REPLY SUBMITTED BY SAINT VINCENT AND THE GRENADINES

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ST. VINCENT AND THE GRENADINES
v.
REPUBLIC OF GUINEA

("THE M./V SAIGA")

REPLY ON BEHALF OF ST. VINCENT AND THE GRENADINES

19th November 1998

Contents

INTRODUCTION

1. In accordance with the agreement between the parties dated 20th February 1998,*[1] Article 61(1) of the Rules of the Tribunal and the Order of the International Tribunal dated 6th October 1998, St. Vincent and the Grenadines has the honour to submit the following Reply to the Counter-Memorial of the Republic of Guinea dated 16th October 1998.

2. For ease of cross-reference, these submissions address the various issues raised in this case in the same order as they were addressed in the Memorial of St. Vincent and the Grenadines dated 19th June 1998.

3. By her Counter-Memorial[2] the Republic of Guinea contests only certain particulars in the account of the facts [. . .] given by St. Vincent and the Grenadines.[3] It is therefore convenient to set out at this stage the issues of fact upon which the parties now appear to be agreed and those upon which they appear divided.

4. Save where the converse is indicated, the facts set out in the following subparagraphs are expressly asserted or accepted by the Republic of Guinea in her Counter-Memorial; or are advanced in the Memorial of St. Vincent and the Grenadines and not challenged in the Guinean Counter-Memorial.[4]

   (i) The M.V. *Saiga*, an oil tanker of some 5,700 metric tonnes, left Dakar at 10.00 hours on 24th October 1997 laden with some 5,400 metric tonnes of gas oil.[5] That evening and on the following day she bunkered

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* *Note by the Registry: For editorial reasons, the numbering of the footnotes in this Reply has been changed from beginning with number 1 on each new page as in the original text to consecutive numbering.*

[1] Annex 2 to the Memorial submitted by St. Vincent and the Grenadines dated 19th June 1998.

[2] Counter-Memorial, paragraphs 10–45.

[3] Memorial dated 19th June 1998, paragraphs 26–76.

[4] To the extent that the facts are set out in the Memorial of St. Vincent and the Grenadines dated 19th June 1998 and not contested in the Counter-Memorial of the Republic of Guinea, the latter must be taken to have assented to them consistently with Article 62(2) of the Rules of the Tribunal and with the general principle *qui tacet consentire videtur si loqui potuisset ac debuisset.*

[5] Annex 16 to the Memorial dated 19th June 1998 page 231 (5,391.435 metric tonnes).

two vessels.[6] The points at which she did so were beyond the northern limit of the exclusive economic zone asserted by the Republic of Guinea by Article 4 of Decree No 336 of 30th July 1980[7] and *a fortiori* beyond the revised maritime boundary resulting from the *Guinea – Guinea-Bissau Maritime Delimitation Award* dated 14th February 1985.[8]

(ii) On 26th October 1997 the M.V. *Saiga* bunkered three further vessels at a point 10º36 degrees North, 16º25 West.[9] On the following day she bunkered another three vessels, *Giuseppe I, Kriti* and *Eleni G*, at 10º25 degrees North, 15º43 West.[10] As the Guinean Counter-Memorial confirms, these were fishing trawlers sailing under the Italian and Greek flags.[11] None of them was flying the Guinean flag.[12] All were holders of Guinean fishing licences which contained no clause restricting the point at which the licensees might to obtain their supplies.[13] No proceedings were brought against the masters of the trawlers.

(iii) The point at which these trawlers were bunkered[14] is beyond Guinean territorial waters but within the Guinean exclusive economic zone and some 22.6 to 22.9 miles south-west of the uninhabited Guinean island of Alcatraz.[15] The Republic of Guinea claims that this point falls within Guinea's contiguous zone.[16] St. Vincent and the Grenadines, while not accepting that the outcome would be different if it did so, observes that

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[6] *Itti I* and *Demetrios* (12º 35 North and 1º 713 West) and *Flipper I* (11º 05 North and 16º 58 West) Annex 16 to the Memorial dated 19th June 1998 pages 237 and 242.

[7] Annex 6 to the Memorial dated 19th June 1998 page 85.

[8] Annex 7 to the Memorial dated 19th June 1998 page 144.

[9] *Ittipesca, Geneviève* and *Trebba*: Annex 16 to the Memorial dated 19th June 1998 page 247.

[10] Annex 16 to the Memorial dated 19th June 1998 pages 247 and 249.

[11] Guinean Counter-Memorial, paragraph 15, page 11. See also paragraph 2, page 5: "fishing vessels having sailed under flags of third countries".

[12] The *Cour d'Appel* Conakry was wrong in stating that the vessels were flying the Guinean flag: Annex 30 to the Memorial dated 19th June 1998 pages 432 and 448.

[13] See the Protocol establishing Fishing Rights and Financial Compensation on Fishing off the Guinean Coast, O.J. 1996 L157/3, Annex 9 to the Memorial dated 19th June 1998. By her Counter-Memorial the Republic of Guinea states that the licensees were obliged to bunker only from "approved service stations", invoking the Law of 15th March 1994 *portant répression de la fraude sur l'importation, l'achat et la vente de carburant en République de Guinée*: Annex 22 to the Memorial dated 19th June 1998 page 304. St. Vincent and the Grenadines submit that on its face that Law does not apply to a case where there is no importation to the Republic of Guinea, nor any sale or purchase within Guinean territory or even her territorial waters.

[14] Marked "5" in the map annexed as Annex A1 to the Memorial dated 19th June 1998 submitted by St. Vincent and the Grenadines.

[15] In the *Guinea – Guinea-Bissau Maritime Delimitation Award*, Annex 7 to the Memorial dated 19th June 1998 page 136 the Tribunal noted that "Guinea-Bissau, after first having contested Guinea's sovereignty over Alcatraz before the Tribunal, then recognized it".

[16] Guinean Counter-Memorial paragraphs 15 and 121.

no such contiguous zone has been duly proclaimed by the Republic of Guinea or notified by her to the United Nations.[17]

(iv) The M.V. *Saiga* completed the bunkering of the last of the three trawlers at 14.00 hours on 27th October 1997.[18] She remained at the same point until 16.26 hours when the master telexed that he would sail to position 09º50 North, 16º15 West for a rendezvous with some Greek fishing vessels, where he expected to arrive at 20.00 hours. He would not proceed closer than 100 miles of Guinea.[19] At 18.42 hours the master received instructions that the proposed rendezvous was not safe and that he should proceed to 09º North, 15º West "which is he usual psn where all Greeks are supplied".[20] At 19.24 hours the master confirmed that he was complying with those instructions.[21] The M.V. *Saiga* left the Guinean exclusive economic zone at about 03.45 hours on 28th October 1997 at approximately 09º03'18 North, 15º02 West. At about that time, she was detected by Guinean two patrol boats[22] which had received orders to inspect her, following Guinean interception of her radio messages to and from fishing vessels on 26th and 27th October 1997.[23]

(v) The M.V. *Saiga* remained beyond the Guinean exclusive economic zone, reaching the point 09º North, 15º West (off the coast of Sierra Leone but beyond her territorial waters) at 04.24 hours. She drifted there until about 08.30 hours, when the master located on his radar two vessels approaching rapidly. They fired at the tanker with the object of

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[17] By Article 33(2) of the United Nations Convention on the Law of the Sea (UNCLOS) the contiguous zone is optional: it is an area within which the coastal State "may" exercise certain controls. In the words of Professor Brownlie "the zone is optional and its existence depends upon an actual claim": *Principles of Public International Law,* 5th ed, 1998, 210. The only Guinean law notified to the Secretary General of the United Nations is Decree No 336 of 30th July 1980 (Annex 6 to the Memorial dated 19th June 1998 page 84) which does not assert jurisdiction in any contiguous zone. Article 13 of the law of 30th November 1995 (*La Code de la Marine Marchande*, Annex 8 to the Memorandum of 19th June 1998) designates a contiguous zone but has not been notified to the Secretary General; and the zone so declared is measured from "the low-water mark along the coast, indicated on large-scale nautical maps officially recognized by the Maritime Authority". No such map has been produced showing that the contiguous zone is measured from the low-water mark along the coast of the island of Alcatraz.

[18] Annex 16 to the Memorial dated 19th June 1998 page 249.

[19] Annex 16 to the Memorial dated 19th June 1998 page 249.

[20] Annex 16 to the Memorial dated 19th June 1998 page 251.

[21] Annex 16 to the Memorial dated 19th June 1998 page 253.

[22] The Guinean Counter-Memorial states at paragraph 16 that the Guinean patrol boats detected her at 4.00 hours on 28th October 1997 "when she was still in the exclusive economic zone of Guinea". The *procès-verbal* of the head of the mobile brigade of the Guinean customs authorities is less clear on the point: Annex 19 to the Memorial dated 19th June 1998 page 268.

[23] Guinean Counter-Memorial, paragraph 15.

immobilising her.[24] The M.V. *Saiga* and her crew were unarmed. The master gave the order to re-start the engine, closed the bridge doors, put the auto-pilot on, announced that there was a piracy attack and told everyone to go to the engine room.[25] The vessels that the master had seen approaching were armed Guinean launches F-328 and P-35. They put armed men aboard, who immobilised the M.V. *Saiga* at 08º58.2 North, 14º50 West, "within the exclusive economic zone of Sierra Leone".[26] The armed men remained aboard the tanker for three and a half hours.

(vi) During that period, some members of the crew of the M.V. *Saiga* suffered injuries.[27] Medical reports show that one, named Serguei Kluynev, sustained gun-shot wounds, including one, approximately 8 centimetres long, requiring surgery under general anaesthetic as well as shrapnel wounds.[28] Medical reports show that another, named Djbril Niasse, suffered gun-shot wounds to the chest, haemorrhaging in both 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 any thoracotomy.[29] A recent medical report shows that Djbril Niasse's severe psychological injuries have persisted.[30] The Republic of Guinea characterises these men's injuries as "slight".[31]

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[24] See the *Procès-Verbal* of the head of the mobile brigade of the Guinean customs authorities: Annex 19 to the Memorial dated 19th June 1998 page 269.

[25] His account is that he did so because he feared an attack of piracy, having received an earlier warning about "oil-hunters": "I understood that it meant piracy. Everybody knows that the most dangerous places of piracy are West Africa, South-East Asia and Latin America": Annex 17 to the Memorial dated 19th June 1998 page 249. He closed the bridge doors, put the auto-pilot on, announced that there was a piracy attack and told everyone to go to the engine room. The Second Officer stated "I heard the announcement of the captain that there is a piracy attack of the vessel and all the crew should proceed downstairs to the engine room": Mr. Kluyev, Prompt Release Proceedings, transcript, pages 10–11. The Republic of Guinea contends that the master could not have assumed that he was being attacked by pirate vessels because patrol boats were faster than pirate boats and the captain should have noticed this: Counter-Memorial, paragraph 17.

