

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

1999

Public hearing

held on Monday, 8 March 1999, at 10.00 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

**Uncorrected
Non-corrigé**

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

Saint Vincent and the Grenadines is represented by:

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

as Agent;

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

as Counsel;

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

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

as Advocates.

Guinea is represented by:

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

as Agent;

Mr. Maurice Zogbélémou Togba, Minister of Justice,
of Guinea,

Mr. Rainer Lagoni, Professor at the University of Hamburg and
Director of the Institute for Maritime Law and Law of the Sea, Hamburg,
Germany,

Mr. Nemankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn,
Germany.

as Counsel.

1 **THE CLERK OF THE TRIBUNAL:** The International Tribunal for the Law of the
2 Sea is now in session.

3
4 **THE REGISTRAR:** The Tribunal will today hear argument on the merits of the
5 *M/V SAIGA* (No. 2) case (*Saint Vincent and the Grenadines versus Guinea*). The case
6 has been entered on the Tribunal's List of cases as case number two.

7
8 The Tribunal has learnt with regret the passing away of Mr Bozo Dabinovic
9 who was the agent of Saint Vincent and the Grenadines. In a communication the
10 Prime Minister of Saint Vincent and the Grenadines has informed the Tribunal of the
11 appointment of His Excellency Mr Carlyle D. Dougan, High Commissioner to
12 London for Saint Vincent and the Grenadines, as agent for Saint Vincent and the
13 Grenadines in the *M/V SAIGA* (No. 2) case.

14
15 **THE PRESIDENT:** This public sitting is being held, pursuant to article 26 of the
16 Statute of the Tribunal, for the hearing in the *M/V SAIGA* (No. 2) case.

17
18 On 20 February 1998 the Government of Guinea and the Government of Saint
19 Vincent and the Grenadines, through an exchange of letters, agreed to submit to the
20 International Tribunal for the Law of the Sea the dispute between them concerning
21 *M/V SAIGA*. The two governments agreed that a submission of the dispute to the
22 Tribunal shall be on the following conditions, and I quote:

23
24 "(One) The dispute shall be deemed to have been submitted to the
25 International Tribunal for the Law of the Sea on 22 December 1997.

26
27 "(Two) The written and oral proceedings before the International Tribunal for
28 the Law of the Sea shall comprise a single phase dealing with all aspects of
29 the merits (including damages and costs) and the objection as to jurisdiction
30 raised in the Government of Guinea's Statement of Response dated 30 January
31 1998;

32
33 "(Three) The written and oral proceedings shall follow the timetable set out in
34 the Annex hereto;

35
36 "(Four) The International Tribunal for the Law of the Sea shall address all
37 claims for damages and costs referred to in paragraph 24 of the Notification of
38 22 December 1997 and shall be entitled to make an award on the legal and
39 other costs incurred by the successful party in the proceedings before the
40 International Tribunal."

41
42 By Order of 20 February 1998, the Tribunal accepted the submission of the
43 dispute, pursuant to the Agreement of the two governments and on the terms specified
44 in the Agreement.

45
46 By Order of 23 February 1998, the Tribunal fixed the time limits for the
47 pleadings in the case.

1 Saint Vincent and the Grenadines filed its Memorial on 19 June 1998.

2

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

9

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

14

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

17

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

25

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

30

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

34

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

37

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

41

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

45

46 Then Dr Plender will speak. He will explain why, in our submission, the
47 Guinean objections to jurisdiction and admissibility are without substance. He will
48 submit that if the Court were to entertain the objections at all, it should dismiss them.
49 Dr Plender will then call our witnesses in the following order: first, Captain Orlov,

1 Captain of *The Saiga*; second, Mr Laszlo Merenyi, of the ship's managing agent;
2 third, Mr Naisse, a member of the crew of *The Saiga*; fourth, Mr Alan Stewart, of the
3 ship's managing agents, who will give evidence about the damage sustained by the
4 vessel and the extent of the financial loss.

5
6 There will then be speeches from Maître Thiam on questions of Guinean law
7 and Dr Plender on issues of public international law.

8
9 I shall then formally close the case for Saint Vincent and the Grenadines.

10
11 **THE PRESIDENT:** I thank the Hon. Minister. I now call upon the Agent for
12 Guinea, Mr Harmut von Brevern, to note and introduce the representation of Guinea
13 and to indicate the schedule of submissions to be made on behalf of Guinea.

14
15 **MR VON BREVERN:** Mr President, Hon. Judges, the delegation of the Republic of
16 Guinea will be composed, first of all, of the Ministry of Justice, Mr Maurice
17 Zogbélémou Togba, who has not yet arrived. His flight is scheduled for tomorrow.
18 Next is the Chargé d'Affaires of the Republic of Guinea in Bonn,
19 Mr Namankoumba Kouyate, who is present, then the member of the delegation is
20 Professor Rainer Lagoni, Professor at Hamburg University and Director of the
21 Institute for Maritime Law and Law of the Sea and then myself as Agent.

22
23 It may be, Mr President, that we will have more members of the delegation.
24 The problem is that the Minister of Justice and his colleagues have not yet arrived.
25 I will be informed as soon as they arrive and as to who will share the membership of
26 the delegation and I will inform the Tribunal as soon as possible. That is as to the
27 delegation.

28
29 With respect to the schedule of submissions to be made on behalf of the
30 Republic of Guinea, I will start with an outline of facts, then continue with questions
31 of admissibility: first, admissibility of objections under the 1998 agreement, the
32 agreement between the two parties.

33
34 Then I will address the question of the non-application of article 97
35 (paragraph 1) of the Rules of the Tribunal. The following issue will be the
36 registration of *M/V SAIGA*, then Professor Lagoni will deal with the question of the
37 genuine link, followed by the question of nationality of the claims, and finally the
38 question of exhaustion of local remedies.

39
40 Then we will continue with the legal arguments. First Professor Lagoni will
41 address the exercise of jurisdiction over bunkering activities of *M/V SAIGA* within the
42 contiguous zone and the exclusive economic zone of Guinea, followed by again
43 Professor Lagoni, submissions on laws of Guinea relating to customs, contraband and
44 bunkering in the Guinean economic exclusive zone, then Professor Lagoni will deal
45 with the pursuit and arrest of *M/V SAIGA*. We will hear Professor Lagoni or myself
46 on the question of force used by the Guinean patrol boats in arresting *M/V SAIGA*.
47 Then I will deal with the question of the *cédule de citation* and then I will speak about
48 the non-violation of articles 292 (paragraph 4) and 296 of the Convention in

1 connection with the question of the bank guarantee and release of *M/V SAIGA*.
2 Finally, I will address the subject of damages, followed by our submissions.

