l'audience du 8 mars 1999, 10 h 00]

Pour la Guinée : [Voir l'audience du 8 mars 1999, 10 h 00]

The President:

Mr. von Brevern, as agreed, your side will present their submissions this morning, and I invite you to commence the presentation.

Mr. von Brevern:

Yes, Mr. President. The presentation will be started by the Minister of Justice of the Republic of Guinea, M. Togba.

Duplique de Guinée

EXPOSÉ DE M. TOGBA
CONSEIL DE GUINÉE
[PV.99/18, F, p. 4–10]

M. Togba:

Monsieur le Président, Messieurs les Juges, comme en novembre 1997, j'ai l'honneur de conduire la délégation guinéenne à l'audience de la procédure au fond dans l'affaire dite du navire *Saiga*.

Avant d'évoquer quelques aspects du procès, permettez-moi, Monsieur le Président, de vous adresser les sincères remerciements du Gouvernement de la République de Guinée pour votre sage et prompt mise au point suite aux propos calomnieux tenus dans ce prétoire à l'encontre de mon pays en particulier, et de l'Afrique en général.

Qu'il me soit permis d'observer qu'il n'y a pas de corrompus sans corrupteur. Et les corrupteurs se sont démasqués dans le procès qui nous rassemble en produisant, à l'appui de leurs moyens d'action, un projet d'arrêté qui n'est ni signé par les ministres compétents, ni enregistré au Secrétariat général du Gouvernement à Conakry et sur lequel le demandeur au procès se trompe doublement : Il se trompe sur la validité du texte qui n'est qu'un projet. Il se trompe sur l'objet dudit projet qui ne vise pas à combler un vide juridique mais à instaurer un régime de taxation plus favorable pour le carburant de soute destiné aux bateaux de pêche et autres navires en transit à Conakry par rapport à la taxation ordinaire du carburant destiné aux véhicules de transport individuel ou collectif.

Le projet offre, en cas d'adoption, la possibilité aux sociétés actuelles – ELF, Mobil, Shell, Total, Bankina, Sodegui – qui pratiquent déjà l'avitaillement et aux nouvelles sociétés qui en feraient la demande, d'appliquer des prix inférieurs à ceux du marché intérieur, d'être donc compétitifs. En effet, alors que le gasoil non détaxé consommé sur le marché terrestre supporte une taxe spécifique de 245 francs guinéens le litre, le projet envisage une taxe de 15 francs par litre. Ce régime de faveur ne bénéficierait qu'au commerce licite, la contrebande continuant d'être réprimée conformément aux textes en vigueur. Au-delà de l'intérêt du projet, la question se pose ici de savoir comment les responsables du *Saiga* qui ne sont pas des fonctionnaires de l'Etat guinéen se sont procuré ce texte.

Monsieur le Président, Messieurs les Juges, il ressort clairement de ce qui précède que le phénomène du coulage pétrolier en mer repose sur un système de relations occultes, sur un réseau impliquant des complicités à terre. Cela rend difficile la lutte que mène notre pays.

Le coulage pétrolier constitue un obstacle sérieux à la réalisation de nos objectifs de développement. Qu'il suffise d'indiquer que la douane mobilise 53 pour cent des recettes intérieures de notre budget national et dans ces recettes douanières, près de 30 pour cent sont générés par la taxation des produits pétroliers – essence, gasoil, pétrole.

La Guinée n'est pas un pays producteur de pétrole, elle ne dispose pas non plus de raffinerie. C'est dire que plus le coulage pétrolier se pratique, plus la perception de nos recettes budgétaires est compromise. Et les statistiques produites au Tribunal dans la procédure de mainlevée en novembre 1997 ont montré la progression des taxes pétrolières suite à l'arraisonnement du navire *Saiga* et à l'intensification de la surveillance côtière. Le tableau ci-après en est une autre illustration.

L'ensemble des droits et taxes liquidés sur le carburant pour l'année 1997 entière nous donnait 81 705 308 207 francs guinéens. Pour le seul premier semestre de l'année 1998, nous avons pu percevoir 50 172 815 249 francs guinéens. Ces chiffres sont suffisamment éloquents.

La Guinée mène une lutte difficile contre le coulage pétrolier depuis les années 1980 avec l'appui d'une part, des Etats-Unis d'Amérique qui lui ont fait don de quatre vedettes : le P328 et le P35, qui ont opéré dans l'affaire *Saiga*, le P300 et le P30 et un dock flottant; d'autre part, des sociétés pétrolières : Elf, Total et Shell, victimes de la contrebande pétrolière en mer.

La diversité des soutiens à l'action du Gouvernement de la République de Guinée montre à suffisance le danger pour les économies des Etats en développement de cette forme moderne de la piraterie maritime qu'est le coulage pétrolier. Et pourtant, à l'instar des sociétés pétrolières citées plus haut et de la société Mobil Oil qui a démarré ses activités en 1997, l'armateur du navire *Saiga* aurait bien pu demander à constituer une société de distribution pétrolière en Guinée, pays ayant résolument opté pour l'économie libérale depuis

1984. Ainsi, par les impôts et taxes qu'il paierait à l'Etat, par les emplois qu'il créerait, et donc les revenus qu'il distribuerait, l'armateur du navire *Saiga* apporterait sa modeste contribution au développement de la Guinée.

Aujourd'hui, la Guinée reproche au navire *Saiga* la violation des articles premier et suivants de la loi 007 du 15 mars 1994 portant répression de la fraude sur l'importation, le transport, le stockage et la vente de carburant en République de Guinée par toute personne physique ou morale non légalement autorisée. Les peines prononcées par les juridictions guinéennes conformément à l'article 8 de la loi précitée ne sont pas plus sévères que celles prévues par les articles 316 du code des douanes guinéen et 309 du code des douanes sénégalais. Ces deux codes prévoient à leurs articles respectifs précités la confiscation de l'objet de fraude, la confiscation des moyens de transport, la confiscation des objets servant à masquer la fraude et une amende égale au quadruple de la valeur des objets confisqués.

Dans l'esprit et la lettre de la loi du 15 mars 1994, les activités d'importation, de transport, de stockage, de vente ou distribution de carburant peuvent s'exercer cumulativement ou de façon autonome; dans le cas d'espèce, il est reproché au navire *Saiga* la vente illégale de carburant en République de Guinée, en considération par ailleurs du fait que Conakry n'était pas sa destination. Ces griefs sont fondés dans l'espace eu égard aux unités de mesures des distances en mer admises en Guinée qui sont : le mille marin et l'encablure. Un mille marin égale 10 encablures égale 1 852 mètres. Ce qui veut dire que l'encablure est égale à 185,2 mètres. Ceci est tout à fait conforme à la bordure de la carte n° 31056-G éditée en 1980.

Monsieur le Président, Messieurs les Juges, pour revenir à un autre aspect plus technique du dossier et conformément à la Convention de 1982 et aux règles de procédure de votre juridiction, la République de Guinée est opposée à l'Etat du pavillon, l'Etat de Saint-Vincent-et-les-Grenadines. Mais la réalité est tout autre : l'adversaire de la Guinée dans la présente instance, c'est bien la communauté des armateurs dont les tankers sillonnent les mers de la planète. A preuve, la campagne de dénigrement organisée dans la presse américaine contre notre pays. Seule la réaction diligente et appropriée de nos représentations diplomatiques à Washington et New York, sur la base des informations à elles transmises, a permis de mettre un terme à la campagne d'intoxication et de désinformation.

Relativement à la qualité des parties, permettez-moi de rappeler les observations pertinentes de la Guinée sur la nationalité du navire *Saiga*. Il a été à cet effet démontré : premièrement, le certificat provisoire d'enregistrement était venu à expiration le 12 septembre 1997, soit plus d'un mois avant l'arraisonnement du navire; deuxièmement, le certificat définitif d'enregistrement a été délivré le 28 novembre 1997, soit un mois après les faits.

Le certificat définitif d'enregistrement n'est délivré qu'à la suite de la production de certains documents au cours de la période de validité du certificat provisoire. La non-délivrance du certificat définitif au cours de cette période de validité du certificat provisoire entraîne la perte du droit aux effets de l'enregistrement provisoire. Ces effets ne pouvaient subsister au-delà du 12 septembre 1997. En délivrant le certificat définitif le 28 novembre 1997, l'Etat de Saint-Vincent-et-les-Grenadines a voulu réparer l'irréparable. Les mentions du certificat provisoire reproduisant les mentions du registre d'enregistrement, les effets de celles-ci ne sauraient contredire ceux du certificat provisoire.

En somme, la nationalité du *Saiga* n'est pas établie au moment des faits; elle est encore moins effective puisque l'armateur est chypriote et le gestionnaire écossais. Il est donc évident que le demandeur est irrecevable en son action pour défaut de qualité à agir.

Dans son intervention devant votre haute juridiction, mon honorable collègue, M. Carl Joseph de Saint-Vincent-et-les-Grenadines, s'est longuement attardé sur les préjudices prétendument subis et dont il sollicite réparation. Qu'il me soit permis ici d'indiquer que pour

ouvrir droit à réparation, le préjudice doit être établi à la charge d'une personne. A cet égard, il convient d'observer, en l'espèce, que premièrement, le préjudice moral tiré d'un dommage causé à un national n'est pas prouvé, le lien de nationalité faisant défaut au moment des faits.

Deuxièmement, quant au préjudice causé au navire, la démonstration faite ici à l'audience laisse pour le moins perplexe. Il fallait, pour arriver à cette fin que les avocats guinéens du navire *Saiga* fissent organiser un constat contradictoire, par un huissier choisi par eux ou désigné par un juge, en présence du capitaine du navire, de la douane et de la marine guinéennes. A défaut d'un tel constat sur le terrain, le montage organisé à partir de Dakar, en l'absence des autorités guinéennes, ne peut prospérer. Les photographies projetées dans cette salle sont nulles et de nul effet.

Troisièmement, les observations ci-dessus sont applicables aux témoins blessés qui ont déposé à la barre. A défaut de s'adresser aux hôpitaux publics, les responsables du *Saiga* avaient le loisir de faire faire les constats médicaux par des médecins privés de Conakry.

Monsieur le Président, Messieurs les Juges, la Guinée est un Etat côtier qui tire une grande partie de ses ressources internes du commerce maritime. A ce titre, elle est soucieuse de respecter ses engagements internationaux. C'est pourquoi elle a comparu et comparait encore aujourd'hui devant votre juridiction. C'est pourquoi dès que les conditions de l'exécution de l'arrêt du 4 décembre 1997 ont été réunies, notamment la rédaction de la caution bancaire du Crédit Suisse dans une forme acceptable par toutes les parties, mon pays s'est exécuté en libérant le navire *Saiga*.

Aujourd'hui encore, la Guinée est abusivement attrait devant votre juridiction. En effet, après avoir constitué avocats, à savoir : M^e Ahmadou Tidiane Kaba, avocat bâtonnier de l'ordre des avocats de Guinée, M^e Richard Bangoura, M^e Alpha Bacar Barry, tous avocats au barreau de Conakry, et M^e Yérin Thiam, ici présent, qui s'était rendu à l'audience à Conakry mais n'a pu plaider, la Convention d'entraide judiciaire entre la Guinée et le Sénégal ne prévoyant pas la réciprocité en matière d'assistance des avocats.

Après avoir défendu sa cause devant le tribunal de première instance de Conakry puis devant la cour d'appel de Conakry, le capitaine du *Saiga* s'est abstenu de saisir la cour suprême aux fins d'appréciation de la légalité de l'arrêt de la cour d'appel de Conakry. En effet, conformément à l'article 87 de la loi organique L/91/008 du 23 décembre 1991 portant attributions, organisation et fonctionnement de la cour suprême de Guinée, il avait un délai de six jours après le prononcé de l'arrêt contradictoire pour se pourvoir en cassation. Par cette voie de recours, le capitaine du *Saiga* avait la possibilité d'obtenir la cassation de l'arrêt si sa requête était fondée, mais surtout il pouvait, avant la décision au fond de la cour suprême, demander un sursis à l'exécution de l'arrêt en remplissant les conditions de l'article 78 de la loi précitée sur la cour suprême.