[26] Ibid. Quotation from Guinean Counter-Memorial, paragraph 16.

[27] Paragraphs 38 to 46 of the Memorial dated 19th June 1998 are not apparently challenged by the Republic of Guinea, which states at paragraph 15 of the Counter-Memorial that she takes issue with paragraphs 34 to 37.

[28] Annex 21 to the Memorial dated 19th June 1998 page 301.

[29] Annex 21 to the Memorial dated 19th June 1998 page 295.

[30] Supplementary Report dated 19th June 1998, **Annex 1 to this Reply**.

[31] Counter-Memorial paragraphs 153–4 and 181. She also challenges the admissibility of the claim advanced on behalf of these two men: paragraphs 73–89.

(vii) It is the case of St. Vincent and the Grenadines that 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 itemised in Annex 41 to the Memorial dated 19th June 1998.[32] By the Counter-Memorial[33] "Guinea contests such theft". It is also the case of St. Vincent and the Grenadines that the Guinean armed personnel caused damage to the vessel including gunfire damage to an electric generator, damage to a bulkhead, to the accommodation structure and bridge front, gunfire damage to a 400 kg fender, to a telephone and fax system, to portholes, cabin doors and bridge front windows.[34] The Republic of Guinea submits that "there is no proof of any damage to the vessel".[35]

(viii) The Guinean authorities seized the M.V. *Saiga*'s cargo of oil. The account given of this episode by St. Vincent and the Grenadines reads in part as follows:[36]

"the Master was ordered to commence discharge of the vessel's cargo of approximately 5000 metric tonnes of gas oil to shore tanks. On initial refusal to discharge the cargo, without instructions from the charterer, the Master was advised by the senior customs officer that he would be taken ashore to jail awaiting trial for smuggling gas oil, and the crew would be required to discharge the cargo under force of arms. The discharge was effected on shore between 10 and 12 November 1997 to the Guinean authorities. The cargo was confiscated and sold to oil companies in Conakry upon the orders of the local authorities shortly afterwards (apparently realizing for the Guinean authorities in excess of US$3 million)".

The Republic of Guinea responds that it is "not accurate" to state that approximately 5000 metric tonnes of gasoil were discharged since the correct figure is 4,906.212 metric tonnes.[37]

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[32] Annex 41 to the Memorial dated 19th June 1998 page 707.
[33] Paragraph 183.
[34] Annex 41 to the Memorial dated 19th June 1998 page 676.
[35] Counter-Memorial, paragraph 176.
[36] Memorial dated 19th June 1998 paragraph 44.
[37] Counter-Memorial, paragraph 19.

(ix) From the point at which the M.V. *Saiga* arrived at Conakry anchorage the Master and some members of the crew were required to remain aboard the detained vessel. After some days, and the intervention of the Ukrainian Embassy, some of the crew were released.[38]

(x) On 13th November 1997 St. Vincent and the Grenadines instituted proceedings against the Republic of Guinea for the Prompt Release of the vessel and crew pursuant to Article 292 of UNCLOS. By judgment dated 4th December 1997 the International Tribunal ordered the Republic of Guinea to release the M.V. *Saiga* and her crew promptly and decided that release should be upon the posting of a reasonable bond or security, consisting of the quantity of gasoil discharged from the vessel and US$400,000 to be posted (in default of agreement) in the form of a letter of credit or bank guarantee.[39]

(xi) On Wednesday 10th December 1997 St. Vincent and the Grenadines posted bank guarantee No 3053/97 issued by *Crédit Suisse* in the amount of US$400,000 with the Agent of the Republic of Guinea, Mr Hartmut von Brevern.[40] Copies were sent to the Ministry of Foreign Affairs in Guinea and to the Registrar of the International Tribunal. On the same day the Guinean authorities issued proceedings against the master of the M.V. *Saiga* charging him with offences against Guinean customs law and joining St. Vincent and the Grenadines as a party having civil liability in the matter.[41] On or about the same day the Guinean customs authorities served on the lawyer acting for the master of the vessel submissions dated 14th November 1997 inviting the Guinean court to convict the master of customs offences and to order the confiscation of the gasoil and the imposition of a fine approximately equal to US$15 million.[42] The proceedings began before the *Tribunal de Première Instance* at Conakry on Friday 12th December 1997. On Wednesday 17th December 1997 that court gave orally its judgment orally. 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 guarantee of payment.[43]

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[38] Memorial dated 19th June 1998, paragraphs 44 to 46; Counter-Memorial paragraph 179 (other crew members were *allowed to leave the detained vessel in due course*).

[39] 37 I.L.M. (1998) 362.

[40] Annex 38 to the Memorial dated 19th June 1998.

[41] Annex 27 to the Memorial dated 19th June 1998.

[42] Annex 28 to the Memorial dated 19th June 1998.

[43] Annex 29 to the Memorial dated 19th June 1998. A written copy of that was made available to St. Vincent and the Grenadines on 6th February 1998. The facts are confirmed in the Counter-Memorial, paragraph 31.

(xii) There followed a series of exchanges between the parties about the bank guarantee. The vessel and her master continued to be detained. It was at this stage that St. Vincent and the Grenadines instituted arbitral proceedings against the Republic of Guinea under Annex VII of UNCLOS and requested prescription of Provisional Measures.[44] By response dated 30th January 1998 the Republic of Guinea requested the International Tribunal to reject the application for Provisional Measures.

(xiii) At an oral hearing on 3rd February 1998 the *Cour d'Appel* 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.[45] On 16th and 18th 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[46] but the bank replied on 19th February that in accordance with the terms of the guarantee it had first to receive a hard copy of the judgment.[47]

(xiv) By exchange of letters dated 20th February 1998 the parties agreed to transfer the arbitral proceedings to the International Tribunal.[48] The Guinean Agent wrote as follows:

"Upon the instruction of the Government of the Republic of Guinea, I am writing to inform you that the Government has agreed to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the M.V. *Saiga*. The Government therefore agrees to the transfer to the International Tribunal for the Law of the Sea of the arbitral proceedings instituted by St. Vincent and the Grenadines by notification of 22 December 1997 . . .
[T]he Government of Guinea agrees that the submission of the dispute to the International Tribunal for the Law of the Sea shall include the following conditions:

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[44] 22nd December 1997: Annex 1 to the Memorial dated 19th June 1998.
[45] Annex 30 to the Memorial dated 19th June 1998 page 448. The name of the flag state is illegible in the judgment of the *Tribunal de Première Instance*, Annex 29 to the Memorial dated 19th June 1998, pages 412 and 417.
[46] Annex 38 to the Memorial dated 19th June 1998 pages 586 and 588.
[47] Annex 38 to the Memorial dated 19th June 1998 page 609.
[48] Annex 2 to the Memorial dated 19th June 1998.

1 The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on 22 December 1997, the date of the Notification by St. Vincent and the Grenadines;
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 to jurisdiction as raised in the Government of Guinea's response dated 30 January 1998;

. . .

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.

. . .

The two letters shall constitute a legally binding Agreement ("Agreement by Exchange of Letters") between the two States to submit the dispute to the International Tribunal for the Law of the Sea, and shall become effective immediately . . . Upon confirmation by the President that he has received the Agreement and that the International Tribunal for the Law of the Sea is prepared to hear the dispute the arbitration proceedings shall be considered to have been transferred to the jurisdiction of the International Tribunal for the Law of the Sea".

(xv) The hearing of the application for prescription of Provisional Measures took place on 23rd and 24th February 1998. On 28th February 1998 the Guinean authorities executed a deed of release whereby the M.V. *Saiga* and her master were permitted to leave Conakry, whence they departed with the remaining crew at 17.00 hours.[49]

(xvi) By Order dated 11th March 1998 the International 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 28th October 1997 and the prosecution and conviction of the master; and recommending that the two States should ensure that no action is taken which might aggravate the dispute. The Government of St. Vincent and the Grenadines

[49] Annex 31 to the Memorial dated 19th June 1998 and paragraph 71 thereof.

wrote to the Agent of the Republic of Guinea on 7th April 1998 proposing an interim agreement.[50] There was no response. The Government of St. Vincent and the Grenadines has endeavoured to ensure that vessels flying her flag shall bunker outside the Guinean exclusive economic zone pending resolution of the present dispute. However that Government has discovered and drawn to the attention of the International Tribunal[51] an undated letter from the National Director of Customs of the Republic of Guinea to the Minister of the Economy, together with an accompanying draft decree and statement of purpose, stating that the draft decree is "intended to close the current legal loophole in the refuelling of ships". St. Vincent and the Grenadines 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 St. Vincent and the Grenadines and other States that may wish to supply bunkers to fishing and other vessels outside the Territorial Waters of Guinea but within their Exclusive Economic Zone".

The Republic of Guinea has yet to respond.

1. Bunkering

5. In response to the observation made by St. Vincent and the Grenadines that bunkering is a multi-million US dollar industry involving all the major oil companies and numerous independent companies,[52] the Republic of Guinea retorts "This is neither correct nor reflected in the magazine *Bunker News*".[53] On this issue there ought not to be no dispute. There is exhibited as **Annex 2 to this Reply** a list of leading bunker traders, very many of which (in addition to members of the Addax Group) list off-shore bunkering as among their principal activities.[54] The scale of bunkering generally is the

[50] Annex 34 to the Memorial dated 19th June 1998.
[51] Dated 15th September 1998.
[52] Memorial dated 19th June 1998, paragraph 7.
[53] Counter-Memorial, paragraph 5.
[54] Those specifically mentioning off-shore bunkering include: ABC Atlantic Bunker Co. and Tramp Oil Atlantic (Canary Islands); Abidjan Offshore (Côte d'Ivoire); Tramp Oil and Marine Ltd. (Côte d'Ivoire); Ajax Off Shore Bunkering Services (Cyprus); All Ports Malik Supply Ltd. (Denmark); O.W. Bunker and Trading Co. (Denmark); A/S Danbunkering (Denmark); Marine Agency Bunker A/S (Denmark); Statoil A/S (Denmark); Total (Egypt); Elf Marine Bunkers (Gabon); O.W. Bunker and Trading Co. (Germany); Mamidoil Jetoil (Greece); Petrotrade Ship Managerment (Greece); Cockett Marine Oil Ltd. (Kenya); Palm Shipping Agency Ltd (Malta); San Lucian Oil Co. Ltd. (Malta); Mediterranean Offshore Bunkering Co. Ltd. (Malta); Valette Marsaxlokk (Malta); Caltex Oil Mauritius

subject of attention in a number of books, including those by Fisher,[55] Cockett[56] and Ewart.[57] Since its formation in 1993 the International Bunker Industry Association has sought to secure good practice in the world's bunkering industry, both on-shore and off-shore. It has more than 400 members.[58]