3
4 I am not in a position now to tell you exactly whom we will call as witness or
5 expert. I am sorry to say that I have to wait until the arrival of the delegation of
6 Guinea. I will then be informed and will inform you as soon as I am in a position to
7 do so.

8
9 **THE PRESIDENT:** I thank the Agent of Guinea.

10
11 The Tribunal will hear the submissions of the Applicant, Saint Vincent and the
12 Grenadines, at this sitting. This sitting will be interrupted at 12 o'clock and resume at
13 1400 hours.

14
15 The submissions of Saint Vincent and the Grenadines will continue on
16 Tuesday and Wednesday of this week, that is tomorrow and the day after. The
17 Guinea submissions will be heard from Thursday to Saturday. Both parties will have
18 the opportunity to reply to the submissions in a second round of presentations that
19 will take place next week.

20
21 In accordance with article 80 of the Rules of the Tribunal, any witnesses to be
22 called by the parties shall remain out of court until they are requested to testify.

23
24 I now invite The Hon. Carl Joseph to commence the submissions on behalf of
25 Saint Vincent and the Grenadines.

26
27 **MR JOSEPH:** Mr President, Members of the Tribunal, as Attorney General and
28 Minister for Justice of Saint Vincent and the Grenadines, I have the honour of leading
29 the Vincentian delegation. I appear with Dr Richard Plender, Queen's Counsel, senior
30 member of Robinson College at Cambridge University, England; with Maître Thiam,
31 Bâtonnier of the Senegalese Bar, and with Mr Nicholas Howe of Howe & Co,
32 Solicitor of the Supreme Court, London. Following the demise of Mr Dabinovic, who
33 will be sadly missed, the function of agent will be assumed by His Excellency
34 Mr Carlyle Dougan, Queen's Counsel, High Commissioner for Saint Vincent and the
35 Grenadines to the Court of Saint James.

36
37 The Republic of Guinea has the advantage of representation of Mr Hartmut
38 von Brevern, Rechtsanwalt, as Agent, and Professor Lagoni of the University of
39 Hamburg, and others.

40
41 When I last addressed this Tribunal on 23 February 1998, I drew attention to
42 the importance that my government attaches to respect for the law of the sea, in view
43 of our position as a maritime nation. I spoke then of the grave concern that my
44 government attaches to the violations of which we complain. In this address, I
45 propose to identify the damage that Saint Vincent and the Grenadines has sustained
46 and to explain why we claim damages, including moral damages.

1 The Damage is that of the Claimant State

2
3 In one sense, the damage sustained by Saint Vincent and the Grenadines is the
4 conclusion, the end of these proceedings. When the Tribunal comes to consider the
5 sum to be awarded, it may find it convenient to address this issue last of all. But in
6 another sense, the damage sustained by Saint Vincent and the Grenadines is our point
7 of departure. It is the grievance that causes us to come to the Tribunal. It is to secure
8 reparation for its losses, tangible and intangible, that my government advances its
9 claim.

10
11 On the date of arrest on 27 October 1997, as at all material times, *The Saiga*
12 was a vessel of the Vincentian registry. The Tribunal has now seen the extract from
13 the register which confirms this fact. She flew the Vincentian flag. She flew it
14 literally where the laws and customs of the sea so required, and metaphorically at all
15 times. It used to be the fashion for writers to compare a vessel with a floating of the
16 flag state's territory. The simile, obviously, was not perfect but it expressed an
17 essential truth. *The Saiga* and all those aboard her were subject to Vincentian
18 jurisdiction. Sir Robert Jennings and Sir Arthur Watts make the point clearly and
19 emphatically in the latest edition of *Oppenheim's International Law* (9th edition,
20 Vol. 1 page 738, paragraph 487), (section 1, tab 2 of the blue folder containing the
21 position of Saint Vincent and the Grenadines). It is quoted here:

22
23 "a vessel, and persons and things aboard, are subject to the law of the State of
24 the flag, and in general, subject to its exclusive jurisdiction".

25
26 Quite so. It follows that an unlawful invasion of the vessel is an infringement of the
27 rights of the flag state. It may be compared with an invasion of the state's territory. It
28 is a violation of the state's sovereignty. Where the violation is manifest, it must be
29 met by an award of damages. The award of damages must be proportionate to the
30 breach.

31
32 There is another consideration. The owners and crew of a vessel look to the
33 flag state for protection. An unlawful invasion of a vessel is a particularly serious
34 breach of the flag State's jurisdiction when it involves injury to the crew or damage to
35 the vessel or its cargo. Since States exist for the welfare of their people, a violation of
36 a State's sovereignty strikes at its most fundamental interests when it involves
37 personal injury to those who look to the State for protection, or the destruction of the
38 property of those individuals. That is why – to paraphrase the famous words of the
39 Permanent Court in case of the *Mavrommatis* (PCIJ) Series A No 2 (1924) (section 1,
40 tab 3) – a state is, in reality, asserting its own right when it seeks reparation for loss
41 suffered by the crew or owners of the vessel. It asserts its own right to secure, in the
42 person of the crew and the owners, respect for the rules of international law.

43
44 This is not abstract legal theory. It is a matter of practical importance,
45 regularly drawn to the attention of those, like myself, who hold public office. People
46 who are subject to a State's jurisdiction rightly look to the State for protection. If the
47 State cannot protect them - by legal process where necessary – they will either look
48 for protection elsewhere or suffer enduring injustice. In either event, the flag State
49 suffers a loss. Saint Vincent and the Grenadines' loss will be a material loss if the

1 owners of a vessel, finding themselves without protection, take their business to
2 another State, which can secure protection by military or other means. Our loss will
3 be intangible, but nevertheless very great, if individuals under our jurisdiction suffer
4 unlawful physical injury or endure unlawful detention and receive no compensation.
5 That is why the injury to the individual is an injury to the state. They are two sides of
6 one coin.

7
8 The Tribunal will need to consider separately the claims that we advance in
9 respect of material losses and intangible or moral losses.