S'agissant de l'armateur, il faut noter qu'il était absent au procès du capitaine. Par conséquent, eu égard à la confiscation du navire, la signification de l'arrêt lui ouvre droit à l'exercice du pourvoi en cassation conformément à l'article 87 précité. La signification ne lui étant pas encore faite, l'armateur est toujours en droit d'user du pourvoi en cassation devant la cour suprême. Le propriétaire de la cargaison, étant dans la même situation juridique que l'armateur, bénéficie aujourd'hui encore de la même voie de recours.

Contrairement aux allégations de M^e Thiam, l'article 300 du code des douanes institue non pas un système d'irresponsabilité administrative, mais plutôt un système de responsabilité de l'administration du fait de ses agents, en l'occurrence les douaniers et les marins. C'est dire que les agents de l'équipage qui ont des prétentions relativement à des dommages subis ont le droit d'engager devant les tribunaux guinéens la responsabilité de l'Etat du fait de ses agents.

Au total, la Guinée dispose bien d'un système légal de réparation que toutes les parties dans la présente cause peuvent utiliser. Il est ainsi clairement démontré que les voies

de recours internes n'étaient pas encore épuisées dans l'affaire *Saiga*. Certaines n'ont même pas été engagées. En réalité, telle n'était pas l'intention des responsables du *Saiga*. L'objectif recherché était, à travers les médias, de ternir l'image de la Guinée dans les milieux du transport maritime international. Et pourtant, même après l'arrêt de la cour d'appel de Conakry, la transaction qui n'avait pu avoir lieu avant le procès restait et reste encore toujours possible conformément à l'article 251 du code des douanes.

La transaction est un mode de règlement légal qui peut intervenir à tout instant à l'occasion d'un litige. Elle n'est pas propre à la législation guinéenne comme l'atteste l'article 248 du code des douanes du Sénégal.

Monsieur le Président, Messieurs les Juges, je me souviens encore de ces menaces à peine voilées entendues à Conakry : « Si nous n'avons pas gain de cause, nous vous traînerons ailleurs ». Ailleurs, c'est bien aujourd'hui ici devant votre juridiction, le Tribunal international du droit de la mer, une saisine accompagnée d'une campagne dans la presse américaine, comme indiqué plus haut.

En somme, que demande aujourd'hui l'Etat de Saint-Vincent-et-les-Grenadines au Tribunal, en contrepartie des droits versés par les grands armateurs du monde qui y vont uniquement pour enregistrer leurs navires ? Un arrêt qui sera le moyen d'étouffer les économies fragiles des Etats côtiers en développement car votre décision fera jurisprudence. Un arrêt qui va asphyxier nos populations, productrices de matières premières, durement éprouvées par la variation des cours mondiaux. Dans cette affaire, s'il y a une victime, ce n'est certainement pas l'Etat de Saint-Vincent mais bien la République de Guinée, qui contrairement à M^e Thiam n'a pas le temps d'ironiser sur son sort parce que, du fait de la contrebande, la Guinée perd des recettes. Du fait de la contrebande, la Guinée pleure aujourd'hui deux de ses agents jetés à la mer il y a quelques mois et dont les corps n'ont pas été retrouvés.

Monsieur le Président, Messieurs les Juges, la République de Guinée est sereine et fait confiance au Tribunal pour que justice soit rendue.

C'est au bénéfice de ces remarques que je sollicite qu'il vous plaise de m'autoriser à laisser le micro aux conseils de mon pays pour leurs plaidoiries. Je vous remercie.

The President:

Mr. von Brevern, please.

STATEMENT OF MR. VON BREVERN
AGENT OF GUINEA
[PV.99/18, E, p. 8–13]

Mr. von Brevern:

Mr. President, Honourable Judges, may I present my paper on the right to contest the admissibility and on one aspect of the admissibility, namely the question of provisional registration.

The present dispute concerning the arrest and detention of the *M/V Saiga* was instituted by the applicant State on 22 December 1997. Having undergone the prompt-release proceeding pursuant to article 292 of the Convention, Saint Vincent and the Grenadines instituted arbitration proceedings on 22 December 1997. These proceedings were based on article 287, paragraph 3, of the Convention and commenced with provisional-measures proceedings before this Tribunal, pursuant to article 290, paragraph 5, of the Convention. At the same time, the first steps to constitute an arbitral tribunal were being undertaken.

Shortly before the opening of the provisional-measures hearings, the parties transferred the dispute on the merits from the arbitral tribunal, yet to be constituted, to this Tribunal. The underlying Exchange of Letters that we have referred to as the 1998 Agreement is now interpreted by the applicant State to have excluded the possibility for Guinea to raise objections to the admissibility of the claims.

Guinea submits that the interpretation by the Applicant is wrong. She has given sufficient explanation concerning her interpretation of the phrase "in a single phase dealing with all aspects of the merits and the objection to the jurisdiction". It is now up to you, Honourable Judges, to decide upon this point. Yet I would like to make some remarks in support of the Guinean interpretation, in particular taking into account what Mr. Howe said two days ago.

In accordance with article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, any interpretation of the 1998 Agreement should be done in good faith. This means that a reasonable person should be able to accept the result of the interpretation as fair and equitable.

No reasonable person could assume that Guinea waived any objection to the admissibility of the claims. Had the parties not concluded the 1998 Agreement, no dispute would have arisen with respect to the wording of its paragraph 2. Had the parties not concluded the 1998 Agreement, no dispute would have arisen with regard to any time limits for the filing of preliminary objections. Had the parties not concluded the 1998 Agreement, Guinea, as a State Party to the Convention without having made a declaration concerning the choice of judicial procedure, would have been deemed to have accepted arbitration pursuant to article 287, paragraph 3, of the Convention.

Mr. Howe tried to explain what the Guinean motivation to waive objections to the admissibility might have been. He drew the conclusion that Guinea necessarily wanted to reach a judgment of this esteemed Tribunal on the ultimate merits in order to prove to the world that she acted in conformity with international law to deter vessels from bunkering off the Guinean coast and to be able to collect the US\$ 400,000 under the bank guarantee. Guinea invites this Tribunal not to follow this reasoning. Apart from the fact that it has always been the Guinean position that the payment of the US\$ 400,000 was dependent on a final decision by a Guinean court, Mr. Howe's interpretation fails to take into account that Guinea did not voluntarily enter into judicial proceedings concerning the present dispute.

It is one of the novelties that the Convention introduces to public international law that it entails compulsory judicial proceedings with respect to disputes concerning the interpretation and application of the Convention. As has been indicated by, for example,

Captain Laszlo Merenyi, Guinea would have preferred to settle the dispute concerning the *M/V Saiga* on a non-judicial basis in accordance with article 251 of the Guinean Customs Code. It is primarily for the compulsory dispute settlement mechanism of the Convention that Guinea appeared as the Respondent before this Tribunal.

Of course, this does not mean that Guinea would not like to show to the international community that she acted in conformity with international law, but this does not mean that Guinea waived any objections to the admissibility of the claims. As Mr. Howe has rightly observed in his first statement on the question, the Guinean objections concern all of the claims advanced. In other words, they are an important and essential part of the Guinean argumentation. In that regard, it is contradictory that Mr. Howe referred to them in his second statement as "some legal technicality", the raising of which would have been precluded.

Guinea submits that a reasonable person would not interpret paragraph 2 of the 1998 Agreement as precluding the raising of objections to admissibility. It is reasonable to assume a waiver of any objections to the jurisdiction of this Tribunal that have not been expressly mentioned, but it is unreasonable to assume the waiver of the fundamental right of the Respondent to challenge the admissibility of material claims brought against it.

That Guinea had not already raised the objections in the prompt-release proceedings or at an earlier stage of the provisional-measures proceedings relates to the fact that these proceedings do not constitute the merits of the case, within the framework of which the objections to admissibility of the claims were intended to be treated. As is also indicated by the discussion concerning the non-exhaustive character of preliminary objections, Guinea has a procedural right to raise her objections in the proceedings on the merits. This is, of course, notwithstanding the general procedural requirement that such objections shall be raised as early as possible to avoid unnecessary work and to give the Applicant sufficient opportunity to respond.

I have argued in my opening statement that the Applicant's Counsel's objection to my raising the objection concerning the non-exhaustion of local remedies in the provisional-measures hearings on 24 February 1998 proved that objections to admissibility had not been waived. Mr. Howe stated in response that this was not so because the Applicant's Counsel objected only to the late stage that this objection was made because this was easier to explain than to refer to any complicated interpretation of the 1998 Agreement. I dare say that no complicated interpretations would have occurred only four days after the conclusion of the 1998 Agreement had the parties really precluded something so substantial as a waiver of objections to the admissibility of the claims.

Mr. President, I, as Agent of the Republic of Guinea, negotiated the 1998 Agreement primarily with counsel of the applicant State who is not present in these current hearings. Therefore, I am the person in this court who can report best on the intentions the parties had when concluding the 1998 Agreement. I repeat very clearly before you, Honourable Judges, that I did not waive any objection to the admissibility of the claims, and – I do not have to emphasize this – I did not have the authority to do so.

I submit that the Guinean interpretation could be accepted by a reasonable person as being fair and equitable, whereas any interpretation to the contrary would be made against good faith.

Next, Mr. President, I would like to respond to Dr. Plender's intervention in the afternoon of Thursday, 18 March, in which he addressed the question of the registration of the *M/V Saiga*. Dr. Plender concluded that Vincentian law would be simple and clear on this issue. Nevertheless, he discussed the question of provisional registration for about 20 minutes. I have, since then, gone through his statement several times but I have failed to understand the legal approach of Dr. Plender in respect to provisional certificates under Vincentian law.

It is not my view that the situation under Vincentian law is such that a provisional certificate of registration always and in any case remains valid for up to one year unless it is replaced during that time by a permanent certificate of registry or unless the exceptional provision of article 37 of the Merchant Shipping Act applies.

Dr. Plender started by referring to section 36, paragraph 2, that states that the provisional certificate would have the same effect as an ordinary certificate until the expiry of one year.

Dr. Plender did not expressly mention the expiry date of the Provisional Certificate of the *M/V Saiga*, namely 12 September 1997, when he continued with section 7 of his declaration, stating that: "provision is made for the issuance of two successive certificates, each for six months". In the same section he became even clearer when he said: "If the paperwork has been completed within the first six months, another provisional certificate is issued".

Furthermore, the brochure issued by Saint Vincent and the Grenadines' Maritime Administration states that a provisional certificate is issued for six months and *can* be extended for a further six months. The same applies to registration procedures in other maritime registries, for example all those cited by Dr. Plender where initial registration is provisional, where the registration period commonly covers six months and where that period can be extended. Accordingly, the witness Allan Stewart expressly stated: "You can get another extension of six months".

What is clear from the statements cited by Dr. Plender is that when the provisional registration certificate expires six months after its issuance the Commissioner for Maritime Affairs must step into action. It cannot be stressed strongly enough that this necessity results from the fact that there is no automatic extension by law.

Saint Vincent and the Grenadines obviously does not maintain the point of view that it had put forward in paragraph 24 of the Reply according to which a vessel registered under the flag of Saint Vincent and the Grenadines remains so registered until deleted from the registry. Dr. Plender now deems any kind of activity by the Commissioner for Maritime Affairs as necessary, while at the same time remains unclear on the characteristics of this activity. Whereas he said under No. 7 of his statement that in such a case "another provisional certificate is issued", he contends in all other parts of his speech referring to provisional certificates that the provisional certificate originally issued for six months can be extended for a further six months. In any case, he does not clarify whether a new paper would have to be issued or whether a statement by the Commissioner for Maritime Affairs in the registry would suffice for the extension of another six months.