6. In this context the Republic of Guinea recalls the submission made by at an earlier stage in these proceedings,[59] when St. Vincent and the Grenadines stated that the imposition of customs duties on an oil tanker for bunkering activities carried out in the exclusive economic zone is *prima facie* prohibited by the 1982 Convention and added that "This is confirmed by overwhelming practice of the Parties to the Convention". St. Vincent and the Grenadines gave 19 illustrative examples.[60] The Republic of Guinea now responds that the Memorial of St. Vincent and the Grenadines fails to take account of the laws of "those States the [*scilicet* that] have express laws obliging States to enter into agreement with the coastal State" (mentioning Guinea-Bissau and the Cameroons) and those "which have reached the same result by requiring fishing vessels to obtain licences for bunkering" (mentioning Sierra Leone and Mauritania).[61]

7. The Republic of Guinea does not substantiate her assertion that those four States impose customs duties on bunkering activities carried out in their exclusive economic zones. In particular, she does not exhibit their laws or legal opinions to that effect. In the case of Guinea-Bissau, Article 23 of the *Decreto Lei No. 4/94*[62] provides for certain payments to be made in connection with fishing but does not refer to bunkering; and makes it clear that the

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Ltd. (Mauritius); Alseco Petroleum Ltd. (Mozambique); Cockett Marine South (Namibia); Bominflot BV (Netherlands); Cockett Marine Oil (Nigeria); Tramp Oil and Marine (Nigeria); Texaco Antilles (Panama); Cockett Marine South Africa (South Africa); TRT Bunkers (South Africa); Stena Oil AB (Sweden); Albar Oilfield Services Ltd. (Tanzania); Shell Markets ME Ltd. (United Arab Emirates); Cockett Marine Oil (United Arab Emirates); Emirates Petroleum Products (United Arab Emirates); International Marine Sales (United Arab Emirates); Fal Energy (United Arab Emirates); Christophersen SA (Uruguay); Coastal Refining and Marketing Inc. (United States of America).

[55] C. Fisher, *Bunkers: An Analysis of the Practical, Technical and Legal Issues*, 1974; see especially page 181.

[56] N. Cockett, *Neil Cockett on Bunkers*, 1997; see especially page 130.

[57] W. D. Ewart, *Bunkers, a Guide for the Ship Operator*, 1982, see especially page 1.

[58] See the extract from *World-Wide Bunkering Services*, June 1998, **Annex 3 to this Reply**.

[59] Reply dated 13th February 1998 to the Guinean Response in the proceedings on Provisional Measures, paragraph 26, page 13.

[60] These are now assembled as Annex 37 to the Memorial dated 19th June 1998.

[61] Counter-Memorial, paragraph 5.

[62] Article 23 provides: "1. As operações de pesca conexas estâo sujeitas a autorização do Ministério das Pescas. 2. A autorização refereida no número anterior está sujeita a pagamentos ou contrapardidas, bem como quaiscar outras coindições que forem determinadas pelo Ministério das Pescas, nomeadamente em termos de zonas ou locais para a realização das operações e da presença obrigadória de observadores ou agentes de fiscalização 1. The Article may be translated as follows: Operations connected with fishing are subject to authorization from the Ministry of Fisheries. 2. The authorization

basis for the payment is the imposition of a term in the authorization granted by the State (whereas in the present case no such term was included in the licences granted to the fishing vessels). In the case of the Cameroons, the evidence shows that prior authorization is required for the supply of oil products within the territorial sea (not the exclusive economic zone).[63] In the cases of Sierra Leone and Mauritania, the legislative provisions in force do authorize the imposition of conditions on the granting of a fishing licence but they do not mention licences for bunkering, nor do they appear to make the bunkering of foreign vessels in the exclusive economic zone an offence. Save in the case of the Cameroons (whose provisions have been exhibited earlier) extracts from the laws of those States are set out at **Annex 4 to this Reply**.

2. St. Vincent & the Grenadines

8. Without challenging specifically any of the statements made by St. Vincent and the Grenadines about her own status and her shipping register,[64] the Republic of Guinea states:

> "it is to be questioned whether the Maritime Register of St. Vincent and the Grenadines is reliable and effective. The Government of Guinea has no proof but rather doubts if there is a genuine link between St. Vincent and the Grenadines and vessels flying its flag".[65]

An imputation of unreliability and inefficacy, made by one sovereign State against the maritime register of another generally, with respect to the whole of the vessels flying her flag, would be unwelcome in any circumstances and is particularly unwelcome where the State making that imputation acknowledges that she "has no proof".[66]

9. There is no basis for challenging the reliability or efficacy of the Maritime Register of St. Vincent and the Grenadines. The point is addressed at paragraphs 23–24 below.

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referred to in paragraph 1 above is subject to payment or counter-obligations, as well as other conditions which may be determined by the Ministry of Fisheries, in particular in respect of zones or areas in which such operations may be carried out and the compulsory presence on board of observers or customs agents.

[63] Letter dated 10th February 1998, Annex 37 to the Memorial dated 19th June 1998, page 518.

[64] Memorial dated 19th June 1998, paragraphs 10 to 12.

[65] Counter-Memorial, paragraph 6.

[66] Such an imputation, expressed generally and without proof, is not consistent with the principle of good faith, as to which see Declaration on Principles of International Law concerning friendly relations and Cooperation among States, G.A. Res 2625 (XXV) 1970; *Nuclear tests Case* I.C.J. Rep. (1974) at 268; B. Cheng, *General Principles of International Law as Applied by International Courts and Tribunals,* 1953 at 105–160; E. Zoller, *La bonne foi en droit international public*, 1977.

10. Nor is there any basis for the assertion that the provisional certificate aboard the M.V. *Saiga* was such that she must be deemed to have been at the material time removed from the Vincentian register. The point is addressed at paragraphs 22–24 below.

3. The Location of the Dispute: Guinea and its Maritime Laws

11. In response to the Memorial of St. Vincent and the Grenadines[67] the Republic of Guinea identifies two of her laws which are alleged to have been violated by the M.V. *Saiga*.[68]

12. The first is the Law of 15th March 1994 "concerning the fight against fraud covering the import, purchase and sale of fuel in the Republic of Guinea".[69] Article 1 provides:

> "the import, transport, storage and distribution of fuel by any natural person or body corporate not legally authorized are prohibited in the Republic of Guinea".

Article 4, on which the Republic of Guinea relies, provides:

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

Article 6, on which the Republic of Guinea further relies, provides:

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

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[67] Memorial dated 16th June 1998, paragraphs 13 to 20.
[68] Counter-Memorial, paragraphs 7 to 9.
[69] Law No. 94/007/CTRN *portant répression de la fraude sur l'importation, l'achat et la vente de carburant en République de Guinée*: Annex 22 to the Memorial dated 19th June 1998 page 304.

Article 8, on which the Republic of Guinea further relies, provides:

> "Where the misdemeanour referred to in Article 6 of this Law has been committed by a group of more than 6 individuals . . . the offenders will be subject to a sentence of imprisonment from 2 to 5 years, a fine equal to four times the value of the confiscated items in addition to the additional penalties provided for under Article 6 of this Law".

13. Articles 1, 6 and 8 of the Law of 15th March 1994, as well as the title, state that what is prohibited is the unauthorized importation of fuel in or "into the national territory" ("*sur le territoire national*"). The M.V. *Saiga* did not import fuel in or into the territory of the Republic of Guinea or even her territorial waters nor did she ever enter those waters.[70] The basis on which the Guinean courts convicted the master was that the vessel supplied fuel to fishing vessels within the Guinean exclusive economic zone.[71] During those proceedings the Guinean prosecuting authorities themselves appear to have recognized the difficulty of reconciling the facts of the case with Articles 1, 6 and 8 of the Law of 15th March 1994 and with the rules of international law. According to the judgment:

> "the Public Prosecutor and the Customs Authority have called for a better reading of the legal provisions in force at both the national and international level".[72]

The Republic of Guinea does not explain how her case against the M.V. *Saiga* is assisted by Article 4 of the Law of 15th March 1994. That Article creates offences capable of being committed by the "owner of a fishing boat, the holder of a fishing licence issued by the Guinean competent authority". There is nothing to suggest that the *Giuseppe I, Kriti* or *Eleni G* imported fuel into Guinean territory or that the owners of those vessels were prosecuted.

14. The second law upon which the Republic of Guinea relies is the Customs Code of 28th November 1990.[73] Article 1 provides:

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[70] In the words of the Guinean Counter-Memorial, paragraph 16: "On all of its way from the position where it supplied the three fishing vessels to this position [where it was detained] the M.V. *Saiga* had never entered the territorial waters of Sierra Leone or another State".

[71] Judgment of the *Cour d'Appel*, Conakry, Annex 30 to the Memorial dated 19th June 1998 pages 443 and 448; see also judgment of *Tribunal de Première Instance*, Annex 29 to the Memorial dated 19th June 1998, pages 413 and 418 ("a so-called economic zone").

[72] *Ibid*.

[73] Law No 094/PRG/SEG *portant adoption et promulgation du Code des Douanes*, Annex 23 to the Memorial dated 19th June 1998 page 308.

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

Thus even if a prohibition of the import of fuel "into the national territory", pursuant to the Law of 15th March 1974 were to be read in the light of the Customs Code upon which the Republic of Guinea now relies, there would remain no basis for contending that the M.V. *Saiga* was engaged in unlawful import. It is not the case and it has not been alleged that the M.V. *Saiga* entered "the Guinean territorial waters". Indeed, the reference to Guinean territorial waters appears to imply *a contrario* that the customs territory does not extend to other waters.

15. The Republic of Guinea now refers to Article 33(2) of the Customs Code, which creates a "customs radius" of 250 kilometres, but fails to mention Article 33(1), which draws a distinction between "customs radius" and the "customs territory". Like Article 43 of the French *Code des Douanes*, to which it appears to owe its origin,[74] Article 33 of the Guinean Customs Code falls within the chapter regulating the authority of the customs service. It prescribes the area, both inland and seawards, within which customs officials are authorised to operate: their "Field of Action". Like its French counterpart, Article 33(2) does not purport to prescribe the border, the crossing of which constitutes importation.