10 Article 111(8) of the Convention

11
12
13 At a pre-trial hearing last Tuesday, the President directed that the parties
14 should supply to the Tribunal a file containing the authorities on which counsel will
15 rely. The Tribunal will find in our file, and in the section devoted to my opening
16 speech, not only the authorities on which I am to rely but also two items that are
17 central to this case and are supplied for convenience. One is a map of the area in
18 question; the other a copy of extracts from the United Nations Convention on the Law
19 of the Sea.

20
21 When the Tribunal considers our claim for compensation in respect of the
22 losses incurred by the vessel and its crew, it will be guided by paragraph 8 of article
23 111 of that Convention. This provides that where a ship has been stopped or arrested
24 outside the territorial sea in the circumstances which do not justify the exercise of the
25 right of hot pursuit, it shall be compensated for any loss or damage that may have
26 been thereby sustained. The key words are those requiring that there shall be
27 compensation,

28
29 "for any loss or damage that may have been thereby sustained".

30
31 The Convention envisages that *any* loss or damage sustained in consequence of the
32 arrest shall be the subject of compensation; and plainly it envisages that the claim will
33 be advanced by the flag state and not by a natural or legal person.

34
35 As the Tribunal knows, the Republic of Guinea challenges our right to
36 advance claims in respect of the vessel or its crew. Mr Howe and Dr Plender will
37 deal shortly with the legal aspects of that challenge. Let me first make a statement of
38 policy. We assert the right to protect our vessels, and those who serve on board,
39 irrespective of their nationality. We do so because this is consistent with the United
40 Nations Convention, particularly at article 111. We do so because this is consistent
41 with international practice, described in some detail in our Memorial dated 19 June
42 and Reply dated 19 November 1998. We do so because convenience and good sense
43 so require.

44
45 It would be preposterous to assert that a separate claim must be advanced by
46 each of the states of nationality of the owners, charterers and members of the crew. If
47 that were the rule, this Tribunal could expect to be confronted, in this case, with
48 applications from the Ukraine, Senegal, Cyprus, the United Kingdom and Switzerland
49 as well as Saint Vincent and the Grenadines. Most of all, we assert the right to

1 advance a claim in respect of the vessel and foreign crew because justice so requires.
2 In registering the vessel in Saint Vincent and the Grenadines the owners subjected her
3 to our jurisdiction and placed her under our protection. In serving aboard the vessel
4 that flies our flag, the crew placed themselves under our jurisdiction and protection.
5 By doing so, the owners and crew undertook obligations towards Saint Vincent and
6 the Grenadines, which they have fulfilled. In the case of the crew, they have done so
7 with outstanding loyalty. We intend to protect them in return and are not to be denied
8 the right to do so.

9 10 The Claim in Respect of the Vessel

11
12 The claim that we advance in respect of the damage to the vessel has been
13 calculated with care. Following representations from the Guinean Agent, the
14 Vincentian delegation prepared a detailed account, explaining the basis for each cent
15 of the claim. The Tribunal is at liberty to scrutinise the claim; and the respondent
16 State will have the opportunity of putting questions about the claim to
17 Mr Alan Stewart, who has had oversight of the preparation of the accounts. We are
18 confident that the Tribunal will find the claim to be fully justified in general and in
19 detail.

20
21 Consistently with article 111, paragraph 8 of the United Nations Convention,
22 our claim is in respect of the physical damage to the vessel, the loss of hire and the
23 value of the items taken from her. Of the items taken, the most valuable by far was
24 the cargo. The Guinean authorities have not contested our case, which is that the
25 cargo was removed and sold for some US \$3 million. We seek the recovery of that
26 sum, on the principle that the party in breach of the law should not profit from its
27 wrong. We seek recovery of the costs of effecting repairs to the vessel, particularly in
28 consequence of gunfire; the loss of revenue for the period when the vessel was off
29 hire; and items stolen from the vessel, including money and bonded goods.

30 31 The Claim in Respect of the Master and Crew

32
33 We have been equally careful in advancing claims in respect of the master and
34 crew. Since awards of damages for personal injuries and detention involve an
35 exercise in judgment, we have gauged our claim in the light of international practice.
36 In particular, we have taken account of the sums awarded by the Inter-American
37 Court of Human Rights and the European Court of Human Rights; and we have paid
38 particular attention to guidelines set by the United Nations Compensation
39 Commission when making awards of damages to those who suffered in consequence
40 of Iraq's invasion of Kuwait.

41
42 In the case of the master we seek compensation for his detention at the rate of
43 \$250 per day. The rate is rather higher than the rate considered normal in the first
44 decade of this century; but it takes account of inflation and the conditions of his
45 detention, of which the Tribunal will shortly hear. The Guinean submission is that he
46 should receive "moral damages... only": meaning, apparently, no more than a
47 nominal sum. That, we say, is manifestly at variance with international standards and
48 with standards of common humanity.

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

9
10 We make separate claims in respect of the physical injuries suffered by the
11 master and by two members of the crew. The Tribunal has already heard from
12 Mr Kluynev, one of the two crew members who were most seriously injured. He
13 sustained gunshot wounds, including one approximately 8 centimetres long, requiring
14 surgery under general anaesthetic, as well as shrapnel wounds. The Tribunal will
15 shortly hear from a second crew member, Djibril Naisse. He suffered even more
16 serious injuries, has undergone radical surgery and sustained traumatic injuries from
17 which he has not recovered.

18
19 The Republic of Guinea claims that Mr Naisse and his fellows of Senegalese
20 nationality should receive no compensation at all, essentially because they were
21 temporary members of the crew. If that were so, justice and law would part company.
22 We have set out in our Reply the legal considerations that lead us to conclude that we
23 are entitled to advance a claim on behalf of Mr Naisse and the other Senegalese on
24 board the vessel. Let me add a practical consideration. It appears to be the case for
25 the Republic of Guinea that if a flag State can protect foreign members of the crew at
26 all, it can protect only those who are part of the vessel's permanent complement. We
27 resist that suggestion, for practical as well as legal reasons. The suggestion would
28 tend to divide the crew. In some cases, it might even be injurious to good relations
29 between the crew, and discipline. The suggestion is also contrary to principle. We
30 expect the loyalty of all those who serve aboard Vincentian vessels, whether on a
31 permanent or a temporary basis. We assert the right to protect them in return.