Dr. Plender avoids mentioning that the Commissioner for Maritime Affairs would have either issued a new provisional certificate or extended the original provisional certificate. One of these two acts, however, would have to be executed by the Commissioner, according not only to the rule in the brochure but also to regulations in other maritime registries as well as according to Allan Stewart's statements. Consequently, we must come to the conclusion that Dr. Plender explained the situation in light of the Merchant Shipping Act of Saint Vincent and the Grenadines and declared thereby that a provisional certificate must either be replaced by another provisional one or have its expiry date extended. Furthermore, we must state that Dr. Plender did not allege that such an act was executed by the Commissioner for Maritime Affairs. It has to be presumed that the Commissioner did not take any action. This is also confirmed by the cross-examination of Captain Orlov recorded in the *procès-verbal* No. 3, p. 7, line 5. From his answer, it becomes evident that he did not receive any information from Seascot as to whether an extension of the Provisional Certificate was granted after its expiry or whether an extension had been requested.

So, instead of producing a letter by the Commissioner for Maritime Affairs that would state the extension of the *M/V Saiga's* Provisional Certificate on 12 September 1997 for another six months or instead of producing a second provisional certificate issued for the *M/V Saiga* as documentary evidence, Dr. Plender cited the letter by the Deputy Commissioner for Maritime Affairs of 1 March 1999, in which she stated that it was "common practice" that owners allowed the validity period of their provisional certificate to lapse for a short period. That is an interesting statement. The person responsible for the registration of vessels in the Saint Vincent registry describes in a letter that will be presented to the International Tribunal that in the Saint Vincentian registry it is regular practice that owners do not care about the expiry date of a provisional certificate. Why did Dr. Plender produce such a letter for the International Tribunal? In my opinion, this is counter-productive to his case. The citation of this statement is obviously intended to give the International Tribunal the impression that the expiry date of a provisional certificate is not to be strictly respected in the Vincentian registry. However, if this were to be the case, then I would say that, in all those cases where owners allowed the validity period of their provisional certificates to lapse, the respective vessels were indeed without valid registration after the expiry date. The same applies to the *M/V Saiga*.

The letter from the Deputy Commissioner for Maritime Affairs of 1 March 1999, however, is also of great interest with respect to the second part of the sentence cited by Dr. Plender. In this second part of the sentence the Deputy Commissioner confirms that, after the expiry of the validity of the provisional certificate, the owner has to obtain either a further provisional certificate or a permanent certificate. The Deputy Commissioner makes it clear that in the *Saiga's* case it was not a further provisional certificate but a Permanent Certificate that was obtained.

By means of documentary evidence, it has been proven that the *M/V Saiga's* Permanent Certificate dates from 28 November 1997. It was exactly the second day of the oral hearing in the prompt-release case when Saint Vincent and the Grenadines produced the Permanent Certificate for the International Tribunal and the parties.

In one of the submissions, Saint Vincent and the Grenadines stated that it was difficult to send the Permanent Certificate on board the *M/V Saiga* because she might have been at sea. If such a fact had indeed been relevant in the case of the *M/V Saiga*, the Permanent Certificate would have shown a date before the arrest of the vessel, namely before 28 October 1997, whereas the delivery of the Certificate might have taken place only later. This, however, is not the case. The Permanent Certificate dates from only one month after the arrest of the *M/V Saiga*. Apparently it was only demanded by the registrar of Saint Vincent and the Grenadines at a time when the problem of validity of the registration of the *M/V Saiga* had arisen in the prompt-release proceedings.

Saint Vincent and the Grenadines produced thereafter confirmations by the Commissioner for Maritime Affairs which were alleged to demonstrate that the original provisional registration of 12 March 1997 was still and continuously effective after the expiry date of validity. From amongst these letters, they produced, for example, an extract from the register dated 24 February 1999 in which the validity of registration was pronounced "permanent". Such effect, however, is limited to the date of issuance of the extract. Consequently, it is made clear by such an extract that the vessel was registered on a permanent basis on and following the date that the register extract was issued. On 12 March 1997, however, the vessel's registration was not permanent, as can be seen from Annex A to the letter of the Deputy Commissioner of 1 March 1999 in which the registry extract of 15 April 1997 is produced and where it is clearly said that this registration was valid only until 12 September 1997. The same applies to the declaration by the Commissioner

for Maritime Affairs of 27 October 1998 produced as Annex 7 in the Reply. He does not confirm in this document that the extension of the registration had been requested.

In this context we must also take into consideration that confirmation and letters signed and issued by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines are not independent documentary evidence. The Commissioner for Maritime Affairs is party to these proceedings. Such confirmations are the only possibility for the Commissioner to support the various parties interested in this case, to overcome the problems raised by the respondent State. The only valid documentary evidence would have been the timely application of Seascot Management to the Saint Vincent and the Grenadines Maritime Administration for a prolongation of the validity of the Provisional Certificate or for the issuance of another provisional certificate. However, such application was not and cannot be produced.

Finally, I should like to reject Dr. Plender's comparison of a vessel's provisional registration certificate with the passport of a natural citizen. Such comparison is not acceptable. The nationality of a natural citizen is acquired by birth. A natural citizen retains the nationality of his State independent of the expiry of his passport. A vessel, however, acquires the nationality of a State only by express application for registration. Such registration can be and will often be changed in the life of a vessel. The registration is a constitutional act by which the nationality of the flag State is granted to the vessel. If this act of registration is limited in its validity, indeed the vessel becomes stateless, which is quite different to the case of a natural citizen. I refer to article 91, paragraph 1, sentence 2, of the Convention which states: "Ships have the nationality of the State whose flag they are entitled to fly."

The entitlement to fly a flag is given by the registrar on condition that the vessel is registered. As in the case of the *Saiga*, the validity of registration was limited to 12 September 1997. Since the validity of that provisional registration had not been extended, the *Saiga* was a vessel without nationality.

As regards the requirements of article 37 of the Merchant Shipping Act, I cannot accept Dr. Plender's statement that the letter of the Deputy Commissioner of 12 March provides the owners of the *Saiga* with "other acceptable evidence that the ship's registration in the country of last registration had been closed".

The Deputy Commissioner, as well as Dr. Plender, failed to explain what the other acceptable evidence was that apparently proved that the registration in the former registry had been closed. There would be no other acceptable evidence besides a deletion certificate of the Maltese register. The fact that Saint Vincent and the Grenadines is not in a position to provide the International Tribunal with such a deletion certificate serves, in my view, as clear evidence that the *M/V Saiga* was not deleted from the Maltese Registry at the time of the arrest. I have no doubt that the International Tribunal will also come to this conclusion, particularly when considering Dr. Plender's explanation for not having produced the deletion certificate when he said that it is unnecessary to trouble the Tribunal with details of her history under a different name and registry.

To conclude, when the *M/V Saiga* was arrested, it was not validly registered in the registry of Saint Vincent and the Grenadines and was, therefore, a vessel without nationality. As has been stated before the International Tribunal, on 28 November 1997, the *M/V Saiga* was validly registered in the Saint Vincent and the Grenadines registry on that very day. From then on, the vessel had the right to fly the Saint Vincentian flag. From then on, the State of Saint Vincent and the Grenadines may be entitled to pursue possible claims that may have arisen concerning the *M/V Saiga* after that date. Consequently, Saint Vincent and the Grenadines cannot pursue any claim for the cargo owner because the confiscation of the cargo had already been terminated before the vessel was permanently registered under the

Saint Vincent registry. Furthermore, Saint Vincent and the Grenadines cannot pursue a claim for the crew members that had already left the *M/V Saiga* on 28 November 1997 including those two crew members who were injured. Furthermore, Saint Vincent and the Grenadines cannot pursue the alleged damages to the vessel since it was not registered in the Vincentian registry at the relevant time. So, under this particular aspect of valid registration, Saint Vincent and the Grenadines could only pursue claims for damages that occurred after 28 November 1997. However, here the other objections as to admissibility apply.

Mr. President, I should like to ask Professor Lagoni to present his paper on further points of admissibility and legal issues.

STATEMENT OF MR. LAGONI
COUNSEL OF SAINT VINCENT AND THE GRENADINES
[PV.99/18, E, p. 13–24]

Mr. Lagoni:

Mr. President, Members of the Tribunal, during the past two weeks we have heard several speeches and many submissions of both parties. A lot of documentary evidence has been presented and six witnesses were examined, cross-examined and re-examined. With Captain Orlov and Lieutenant Sow, this procedure continued over hours. In this speech, which will be my last appearance as Counsel for the Republic of Guinea in this case before the Tribunal, I will not and cannot address all facts and legal issues in detail. Instead, I will focus on certain questions and issues which in our view are important, if not crucial, to decide the case of the *M/V Saiga* on the merits.

Thereby, I shall take into account the list of issues agreed between the parties with the help of your good offices, Mr. President, on 5 February 1999. Some of the issues mentioned there have remained contested between the parties, whereas others lost their significance. Accordingly I will talk on the issue of the admissibility of certain objections against the Saint Vincentian claim, on the applicability of its customs laws by the Republic of Guinea in its customs radius and finally on hot pursuit.

I begin with the admissibility of Guinean objections against certain damage claims brought by Saint Vincent and the Grenadines. The first point I want to make refers to the genuine link between Saint Vincent and the Grenadines and the *Saiga* (article 91, paragraph 1, third sentence, of the Convention). We would like to make it very clear before this Tribunal that the Republic of Guinea recognizes that open shipping registers are institutions of importance in the competition of modern shipping and that the revenues gained from such registers are of relevance for several developing countries. However, here I have to pause to tell my learned colleague, Dr. Plender, what an open register is. It is exactly what it says; that is, a register open to ships, the beneficial ownership of which are not nationals of the registering country. Accordingly, the British, French, German, Italian, American registers and many others are not open registers. In these countries, registration in the national shipping register generally requires that the beneficial owner of the ship is a national of the country. I say "generally" because there are various exceptions for bare-boat charter registration or so-called "second registers". Many open registers, however, require that the owner is a resident, or, as a juridical person, that he is domiciled in the country of registration whereas others, such as the Vincentian register, are satisfied with a registered agent domiciled in the country.

Guinea does not challenge the sovereign decision of any country to establish an open shipping register. Nevertheless, it submits that certain legal requirements, which the Law of the Sea Convention contains for open registers, are not met in the case of a registered agent. I specified in my speech of Thursday, 11 March, in particular the ownership requirement for the genuine link, which follows, in my view, from articles 94, 217 and 235 of the Convention. As I am addressing this point, perhaps I may take the opportunity to remark that the relevant parts of my speech are missing in the uncorrected English verbatim record, PV.99/8, page 15, line 19, whereas they are contained in the French verbatim records on page 19, line 6, to page 23, line 6.³⁵

It has been submitted there and earlier in the proceedings that the flag State shall have jurisdictional and enforcement jurisdiction over the owner or operator of a ship flying his flag, otherwise the flag State cannot fulfil his obligation under the Convention in particular

³⁵ Note by the Registry: The missing passage was inserted and is contained in these minutes.

with respect to environmental matters. In the absence of such jurisdiction, the genuine link is missing, and the respondent State is not required to recognize claims of the flag State.

In his as usual enlightening and inspiring speech of 18 March, Dr. Plender called my view on this point "*Professorenrecht*". I take this as a term of honour, hoping that it will become a German borrowing in the rich English language. It reminds me that the United Kingdom urged the German Reich at the end of the First World War to indicate its industrial goods on export as "Made in Germany". Moreover, Meister Eckhart would certainly not have speculated whether an angel without wings could fly if this great medieval thinker had lived in our times of jet propulsion.