16. Most of the other provisions of the Customs Code cited by the Republic of Guinea[75] authorize members of the customs service to engage in specified action within the customs radius.[76] They do not support the contention that even as a matter of Guinean law a master commits an offence when bunkering vessels in the excusive economic zone. The Republic of Guinea refers to Article 54, which falls within the chapter dealing with the importation of bonded goods. It requires masters to subject the original of the manifest for such goods to the customs authorities, to enable them to subject it to the *ne varietur* endorsement. The oil aboard the M.V. *Saiga* was

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[74] The French *Code des Douanes,* as amended most recently by Law No. 97–1269 of 30th December 1997, J.O.R.F. 1997 p. 19261, is published in a consolidated version in Jupiter, *Recueils Pratiques du Droit des Affaires*, Tome VII, appended as **Annex 5 to this Reply**. In Article 43 of the French *Code des Douanes* the marine radius is of 12 miles, not 250 kilometres. That Article 43 of that *Code* regulates the field of action of the customs service is clear upon the face but confirmed by Michel de Juglart and Benjamin Ippolito, *Droit Commercial*, 4th ed., 1998 at paragraph 84, page 122.

[75] Two of the references made by the Republic of Guinea appear to be mistyped: the reference to Article 40(1) should apparently read Article 41(1); the reference to Article 232(2) should apparently read Article 231(2).

[76] Articles 41, 44, 45. See also Article 52 which authorises customs officials to check the identity of persons entering or leaving Guinea or travelling within the customs radius.

not "bonded goods" nor was it being imported; nor was there any demand for a manifest; nor is there any apparent basis on which a *ne varietur* endorsement might be appropriate.

17. Of the other provisions cited by the Republic of Guinea, one calls for comment. Without explaining its significance, the Republic of Guinea cites Article 300 of the Customs Code, whereby the customs department is liable in respect of its employees only in respect of their duties. When seizing the M.V. *Saiga* the Guinean customs authorities were plainly acting in purported exercise of their authority. On this issue international law is clear:

> "The State . . . bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official or organ has acted within the limits of his competency or has exceeded those limits . . . it is necessary that they should have acted, at least apparently, as authorized officials or organs, or that in acting they should have used powers or measures appropriate to their official character".[77]

18. St. Vincent and the Grenadines invites the International Tribunal to rule that the Republic of Guinea has failed plausibly to identify any Guinean law violated by the M.V. *Saiga*. Further, and in any event, the International Tribunal should conclude that even if a Guinean law had purported to penalise the supply of fuel by one foreign vessel to another, beyond Guinea's territorial waters but within her exclusive economic zone, this would violate the rights enjoyed by the flag States of those vessels, at least in a case such as the present, where there is no allegation or evidence that the fuel was ever imported to Guinea's customs territory, or intended to be so imported, and no suggestion that the Guinean law was imposed or enforced for the protection or preservation of the marine environment or for others of the purposes listed in Article 56 of UNCLOS.

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[77] *Union Bridge Company Case*, (1929) R.I.A.A. 516 at 530, 5 A.D. (1929–30) No 91. In the *Youmans* case the Commission stated: "soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts": (1926) R.I.A.A. 110 at 116; 3 A.D. (1925–6) No 162. Likewise in the *Caire Claim*, Professor Verzijl, presiding, stated "that acts committed by the officials and agents of the State entail the international responsibility of that State even if the perpetrator did not have specific authorization" (1929) 5 R.I.A.A. 516.

19. In other words, the determinative issue is not the interpretation of Guinean law but its opposability. Even if Guinean law assimilated the exclusive economic zone or a customs radius of 250 miles to her own territorial waters, she would not be entitled to assert against flag States of foreign vessels the power to prohibit bunkering within that zone or radius on the premise that she has a "fiscal interest in regulating off-shire bunkering".[78] In the words of the International Court of Justice:

> "the delimitation of sea areas always has an international aspect and cannot be dependent merely upon the will of the coastal state as expressed in its municipal law".[79]

It matters not for present purposes whether the exclusive economic zone is described as a part of the high seas to which special provisions apply or as "a *tertium genus* between the territorial sea and the high sea".[80] Manifestly it [is] not assimilable to national territory.[81]

20. Moreover, even if such laws were, as a matter of principle, opposable by a coastal State against a flag State, the provisions on which the Republic of Guinea relies in the present case would remain unopposable since the laws and the corresponding charts they were not deposited with the Secretary General of the United Nations consistently with Article 75(2) of UNCLOS.

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[78] Counter-Memorial, paragraph 104. Article 73(1) of UNCLOS authorises the boarding, inspection and arrest of foreign vessels within the exclusive economic zone for specified purposes only. *A contrario* there is no general power of arrest in the zone. Writing in 1982 Professor O'Connell stated: the "asserted power of visit and search stands at the present limits of legal plausibility, even if it is restricted to fishing boats . . . It would be an innovation even in the doctrine of the territorial sea": *The International Law of the Sea*, 1982, Vol. I page 577.

[79] *Anglo-Norwegian Fisheries Case*, I.C.J. Rep. (1951) 116 at 132.

[80] The language is that of the International Court of Justice speaking of the 12-mile fishery zone in the *Fisheries Jurisdiction* cases, I.C.J. Rep. (1974) p. 3 at paragraph 52. The Republic of Guinea asserts that the exclusive economic zone is *sui generis* and not part of the high seas: Counter-Memorial, paragraph 94. Article 58(2) of UNCLOS applies to the exclusive economic zone, in principle, the rules in Article 88 to 115, which fall within the Part dealing with the high seas. In their edition of *Oppenheim's International Law*, 9th ed. (1992) Vol. I at 725, Sir Robert Jennings and Sir Arthur Watts write: "Since the exclusive economic zone, where the State adopts one, is *sui generis* and although not territorial nevertheless importantly modifies the regime of the high seas over which it is extended, the 1982 Convention, in Part VII entitled 'High Seas', avoids any new attempt to define the high seas, and has instead an 'application' provision for the articles appearing in that Part". Article 58(2) of UNCLOS applies to the exclusive economic zone, in principle, the rules in Article 88 to 115, which fall within the Part dealing with the high seas. On the *tertium genus* issue, see further D. P. O'Connell, *The International Law of the Sea*, 1982, Vol. I page 577.

[81] The point is developed at paragraph 3.2 below.

4. Previous Incidents Off the Guinean Coast Involving Guinean Customs Authorities

21. The Republic of Guinea does not take issue with the account given by St. Vincent and the Grenadines of previous incidents off he Guinean coast involving Guinean customs authorities.[82] Indeed, it tends to confirm that account by stating that the master should have been aware of the action taken by the Guinean authorities in relation to the *Napetco* and the *Africa* in 1996 and 1997.[83] Accordingly St. Vincent and the Grenadines relies on the account given in her Memorial dated 19th June 1998, without further elaboration,[84] save that it is necessary to identify the vessels involved in incidents in 1993 and 1996.

22. The M.V. *Napetco I*, which was owned by a Sierra Leone company and flew the Sierra Leone flag was attacked by Guinean forces within the [. . .] exclusive economic zone of Sierra Leone both in 1993 and in 1996.[85] It was the second attack that provoked a formal protest from the Government of Sierra Leone.[86] The vessel hit in 1996 by some 200 bullets fired by two Guinean patrol boats was the *Alfa I.* She was left ablaze some 40 miles off the Guinean coast.[87] The M.V. *Africa* is understood to have been seized by Guinean forces in 1996 some 25 miles within Sierra Leonean exclusive economic zone (but not set ablaze).

SECTION 1: FACTUAL BACKGROUND

1.1 The M.V. *Saiga*

23. Relying on the fact that the certificate exhibited to the Memorial in this case was a provisional one, expiring on 12th September 1997, and that the permanent certificate was issued on 28th November 1997, the Republic of Guinea claims:

> "it is thus very clear that the M.V. *Saiga* was not validly registered in the time between 12 September 1997 and 28 November 1997. For this rea-

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[82] Memorial dated 19th June 1998, paragraphs 21–24.
[83] Counter-Memorial, paragraph 15.
[84] Rules of the Tribunal, Article 62(3).
[85] See statement of Vincent Kanu, Annex 11 to the Memorial dated 19th June 1998, page 184.
[86] Annex 11 to the Memorial dated 19th June 1998, page 197.
[87] Annex 10 to the Memorial dated 19th June 1998, page 197.

son the M.V. *Saiga* may be qualified to be a ship without a nationality at the time of its attack".[88]

24. That is incorrect. When a vessel is registered under the flag of St. Vincent and the Grenadines it remains so registered until deleted from the registry in accordance with the conditions prescribed by Section 1, articles 9 to 42 and 59 to 61 of the Merchant Shipping Act 1982.[89] At the time of registration a provisional certificate of registry is issued, followed by a permanent certificate of registry when certain conditions are satisfied. In the case of the M.V. *Saiga* her location prevented delivery on board of the permanent certificate but this in no way deprived the vessel of its character as Vincentian nor had the effect of withdrawing it from the register. Had there been any doubt in this regard, inspection of the Ship Register would have eliminated it. Further re-confirmation of this position is supplied with this Reply.[90]

25. The Republic of Guinea comments that "interestingly enough" St. Vincent and the Grenadines failed to mention the "nationality" of the owner of the M.V. *Saiga*. At the outset of their first proceedings before the International Tribunal, St. Vincent and the Grenadines identified the owner (Tabona Shipping Co., Ltd.) and exhibited a provisional certificate of registry certifying that the vessel was owned by "Tabona Shipping Co., Ltd. of Nicosia, Cyprus".[91] The "nationality" of the company owning the vessel (meaning, presumably, its place of formation or *siège social*) is not relevant to the issues before the International Tribunal.

26. It is next asserted that:

> "It is neither clear to St. Vincent and the Grenadines, nor to the Agent of the Republic of Guinea who at the relevant time was the charterer of the M.V. *Saiga*. Whereas Addax Bunkering Services is mentioned as charterer at para. 7 of the Memorial, another company named Lemania Shipping Group Ltd. is held to be charterer at para. 26 of the same Memorial".

As St. Vincent and the Grenadines explained in her Arbitration Notification dated 22nd December 1997,[92] as her representative repeated at the oral

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[88] Counter-Memorial, paragraph 10.
[89] **Annex 6 to this Reply**. See in particular section 37.
[90] **Annex 7 to this Reply**.
[91] Institution of Arbitral Procedure, 22nd December 1997, paragraph 2, Annexes 1 and 13 to the Memorial dated 19th June 1998.
[92] Paragraph 2.

hearing on 23rd February 1998,[93] and as the Memorial of 19th June 1998 reiterated,[94] the charterer of the vessel at all material times was Lemania Shipping Group Ltd. The reference to Addax Bunkering Services at paragraph 7 is to the group to which Lemania Shipping Group Ltd. belongs. This appears from Annex 3 to the Memorial dated 19th June 1998, to which paragraph 26 refers. It also appears from the statement of Marc Vervaet, at Annex 10 to that Memorial who explains that the Addax and Oryx *Group* have certain vessels on charter, one being the M.V. *Saiga*.