32 33 The Claim for Moral Damages

34
35 I turn now to the claim for moral damages: a matter on which the Tribunal has
36 particularly invited us to address oral argument. The case for Saint Vincent and the
37 Grenadines is that the violation of which it complains was particularly serious.
38 Guinean agents violated our jurisdiction over a Vincentian vessel well beyond
39 Guinea's territorial sea. The Guinean action was not justified by hot pursuit. Guinean
40 agents used armed force against an unarmed crew. They fired weapons
41 indiscriminately. They threatened one member of the crew at gunpoint, traumatised
42 another and inflicted serious injuries on two of them. The master and crew were
43 detained *de jure* and *de facto* for a substantial period. A Guinean court even issued a
44 summons directed at the sovereign State which I now represent. The violation was
45 compounded by the subsequent conduct of the Guinean authorities. Despite the
46 Tribunal's Order of 11 March 1998, the Guinean Government has prepared a decree
47 proposing to make it an offence to bunker vessels outside Guinean territorial waters,
48 but within her exclusive economic zone, unless the parties hold a licence. Far from
49 issuing an apology and indicating that it will alter its policy, the Republic of Guinea

1 shows itself determined to assert her authority over merchant vessels well beyond her
2 territorial sea and to compel compliance by force of arms. In these circumstances, we
3 submit that the Guinean violation deserves to be met with an award of substantial
4 moral damages.

5
6 At paragraph 170 of her Rejoinder, the Republic of Guinea contends that no
7 moral damages should be awarded at all, claiming that there is no firm precedent for
8 such an award. It is fair to say that precedents are few. Violations of the kind of
9 which we now complain are uncommon. The arbitral tribunal in the second *Rainbow*
10 *Warrior* case (Section 1, tab 4) observed that there are not many recorded awards of
11 moral damages, because the circumstances giving rise to them occur infrequently. In
12 the arbitral tribunal's words:

13
14 "It is true that such orders are unusual but one explanation of that is that these
15 requests are relatively rare".

16
17 Having said so, the arbitral tribunal proceeded to make an award of moral damages, in
18 view of the gravity of the violation of New Zealand's sovereignty.

19
20 Regrettably, the circumstances of the present case are not wholly
21 unprecedented; and in the light of modern experience, international law clearly
22 provides for the grant of moral damages where such breaches occur. In our
23 memorials, we have drawn attention in particular to the award of moral damages in
24 several cases, including *The I'm Alone* (3 R.I.A.A. (1935) 1609) (Section 1, tab 5) and
25 *Letelier and Moffit* (88 ILR 727 AT 735) (Section 1, tab 6) and that of the *Rainbow*
26 *Warrior* (74 ILR 241 at 274) (Section 1, tab 7). Two of these three cases, like the
27 present case, involved unlawful attacks on an unarmed foreign vessel, outside the
28 defendant State's jurisdiction; and all, like the present case, involved the infliction of
29 injuries on foreign civilians.

30
31 It would be fair to comment that the award of moral damages is a feature of
32 modern international law and particularly of the United Nations era. That being the
33 case, the legal representatives of the Republic of Guinea have been able to locate
34 certain passages, particularly in the older literature, expressing scepticism about such
35 awards. As we have shown in our Reply, however, the overwhelming majority of
36 modern writers acknowledge the availability of moral damages; and those who do so
37 most vigorously include many of the most authoritative publicists. For instance, the
38 late Professor Schwarzenberger wrote (in the third edition of his treatise on
39 *International Law*, Volume 1, at page 664) (Section 1, tab 8):

40
41 "Damages may be awarded in addition to satisfaction, where redress for
42 insulting the national honour of the claiming State is in question".

43
44 In language equally appropriate to this case, Professor Brownlie states (in his new
45 edition of *Principles of Public International Law*, 1998, at page 461) (Section 1,
46 tab 9):

1 "Compensation is paid for a breach of duty which is actionable, without proof
2 of particular items of financial loss, for example ... illegal arrest of a vessel on
3 the high seas".
4

5 In view of the overwhelming preponderance of authority on the point, both judicial
6 and academic, I venture to describe as "plain" the proposition that moral damages
7 may be awarded. The more difficult question is how to assess the amount. In our
8 submission, the sum to be awarded should be greater than that in the *Rainbow*
9 *Warrior* award. We say that because the present case has a number of features which
10 make the violation more serious than in that case. First, the sinking of the *Rainbow*
11 *Warrior* was a single isolated incident. As you have read, however, and as you will
12 hear from witnesses, the attack on *The Saiga* was not isolated. It was part of a
13 pattern.
14

15 Second, in the *Rainbow Warrior* case, the French authorities promptly offered
16 an apology. In the present case, by contrast, the Guinean authorities show every
17 intention of persisting in their conduct and continue to assert their right to do so.
18

19 There is a third feature to which special importance should be attached, when
20 the amount of damage is under consideration. The French action in the *Rainbow*
21 *Warrior* case was not taken for any economic reason. By contrast, the Guinean action
22 in seizing *The Saiga* and its cargo was economically motivated, and at today's date,
23 has yielded a profit to the Respondent State. Unless substantial damages are awarded,
24 she will reap a reward from her actions
25

26 Fourth, in the *Rainbow Warrior* case, the resulting fatality was accidental. In
27 the present case, on the other hand, the Guinean agents know very well that the vessel
28 was manned and that their gunfire might well result in injury. Their mistreatment of
29 the crew was sustained and grave; and on the evidence of the Second Mate,
30 Mr Kluyev it was affected by racial consideration. For all these reasons, and for
31 others which will become apparent in the course of the evidence, we submit that this
32 is an appropriate case for substantial moral damage.
33

34 Conclusion 35

36 In conclusion, Mr. President, Members of the Tribunal, our decision to bring
37 this matter to this forum was not taken lightly. We have felt compelled to do so, by
38 the gravity of the infringements of which we complain, the threat presented by
39 Guinea's action to the freedom of navigation in her area and her proclaimed
40 determination to persevere. Mr. Howe will now address the Tribunal on an aspect of
41 admissibility. Thank you Mr. President, Members of the Tribunal.
42

43 **THE PRESIDENT:** I thank the Honourable Carl Joseph and I invite Mr. Nicolas
44 Howe to continue the submissions on behalf of Saint Vincent and the Grenadines.
45

46 **MR HOWE:** Mr President, Members of the Tribunal, it is my pleasure to appear
47 before you again. My task today is to explain why it is not open to the Republic of
48 Guinea to raise objections to the jurisdiction of the Tribunal or the admissibility of the
49 case.