But I shall turn back to our issue. Mr. President, Members of the Tribunal, we are well aware of the far-reaching consequences that your decision on the point of the genuine link might have for international shipping. At any rate, the Republic of Guinea ventures to submit that it is in the interest of all coastal States to strengthen the genuine link in order to improve the protection of the marine environment against pollution from vessels. On the other hand, the implementation of the ownership requirement into the conditions of registration is a small step for a flag State with an open register.

My next point with respect to admissibility relates to the exceptions from the national claims rule. I concede that Guinea has not maintained its argument with respect to claims of the shipowner in relation to the ship. But I have not included the cargo owner, as a look into the English verbatim record PV.99/8 of 11 March 1999 at p. 17, line 10, to which Dr. Plender has referred, can prove. I have only stated in my speech that the protection of foreign cargo owners is, technically speaking, not a case of the application of the exception of foreign seamen. The right of the flag State to exert diplomatic protection over ships flying its flag does not necessarily include a foreign cargo in times of peace. This may be different under the law of warfare and neutrality, but this law is of no relevance in our context.

Therefore, I ask again whether the scope of the flag State's right of diplomatic protection really includes the cargo. Let us imagine a modern container ship of 4,000 containers. The flag State, no doubt, may seize the International Tribunal under article 292 of the Convention if the requirements for prompt release of the vessel including the cargo and the crew are fulfilled. But can this flag State also bring claims on behalf of cargo owners from various countries with whom he never had any connection whatsoever? I am indeed building this case cautiously on questions, because there is no hard and fast law, as yet, which would allow us a simple answer.

As to the foreign seamen, the traditional view of the *duplex ligamen* or double bond, to which Dr. Plender was referring, has become completely fictitious under modern conditions of shipping. Foreign seamen, like foreign workers, are subject to the rules of labour under which they are working. These rules require a certain discipline. But a comparison of their status with armed forces is, under modern working conditions, even in the United Kingdom, which is obviously maintaining its traditions better than other countries, and I mention this with admiration and respect, completely out of time. That foreign seamen and foreign workers are under criminal jurisdiction of the flag State, or respectively of the territorial State, is just confirming the similarities between both groups.

Finally, Dr. Plender has pointed to practical considerations. He infers from my thesis that the number of parties in any proceedings in this Tribunal would be at least as great as the number of nationalities represented on board the vessel. I agree with him that this cannot be right, but for other reasons than he has in mind. I fail to see on which legal basis a home State of a seaman could bring a claim against another State under the Convention before this Tribunal. Article 111, paragraph 8, of the Convention provides a right of compensation for the ship and accordingly a right of diplomatic protection of the flag State, but not of the home States of the seamen.

Turning to my last point of admissibility, the question of the exhaustion of local remedies, I observe with pleasure that in paragraph 31 of his speech of 18 March, Dr. Plender no longer maintains the view that there is no jurisdictional connection between the coastal State and a vessel that is licensed to make use of the coastal State's sovereign rights in the exclusive economic zone. I refer to PV.99/16, p. 19, line 48. On this point we are indeed *ad idem*. The common ground ends, however, when it comes to the reason for this jurisdictional connection. Unless the Tribunal decides otherwise, the Republic of Guinea maintains that the prohibition of bunkering is not an exercise of a sovereign right. Instead, it is an exercise of coastal State's jurisdiction which is [implied] but not expressly set forth in the Convention.

Notwithstanding this, the jurisdictional connection comes into existence at the moment when the foreign ship voluntarily enters the customs radius in order to supply fishing vessels with gas oil in this zone. This could easily be shown by an example. A ship which is calling at a port in distress does not establish a jurisdictional connection with the port State. But the *Saiga* came voluntarily and intentionally into the customs radius in order to conduct its bunkering business there.

Dr. Plender also pointed to the fact that the local remedies available in the respondent State must be effective. I venture to say that in times of peace, the local remedies in a State nowadays must be presumed as being effective. Saint Vincent and the Grenadines has failed to specify why Guinean remedies should not be effective. Nevertheless, His Excellency Mr. Togba, the Minister of Justice of the Republic of Guinea, has explained this morning the local remedies available for the different claims within Guinea, and that they are effective.

In concluding my remarks on the admissibility, I submit that the local remedies have not been exhausted in accordance with article 295 of the Convention. For this reason, and for the reasons set forth before, the respective claims of Saint Vincent and the Grenadines are not admissible.

Mr. President, Members of the Tribunal, in the case that the Tribunal will nevertheless decide that claims advanced by Saint Vincent and the Grenadines are partly or even in total admissible, I will turn now to the second main issue of this dispute. Here I will address the question of the applicability of Guinean customs laws to its customs radius beyond its territorial sea.

As to the question whether or not the Republic of Guinea applies its customs laws in the customs radius in order to prohibit offshore bunkering of fishing vessels beyond its territorial sea, His Excellency, the Minister of Justice of the Republic of Guinea, has again set forth in his statement this morning that it does, and how it does. I will dwell on a few aspects of his statement here.

It has to be noted that the fishing vessels supplied by the *Saiga* are pursuant to their fishing licence obliged to purchase oil only from approved service stations. This obligation enabled the Guinean Customs authorities to make sure that only such gas oil is sold to fishing vessels for which customs duties and taxes have been levied. The fact that the fishing vessels have not been convicted as yet for obtaining fuel from the *Saiga* does not exclude their conviction in future. We have heard from Mr. Mamadi Askia Camara in his statement of 16 March, and this is PV.99/15, p. 17, lines 46-50, that a prosecution order has been issued on 21 November 1997. Maintaining that this was not successful by now, we also have to take into consideration certain obstacles which the Guinean authorities are facing in the prosecution of foreign fishing vessels. These vessels are obliged to land their catch only once a year in Guinea. Normally they return to their home ports in Europe after having completed their fishing in the Guinean exclusive economic zone. Hence, their prosecution is difficult for the Guinean authorities.

Besides this, from the point of view of international law, the enforcement measures against the *Saiga* at sea were not merely in execution of criminal prosecution for complicity with the fishing vessels in the violation of their obligations. They were in execution of the prohibition in customs law to supply fishing vessels in the customs radius with fuel. The relevant *ordre de mission* No. 770 of 26 October 1997 of the Customs Authority states as "*Object de la Mission : Recherche et répression de la fraude en mer et à terre*". And I emphasize the word "*répression*". The fact that the conviction of the Master in the criminal court in Conakry rested upon criminal law does not alter the fact that the *Saiga* was arrested not on the basis of Guinean criminal law but of customs law.

I would like to underscore in this context again that the Republic of Guinea has prohibited the unauthorized sale of fuel in article 1 of its law No. [94/007/CTRN]. The heading of the law expressly mentions the word "sale" ("*vente*") which is included in the term "distribution" ("*la distribution*") in article 1.

This prohibition applies to the "Republic of Guinea", as it is clearly stated in article 1 and in the heading of that law. The term "Republic of Guinea", as it is conceived in this law, is not confined to the Guinean territory. It also includes the customs radius. This is the clear and consistent practice of the Guinean administration and the Guinean courts. In short, the Republic of Guinea prohibits the unauthorized sale of fuel, i.e., offshore bunkering, in its customs radius. As I have submitted earlier, this prohibition does not relate to bunkering of ships in transit to other countries but to all fishing vessels with Guinean licences.

It is accordingly of no relevance to the question of whether or not Guinea could and did apply its customs law within its customs radius to the *Saiga* that the ship itself has not entered the Guinean territorial sea. Moreover, the bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of criminal law. The relevant area here is the customs radius. This is a functional zone established by Guinean customs law within the realm of the contiguous zone and a part of the Guinean exclusive economic zone. One can describe it as a limited customs protection zone based on principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.

Against the submissions of Dr. Plender in his speech of 18 March 1999 before this Tribunal, the Republic of Guinea in no way claims to exercise territorial jurisdiction in this zone. Dr. Plender inferred this, *inter alia*, from the fact that Lieutenant Sow spoke several times in his examination as a witness about "our waters" and that other Guinean witnesses apparently used similar descriptions as well. I simply cannot regard this use of circumscription as a national claim to territorial jurisdiction, and I venture to doubt whether the eminent Queen's Counsel seriously does. Especially in the case of Lieutenant Sow who, upon examination, knew quite well the legal difference between the zones of national jurisdiction, this is obviously a matter of the convenience of language.

More important, however, might be the fact that other States have not as yet established a customs radius or a similar zone. But this does not mean that it would be prohibited forever. If the practice of States prevailing at any time excluded the development of the law, we would still have the classical order of the oceans which has existed since Hugo Grotius until 1958. There would be no exclusive economic zone.

This gives me reason to briefly digress. Maître Thiam has repeatedly submitted that Guinea has not established a contiguous zone of 12 nautical miles beyond its territorial sea, and that at least the relevant law has not been communicated to the Secretary-General of the United Nations. We have contested this. Guinea has set forth in its Counter-Memorial (paragraphs 120-121) that it has established a contiguous zone also around the island of Alcatraz. In paragraph 101 of its Rejoinder, it has submitted that "the proclamation of a contiguous zone does not require publication of charts or lists of co-ordinates, neither must

any lists or charts be deposited with the Secretary-General of the United Nations." There is also no obligation to communicate the relevant laws to the Secretary-General under the Law of the Sea Convention.

Mr. President, Members of the Tribunal, from the point of view of international law, several questions have arisen with respect to this prohibition. I will briefly address some of them.

First, does international law require that the Republic of Guinea should have promulgated a verbatim prohibition of offshore bunkering? The answer is clearly in the negative. Article 58, paragraph 3, of the Convention speaks of the laws and regulations adopted by the coastal State and article 111, paragraph 2, correspondingly refers to the applicable laws and regulations of the coastal State. Except for the conservation and management laws for living resources that are mentioned in article 62, it is nowhere said in the Convention that the coastal State shall promulgate specific laws for the EEZ. The reference to regulations shows that the prohibition can even be contained in an ordinance. From this, I conclude that the provision of offshore bunkering must be a clear one, but it does not need to be a verbatim one. It is sufficient that it is clearly contained in the applicable laws, leaving those who are subject to these laws in no doubt. These requirements are fulfilled in the case of the Guinean prohibition of offshore bunkering.

Secondly, does international law require that the law prohibiting offshore bunkering was communicated to the Secretary-General of the United Nations? The answer is also clearly in the negative. It is nowhere stated in the Convention that the relevant laws shall be communicated to the Secretary-General. According to article 62, paragraph 5, the coastal State shall give due notice of conservation and management laws and regulations. The law prohibiting offshore bunkering, however, is not a law on conservation and management of living resources. However, even if one were to apply article 62, paragraph 5, by analogy here, law No. 94/007/CTRN has been promulgated and published in the *Journal Officiel de la République de Guinée*. Notice on the law has also been given to companies trading with fuel in Guinea.

Thirdly, in the light of good faith, international law requires that the *Saiga* also could have taken notice of the prohibition of offshore bunkering in the Guinean customs radius. The knowledge of the prohibition must not be based on detailed information of particular Guinean laws. It is sufficient that, in the light of good faith, those to whom this prohibition relates knew about it. As I have set forth on the basis of documentary and oral evidence, not only the Master of the *Saiga* but also the charterer, who was actually entertaining this offshore business, had knowledge of this prohibition. The regional manager of the charterer, M. Marc Albert Vervaeke, has, according to evidence submitted by Saint Vincent and the Grenadines, stated in a report that "Guinea has another regime than other jurisdictions in the region." I have already referred to this annex in my speech of 15 March.