27. The Republic of Guinea purports to find a discrepancy between paragraph 26 of the Memorial dated 19th June 1998, which states that the M.V. *Saiga* had a crew of 24 in addition to the master, and the Application in the Prompt Release proceedings, which lists a crew of 25. There is no discrepancy. As the Application in the Prompt Release proceedings shows, the 25 persons listed there include the master.[95]

28. Next the Republic of Guinea claims that crew should be taken to number 22, excluding three Senegalese engaged as painters. Although the point is of marginal relevance, St. Vincent and the Grenadines submits that the three painters are properly to be considered as members of the crew, since that term embraces all those who work upon a vessel at a material time in connection with her navigation or commercial activities. In its ordinary meaning[96]

> "The term 'crew' must be understood as covering all persons engaged in the navigation and servicing of a ship, including the performance of tasks linked to the economic activity carried out on board".

To determine whether a special meaning should be given to the term in the context of State responsibility for injuries to aliens, it is necessary to take account of the purpose of the principle whereby one State may advance claims against another in respect of injuries suffered by alien members of the crew of vessels flying the former's flag. That principle is one of the generally accepted exceptions to the nationality of claims rule. In the words of Professor Brownlie:

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[93] Transcript, page 25 line 14.
[94] Paragraph 13.
[95] Annex 14 to the Memorial dated 19th June 1998, page 217.
[96] Mr. Advocate General Léger in Case C-204/94, *R v Commissioners of Customs & Excise ex parte Faroe Seafood & Føroya Fiskasøla*, [1996] E.C.R. I-2465 at 2489. The Court of Justice held that on the interpretation of the particular Community instrument in issue, a narrower meaning was to be given to the term in view of the specific objects of that legislation: see pages 2528 and 2550.

> "The other generally accepted exceptions [to the nationality of claims rule] are alien seamen on ships flying the flag of the protected State and members of the armed forces of the State. If the injured party was in the service of the claimant State, the latter may be said to have suffered harm to a legal interest although the victim was an alien".[97]

29. Like the nationality of claims rule itself, the principle owes its existence to the fact that the State, when taking up the case of an individual is in reality asserting its own right to secure respect for the rules of international law.[98] The right of the flag State to ensure respect for the rules of international law governing the navigation of vessels and their protection against the unlawful exercise of power by other States is infringed when any member of the ship's complement is wrongfully injured or detained.[99] That is so in the case of painters as in the case of engineers, for all play a part in the maintenance of the vessel. Thus in *Worth v. United States*[100] the court recorded that:

> "It was a great principle for which our government had contended from its origin – a principle identified with the freedom of the seas, *viz*., that the flag protected the ship and every person and thing thereon not contraband".

Further, this principles is to be defended on the ground that no distinction should be drawn between members of the crew (or of a State's armed forces) according to their nationality, rank or period of service, for the common discipline to which they are subject and the unity of purpose which their work requires, demands that they should be equally eligible for the diplomatic protection of the flag State, just as they are equally entitled to enjoy the minimum standards of protection for which relevant international conventions provide.[101]

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[97] *Principles of Public International Law*, 5th ed., 1998 page 482.

[98] The reference is to the oft-quoted words of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions Case* (1982) P.C.I.J. Ser. A No. 2, page 12. See also *Greece (in behalf of Apostolidis) v. Federal republic of Germany,* 34 I.L.R. (1960) 219.

[99] In the *Rainbow Warrior* case, where damage was done in New Zealand to a vessel not flying her flag and deaths were caused to persons not having her nationality, that State claimed compensation in respect of the vessel and the deceased crew because the acts perpetrated by French agents amounted to a violation of New Zealand's sovereignty and an affront and insult to her: 74 I.L.R. (1986) 241 at 259.

[100] *Moore's Digest of International Arbitration*, Vol. III (1898) 2350–1.

[101] See for example Article 2 of the Convention concerning Minimum Standards in Merchant Ships, Geneva, 29th October 1976, 15 I.L.M. (1976) 1288, as amended on 8th October 1996, particularly by insertion into the preamble of a reference to the Discrimination (Employment and Occupation) Convention, Geneva, 25th June 1958, 362 U.N.T.S. 31. On the (unamended) Convention of

30. The Republic of Guinea next complains[102] that the employer of the crew is not stated. The employer was Tabona Shipping Co., Ltd.;[103] but the point is without relevance.

1.2 The Detention

31. The account of the detention of the M.V. *Saiga* given in the Counter-Memorial[104] differs in several respects from that given in the Memorial of St. Vincent and the Grenadines. The principal differences are as follows.

32. First, the Republic of Guinea makes the point that before being approached by the Guinean patrol boats, the M.V. *Saiga* was sailing in a southerly direction towards the exclusive economic zone of Sierra Leone "without showing a flag".[105] The significance of this observation is not explained. It is neither required by international law nor accepted in maritime practice that a vessel should show her flag outside territorial waters. In the words of Professor O'Connell:

> "Provided that it is used in circumstances in which identification is required, the flying of the flag need not be continuous, although it is the practice for it to be shown when in foreign national waters".[106]

The master was therefore fully entitled to respond, when questioned about this:

> "I only fly a flag when I am in the territorial waters of a country or when I am entering a port".[107]

It would not be reasonable to suggest that he should have raised his flag, at a later stage, well beyond Guinea's territorial waters and outsider her

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29th October 1976, see E. Osieke, "The International Labour Organisation and the Control of Substandard Merchant Vessels", 30 I.C.L.Q. (1981) 497.

[102] Counter-Memorial, paragraph 13.

[103] See **Annex 8 to this Reply**.

[104] Paragraphs 15 to 18.

[105] Counter-Memorial, paragraph 15.

[106] *The International Law of the Sea*, 1982, Vol. II page 757. Thus for example in the United Kingdom's Merchant Shipping Act 1995, section 5, a British ship is required to hoist its flag on entering or leaving port but not when on the high seas or in the exclusive economic zone or even in the territorial waters of a foreign State.

[107] Annex 19 to the Memorial dated 19th June 1998, page 280.

exclusive economic zone, while under fire from vessels which he took to be pirates' boats, particularly as the port of registry of the M.V. *Saiga* was clearly shown on her hull.[108]

33. Next the Guinean Counter-Memorial states:[109]

> "The task of the Guinean patrol boats was to search and stop the M.V. *Saiga*. However it was clear that the M.V. *Saiga* was aware of being pursued. Therefore the M.V. *Saiga* received shortly thereafter instructions to proceed to position 09º50 North, 15º, lying slightly south of the Guinean border. Having heard such new instructions the Guinean patrol boats headed to the southern border and detected the M.V. *Saiga* on the radar at 4 o'clock in the morning of 28 October 1997 when she was still in the exclusive economic zone of Guinea".

That is at variance with the evidence in several respects. It was at 18.42 hours on 27th October that the master received instructions to proceed to 9º North, 15º West. The M.V. *Saiga* was not then "being pursued" nor is it this alleged by the crew of the Guinean patrol boat.[110] At 04.00 hours on 28th October 1997 the M.V. *Saiga* was not in the Guinean exclusive economic zone. She left that zone at about 3.45 hours. At 04.24 hours she reached her rendezvous, in the exclusive economic zone of Sierra Leone, where she lay drifting for some four hours before being attacked.[111] The order to start the engines was given only when the master saw fast vessels approaching his own.

34. Next it is alleged that the M.V. *Saiga*

> "attempted to sink the patrol boats twice, the success of which the crews of the patrol boats barely managed to avoid".[112]

The Tribunal should reject that allegation as incredible for the following reasons:

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[108] Counter-Memorial, paragraph 16.
[109] Counter-Memorial, paragraph 16.
[110] Annex 19 to the Memorial dated 19th June 1998, page 278.
[111] If she was detected by radar while still in the Guinean exclusive economic zone, that could not have been "at 4 o'clock in the morning" as alleged in the Guinean Counter-Memorial. The vessel left the Guinean exclusive economic zone at about 3.45 A.M.).
[112] Counter-Memorial, paragraph 16.

(i) The master of the M.V. *Saiga*,[113] the crew of the patrol boats[114] and the Guinean Counter-Memorial[115] all confirm that at this stage the wheelhouse was empty and the ship sailing on automatic pilot. Indeed, the windows of the wheelhouse had been smashed by bullets fired from the patrol boats.[116]

(ii) Even if there had been anyone at the wheelhouse, it is inherently unlikely that he would have been able to manoeuvre a laden tanker so dextrously as to endanger highly manoeuvrable patrol boats or that he would have been so rash as to do so when the latter were heavily armed and the tanker not only unarmed but carrying an inflammable cargo.

(iii) The allegation now advanced is based on the account given by the Guinean reporting officer[117] whose report contains manifest inaccuracies. For instance, that report states that the patrol vessels "dashed" towards the tanker "increasing speed in order to catch up with it. But it seemed to go faster";[118] on this evidence the *Tribunal de Première Instance* concluded that the M.V. Saiga, already travelling at an "impressive speed", "increased its speed"; but it would have taken the M.V. *Saiga* some time to reach her maximum speed of ten knots, after drifting for some hours with her engine closed down,[119] whereas the patrol boats have speeds of 26 and 35 knots.[120] The same report states that the M.V. *Saiga* changed course and headed for the high seas, even after the patrol boat had put armed men aboard;[121] but her wheelhouse was empty. It reports that the master had confessed to supplying fishing vessels "all flying the Guinean flag": it is now established that they were not flying the Guinean flag. Indeed, while the French translation of the master's words state that he admitted that the vessels were flying the flag of Guinea, those words do not appear in the Ukrainian version: the master was speaking Ukrainian; and the transcript of the recordings of the radio messages sent by the master, part

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[113] Annexes 17, 18 and 19 to the Memorial dated 19th June 1998, page 280.
[114] Annex 19 to the Memorial dated 19th June 1998, pages 263, 264 and 278.
[115] Counter-Memorial paragraph 16.
[116] As explained by the master and confirmed by the *Tribunal de Première Instance*, Annex 29 to the Memorial dated 19th June 1998 page 418.
[117] Annex 19 to the Memorial dated 19th June 1998, page 278.
[118] *Ibid*.
[119] "The speed increased very slowly as fully loaded vessel": Annex 18 to the Memorial dated 19th June 1998, page 264.
[120] Annex 35 to the Memorial dated 19th June 1998, page 372.
[121] Annex 19 to the Memorial dated 19th June 1998, page 278.

of which has been produced by the Republic of Guinea[122] show that the master was well aware that at least one of the vessels was Italian.[123] The account given by the Guinean reporting officer states that two of the crew of the M.V. *Saiga* were "slightly injured": the medical evidence shows that their injuries were not slight.