1
2 Your jurisdiction in this case is based on the exchange of letters dated
3 20 February 1998. For convenience, a copy of the Guinean letter of that date is
4 included in the file of authorities accompanying my speech. By that exchange of
5 letters, and you will find this at Section 2 tab 1, the parties agreed that the Tribunal
6 shall deal in a single phase

7
8 "with all aspects of the merits (including damages and costs) and the objection
9 as to jurisdiction raised in the Government of Guinea's Statement in response
10 dated 30 January 1998."

11
12 It appears that the Republic of Guinea no longer objects to the jurisdiction of the
13 Tribunal. However, she does object to the admissibility of the various claims that
14 form the basis of this case. It is my submission that the Republic of Guinea is
15 precluded from doing so.

16
17 In the first place, the effect of the exchange of letters constituting the
18 agreement to subject the dispute to the Court is to prevent the filing of objections to
19 the admissibility of the case or to the jurisdiction of the Court, except for the
20 objection specifically mentioned by the agreement.

21
22 Secondly, the objections filed by the Republic of Guinea were made after the
23 90 days provided for the making of such objections by article 97(1) of the Rules of
24 the Tribunal. The objections are therefore out of time and the Republic of Guinea is
25 estopped from advancing any such objections which would preclude the Tribunal
26 from dealing with the merits of this case.

27
28 The effect of the Exchange of Letters is to Exclude the Possibility of Advancing
29 Objections to the Admissibility of the Action or to the Tribunal's Jurisdiction

30
31 Mr President, Members of the Tribunal, let me first turn to the effect of the
32 agreement between the parties. By entering into that agreement the parties submitted
33 all aspects of the merits for the decision of the Tribunal. This is clear from the
34 wording of the exchange of letters and from their context. In that agreement, the
35 parties "agreed to submit to the International Tribunal the dispute between the two
36 States relating to the M/V Saiga". What else could this mean but that parties intended
37 that the Tribunal would be competent to adjudicate on the dispute between them?
38 Indeed, the parties went further to provide that the Tribunal will deal with "all aspects
39 of the merits". The language used does not therefore contemplate that one of the
40 parties will later be able to raise arguments so as to preclude the Tribunal from
41 exercising the jurisdiction so conferred. As a matter of fact, the parties were careful
42 to include within their agreement, the one situation in which they contemplated that a
43 party, that party being the Republic of Guinea, might wish to exclude the Court from
44 adjudicating on the dispute. Suffice it to say that the objections subsequently
45 advanced by the Republic of Guinea are not the same as the objection to jurisdiction
46 specifically permitted by the exchange of letters. The objections advanced should
47 therefore be rejected.

48

1 Where parties enter into a special agreement by which they submit a dispute to
2 an international tribunal, it must be presumed that unless they provide otherwise, the
3 parties intend that the Tribunal will adjudicate over the whole of the dispute as
4 submitted to it. Evidently, such an intention usually constitutes the object and
5 purpose of such an agreement. It cannot be lightly presumed that the parties seek to
6 take back with one hand what they have given to the Tribunal with the other. Where
7 the parties seek to leave themselves free to subsequently challenge the jurisdiction of
8 the Tribunal or the admissibility of the claim, they have usually incorporated that
9 right into their original agreement. In fact, Saint Vincent and the Grenadines cannot
10 find any case in which the parties have entered into a special agreement by which
11 they agree to refer a matter of dispute to an international tribunal and where one of the
12 parties has subsequently been allowed to raise an objection to the jurisdiction or
13 admissibility in relation to matters covered within that special agreement.

14
15 As we have shown in our Reply dated 19 November 1998, the ordinary
16 meaning to be given to the terms of exchange of letters, in their context and in the
17 light of their object and purpose is that the International Tribunal is authorised to
18 resolve all aspects of the merits of the dispute between the two States relating to the
19 *M/V SAIGA*. That you will see in Section 2, tab 2. Sir Gerald Fitzmaurice has
20 defined the merits of a case as consisting of

21
22 "all those propositions of fact and law which must be established by a party in
23 order to enable it to obtain a judgment in its favour, *on the assumption that the*
24 *tribunal has jurisdiction to entertain these propositions, and that there is no*
25 *objection to the substantive admissibility of the claim...*"

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

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

37 One of the writers the Republic of Guinea refers to is Sir Gerald Fitzmaurice.
38 I have just quoted the definition Sir Gerald gives to the merits. This is a definition
39 that excludes jurisdictional or admissibility points from the merits. The work of Sir
40 Gerald Fitzmaurice to which the Republic of Guinea refers at paragraph 37 of her
41 Rejoinder is the very same work as that from which I have just read. In fact, the
42 Guinean quotation is extracted from the page immediately following the one in which
43 Sir Gerald offers his definition of the merits. It cannot be supposed that Sir Gerald
44 Fitzmaurice intended to contradict himself, by encompassing issues of admissibility
45 within the definition of merits, in the very page following the one in which he
46 excluded such issues from the definition.

1 What then was Sir Gerald referring to in relation to the *Ambatielos* case? The
2 Tribunal will recall that the issue before the International Court in that case was
3 whether the United Kingdom had an *obligation* to submit a dispute with Greece to
4 arbitration. The Court had first to determine whether it had jurisdiction to determine
5 whether or not the United Kingdom had such an obligation . It decided that issue in
6 the first phase: the jurisdictional phase. Having concluded that it had jurisdiction, the
7 Court turned to the merits. The point at issue on the merits was whether the United
8 Kingdom had to submit the dispute to arbitration. The point being made by
9 Sir Gerald Fitzmaurice was that the International Court's function at the merits phase
10 did not involve a decision on the underlying dispute, which could only be a matter for
11 determination by an arbitral tribunal. Of the two other writers cited by the Republic
12 of Guinea one was making the same point. That is Professor Verzijl (writing in the
13 Netherlands Yearbook of International Law), which you will find in Section 2 tab 4.
14 He points out that Greece did not ask the Court to decide on the underlying dispute
15 between the parties: Greece asked the Court only to determine whether there was an
16 obligation to arbitrate. The other author cited was Professor Brownlie. The
17 Respondents refer to a superseded edition of his textbook, *Principles of Public*
18 *International Law*, which you will find at Section 2 tab 5, where he makes the
19 observation that subsequent practice is an aid to treaty interpretation. That is neither
20 controversial nor relevant.

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

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

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

44 To support her assertion that when submitting "all aspects of merits" to the
45 Tribunal, the parties intended to permit objections to admissibility, Guinea also relies
46 on the words "a single phase". She contends that this expression indicates that the

1 parties were concerned not to split the case into separate elements. On that issue she
2 is correct. The parties did indeed wish to avoid litigation in successive phases. That
3 is not to say that the parties intended to permit objections to admissibility. The
4 exchange of letters itself identifies the elements to be addressed in a single phase.