In addition to this, the applicant State has already noted in its Memorial to the proceedings on prompt release that it was aware of attacks upon other tankers including the following: *Africa*, *Napetco*, *Tourmalet*, *Alfa 1*, *Leona 1*, *Leona 2* (Memorial, 19 June 1998, paragraphs 21-24). He repeated this in his Memorial of 19 June 1998 for the pending proceedings in paragraphs 21-24, as well as in the Reply dated 19 November 1998 in paragraphs 21-22. Nevertheless, Mr. Howe advised his clients that, when offshore bunkering, "they were not doing anything unlawful in accordance with the United Nations Convention on the Law of the Sea which Guinea had ratified." He conceded, however, that AOG was exercising "additional caution" in their bunkering operations after the *Alfa 1* incident of May 1996 (PV.99/16, p. 6, line 7).

If I may proceed with my enumeration, the fourth question relates to a general appraisal of the Guinean prohibition of offshore bunkering in the context of the balance of the

coastal State's interests *versus* the flag State's interests in the exclusive economic zone. We have laid down in our submissions that Guinea's prohibition is of cogent necessity for the protection of important interests of the country, which I think we have again heard this morning from the Guinean Minister of Justice; that it is carefully drafted; that it is proportionate; and that it is related to fishing, although it is not fishing.

In this context, I venture to say also that this Tribunal did not regard offshore bunkering as fishing when it concluded, in paragraph 71 of its Judgment of 4 December 1997 on the prompt-release proceedings, "that for the purpose of the present proceedings, the actions of Guinea can be seen within the framework of article 73 of the Convention". To say that it was not fishing but could be seen as such for the purpose of those proceedings is clearly a legal fiction. Furthermore, Guinea has submitted that the effects of its prohibition are very limited and very specific and, last but not least, that it does not affect navigation.

Therefore, we submit that this prohibition of offshore bunkering in the customs radius does not amount to a residual jurisdiction. It is not a case of the so-called "creeping jurisdiction" of the coastal State. It does not affect the rights of the flag States in the EEZ. It is completely in conformity with the balance of interests underlying the requirement of the EEZ in modern international law.

This brings me to my fifth and last point of international law relating to the applicability of the Guinean prohibition in its customs radius. This point touches upon the possible relevance of article 59 of the Convention in the proceedings before this Tribunal. The Republic of Guinea submits that article 59 of the Convention is not applicable because the jurisdiction which Guinea is claiming over offshore bunkering is based on a customary principle of the protection of its vital interests, which is attributed to the coastal State, as I have shown at an earlier stage before this Tribunal.

Notwithstanding this, Guinea is well aware that the solution of the conflict between the interests of the flag State and the interests of the coastal State shall be in line with the principles mentioned in article 59 of the Convention. Article 59 is merely a codification of the fundamental conception according to which equity is part and parcel of general international law, as Judge Jessup said in the 1969 *Continental Shelf* cases. Taking into account that, on the one hand, the prohibition of offshore bunkering does not affect the freedom of navigation in the EEZ and, on the other hand, that the coastal State has a cogent interest in protecting its public interest against unjustified offshore bunkering in the EEZ, any equitable solution ought to take Guinea's prevailing interests into consideration.

Moreover, if one looks also to the interests of other participants, in particular to the economic interest of the *Saiga* in offshore bunkering, one has to take into consideration that bunkering within the EEZ is indirectly linked to fisheries. Without the fishing vessels operating in the EEZ, the *Saiga* could not achieve its aim to be a mobile bunker station in that zone. From an economic point of view, the fishing vessels in the EEZ form a particular market for offshore bunkering. The *Saiga* took advantage of this market, but these fishing activities rest upon the coastal State's sovereign rights over the living resources in the EEZ. Therefore, the public interest of the coastal State prevails also over the economic interest of the bunkering industry in the EEZ.

In conclusion, the Republic of Guinea submits that it had applied its relevant customs laws prohibiting offshore bunkering in its customs radius on the *Saiga* in conformity with international law.

Mr. President, Members of the Tribunal, the next point in my speech is the question of hot pursuit. Having realized that the Agent and Counsel of Saint Vincent and the Grenadines have not referred in their concluding speeches to the question of the signals given to the *Saiga* when the pursuit was commenced, I will leave this question out here and refer you kindly to what was said earlier on this point by us.

Instead, I will focus on the issue of whether the pursuit was begun when the *Saiga* was still in the Guinean EEZ on the morning of 28 October 1997. We have submitted two lines of evidence for the fact that the ship was still in the Guinean waters, if I may use that general description without any further allusions, when it was discovered by Lieutenant Sow on the Guinean patrol boat P328.

The first is a method of calculation on the basis of the *Saiga's* log book. The value of this log book is documentary evidence and the reliability of the entries into it has at no time been contested between the parties. On 28 October 1997 at 0000 hours the *Saiga* was, according to her log book, at the position 09°27.5'N and 15°26.5'W. At 4 o'clock on the same morning she was at the position 09°02.7'N and 15°02.6'W. The distance between both positions is 35 nautical miles. Accordingly, the *Saiga's* speed over ground during these four hours was 8.5 knots – 35 nautical miles divided by 4 is 8.5. The *Saiga's* position at 4 o'clock was 0.5 nautical miles or 6 cables south of the boundary between the exclusive economic zone of Guinea and Sierra Leone. The boundary line is at 09°3'18"N, which corresponds to 09°03.33'N. If the ship sails 8.5 miles per hour over ground, it has crossed the boundary between 0355 and 0356 hours on the morning of 28 October 1997. Therefore, this was still north of the boundary within the exclusive economic zone of Guinea when she was discovered at 0350 hours.

This calculation upon the basis of the log book is in conformity with the evidence given by Lieutenant Sow. He stated in the cross-examination by Maître Thiam that he discovered the *Saiga* on 28 October 1997 at 0350 hours at a distance of 44.5 nautical miles, or 445 cables – in French one should say "*encablures internationales*" – in the direction of 205° (English PV.99/13, p. 22, lines 5-49). The measurement of the distance by way of radar is very precise. He saw, with the help of the radio direction finder, in this direction on the radar only one big target. That this target must have been the *Saiga* became clear when the *Saiga* started answering the fishing vessels by radio at 0350 hours, giving the fishing boat *Poseidon I* the new meeting point at 09°00'N and 15°00'W (English PV.99/12, p. 20, lines 43-50 and p. 24, lines 1-14).

It is understandable from their point of view that legal counsel for the applicant State tried to shake this clear, precise and in all respects convincing evidence of Lieutenant Sow. I dare wonder, however, whether the methods chosen by Maître Thiam to contest Lieutenant Sow's credibility are appropriate before an International Tribunal. Yet I am not surprised that Maître Thiam's attempts were in vain. His line of reasoning suffers from misunderstandings and miscalculations. In order to show this, I shall briefly browse through his appraisal of the evidence given on 19 March.

Turning first to the *ordre de mission* No. 770 of 26 October 1997, to which he refers in the English verbatim record No. 17, p. 4. The fact that the *Saiga* was not yet in the Guinean EEZ on 26 October 1997 is of no relevance because we have set forth that the Guinean Customs administration had monitored the ship since she had left Dakar. The general reference to the purpose of the *ordre de mission* and the reason not to mention the *Saiga* in this mission order has been convincingly explained by Guinea as security considerations. We have learned, and this was confirmed by the telex communication between ABS and Captain Orlov warning him about patrol boats leaving Conakry, that obviously "walls have ears" in Conakry, to use at this stage a German saying.

To turn to another example of unfounded conclusions drawn by Maître Thiam, I will mention the matter of the log book here. Lieutenant Sow explained that the big patrol boat P328 used "board sheets" instead of a log book. Maître Thiam assailed him in the English PV, No. 17, p. 6, line 7, that the Guinean Navy would be the only navy in the world which does not use a log book on the boat, which is "one of the biggest that they have". The Guinean Navy has much bigger ships; for example, two corvettes with a length of 75 metres

armed with 76 mm guns. One has also to bear in mind that the P328 is used as a patrol boat for various coast guard missions. Its operation is being documented in the reports after the respective mission. As to the small patrol boat, P35, Lieutenant Sow answered to Maître Thiam's question that he did not know whether board notes were used. In any given case, the officer commanding the small launch may or may not use his own notes. The use of board notes is not required in the small launch which is an open speedboat with two outboard engines.

Another example relates to the naval chart No. 31056-G used by Lieutenant Sow on his mission. First of all, it will be stated here that the chart submitted by Guinea is not the original chart used on board P328 during the mission of 27 to 28 October 1997. The chart was handed in by Lieutenant Sow with his original report to the naval administration. Lieutenant Sow at all stages explained that he drew this chart submitted to the Tribunal on the basis of his report and the entries of the log book of the *Saiga* before he came to Hamburg. I myself have characterized this chart as an original document, as compared with the copies of this chart made here in Hamburg, in order to prevent it being changed by Maître Thiam during the cross-examination of Lieutenant Sow, and further to make clear that the copies cannot be used for marine measuring.

Marine charts are always indicated by their numbers, and this is general knowledge of any man who has ever been at sea. Maître Thiam alleged that there was no entry with respect to the courses and speed of the patrol boat. A closer look at the chart could, with all respect, easily convince him that he is in error. The courses and speed are noted on the chart.

Maître Thiam placed great emphasis on the fact that Lieutenant Sow did not indicate the position of the *Saiga* on 27 October 1997 at 2000 hours on the chart. He infers from this conclusions concerning the reliability of Lieutenant Sow and his plotting of the *Saiga's* course, as well as to the documentary value of the chart drawn by Lieutenant Sow. The naval officer gave a simple and convincing answer that he did not need the position of the *Saiga* at 2000 hours for the purpose of his report. The ship was anywhere on her course between her position at 1600 hours and 2400 hours. But he could have included the position at 2000 hours without a problem, of course.

I turn now to the miscalculations I mentioned earlier. Maître Thiam tried to calculate the distance of 445 cables from the position of P328 on 28 October 1997 at 0350 hours in kilometres. Anyone who ever went to sea knows that kilometres are a strange species for seamen in general and navigation officers in particular. The trap into which Maître Thiam stepped in his calculation, however, was the conversion from cables to metres which he undertook. He took the French measure of *encablures* as the basis for his calculation because, as he stated in PV.99/17 of 19 March 1999, p. 10, line 13³⁶: "The Lieutenant did this by talking about *encablures* in French".

We all know that the French *encablure* is longer than the international cable. It is more than 185.2 m. I have always been a great admirer of the influence of the French culture – especially the French language – upon Africa. This influence obviously gives rise to a presumption that also the nautical measures have been adopted from *La Grande Nation*. I regret to say, however, that Maître Thiam, a native of the neighbouring country of Senegal, has become a victim of an error in this respect.

The Guinean Navy uses, for maritime measurement, the international nautical mile of 1,852 metres and the international cable of 185.2 metres. We have heard this again from His Excellency, the Minister of Justice of Guinea, this morning. Accordingly, one cable – and the French term used is in fact *encablure* – is one tenth of a nautical mile. Lieutenant Sow stated this time and again in his examination and cross-examination. This is in complete

³⁶ Note by the Registry: Interpretation of the statement in French.

conformity with the nautical measures used in the Republic of Guinea. Guinea has this in common with other naval States, such as the United Kingdom, the United States, Germany, Russia, the former Soviet Union and many others. The reason for this adoption of the international measure of the cable – the *encablure internationale* – is that the Guinean naval charts are based on hydrographic data supplied by the former Soviet Union. You may see that the official charts used by the Guinean Navy, like our chart 31056-G, are still printed by the *Département Principal de la Navigation et de l'Océanographie* of the *Ministère de la Défense de l'URSS*. Lieutenant Sow has consistently, and under heavy fire from Maître Thiam, confirmed all this.

However, I will not go any further with my analysis of the appraisal that Maître Thiam has given about the examination and cross-examination of Lieutenant Sow. I will also, therefore, not dwell further on such details as the wrong date repeatedly contained in Maître Thiam's speech with respect to the important time of 0350 hours. It was on 28 and not on 27 October 1997 (PV.99/17 of 19 March, p. 10, lines 11 and 33, and p. 11, line 37). I will not do that because everybody can be subject to slight errors, even in a speech which aims at bringing about the truth.