35. It is next alleged that before attacking the M.V. *Saiga* the patrol boats ordered her to stop by radio, acoustic signal, bell and visual warning. The account given by the Guinean reporting officer is simply that "having signalled our identity in advance, we continued to order it to heave to".[124] Even that account is at variance with the account given by both the master of the M.V. *Saiga*, who "did not hear or see any warning by VHF, sound or light signal": rather the first he heard was shooting from 1–2 miles.[125] The Tribunal is invited to prefer the evidence of the master, corroborated as it is by that of the Second Officer.

1.3 Guinea's Allegations Concerning the Violations of Guinea's Customs and Related Laws

36. St. Vincent and the Grenadines have responded in paragraphs 12 to 21 above to the parts of the Counter-Memorial dealing with alleged violations of Guinea's customs and related laws. The Republic of Guinea does not challenge the statements of fact made on behalf of St. Vincent and the Grenadines when dealing with that matter.

1.4 Application for the Prompt Release of the M.V. *Saiga*

37. By her Counter-Memorial the Republic of Guinea makes no comment on the section of the Memorial of St. Vincent and the Grenadines relating to the prompt release of the M.V. *Saiga*. The Republic of Guinea does not challenge the statements of fact made on behalf of St. Vincent and the Grenadines when dealing with that matter.

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[122] The Republic of Guinea supplied to a solicitor for St. Vincent and the Grenadines two copies of the first part of the tape recordings but no copy of the second part.

[123] See page 6 of the transcript, exhibited as **Annex 9 to this Reply**.

[124] Annex 19 to the Memorial dated 19th June 1998, page 278. The *Tribunal de Première Instance* does not record even that evidence but only that it was "necessary for them to fire over the ship causing damage to the latter's windows" to warn it to stop: Annex 29 to the Memorial dated 19th June 1998, page 418.

[125] Annex 17 to the Memorial dated 19th June 1998, page 263.

1.5 The Bank Guarantee

38. By its judgment concluding the Prompt Release proceedings, the International Tribunal:

    (i) held unanimously that it had jurisdiction under Article 292 of UNCLOS, notwithstanding the submission to the contrary of the Republic of Guinea;

    (ii) found by 12 votes to 9 that the application was admissible; ordered that Guinea should promptly release the M.V. *Saiga* and her crew; decided that such release should be on posting of a reasonable bond or security; and decided that the security should consist of the gasoil discharged from the M.V. *Saiga* plus 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".

39. The Republic of Guinea submits that St. Vincent and the Grenadines should be ordered to pay the costs of the Prompt Release proceedings, notwithstanding the fact that the Tribunal substantially acceded to the requests that she had made and dismissed unanimously the Guinean objection to jurisdiction.[126] St. Vincent and the Grenadines submits that as she was successful in those proceedings, in all respects save the identity of the person with whom the guarantee was to be lodged, she should receive her costs.[127]

40. The Republic of Guinea next contends[128] that in posting the guarantee with the Guinean Agent, St. Vincent and the Grenadines acted contrary to Article 113 of the Rules of the Tribunal which provides that:

> "The bond or other financial security for the release of the vessel or the crew shall be posted with the detaining State unless the parties agree otherwise. The Tribunal shall give effect to any agreement between the parties as to where and how the bond or other financial security for the release of the vessel or crew should be posted".

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[126] Counter-Memorial, paragraph 20.

[127] In failing to address that issue at the present (inappropriate) stage, save on invitation of the International Tribunal, St. Vincent and the Grenadines must not be taken to accept in any way that it would be appropriate to order her to pay the costs. [. . .]

[128] The argument is advanced at two points in the Counter-Memorial: paragraphs 20–31 and 157–159.

41. Since a State is a legal person,[129] it is obvious that when providing that a bond or guarantee "shall be posted with the detaining State" Article 113 requires that it shall be posted with a natural person representing the State. The question arising in this context is that of identifying the representative or representatives of the State with whom the guarantee was to be posted. In the submission of St. Vincent and the Grenadines, the Agent of the Republic of Guinea was the representative with whom it was to be posted, or at any rate was one of those representatives.

42. Echoing Article 42 of the Statute of the International Court of Justice, Article 53(1) of the Rules of the Tribunal provides that "The parties shall be represented by Agents". The International Tribunal has itself confirmed that the person styling himself the Agent of the Republic of Guinea is to be considered as the Agent;[130] and the Republic of Guinea does not maintain that Mr. von Brevern is other than duly authorised at act as her Agent in these proceedings.

43. Article 52(1) of the same Rules of the Tribunal provides "All communications to the parties shall be sent to their Agents". While States are, in principle, free to nominate any person to act as Agent, the person so nominated and acting is both authorised and required to be the channel of communication between the parties and the International Tribunal in respect of the litigation. Dealing with the similar position of Agents before the International Court of Justice, Professor Rosenne comments:

> "The status of Agent is roughly equivalent to that of head of a special diplomatic mission. He is empowered to bind his country in all that concerns the conduct of the case in the Court. In that capacity he has to sign every important document relating to the case, and he has to confirm every important and binding statement made in the government's name in the conduct of the proceedings."[131]

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[129] A legal person ordinarily comprising a permanent population, defined territory, government and capacity to enter into international relations: Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S. 19. On the subject see H. L. A. Hart, *The Concept of Law*, 1961, 219; A. Ross, "On the Concepts 'State' and 'State Organs' in Constitutional Law" in *Scandinavian Studies in Law*, 1961; R. A. Klein, *Sovereign Equality among States: The History of an Idea*, 1974; P. C. Jessup, *The Birth of Nations*, 1974.

[130] See the Order dated 11th March 1998, paragraph 6; cf the Order dated 20th February 1998, paragraph (3).

[131] S. Rosenne, *The World Court: What it is and How it Works*, 194, 119; see also S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 1983, 96. A similar rule applies in the case of representatives of States before the Court of Justice of the European Communities: Statute of the Court of Justice of the European Communities, Article 17; Statute of the Court of Justice of the European Coal and Steel Community, Article 20;

44. It is therefore of no avail to plead, as the Republic of Guinea now does,[132] that the Guinean Agent was unable or unauthorised to decide whether the guarantee posted with him was "reasonable" and that he had been unable to receive instructions from Conakry, and that the Guinean Minister of Justice was absent from the country and that "no contact could be established between the Agent and the Republic of Guinea for weeks". The arrangements made by a State for communications between its ministries and its Agent, and for limiting the authority of the latter, are of concern to that State only. Other States with which it may be engaged in litigation before the International Tribunal are entitled to expect that the Agent is empowered to bind his country in all that concerns the conduct of the case.

45. By its judgment dated 4th December 1998 the International Tribunal decided that the security to be given to the Republic of Guinea shall comprise the oil discharged from the M.V. *Saiga* plus a bank guarantee for US£400,000. It observed that:

> "The criterion of reasonableness encompasses the amount, nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable".[133]

The guarantee supplied by St. Vincent and the Grenadines pursuant to that decision was reasonable and that the objections raised by the Guinean Agent on 11th December were not such as to lead to a converse conclusion:

(i) On 10th December the Guinean Agent, having received the guarantee and raised no objection to the fact that it had been posted with him, stated "Please be advised that the Government of Guinea considers this bank guarantee not to be reasonable because it is drafted in English". He requested a guarantee in the French wording and proof that the signatories on behalf of *Crédit Suisse* were duly authorised.[134] On the following day *Crédit Suisse* sent by fax to the Guinean Agent, the Guinean Ministry of Foreign Affairs and the Registrar of the International Tribunal a warranted translation into the French language of the guarantee, confirmation that the signatories were duly authorized and, in

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Statute of the Court of Justice of the European Atomic Energy Community, Article 20; and see Case 221/89, *R v. Secretary of State for Transport ex parte Factortame and Others*, [1991] E.C.R. I-3905.

[132] Counter-Memorial, paragraphs 23–24, 28, 29 and 30.

[133] 37 I.L.M. (1968) 362 at 376.

[134] Annex 38 to the Memorial dated 19th June 1998 page 541.

response to a further concern raised by the Guinean Agent, confirmation that the word "claims" when used in the guarantee had the meaning for which the Guinean Agent contended.[135]

(ii) On 11th December the Agent of the Republic of Guinea raised several objections to the wording of the guarantee (for instance, that it was in English with a warranted French translation rather than in French original). The letter stated

"we suggest to get a bank guarantee of *Crédit Suisse* with the following wording in the English language. However, as has already been mentioned our client would prefer to have the wording in the French language".[136]

This was followed by a further communication, requesting that disputes should be resolved by arbitration in Hamburg under the rules of the German Maritime Arbitration Association.[137] (The International Tribunal will recall that it was on this date that the proceedings began before the *Tribunal de Première Instance* at Conakry: judgment was given orally five days later).

(iii) On being informed that St. Vincent and the Grenadines proposed to institute prompt proceedings before the International Tribunal for the interpretation of its judgment,[138] the Guinean Agent again requested a guarantee following the wording set out in his letter of 12th December.[139] This was followed by a letter dated 15th December 1997 stating that the Agent was not able to give any definite answer[140] and a further letter dated 6th January 1998 conveying objections to the wording of the bank guarantee. Most of these were different to those that had been raised by the Agent but one of which (the authorisation of the signatories) had already been addressed by *Crédit Suisse*.[141] On 20th January 1998 the Guinean Agent stated that the original guarantee had been returned to *Crédit Suisse*.[142]

[135] Annex 38 to the Memorial dated 19th June 1998 page 545.
[136] Annex 38 to the Memorial dated 19th June 1998 page 553.
[137] Annex 38 to the Memorial dated 19th June 1998 page 555.
[138] Annex 38 to the Memorial dated 19th June 1998 page 557.
[139] Annex 38 to the Memorial dated 19th June 1998 page 559.
[140] Annex 38 to the Memorial dated 19th June 1998 page 560.
[141] Annex 38 to the Memorial dated 19th June 1998 page 562.
[142] Annex 38 to the Memorial dated 19th June 1998 page 567.