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

13
14 Contrary to article 97(1) of the Rules of the Tribunal, the objections raised by
15 the Republic of Guinea to the admissibility of the action have not been raised
16 in writing within 90 days from the institution of the proceedings

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

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

25
26 The exchange of letters constituting the basis of the Tribunal's jurisdiction
27 provides that

28
29 "the dispute shall be deemed to have been submitted to the International
30 Tribunal for the Law of the Sea on 22 December 1997"

31
32 For any objections falling within article 97(1) to be valid, it must therefore
33 have been made in writing by 22 March 1998. The first time that the Republic of
34 Guinea filed in writing any objections to the admissibility of the case was in her
35 Counter-Memorial submitted on 16 October 1998. As Saint Vincent and the
36 Grenadines has pointed out in her Reply, the Guinean objection to admissibility
37 would still be out of time, even if the 90-day period were computed from the date of
38 the exchange of letters or from the date of the submission of the Vincentian
39 Memorial.

40
41 The Republic of Guinea nevertheless submits, at paragraph 53 of the
42 Counter-Memorial, and paragraph 42 of the Rejoinder, that:

43
44 "it is for her to decide whether or not objections to the admissibility of the
45 claims should be raised as formal preliminary objections in accordance with
46 article 97 (1) of the Rules."
47

1 She goes on to argue that she has not made objections to the admissibility of
2 the application as a whole but only to the admissibility of certain claims. She argues
3 that it is up to her to choose whether she will seek a decision before any further
4 proceedings on the merits or not. The assumption is that if a decision on the objection
5 is not sought before further proceedings on the merits, the 90-day period is
6 inapplicable.

7
8 One of the difficulties with this argument is that it is based on a false factual
9 premise. The assertion is that there has been no objection to the admissibility of the
10 application but only to the admissibility of certain claims. The Republic of Guinea
11 therefore accepts, as it must, that if it had objected to the admissibility of the action as
12 a whole, the objection must be made in writing within the time limit stipulated in
13 article 97(1).

14
15 Let us therefore look at the objections to admissibility raised by the Republic
16 of Guinea. The Republic of Guinea has submitted the following objections to
17 admissibility:

- 18
19 (i) At paragraphs 56-71 of her Counter-Memorial she raises the objection
20 that the Vincentian claim relating to the flag State's freedom of navigation
21 and/or other internationally lawful uses of the sea is inadmissible because of
22 an alleged absence of a genuine link with the vessel.
23
24 (ii) At paragraph 72 of the Counter-Memorial, she objects that we are not
25 entitled to bring a claim on behalf of the *M/V SAIGA* because that vessel,
26 allegedly, does not have the nationality of the applicant as a result of absence
27 of a genuine link.
28
29 (iii) At paragraphs 73-78 of the Counter-Memorial, she objects that we are
30 not entitled to bring a claim on behalf of the injured individuals because they
31 are not nationals of Saint Vincent and the Grenadines.
32
33 (iv) At paragraphs 79-89 of the Counter-Memorial, she objects that we are
34 not entitled to bring a claim on behalf of the injured individuals and private
35 persons because of an alleged non-exhaustion of local remedies.
36

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

43
44 In these circumstances, it is apparent that the Republic of Guinea has failed to
45 bring herself within the rule that she advances. Even were it to be accepted that a
46 distinction can be drawn between objections to the admissibility of the action as a
47 whole and to the admissibility of particular claims, with the former being subject to a
48 time limit and the latter not, it is clear that the objections advanced by the Republic of
49 Guinea in this case are to the entire action. Consequently, article 97(1) of the Rules

1 requires that they ought to have been made in writing within 90 days of the institution
2 of the case.

3
4 The Republic of Guinea has contended, in paragraph 32, of the Rejoinder, that
5 she did advance at least certain objections within the 90-day period. She alleges that
6 during the oral hearings in the provisional measure phase she raised the objection of
7 non-exhaustion of local remedies. Members of the Tribunal may indeed recall
8 Mr von Brevern raising this issue briefly towards the end of those oral hearings.
9 Mr Sands, then appearing as one of the Counsel for Saint Vincent and the Grenadines,
10 objected that Mr von Brevern was raising an issue that had not been raised in the
11 written pleadings. That objection was sustained by the President and Mr von Brevern
12 did not persist with his point. The cursory raising of an issue in this way does not
13 satisfy the provisions of article 97(1) of the Rules, the terms of which are explicit, that
14 the article requires the submission in writing of any of the objections listed therein.
15 Oral objections will not suffice. Brief and elliptical oral comments, made without
16 prior warning and against an objection, sustained by the President, will certainly not
17 suffice.

18
19 Mr President, Members of the Tribunal, our principal submission is that
20 Guinea is precluded from raising objections to admissibility. In case, however, the
21 Tribunal should decide to deal with any of those objections, we submit that they are
22 without merit. Dr Plender will now deal with each of the Guinean objections in turn.

23
24 **THE PRESIDENT:** Thank you very much, Mr Howe. I now invite
25 Mr Richard Plender, QC, to continue the submission on behalf of Saint Vincent and
26 the Grenadines.

27
28 **DR PLENDER:** Mr President, Members of the Tribunal, it is an intimidating
29 privilege to appear before this Tribunal, especially for the first time. Your
30 jurisdiction is young, but the importance of your work and the calibre of those
31 appointed to perform it are sufficient to daunt the most intrepid of advocates.

32
33 For this reason, among others, I shall try to be brief, but I bear in mind the
34 words of Horace: *Brevis esse laboro, obscurus fio* – the more I struggle to be brief,
35 the more obscure I become. If my remarks are longer, than I would wish, that is
36 because I strive for clarity.

37
38 I shall this morning begin to deal with the objections to admissibility raised on
39 behalf of the Guinean Government. I expect to complete those submissions after the
40 adjournment. My present submission is that the Tribunal should dismiss the
41 objections to admissibility. For, even if it were open to Guinea to raise those
42 objections, they would not carry conviction.

43
44 The first objection to the admissibility of this action is that the allegation that
45 *M/V SAIGA* did not have a genuine link with Saint Vincent and the Grenadines at the
46 material time. That objection is expressed in two ways. At paragraphs 56 –71 of the
47 Counter-Memorial, Guinea argues that we cannot advance a claim based on freedom
48 of navigation since the freedom is that of the vessel which was not genuinely linked
49 with the claimant state.