Mr. President, Members of the Tribunal, in conclusion I submit that the Guinean patrol boats commenced the pursuit of the *Saiga* before the ship left the Guinean EEZ and, correspondingly, the customs radius of the Republic of Guinea. As all other conditions of hot pursuit were fulfilled at that time, including the requirement of signals, as we have set forth before this Tribunal on the basis of sufficient evidence, I conclude that the hot pursuit was justified under article 111 of the Law of the Sea Convention.

Before coming to an end, Mr. President, please allow me to make two remarks. The first remark relates to the facts of the *Saiga* case as they have been presented by Saint Vincent and the Grenadines. The eminent lawyers of the applicant State succeeded in presenting their facts of the case in a dramatized way, which is really surprising for a humble professor of international law such as me. We lastly heard from Dr. Plender a version of the *Saiga* saga which came close to one of its ancient Nordic predecessors. It was insinuated that an innocent merchant vessel was illegally arrested in neutral waters by a gang of uncontrolled land dwellers who used excessive force in order to intimidate the crew and rob the valuable cargo. This smells of a kind of "State piracy". No wonder that the local press, always open to sensations of this calibre, gave the headline, a few days ago "*21 Richter und der Seekrieg vor Guinea*" which means, in English, "21 Judges and the naval warfare off Guinea".

Yet, from the point of view of an innocent academic, who is not acquainted with the customs and usages of litigation, the facts of the *Saiga* case wear another garment. The strong and powerful offshore bunkering business is pursuing its business interests in the exclusive economic zone of a small developing country and to the disadvantage of this country. If you, Mr. President, Distinguished Judges, permit this today, tomorrow the offshore business will turn from oil to all kinds of merchandise. Then it will soon become not only an issue of certain small States but of the whole world. We cannot neglect that mankind is moving out to sea. The next step, after navigation, fishing, the exploration and exploitation of non-living resources of the protection of the environment, is tax-free business at sea close to the coast and just outside the territorial sea. To make this very clear here today, I am not against business, neither am I against business at sea. But this has to be regulated and I believe that the foundations of such regulations are already laid down in the Law of the Sea Convention. The Convention provides for the right of the coastal State to regulate this business in order to protect its own essential interests.

Mr. President, Members of the Tribunal, my second remark is of a personal nature. I would simply like to express my high respect to the learned colleagues. I admired Dr. Plender's profound legal thinking; I was enchanted by the elegance of Maître Thiam's

forensic argument; I was impressed by Mr. Howe's great experience in maritime law, and I enjoyed every moment of common work with my esteemed colleagues von Brevern and von Carlowitz, on the Guinean side, even when we were preparing statements until 0350 hours.

Mr. President, Distinguished Judges, a Prince of Denmark was mourning in his great monologue about "the law's delay". After two weeks of hard work, both by the Tribunal and the Agents and Counsel of the parties, I am deeply convinced that you will hand down, within an appropriate time, a just and equitable solution of this challenging case; a case which, no doubt, will be included in the list of great cases of the modern law of the sea. It has been said that the Law of the Sea Convention is a constitution for the oceans. You are the guardians of this constitution. We are in your hands.

I once learnt that before a court, and as a sailor on duty, one never says "thank you", and so I shall simply state that this is the end of my speech.

The President:

Thank you, Professor Lagoni.

Mr. von Brevern, as we agreed, it is clear that we cannot conclude everything by twelve o'clock. My question is whether you believe you can conclude your presentation by one o'clock. If you believe so, then in accordance with our practice, we will have a short break of about ten minutes. You can then resume and that time will be added to the one hour allowed to you. Do you think that you can complete your presentation in one hour? If that is so, we will break for just ten minutes. If you cannot complete in one hour, we will break for two hours and come back at two o'clock.

Mr. von Brevern:

Mr. President, I can conclude in one hour.

The President:

In that case, we will break for ten minutes. You will then resume and will have one hour to complete.

INTERVENTION BY MR. PLENDER
DEPUTY AGENT FOR SAINT VINCENT AND THE GRENADINES
[PV.99/18, E, p. 24]

Mr. Plender:

Mr. President, before we do that, perhaps I may, with great reluctance, speak to the Tribunal once more. There has been presented, this morning, some fresh evidence. I request to know whether, in accordance with article 71, paragraph 4, and 73, I shall be permitted to comment on that evidence. My comments would take some five minutes. However, it may be desirable to find a suitable place for their insertion if I am to be allowed that right.

The President:

Thank you, Mr. Plender. The information that I have been given is information that was referred to in the submissions of parties. I hope you are referring to the information attached to the letter that we have just received?

Mr. Plender:

I am, Mr. President – the fishing licences which we have now seen for the first time this morning and upon which I understand reliance is placed for the assertion that these limit the places in which the vessels in question may obtain their supplies.

The President:

The normal rule which we have followed, and which I have explained, is that the presentations are made by the Applicant and then by the Respondent. There is no provision for further presentations. However, if the Applicant feels that in the circumstances a further submission is necessary, the Tribunal would be willing to receive that submission in writing.

Mr. Plender:

I am grateful, Mr. President. That is a most convenient way of dealing with it, if I may respectfully say so. I am much obliged.

The President:

I am very pleased to hear that. The sitting will be suspended for ten minutes. We will resume at 12.10 p.m. The sitting is suspended.

The Tribunal adjourned at 12.00 noon.

The President:

Yes, Mr. von Brevern, you may proceed now.

STATEMENT OF MR. VON BREVERN
AGENT OF GUINEA
[PV.99/18, E, p. 25–34]

Mr. von Brevern:

Mr. President, Honourable Judges, in my last address on behalf of the Republic of Guinea, I would now like to deal with some facts, and with the problem of damages.

The International Tribunal will not be surprised to hear that the facts of the case as stated by Dr. Plender in his speech of 19 March 1999 under No. 21 do not conform with the facts as experienced and witnessed by the Republic of Guinea. At least some of the facts will be mentioned, and some of the allegations put forward by Dr. Plender will be rejected and corrected in the following.

The *M/V Saiga* had been auctioned in February 1997 by a Cyprus company, Tabona Shipping Company. Tabona had contracted with Seascot in Scotland, a company that had taken over the total management of the vessel including the crewing, equipment and employment of the vessel. It was decided to register the vessel under the flag of Saint Vincent and the Grenadines, and therefore two weeks after the auction the vessel received a Provisional Certificate from Saint Vincent and the Grenadines for half a year. Interestingly enough, three days before the vessel was bought in auction – the auction date is mentioned in all certificates of the Saint Vincent Maritime Administration – Seascot, on behalf of Tabona Shipping Company, chartered out the *M/V Saiga* to the charterer. See Annex 19 of the Reply. The charterer was Lemania Shipping Group Ltd. of Tortola British Virgin Islands. Part of the regulations of the charterparty on p. 1, line 20, reads: The vessel “shall have on board all certificates and documents required”. Line 310 states: “The service speed of the vessel is 10 knots laden”. And finally, according to clause 66, it was agreed that “Any delay, expense and/or fines incurred on account of smuggling to be for Charterer’s account if caused by the Charterer”.

The charterer did not give any instructions to the vessel. It was the oil company Addax Bunkering Services, Geneva, that instructed the vessel and furnished the Captain with the names and positions of the boats that wanted to be supplied with gas oil, as well as the amount of gas oil wanted. Captain Orlov made clear in his cross-examination in PV.99/3, p. 5, line 39, and p. 6, line 25, that he was receiving all his instructions from the operator in Geneva, as can also be seen in Annex 16 of the Memorial of Saint Vincent and the Grenadines

On 24 October 1997, the *Saiga* left the port of Dakar. She had on board more than 5,000 tons of gas oil. When leaving Dakar, she had received orders for only about 400 tons of gas oil. The clients are supplied on average with about 50 tons per client. The *Saiga* had loaded 5,391,435 tons in Dakar. This means that about 100 vessels needed to be found and supplied if all the gas oil on board was to be sold. Including the three vessels supplied on 27 October 1997 in the contiguous zone of Guinea, the *Saiga*, having left Dakar, had so far supplied nine vessels. More than another 90 vessels had to be found for the gas oil owners.

The interest of the Captain of the *Saiga* was therefore exclusively focused on the information as to which further vessels could be supplied, as well as their positions and the amount of gas oil to be supplied.

In the *Saiga*’s supply procedure, both the tanker and the fishing boats had to sign bunker receipts on Addax Bunkering Services letterheads which Addax had provided to Captain Orlov beforehand, see Annex 20 to the Memorial.

The vessel therefore did not receive its instructions from the charterer but from the company that was exclusively interested in the sale of the cargo offshore. It is not clear whether the company Addax Bunkering Services was indeed the owner of the gas oil on

board the *M/V Saiga*. In the documentation, some invoices of other companies are found, under the names of Adryx Oil Company, N.V Curaçao or Oryx Senegal S.A. All these companies seem to be connected to each other. It is not clear who the cargo owner of the gas oil on board the *Saiga* was. Yet, when signing bunker receipts, the Captain performed functions, not on behalf of his employer or the shipowner, but on behalf of the oil trading company.

From what has been said above, it becomes evident that the *M/V Saiga* was a floating warehouse in the form of a petrol station. The very purpose of the *M/V Saiga* was to facilitate the sale of gas oil and to transport the gas oil to the potential buyers. The *Saiga* therefore did not leave the port in transit to another harbour. Having left the port of Dakar and having supplied the first clients, the vessel would drift or be at anchor without the aim of a new destination, merely waiting for new clients. This shows that my esteemed colleague Professor Lagoni is correct in his interpretation of the activity of the *Saiga* being commerce instead of navigation.

Before he left Dakar on 24 October 1997, the Captain of the *M/V Saiga* had been informed by the oil traders Addax Bunkering Services that it was not safe to bunker fishing trawlers in the region of Guinea because there would be a hunt for the tankers (PV.99/3, p. 15, line 31). Captain Orlov continued by saying that he had been informed privately by Mr. Li, a Chinese interpreter working on another tanker, that it was possible that officials of the port of Conakry took part in that hunt (p. 10, line 45).

In the bridge order book of 26 October 1997, the Captain notified the officer in charge: "If you notice any fast moving target coming towards our vessel, call me at once." This was also noted in the bridge order book of 27 October 1997. On the same day at 1842 hours the Captain received a telex from the operator in Geneva, informing him that Guinean port authorities were sending out patrol boats and that he should watch out day and night on radar for fast navy speed boats.

On the same day, the two patrol boats left the Conakry region after they had received the *ordre de mission* on 26 October 1997. This *ordre* was caused by the fact that the *Saiga* was engaged in an unlawful activity in the customs radius and in the contiguous zone of Guinea. Radio communications between the *Saiga* and fishing vessels were already listened into by Guinean authorities as early as 26 October 1997. The Tribunal has already been provided with the radio recordings in the previous proceedings, and you will find the transcript of those radio messages in Annex 9 of the Reply of Saint Vincent and the Grenadines. Due to that communication, Guinea was absolutely and perfectly informed about the exact position of the three fishing vessels to be supplied in the contiguous zone of Guinea.

The small and fast patrol boat was sent ahead alone to the position where the *Saiga* had already been supplying fishing boats, and was ordered to stop the *Saiga*. When it became evident that the *Saiga* had left her former position and was sailing in a westerly direction, the small patrol boat was ordered back because she was not in a position to pursue such a mission on her own without the assistance of the big patrol boat.