(iv) On 22nd January 1998 the Agent of the Republic of Guinea wrote "we have now received the instructions of the Minister of Justice of the Republic of Guinea" requesting certain amendments to the wording of the guarantee and a notarised confirmation of the authorization of the signatories.[143] This (for the first time) asked that the bank guarantee should be sent directly to the Minister of Justice. St. Vincent and the Grenadines met that request on 30th January 1998.[144] On that day the vessel was attacked, while in the custody of the Guinean authorities: one crewman was injured, others threatened at knife-point, damage was done and items stolen.[145] The Minister of Justice did not agree to accept the guarantee until shortly after the decision of the *Cour d'Appel* dated 3rd February 1998.[146]

(v) On 17th February 1998 the Agent of the Republic of Guinea informed the Applicant State and the International Tribunal that the M.V. *Saiga* would be released only when *Crédit Suisse* has actually paid the sum prescribed by the guarantee.[147] However the master was told that he and his vessel would not be released unless he signed a confession;[148] it is upon this that the Republic of Guinea now relies in her Counter-Memorial, pleading that the delay in releasing the vessel was due to his refusal to sign the document.[149] On 19th February 1998 Guinean Agent sent to *Crédit Suisse* by fax a copy of the judgment of the Guinean *Cour d'Appel*; but failed to send a hard copy, duly issued and signed, in accordance with the terms of the guarantee.[150] The vessel and master were not released, and the skeleton crew not able to depart on the M.V. *Saiga* until 28th February 1998.

46. In view of this sequence of events, St. Vincent and the Grenadines submits that the guarantee posted on 11th December was "reasonable" *ab initio* or at least once the clarifications initially requested by the Republic of Guinea had been given on 12th December 1997; or alternatively at the very latest it was reasonable when given in the form accepted by the Republic of Guinea on 6th February 1998.[151]

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[143] Annex 38 to the Memorial dated 19th June 1998 page 571.
[144] Save that the guarantee had to be given in the English language with French translation: Annex 38 to the Memorial dated 19th June 1998 page 572.The new guarantee was issued on 28th January 1998.
[145] Annex 38 to the Memorial dated 19th June 1998 page 579.
[146] Annex 38 to the Memorial dated 19th June 1998 page 580.
[147] Annex 38 to the Memorial dated 19th June 1998 page 584.
[148] Annex 38 to the Memorial dated 19th June 1998 page 580.
[149] Counter-Memorial paragraph 45.
[150] Annex 38 to the Memorial dated 19th June 1998 page 587.
[151] Memorial dated 19th June 1998 paragraph 55. St. Vincent and the Grenadines revert to the sub-

1.6 Charges, Criminal Proceedings and Conviction and Sentencing by the Municipal Courts of Guinea

47. The Republic of Guinea does not challenge the accuracy of the account given by St. Vincent and the Grenadines as to the sequence of events leading to the conviction and sentencing of the master, the confiscation of the cargo of the M.V. *Saiga* and the posting of a guarantee in the sum of US$400,000 by St. Vincent and the Grenadines. On all points but one the differences between the parties as to the effects of Guinean law are addressed in section 1.3 above. The remaining issue concerns the *cédule de citation*.

48. Both at the public hearing on 23rd February 1998[152] and in the Counter-Memorial,[153] the Republic of Guinea has sought to minimise the significance of the addition of the name of St. Vincent and the Grenadines to the *cédule de citation*. She makes the point that a *cédule de citation* is an administrative document, which does not expose the State of St. Vincent and the Grenadines to enforcement of the fine imposed by Guinean courts on the captain of the M.V. *Saiga*. That assertion misses the point.

49. The parties appear to have a common understanding of the significance of a *cédule de citation*: it corresponds with a summons. This is confirmed by the Republic of Guinea, in acknowledging that its effect was that St. Vincent and the Grenadines "may be asked to come to appear" before the *Tribunal de Première Instance*.[154] The character of a *citation* in French law is demonstrated by Articles 550 to 566 of the *Code de Procédure Pénale*, and by the decision of the *Cour de Cassation* dated 13th February 1990.[155] The schedule (*cédule*) to the *citation* indicates, *inter alia* the identity of the person alleged to have civil liability.[156]

50. This appears to explain the decision of the *Tribunal de Première Instance* at Conakry to join St. Vincent and the Grenadines to the *cédule de citation* on 10th December 1997.[157] That was done on the very day on which St. Vincent and the Grenadines posted bank guarantee No 3053/97 with the Agent of the Republic of Guinea, consistently with the judgment of the

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ject under Section 3.3 below, when dealing with violation of Articles 292(4) and 296 of UNCLOS on Prompt Release.

[152] Transcript, page 29 line 24 *et seqq*.

[153] Counter-Memorial, paragraphs 32 and 171: "the *cédule de citation is an administrative document which has only the meaning that a party may be asked to come to appear before a criminal court*."

[154] Counter-Memorial, paragraph 171.

[155] Exhibited as **Annex 10 to this Reply** and **Annex 11 to this Reply**.

[156] See in particular Article 551 third sub-paragraph.

[157] Annex 27 to the Memorial dated 19th June 1998, page 405.

International Tribunal, whose judgment is, of course, directed to the States parties before it.[158]

51. The issuance of a summons by the courts of one State against another is permitted by public international law only in strictly limited circumstances; for instance, where the State to which the summons is issued is itself a party to a commercial contract or is the owner or operator of a vessel engaged in commercial transactions out of which a dispute has arisen.[159] The issuance of the *cédule de citation* in the present case amounted to a violation of that rule.

1.7 Application instituting Arbitral Proceedings under the 1982 Convention

52. The Republic of Guinea does not contest the account given by St. Vincent and the Grenadines of the institution of arbitral proceedings in accordance with Annex VII to UNCLOS.[160] It is necessary only to recall paragraphs 28 and 29 of the instrument instituting those proceedings[161] which read as follows:

> 28 St. Vincent and the Grenadines and Guinea are both parties to UNCLOS. Guinea ratified UNCLOS on 6 December 1985 and St. Vincent ratified on 1 October 1993. Neither party has by means of written declaration at the time of signature or ratification or at any time thereafter chosen one of the means for the settlement of disputes set out in Article 287(1) of the Convention. Accordingly by application of Article 287(3) of the Convention, both parties are deemed to have accepted arbitration in accordance with Annex VII of the Convention.
>
> 29 This is a dispute concerning *inter alia* the contravention by Guinea of the provisions of the Convention in regard to the freedoms and rights of navigation or in regard to other internationally lawful uses of the sea specified in Article 58 of the Convention. Accordingly, by application

[158] Both in its original form and in the form accepted by the Republic of Guinea the letter of guarantee refers to the judgment of the International Tribunal The Guinean Agent accordingly stated that any proceedings before the International Tribunal about the guarantee would be a matter for St. Vincent and the Grenadines, not the master: Annex 38 to the Memorial dated 19th June 1998, page 559.

[159] Articles 6 and 18 of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property, I.C. Ybk. (1986) II (2) page 8. On the subject see Sir Robert Jennings and Sir Arthur Watts in *Oppenheim's International Law*, 9th ed. (1992) Vol. I at 355 and *Kuwait Airways Corporation v Iraqi Airways Company*, [1995] 3 All ER 694 (HL).

[160] Memorial dated 19th June 1998, paragraphs 67–68.

[161] Annex 1 to the Memorial dated 19th June 1998.

of Article 297(1)(a) of the Convention the dispute is one in respect of which Guinea has accepted the jurisdiction of arbitration proceedings under Part XV Section 2 of the Convention".

1.8 Request for Provisional Measures

53. The Republic of Guinea does not contest the account given by St. Vincent and the Grenadines of the Request for Provisional Measures.[162]

1.9 Release of the M.V. *Saiga*

54. In her account of the release of the M.V. *Saiga*, the Republic of Guinea contends that this was delayed until 28th February 1998 because of the master's refusal to sign a confession "despite the presence of his three lawyers"; and that the date of his release was determined by an "agreement" concluded on 27th February 1998.[163] St. Vincent and the Grenadines invites the International Tribunal to have rather to the express statement of the Guinean Agent the M.V. *Saiga* would be released only when *Crédit Suisse* had actually paid the sum prescribed by the guarantee;[164] and submits that it is fair to infer that the Guinean authorities sought to delay his release until the monies were obtained. In any event, Guinea's failure to release the master on the ground that he refused to sign the documents presented to him constitutes disobedience to the judgment of the International Tribunal dated 4th December 1997.

1.10 Order for Provisional Measures

55. The Republic of Guinea does not contest the account given by St. Vincent and the Grenadines of the order for provisional measures.[165] In particular, St. Vincent and the Grenadines has submitted to the International Tribunal its interim report on the steps taken to ensure prompt compliance with the measures prescribed.[166] The Republic of Guinea does not claim to have done so.

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[162] Memorial dated 19th June 1998, paragraphs 69–70.
[163] Counter-Memorial, paragraph 45.
[164] Annex 38 to the Memorial dated 19th June 1998 page 584.
[165] Memorial dated 19th June 1998, paragraphs 73–75.
[166] Annex 34 to the Memorial dated 19th June 1998 page 461. This was done pursuant to Article 95 of the Rules of the Tribunal.

SECTION 2: JURISDICTION

56. It is common ground that at this stage the basis for the jurisdiction of the International Tribunal is the exchange of letters dated 20th February 1998.[167] By that exchange of letters the parties agreed that the International Tribunal was to have jurisdiction to deal with

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

It is scarcely necessary to emphasise the generality of the opening words of that expression "all aspects of the merits (including damages and costs)". Equally there is little need to underscore the fact that only one jurisdictional objection was contemplated: "the objection to jurisdiction as raised in the Government of Guinea's response dated 30 January 1998".

1. History of the Exchange of Letters

57. As the Counter-Memorial indicates,[168] parties' intentions when concluding the exchange of letters are to be discerned in the light of contemporary circumstances. It was on the initiative and at the insistence of the Republic of Guinea that the parties concluded that exchange of letters. By letter dated 22nd January 1998 the Republic of Guinea informed St. Vincent and the Grenadines that it would not agree to submit to arbitration and "only the Law of the Sea Tribunal would be competent". The Republic of Guinea failed to appoint an arbitrator and on 4th February 1998 the lawyers acting for that Government requested those acting for St. Vincent and the Grenadines to draft an agreement providing for submission of the dispute to the International Tribunal. On receiving a draft, those acting for the Republic of Guinea consulted the President and the Registrar of the International Tribunal and the latter set out in a letter sent by fax on 18th February 1998 issues for consideration of the Republic of Guinea. These matters may be seen from the bundle of contemporary correspondence, exhibited as **Annex 12 to this Reply**.