1
2 Then, from paragraph 72, Guinea argues that we cannot advance a claim in
3 respect of the damage to *The Saiga* because the vessel was insufficiently linked to the
4 claimant state.

5
6 If the Tribunal considers it right to consider the objections to admissibility,
7 notwithstanding the points raised by Mr Howe, the claimant State will be content for
8 the Tribunal to dispose of the objections on the evidence. You have now had an
9 opportunity of examining the certificate of registration of the vessel for the relevant
10 period, together with the certificate of inspection of the classification society. You
11 have been supplied with a copy of the Vincentian Merchant Shipping Act. You have
12 been given an account of the regulatory and administrative and regulatory steps taken
13 in Saint Vincent and the Grenadines to secure compliance with the numerous
14 international conventions on merchant shipping to which she is a party. You may ask
15 the Attorney General to answer any questions that you may consider appropriate
16 about the administrative arrangements taken in Saint Vincent and the Grenadines to
17 supervise compliance with her international obligations and her domestic laws. You
18 will also have, this afternoon, an opportunity to question the master of the vessel
19 about those matters.

20
21 The evidence demonstrates overwhelmingly, and further enquiries will
22 confirm, that there is a genuine link between the vessel and the claimant state. The
23 evidence establishes, among other points, the following:

- 24
25 (i) *The Saiga* is represented in Saint Vincent and the Grenadines by a Vincentian
26 company formed in Saint Vincent and the Grenadines, resident and established
27 there.
28
29 (ii) She is subject to the supervision of the Vincentian authorities to secure
30 compliance with the SOLAS Convention, the MARPOL Convention and other
31 conventions of the International Maritime Organisation to which Saint
32 Vincent and the Grenadines is party.
33
34 (iii) Regular supervision of the vessel's seaworthiness is secured by surveys on at
35 least an annual basis conducted by reputable classification societies.
36
37 (iv) Preference is given to Vincentian nationals in respect of her manning.
38
39 (v) Saint Vincent and the Grenadines has been vigorous in attempting to secure
40 her protection at the international level both before and throughout this
41 litigation. Before the matter was brought before this Tribunal, the Vincentian
42 authorities were placed at a disadvantage by the failure of the Guinean
43 authorities to notify them of the action which the Guinean authorities had
44 taken in respect of the Vincentian vessel, and the failure of the Guinean
45 authorities to respond to the intervention of Mr Dabinovic, then Commissioner
46 for Maritime Affairs. The action that he took is described in an article
47 published in the *International Ship Registry Review* which is included among
48 the authorities accompanying this speech (section 4, tab 1 of the blue bundle).
49

1 It is, therefore, unnecessary to consider the hypothetical question, raised by
2 the Guinean agent, as to whether a State is precluded from advancing a claim
3 for violation of freedom of navigation or for damage to a vessel, in the
4 absence of an effective link between the relevant vessel and the claimant
5 State.
6

7 Mr President, Members of the Tribunal, I must not be taken to
8 concede, for a moment, that a State is precluded from advancing a claim in
9 such circumstances, but those circumstances do not arise in this case.
10

11 The Republic of Guinea appears to assert in her Rejoinder
12 (paragraph 59) that there can be a genuine link between a vessel and a State
13 only when the owner of a vessel is a national of that state or is domiciled or
14 incorporated there. I venture the observation, in passing, that if this
15 proposition were accepted, a substantial proportion of the world's tonnage
16 would immediately be deprived of the protection of international law.
17

18 To make good that argument, the Republic of Guinea continues to rely
19 upon the United Nations Convention on Conditions for Registration of Ships.
20 A copy of that Convention is appended to our Reply. Neither Saint Vincent
21 and the Grenadines nor Guinea is a party to it. Indeed, as Members of this
22 Tribunal will know very well, the Convention failed to secure widespread
23 support and has yet to come into force 13 years after the adoption of its text.
24 As of 1 March this year, it had only 14 signatories of which only 11 had
25 proceeded to ratification. The Convention falls far short of the 40 ratifications
26 that would be needed to bring it into force. Its provisions do not represent
27 customary international law. However, even if it had been in force, it would
28 not assist the Republic of Guinea.
29

30 The first paragraph of article 10, upon which the Republic of Guinea
31 relies, does indeed contemplate that one basis for entering a vessel on a ship's
32 register is that the owner is established or has a place of business with the
33 territory of that State; but, the second paragraph of the same article provides
34 that registration may proceed where,
35

36 "a representative or management person who shall be a national of the
37 flag State, or be domiciled therein."
38

39 That requirement is reflected precisely in Section 9 of the Merchant
40 Shipping Act 1982 of Saint Vincent and the Grenadines (also annexed to our
41 Reply). The requirements of article 10 (paragraph 2) are met in the case of
42 *The Saiga*.
43

44 Further, the establishment of a genuine and effective link may be
45 formed under the Convention either by ownership or by manning. Vincentian
46 law gives precedence to Vincentian nationals in respect of the manning of
47 Vincentian ships, including *The Saiga*. It is true that at the date of her arrest
48 or seizure, *The Saiga* did not have Vincentian nationals aboard. Such a
49 situation may be expected to occur more frequently in the case of ships from

1 small States than from those States with large populations. The United
2 Nations Convention is not to be read, however, as making the effective
3 "nationality" of a vessel dependent upon the national composition of the crew
4 at any moment. If that were the case, vessels would change their effective
5 nationality rather frequently. On a single voyage a vessel would change its
6 nationality perhaps several times depending upon those who come aboard and
7 those who leave. That cannot be the intention of the United Nations
8 Convention.

9
10 Further, it must be remembered that the purpose of the effective link is
11 (in the words used by the Guinean agent himself, in Guinea's own Rejoinder at
12 paragraph 59) to ensure that:

13
14 "the flag State can effectively exercise jurisdiction (including enforcement
15 jurisdiction) over the ship owner or operator in order to fulfil its obligations
16 under international law."

17
18 But, we have demonstrated how Vincentian law does secure effective
19 compliance with her international obligations in respect of vessels under her
20 flag. In short, Saint Vincent and the Grenadines effectively exercises
21 jurisdiction over her flag vessels, including *The Saiga* which had, at all
22 material times, an effective link with that state.