The search for the *Saiga* by the patrol boats and her successful identification by radar has been explained at length by Professor Lagoni. I will proceed with the facts starting from the point when the small patrol boat reached the *Saiga*. As has been clearly confirmed by all three witnesses called by Guinea, she was repeatedly asked to stop on channel 16, signalled to stop by siren and blue light, and was rounded twice by the small patrol boat without giving any reaction. The events that then took place in order to stop the vessel like the boarding of the motor vessel, the search for the crew, and finally the immobilization of the vessel, have been stated at length and fully confirmed by the Guinean witnesses. It has been made clear that no excessive force was exercised by the Customs representatives on board the small patrol boat. With respect to the force used, it must always be borne in mind that the situation

in which the Guinean officials found themselves was not comparable to normal police action. It must be understood that it is a very difficult and dangerous task for only three people to stop and search a ship of the size of the *M/V Saiga*. It is not denied by Guinea that the Customs officials made use of their arms. However, this use was justified in view of the behaviour of the crew of the *M/V Saiga*.

Three points are to be made. First, the Master of the *M/V Saiga* was not prepared to stop the ship, although it must have been obvious to him that he was ordered to do so by the Guinean authorities. Secondly, the crew of the *Saiga* behaved in a manner which naturally made the Guinean authorities believe that the situation on board constituted a substantive danger. It must be seen in this light that a shot for the purpose of defence was fired at the bridge. Finally, the immobilization of the *M/V Saiga* was only possible by means of the use of arms. Even Captain Orlov, who was the only member of the crew of the *M/V Saiga* not being in the engine room or somewhere else below deck, could not confirm that he had seen that the Customs officials applied excessive force.

Dr. Plender stated in his concluding remarks that the crew of the *Saiga* was handcuffed, threatened and insulted. Furthermore, he stated that the ship was pillaged, money stolen and goods bonded. This is not only in contradiction to the testimony of the witnesses called by Guinea, it must also be considered that the Applicant's witnesses contradicted themselves with regard to the events concerning the arrest of the *Saiga*. As has been pointed out at an earlier stage, this especially applies to the testimony given by Captain Orlov compared to that of Mr. Niasse.

We contest Dr. Plender's statement made in his speech of 19 March 1999 under number 21 that the Guinean Customs representatives had seen men on the deck. Contrary to his statement, the Customs representatives had given a warning; they did not apply handcuffs; they did not threaten or insult members of the crew. The injuries of two crew members were caused by splintered glass. The Guineans did not pillage the *Saiga*, nor did they steal money or bonded goods. However, they did have to open the locked doors with hammers in order to find crew members. When finally the crew was found, the three vessels sailed to Conakry. There, the two injured crew members were treated in a hospital. There is no reason whatsoever to assume, as Dr. Plender did, that they were not given adequate medical attention. It is not correct that one of the two was refused medical treatment because he was a foreigner.

This is confirmed by the Applicant's witness Mr. Niasse. His statement cannot be misunderstood in regard to the fact that it was he who refused to be treated by Guinean doctors. When asked whether he had received medical treatment in Conakry, he answered "I did not want people touching my eyes because I did not want to be treated in Guinea because I was afraid of losing my sight if that had been the case" (PV.99/5, p. 15, line 35³⁷).

It is correct that guards were put on the vessel in Conakry, but their mission was to safeguard the vessel and the crew. It is not correct that the conditions for the crew were harsh. The vessel was the crew's usual environment. They were able to leave the vessel for a visit to the town of Conakry when accompanied by someone from the Guinean authorities. No-one was beaten by Guinean armed personnel.

Contrary to Dr. Plender's statement, the *procès-verbal* was correct. There is no reason to criticize Mr. Mangué Camara's testimony that he had signed the *procès-verbal* without having read it. By signing it, he only confirmed that he had taken part in the immobilization of the *Saiga*. Incidentally, apart from Mr. Bangoura and Mr. Camara, twelve other men from Guinea who had taken part in the manoeuvre signed the *procès-verbal* to testify that they had

³⁷ Note by the Registry: Interpretation of the statement in French.

taken part. It is not correct to say that the witness Mr. Bangoura acknowledged that important facts in the document did not correspond with reality.

It was in full compliance with Guinean law that the cargo on board the vessel was seized and confiscated. Captain Orlov was subjected to criminal proceedings, represented by his lawyers, in two cases. He was charged with a penalty that was upheld in the second instance in accordance with Guinean law. He voluntarily decided not to call the Court of Cassation. Neither the shipowner nor the cargo owner, both of whom had and still have the right to file a suit for damages against the Guinean Customs according to article 300 of the Guinean Customs Code, chose to exercise these rights, although they were duly represented by excellent lawyers, as, for example, Maître Thiam, whom we all know. None of the crew members, neither the injured ones nor the rest of the crew, took court measures.

Almost immediately after the *Saiga* arrived at Conakry, Captain Merenyi and others were able to board the vessel and talk to the crew. This has been very clearly stated by Captain Merenyi. During the four months that the vessel was harboured in Conakry, Seascot's superintendent and other representatives were often in Conakry on board the vessel. During this long period, however, not a single photograph was taken of the vessel or of any possible damage to the vessel by the superintendent or other representatives of Seascot or by representatives of the owners or by the P&I Club representative. The latter did not even organize a survey of the alleged damage to the vessel.

To conclude, all these facts contribute to a clear picture documenting that the Republic of Guinea cannot be blamed for the allegations made by Dr. Plender.

Mr. President, Members of the Tribunal, I will now deal with the last issue, that of damages. On the premise that the Guinean State was held to have pursued and arrested the *M/V Saiga* in violation of article 111 of the Convention, the applicant State invokes article 111, paragraph 8, of the Convention and claims damages totalling nearly US\$ 5.5 million. The claim includes both damages sought on behalf of individuals and corporations, as well as damages claimed in the Applicant's own right.

Guinea submits that article 111, paragraph 8, of the Convention does not constitute a legal basis for all the claims advanced. Yesterday, Dr. Plender argued that the fact that article 111, paragraph 8, of the Convention mentions the ship as claimant, whereas article 106 of the Convention mentions the flag State as claimant, was a point which was "true but not interesting." This opinion is not shared by Guinea, although it is obvious that in both cases the flag State has to advance the claim before an international tribunal. The relevant point in the different wording of the two articles lies in the fact that article 111, paragraph 8, concerns only the claims that arose to the shipowners as a result of the pursuit or arrest of the vessel. It is apparent from that wording that this article does not provide for the recovery, for example, of moral damages of the flag State in its own right. I will further address the issue of moral damages for States proper below.

Moreover, Guinea contends that the wording of article 111, paragraph 8, of the Convention does not permit the recovery of damages that did not arise from the pursuit or arrest but from subsequent actions like the removal of the cargo. This is a question of causality. Dr. Plender has rightly pointed out that in the present case the arrest of the *M/V Saiga* was a *conditio sine qua non* without which the cargo would not have been removed. This is, of course, true. It is equally true that not every *conditio sine qua non* can be taken into consideration when determining compensation for loss or damage. International arbitral practice often uses the criterion of a direct link between violation and damage in order to determine whether the damage should be compensated. In the present case, the removal of the cargo or the alleged attack on 30 January 1998 were not directly caused by the arrest of the *Saiga*. The cargo was confiscated as an *instrumentum sceleris* by an act entirely distinct from the arrest of the *M/V Saiga*.

Dr. Plender also addressed the issue of mitigation of damages. He argued that the Master could not be held to have contributed to the damages sustained because he would have acted in accordance with international law. At this point, I would like to stress that a Guinean liability pursuant to article 111, paragraph 8, does not necessarily mean that the Master acted in conformity with international law.

However, even if this Tribunal found that the *M/V Saiga* acted in conformity with international law when bunkering the fishing vessels off the Guinean coast, there would be an obligation to mitigate damages. Guinea submits that this case, namely where the injured State has acted in accordance with international law, is the very basic case as regards the principle of mitigation of damages.

The provocation of the Guinean enforcement action lies not only in the fact that the *M/V Saiga* entered the Guinean contiguous and EEZ despite her knowledge that these actions were held to be illegal by Guinea, but also in the fact that the *M/V Saiga* did not stop when signals were given to her to halt and when she saw the Guinean patrol boat P35 approaching. The fact that the *M/V Saiga* activated the automatic pilot and tried to escape from the Guinean inspection contributed severely to the damages. This conduct gave the Guinean Customs authorities no other choice but to use force in order to fulfil their mission. Since the *M/V Saiga* saw that the Guinean authorities were determined to inspect her, it would have been reasonable for her to stop. Had the *M/V Saiga* stopped, she would have avoided any shooting. The *Saiga's* obligation to act reasonably exists independently of the question whether or not the Guinean actions were lawful. This point is, for example, indicated by article 111, paragraph 1, of the Convention, which requires the coastal State to have good reason to believe that the pursued ship has committed a violation. This requirement demonstrates that a hot pursued can be lawful even if the pursued ship has in fact not violated the laws and regulations of the coastal State.

The applicant State has advanced a variety of claims that are challenged by Guinea, partly on the basis of their legal grounds, partly on the basis of insufficient evidence and partly with respect to their quantum.

The claims involve moral damages for the benefit of the Master and the crew mainly for illegal detention, as well as for two crew members for serious personal injuries. Whereas Guinea concedes that the arrest of the *M/V Saiga* might have caused personal injuries, she rejects the case for the detention of the Master and crew. Guinea has pointed out before that no crew member was detained, let alone suffered any damages on the grounds of a *de facto* detention. With respect to the two injured crew members, Guinea doubts the seriousness of the injuries and questions, in particular, the evidence offered by the X-ray photograph without a name or date or anything comparable on it.

Guinea submits that the claimed moral damages are highly excessive and agrees with Dr. Plender that the practice of the United Nations Compensation Commission might provide useful guidelines for the assessment of any moral damages to be awarded.

Similarly, Guinea requests the Tribunal to apply the standards of the United Nations Compensation Commission in admitting and evaluating documentary evidence with respect to the material claims advanced. Guinea submits that only those material damages should be granted that have been proved by full documentary evidence. No award should be made with respect to claimed damages the exact amount of which has either not been ascertained yet – as is the case with respect to any insurance payment – or which cannot exactly be determined, as is the case with respect to the time that public servants of the applicant State devoted to the case or what might have incurred to other vessels flying the flag of Saint Vincent and the Grenadines.

Guinea concedes that a certain amount of damages might have been caused to the vessel as a result of its arrest. Yet, the quantum of these damages is contested. In my

statement of 16 March I described in detail the doubts Guinea has with respect to the evidence offered by the applicant State. At any rate, Guinea submits that no substantial damages to the vessel were caused by her authorities. Substantial damage has occurred to the ballast tank, which seems to have been caused by a crew member of the *M/V Saiga* who forgot to switch off the pump and left the safety valve of the tank closed while the right ballast tank was being filled.

When calculating the material damages incurred to the vessel, it should also be considered that the *M/V Saiga* was built in 1975; in other words, she was a very old tanker. Any award on repair costs should take into account her reasonable market value at the time of the attack and the increase of value incurred by any exchange of old parts for new parts of the vessel.

Finally, Guinea submits that if there should be any award at all for the cargo, it should be made on the basis of the loss of profit claimed by ABS Geneva. As shown by the applicant State to the Tribunal yesterday, the cargo was calculated to have had a value of US\$ 1,164,887. The calculation was detailed and profound and should not be questioned.

The Permanent Court stated in the *Factory at Chorzów* case that any "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed". This statement makes clear that the calculation of what constitutes the equivalent in US dollars of the discharged cargo must be based on the profit which ABS Geneva would have received after deduction of the necessary costs the cargo owners would have to bear to earn the profit. Thus, any extra price for the gas oil which Guinea has recovered due to Guinean taxes levied is irrelevant for the calculation and not to be taken into account.

When turning to moral damages for the applicant State in its own right, Dr. Plender rightly observed that the parties continue to be divided on the issue. He stated that there was no basis in international case law to distinguish between moral damages awarded for direct injuries to a State and moral damages that a State has suffered indirectly in consequence of injuries to its nationals.