23
24 Claims by a flag State on behalf of crew members who do not hold the
25 nationality of Saint Vincent and the Grenadines are admissible under
26 International Law

27
28 I turn to the next objection raised by the Republic of Guinea: her
29 assertion that the Tribunal cannot entertain a claim in respect of damage
30 suffered by members of the crew of *The Saiga* who were not Vincentian
31 nationals.

32
33 The parties are agreed – for, indeed, it is elementary and obvious –
34 that, as a general rule, a State may not advance a claim against another State.
35 It is, however, very well established that there are exceptions to that general
36 rule. It is on one such exception that we rely. By customary international law,
37 a State may advance a claim against another State in respect of the alien crew
38 of the former's vessel. In her Counter-Memorial at paragraphs 74 –78, the
39 Republic of Guinea doubted the existence of such a rule. After we had set out
40 in our Reply ample authority and practice demonstrating the existence of the
41 rule, the Republic of Guinea, in her Rejoinder, appeared to withdraw the
42 argument that there is no such rule. Instead, she appeared to contest the
43 application of the rule to this case.

44
45 Among the many authorities upon which we relied were opinions
46 expressed by three distinguished judges of the International Court: Judges
47 Hackworth and Badawi Pasha in *Reparations for Injuries* (ICJ Rep 1949, 174
48 at 202 and 206-7) (Section 5, tab 9 of our bundle) and Judge ad hoc Riphagen

1 in the *Barcelona Traction Case* (ICJ Rep 1970 S at 346) (section 4, tab 2).
2 Judge Hackworth said:

3
4 "Alien seamen are assimilated to nationals"

5
6 for the purpose of diplomatic protection. Judge Badawi Pasha states that in
7 the case of:

8
9 "the protection of the flag and of the armed forces, protection extends
10 to everyone in the ship or in the armed forces".

11
12 Judge Riphagen endorsed those comments, speaking of the "functional
13 protection" extended to members of the crew flying the flag of a state.

14
15 At paragraph 67 of her Rejoinder, the Republic of Guinea comments
16 upon those three judgments as follows:

17
18 "Ships or seamen constituted neither in the Advisory Opinion nor in
19 the Judgment a part of the subject matter or related in any way to the
20 case".

21
22 She asserts further, at paragraph 67 of the same Rejoinder, that the references
23 to scholarly literature cited in our Reply are not "the result of a legal scrutiny
24 of the issue"; and she maintains that the rule permitting a State to advance a
25 claim on behalf of foreign crew members can apply only where the nationality
26 of the ship is not in dispute.

27
28 I take the last objection first, for we may dispose of it by agreement. It
29 is clear that the rule whereby a flag State can protect alien seamen presupposes
30 that the vessel has the nationality of the flag State. Indeed, the protection of
31 the crew by the flag State follows from the protection which that State is
32 entitled to give to the vessel. As the arbitral tribunal put it in *Worth v United*
33 *States* (Moore's Digest of International Arbitration, Vol.III (1898) 2350-1,
34 Section 5, tab 1) the principle is that

35
36 "the flag protects the ship and every person and thing thereon not
37 contraband".

38
39 Therefore, it is only when the flag protects the ship that it protects the persons
40 on board. On this the parties are agreed.

41
42 The Guinean objection to our claim in respect of injuries to the crew
43 adds nothing to her objection to our claim in respect of the vessel. If we are
44 entitled to advance a claim in respect of the vessel – and I have submitted that
45 manifestly we are – the Guinean challenge to that claim in no way supports or
46 assists her challenge to the claim in respect of the seamen.

47
48 Guinea's objection to our reliance upon judgments of judges of the
49 International Court of Justice, on the other hand, raises issues both novel and
50 disturbing. It is trite that international law, unlike the common law, does not

1 know of the doctrine of binding precedent. In a system based upon precedent,
2 a quest for the *ratio decidendi* (reasons for decision) is crucial, and *obiter*
3 *dicta* (remarks by the way) have lesser significance. But even in such
4 systems, *obiter dicta* are not ignored. They usually form the building blocks
5 for later decisions. In the international system, greater significance is attached
6 to statements of law made by judges in relation to issues that are not central to
7 the case. The International Court of Justice itself frequently cites parts of its
8 judgments that do not relate to the specific facts of the case. In a recent article
9 in the *International and Comparative Law Quarterly*, Sir Robert Jennings, a
10 former President of the Court, has written that

11
12 "even a casual acquaintance with almost any judgment of the
13 International Court of Justice will reveal that the Court itself uses
14 reported cases in both these different ways".

15
16 (*The Judiciary, International and National and the Development of*
17 *International Law* ICLQ (1996) 1, at 9, Section 4, tab 4).

18
19 While Sir Robert Jennings himself favours a recognition of the
20 distinction between *ratio decidendi* and *obiter dicta*, he recognises that "an
21 *obiter* opinion can of course be valuable and important even though not part of
22 the precedent." Sir Hersch Lauterpacht (who, as you will know, shared with
23 Sir Robert the two distinctions of being a Judge of the International Court of
24 Justice and Whewell Professor of International Law at Cambridge University)
25 wrote:

26
27 "It is not conducive to clarity to apply to the work of the Court the
28 supposedly rigid delimitation between *obiter dicta* and *ratio decidendi*
29 applicable to a legal system based on the strict doctrine of precedent."

30
31 (Lauterpacht, *The Development of International Law by the International*
32 *Court* (2nd edition, 1958, p.6, Section 4, tab 5).

33
34 Yet this is precisely what the Republic of Guinea invites this Tribunal
35 to do. She invites the Tribunal to accept that certain statements are *obiter*
36 *dicta* and to infer that they are therefore of no precedential value. That proves
37 too much.

38
39 Nevertheless, it must be remembered that the statements of the judges
40 in the International Court relating to a claim on behalf of foreign crew do not
41 stand in isolation. They stand together with the approval of scholars and,
42 more importantly, they stand alongside a long and amply demonstrable
43 practice of States together with a substantial body of judicial and arbitral
44 decisions, both national and international. That body of authority has been
45 compiled in our Reply. We continue to rely upon it.

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47 In conclusion, Saint Vincent and the Grenadines submits that she does
48 have a right under international law to bring a claim before this Tribunal on
49 behalf of crew members of the *M/V SAIGA* not of the nationality of that State.

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Mr President, I am in the Court's hands. The next issue with which I propose to deal is *Exhaustion of Local Remedies*. You may consider that it would be convenient to adjourn at this point and for me to be invited to deal with that separate issue this afternoon.

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

(Adjournment 11:45 a.m)