In particular, the second *Rainbow Warrior* award would, according to Dr. Plender, constitute a precedent that pecuniary compensation could be calculated to cover both the moral damages sustained by the injured individuals and, at the same time, the moral damages sustained by the State in its own right as a result of the injury to the individual. Yet, this is not so. The award in the *Rainbow Warrior* No. 2 case did not pronounce on compensation, since New Zealand had not requested any. It was in the first *Rainbow Warrior* case where a ruling was made on compensation. Here New Zealand had claimed damages in its own right for an injury suffered directly. This request was initially understood to relate only to material damages. In the course of written proceedings, it then became clear that New Zealand was also seeking moral damages for the public outrage that the sinking of the *Rainbow Warrior* had caused. But New Zealand had explicitly not requested compensation for the moral damages on behalf of the injured individuals and Greenpeace. Thus, the *Rainbow Warrior* case cannot be said to be a precedent for a simultaneous award of both moral damages for direct injuries of the State and moral damages suffered by individuals.

However, the crucial question is not whether an award on moral damages can be made at the same time for direct and indirect State injuries. The crucial question is which moral damages are to be compensated. In the case where an individual is injured, the moral damages suffered are usually compensated by payment to the State of nationality of the individual on behalf of the individual. It is in this context that the Permanent Court said that the State was, in reality, asserting its own right when seeking reparation for loss suffered by its national. Yet only if the injury to the individual also involves an injury to the honour of a State which might be manifested by public outrage, for example, the State might be eligible

for moral damages to be paid to it independent of any moral damages to be paid on behalf of the injured individual.

It is with respect to such moral damages of a State that the arbitral tribunal in the *Rainbow Warrior* No. 2 case made its *obiter dictum*. Similarly, it is in this context that the International Law Commission commented on moral damages to be compensated to a State for gross infringements of its own rights, irrespective of losses to private individuals.

Guinea submits that neither article 111, paragraph 8, of the Convention – as I have explained previously – nor customary international law gives a legal basis for such an award. It is clear that the comment of the International Law Commission, which was cited, falls within the scope of progressive development and not the codification of international law. Article 15 of the Statute of the Commission describes "codification of international law" to cover the "more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine". Guinea submits that neither extensive State practice, compelling judicial precedents nor sufficient and uncontradicted doctrine exist to support the assumption that such claims are warranted by customary international law.

But even if this were not so, no award on moral damages should be granted to the applicant State for a violation of its own rights, independent of injuries to its nationals. Guinea submits that Saint Vincent and the Grenadines has not suffered such injury but has based its claim for moral damages primarily on the injuries sustained by the individuals and companies involved.

There has been no public outrage comparable to the one caused by the sinking of the *Rainbow Warrior*. There were no pictures of the *M/V Saiga* going around the world. There were no international public campaigns in favour of the cause of the *M/V Saiga*. This is because the dispute concerns, at its core, economic interests in the Guinean exclusive economic zone. It concerns the lawfulness of the enforcement of Guinean customs legislation with respect to an activity that has not been expressly regulated by the Convention. Article 59 of the Convention indicates that the balance of rights enjoyed by the coastal State and the international shipping community in the EEZ is a matter of juridical and political delicacy.

Apart from the individuals concerned, the dispute caused concern to the companies involved because their economic interests were endangered. Guinea fails to see how such an essentially commercial dispute should have caused serious public outrage, for example, to the population of Saint Vincent and the Grenadines. This reasoning is supported by the fact that the connection between the *M/V Saiga* and her flag State was so loose as to even allow that the vessel was not validly registered at the relevant time.

Further, the Republic of Guinea contests the allegation that she insulted Saint Vincent and the Grenadines. Guinea regrets, as she has always done, that individuals and companies have suffered damage resulting from the arrest of the *M/V Saiga*. Guinea has explained in detail that there was a certain contribution to these damages *by the M/V Saiga herself*. This Tribunal will soon decide on the appropriate remedies. We shall await the outcome with curiosity.

The Republic of Guinea regrets that the *M/V Saiga* was not released sooner. As has been extensively shown in the pleadings, the prompt-release Judgment of 4 December 1997 left it to the parties to find the concrete steps to be taken for the posting of the bond and the release of the vessel and crew. This procedure was new to both parties and to this Tribunal. It should not be taken as an insult that, for this reason, as well as for other reasons that lay in the sphere of both parties, it might have been that the finding of an appropriate wording and other modalities of the bank guarantee has unfortunately delayed the release of the *M/V Saiga*.

Neither should the issue of the *cédule de citation* addressed to the Master of the *M/V Saiga* on 12 December 1997 be taken as an insult to the applicant State. The Republic of

Guinea has declared several times that the *cédule de citation* did not have the effect to make Saint Vincent and the Grenadines liable for any penalty imposed on the Master. I do not see how this administrative document could justify any award on moral damages for the applicant State on the basis of a direct injury.

The applicant State claims damages with a total of nearly US\$ 5.5 million. Nearly one-third of those damages are assessed on a speculative basis, that is without having an exact scale for their assessment. About four-fifths of these damages are made on behalf of multinational companies making huge profits with bunkering activities off the African coast. The Republic of Guinea, on the other hand, is one of the poorest countries in the world with a per capita income of around US\$ 540 per year. In comparison thereto, Switzerland, the country of the seat of the cargo owner, with a population of nearly the same size as Guinea, has a per capita income of around US\$ 33,519.

Mr. President, Honourable Judges, Maître Thiam pleaded to you yesterday to contribute with your judgment to more justice in the world. The Republic of Guinea embraces this pledge and requests you to dismiss the claims advanced. On an auxiliary basis, Guinea requests you to reduce the quantum of the claims to a reasonable and equitable amount.

Mr. President, Honourable Judges, I have come to the end of the oral presentation of the Republic of Guinea. Before reading out the formal submissions, please allow me to make the following remarks.

Both parties in these proceedings have contributed to the development of the International Law of the Sea by consenting to submit this case to the International Tribunal. In doing so, both parties have enabled the International Tribunal to preside over its second case. We have greatly appreciated the privilege of presenting our case to the Tribunal's Honourable Members and to thereby participate in the creation of a positive profile of the new International Tribunal from the very beginning of its activities. Simultaneously, both parties had the privilege of making the acquaintance of the Tribunal's Members and establishing a high regard for them.

Speaking for the Republic of Guinea, the Tribunal's decision of 4 December 1997 in the prompt-release proceedings is an eminent demonstration of the International Tribunal's careful and conscientious treatment of the party's petitions. The Tribunal's order concluding the proceedings for provisional measures is proof of the Tribunal's wisdom in finding a solution that is acceptable to both parties.

The proceedings on the merits that have now, finally, come to an end cannot be compared in the least with the two previous proceedings since the present proceedings have required outstanding performance on all sides. This does not only apply to the representatives of the parties, but also to the Honourable 21 Judges of the International Tribunal and to the Tribunal's administration, Mr. Chitty and his staff, including the translators and those who prepared the transcripts. It is due to your very able conduct of the proceedings, Mr. President, that both parties have cooperated reciprocally.

Despite the increased efforts that the proceedings required of all participants, the past fortnight was worth it. Participating in the discussion of the multitude of highly interesting problems during the past two weeks was a particular experience. Of course, I also listened with great respect to the arguments of the representatives of Saint Vincent and the Grenadines. I express my thanks, and those of Professor Lagoni, to His Excellency the Minister of Justice for Guinea, and to his delegation. The cooperation with Professor Lagoni will always remain an unforgettable pleasure. Finally, I thank my assistants and Mr. von Carlowitz for their invaluable support.

Perhaps I may now read out the final submissions on behalf of the Republic of Guinea, 20 March 1999. I herewith, on behalf of the Government of the Republic of Guinea,

in accordance with article 75, paragraph 2, of the Rules of the International Tribunal, present the final submissions as follows:

For the reasons given in writing and in oral argument, or any of them, or for any other reason that the International Tribunal deems to be relevant, the Government of the Republic of Guinea asks the International Tribunal to adjudge and declare that:

- (1) the claims of St. Vincent and the Grenadines are dismissed as non-admissible. St. Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

Alternatively, that:

- (2) the actions of the Republic of Guinea did not violate the right of St. Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in Articles 56(2) and 58 and related provisions of UNCLOS;
- (3) Guinean laws can be applied for the purpose of controlling and suppressing the sale of gasoil to fishing vessels in the customs radius ("rayon des douanes") according to Article 34 of the Customs Code of Guinea;
- (4) Guinea did lawfully exercise the right of Hot Pursuit under Article 111 of UNLCOS in respect to the MV "SAIGA" and is not liable to compensate the M/V Saiga according to article 111(8) of UNCLOS;
- (5) the Republic of Guinea has not violated article 292(4) and 296 of UNCLOS;
- (6) The mentioning of St. Vincent and the Grenadines in the "Cédule de Citation" of the Tribunal de Première Instance de Conakry of 12 December 1997 under the heading, "civilement ... responsable à citer" did not violate the rights of St. Vincent and the Grenadines under UNCLOS;
- (7) There is no obligation of the Republic of Guinea to immediately return to St. Vincent and the Grenadines the equivalent in United States Dollars of the discharged gasoil;
- (8) The Republic of Guinea has no obligation to pay damages to St. Vincent and the Grenadines;
- (9) St. Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

Thank you very much, Mr. President.

Closure of the Oral Proceedings

[PV.99/18, E, p. 34–35]

The President:

Thank you, Mr. von Brevern.

That brings us to the end of the presentations and the oral proceedings in the *M/V SAIGA (No. 2) Case*. I should like to take this opportunity to thank the Agents, Counsel and Advisers of both parties for the presentations they have given to the Tribunal over the past two weeks. In particular, the Tribunal appreciates the professional competence and personal courtesies exhibited so consistently by Agents and Counsel on both sides. We have greatly benefited from your expertise and we thank both sides for the very kind words you have expressed to the Tribunal.

I should like to repeat that Saint Vincent and the Grenadines has the permission of the Tribunal to comment in writing on the documents presented to the Tribunal under cover of the letter of 19 March from the Agent of Guinea. Pursuant to the Rules of the Tribunal, the comments of Saint Vincent and the Grenadines on this document will be communicated to Guinea for information and reaction, if any.

The Registrar will now address questions relating to documentation and costs for the parties.

The Registrar:

Thank you, Mr. President.

In conformity with article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts of the presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible but in any case not later than the end of Wednesday, 24 March 1999. In addition, the parties are requested to certify that all the documents they have submitted are true and accurate copies of the originals of those documents. For that purpose, they will be provided with a tentative list of the documents concerned.

The parties are also requested to submit any documentation they wish the Tribunal to take into account when making its determination on the costs of the proceedings not later than the end of Tuesday, 6 April 1999.

The President:

Thank you.

The Tribunal will now withdraw to deliberate and take a decision with regard to the Judgment in this case. The Judgment will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the Judgment. That date is 29 June, but I repeat that that is a tentative date. The Agents will be informed reasonably in advance if there is any change to this schedule, either in advance or by way of postponement.

In accordance with the usual practice, I will ask that the Agents kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that the Tribunal may need in its deliberation of the case prior to the delivery of the Judgment. The sitting is now closed.

(The Tribunal rises at 1.10 p.m.)

The preceding texts are the corrected transcript of the public sittings and constitute, pursuant to article 86 of the Rules of the Tribunal, the authentic minutes of the hearing in the *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*.

Le texte qui précède est le compte rendu corrigé des audiences publiques et constitue, en vertu de l'article 86 du Règlement du Tribunal, le procès-verbal authentique de l'audience en l'*Affaire du navire « SAIGA » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée)*.

17 May 2006
Le 17 mai 2006

Signé/Signed

Le Président
Rüdiger Wolfrum
President

Signé/Signed

Le Greffier
Philippe Gautier
Registrar