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[167] The exchange of letters is to be found at Annex 2 to the Memorial dated 19th June 1998. That this is common ground will be seen by comparing paragraph 77 of the Memorial dated 19th June 1998 ("The Tribunal has jurisdiction over this dispute by virtue of the 1998 agreement") and paragraph 49 of the Counter-Memorial ("the basis for the International Tribunal's jurisdiction on the merits of the dispute is the 1998 agreement of the parties").

[168] Paragraph 47.

58. By 20th February 1998, the International Tribunal had been seized of the Request for Provisional Measures made pursuant to Article 290(5) of UNCLOS. The hearing was to begin on 23rd February 1998. It was at the forefront of the minds of the parties. In particular the parties had in mind the Guinean objection to the jurisdiction of the arbitral tribunal and the International Tribunal, based on Article 297(3) of UNCLOS.[169] As the Republic of Guinea confirms in the Counter-Memorial,[170] she was concerned on 20th February 1998 to ensure that in the imminent proceedings on Provisional Measures, she should not be precluded contending that the legislation that she had invoked against the master of the M.V. *Saiga* was concerned with matters other than fisheries. That concern was accommodated by St. Vincent and the Grenadines in the exchange of letters. That is why it provides that the Republic of Guinea should remain free to contend that the International Tribunal has no jurisdiction under Article 297(3). Although the reference to that particular jurisdictional objection was made in view of the imminent Prompt Release proceedings, it is common ground that the Republic of Guinea continues to be free to advance in the present proceedings any objection to jurisdiction based on Article 297(3).[171]

59. It is also clear that on 20th February 1998 the Republic of Guinea was anxious to secure prompt payment of the sum of US $400,000. Indeed, the Republic of Guinea had shown itself eager to obtain monies promptly at an earlier stage in the negotiations concerning the M.V. *Saiga*;[172] but by the terms of the bank guarantee, payment of US$400,000 was conditional on presentation of a certified copy of the "final decision of a final appeal court".[173] On 20th February 1998 the written judgment of the *Cour d'Appel* had only recently become available. Before even obtaining a certified copy of it, the Director of Customs had sent a fax to *Crédit Suisse* dated 16th February requesting payment of the sum; and the Guinean Agent had done likewise on 18th February.[174] On the same date, St. Vincent and the Grenadines were also concerned to avoid further delays. The master and vessel had by then been detained for nearly four months; and the concern

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[169] Statement in Response, paragraph 3. Article 297(3) provides in part: "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2 . . ."

[170] Paragraph 47.

[171] Counter-Memorial, paragraphs 48–49. The Republic of Guinea asserts at paragraphs 48–49 of her Counter-Memorial that her actions were not based on considerations of fishery protection. This is also now common ground: see the Memorial dated 19th June 1998, paragraph 76.

[172] The account of this aspect of the negotiations, given in paragraph 50 of the Memorial dated 19th June 1998, is not contested in the Counter-Memorial.

[173] Annex 38 to the Memorial dated 19th June 1998, page 587.

[174] Annex 38 to the Memorial dated 19th June 1998, pages 588 and 586 respectively.

for the skeleton crew had been increased by news of the attack dated 30th January 1998.[175] It was in the common interest of the parties, and it was their common wish, to avoid the delay that would have been entailed by a further appeal from the *Cour d'Appel* to the Supreme Court.[176]

60. Further, when agreeing to invest the International Tribunal with jurisdiction in respect of "all aspects of the merits" the parties intended that it should not be restrained from enquiring into the merits by a challenge to admissibility based on the legal interest of the Applicant State. In all the correspondence and exchanges between the parties over some four months, there had not been a scintilla of a suggestion on the part of the Republic of Guinea that St. Vincent and the Grenadines had an insufficient legal interest in the vessel flying her flag. On the contrary, the Republic of Guinea had manifested her firm conviction in the legal interest of St. Vincent and the Grenadines by citing her as the party civilly liable in the *cédule de citation* on 10th December 1997.[177]

61. Notwithstanding this history, the Republic of Guinea now submits that she is

> "not precluded by Article 97(1) of the Rules from raising all legally possible objections against the admissibility of the claims in the present proceedings".[178]

St. Vincent and the Grenadines will shortly show that Article 97(1) of the Rules does indeed preclude the raising of objections to admissibility at this stage.[179] There is however a more fundamental objection to the raising of such objections. They are precluded by the parties' exchange of letters dated 20th February 1998.

2. Interpretation of the Exchange of Letters

62. When interpreting that exchange of letters, as when interpreting any treaty, the International Tribunal should follow the canons of construction codi-

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[175] Annex 38 to the Memorial dated 19th June 1998 page 579.
[176] On the Guinean side, this concern appears to be reflected in the action of the Guinean Agent in describing the judgment of the Court of Appeal as a judgment of the Supreme Court in his letter to *Crédit Suisse* dated 18th February: Annex 38 to the Memorial dated 19th June 1998, page 586.
[177] Annex 27 to the Memorial dated 19th June 1998, page 405.
[178] Counter-Memorial, paragraph 51.
[179] *Infra*, paragraphs 56–74.

fied in Articles 31(1) and 32 of the Vienna Convention on the Law of Treaties.[180] These provide:

> "31(1) A treaty 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 their object and purpose.
>
> 32 Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting form the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable".

63. By the exchange of letters dated 20th February 1998, St. Vincent and the Grenadines and the Republic of Guinea "agreed to submit to the International Tribunal the dispute between the two States relating to the M.V. *Saiga*", enabling the latter to deal "with all aspects of the merits" and to "address all claims for damages". Those words are to be interpreted in good faith. That is fundamental: *pacta sunt servanda*.[181] Observance in good faith of the undertakings expressly undertaken by the exchange of letters precludes an objection to jurisdiction or admissibility which, if accepted, would prevent the International Tribunal from resolving the dispute between the two States relating to the M.V. *Saiga* and from dealing with all aspects of the merits and from addressing all claims for damages.

64. Further, the exchange of letters dated 20th February 1988 must be interpreted in accordance with the ordinary meaning to be given to the terms. That principle is elementary: *clara non interpretanda*.[182] The ordinary meaning of the language used in the exchange of letters is that the International Tribunal is authorised to resolve the dispute between the two States relating to the M.V. *Saiga*, to deal with all aspects of the merits and to address all claims for damages. The assertion of a right to object to admissibility, at the present stage, is incompatible with the ordinary meaning

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[180] U.N. Doc. A/Conf. 39/27; 8 I.L.M. (1970) 679.

[181] *North Atlantic Coast Fisheries Case*, XI R.I.A.A. (1910) 188; *Case Concerning Rights of United States Nationals in Morocco*, I.C.J. Rep. (1952) page 212; T. O. Elias, *The Modern Law of Treaties*, 1974, 40–45.

[182] See *Chorzów Factory Case*, (1927) P.C.I.J. Ser. A No. 9 page 24; Judge Anzilotti's Dissenting Opinion in *Employment of Women During the Night*, (1932) P.C.I.J. Ser. A/B No. 50 at page 30.

of that language. It is also contrary to the ordinary meaning of the language to contend that when the parties referred to "the objection to jurisdiction as raised in the Government of Guinea's response dated 30 January 1998" they intended to leave it open to the Government of Guinea to raise other objections as to jurisdiction or admissibility. The parties singled out for mention one basis only upon which the Respondent State might object to consideration of the merits by the International Tribunal. Thereby they clearly indicated that other grounds were precluded: *expressio unius, exclusio alterius.*

65. The words appearing in the exchange of letters dated 20th February 1988 must be interpreted in their context. As the International Court of Justice put it in the Advisory Opinion on *Admission of a State to the United Nations*:

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter".[183]

The Republic of Guinea did not merely confirm that she "has agreed to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the M.V. *Saiga*": she made that statement in a context which evinced her intention to preclude reliance on objections to admissibility which would prevent the International Tribunal from resolving the dispute between the parties on its merits. That is the significance of the reference to the jurisdiction of the International Tribunal to deal with "all aspects of the merits". Moreover, the context for this purpose must include the instrument instituting the arbitral procedure[184] which dealt extensively with the merits and provoked no objection from the Republic of Guinea as regards admissibility.

66. Further, the terms of the exchange of letters dated 20th February 19[98] must be interpreted in the light of their object and purpose. The expressed object was to enable the International Tribunal to substitute itself for the arbitral tribunal which was to be established pursuant to Articles 286 and 287(3) of UNCLOS and Annex VII thereto for the purpose of resolving the dispute between the two States on its merits.

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[183] I.C.J. Rep. (1950) 8.
[184] Vienna Convention on the Law of Treaties, Article 31(2)(b).

67. Finally, to confirm the meaning appearing from the text of the exchange of letters dated 20th February 19[98], or to resolve any ambiguity therein, that text is to be interpreted in the light of the circumstances of its conclusion. The circumstances of its conclusion show that:

(i) When preserving the Guinean right to advance "the objection to jurisdiction as raised in the Government of Guinea's response dated 30 January 1998" the parties intended to meet the Guinean concern that she should remain free to contend, in the imminent Prompt Release proceedings, that the legislation that she had invoked against the master of the M.V. *Saiga* was concerned with matters other than fisheries. The phrase in the exchange of letters cannot be taken as an illustrative example of a wider species of objections that might be raised by the Republic of Guinea to the determination of the merits by the International Tribunal.

(ii) At the date of the exchange of letters both parties knew that an appeal to the Supreme Court would cause further delay and both sought to avoid that delay. It was not in the contemplation of either party that the Republic of Guinea should be entitled to object to the admissibility of the proceedings on the ground that the master of the M.V. *Saiga* had failed to appeal to the Guinean Supreme Court.

(iii) When agreeing to invest the International Tribunal with jurisdiction in respect of "all aspects of the merits" the parties intended that it not be restrained from enquiring into the merits by a challenge to admissibility based on the legal interest of the Applicant State. At the material time (and at all times prior to the Counter-Memorial) there had been no suggestion that St. Vincent and the Grenadines lacked the appropriate legal interest.

3. Article 97(1) of the Rules of the Tribunal

68. For these reasons, it is submitted that the Republic of Guinea is precluded from advancing an objection to jurisdiction or admissibility, irrespective of the effect of Article 97(1) of the Rules of the Tribunal. However, even if the Republic of Guinea could overcome those fundamental obstacles it would be precluded from advancing objections to jurisdiction or admissibility at this stage by Article 97(1). That Article reads as follows:

> "Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection, the decision on which is

> requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of the proceedings".[185]

69. By the first numbered paragraph of their exchange of letters of 20th February 1998 the parties agreed 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, the date of the Notification by St. Vincent and the Grenadines".[186]

The period of 90 days measured from 22nd December 1997 ended on 22nd March 1998. No objection to jurisdiction or admissibility was raised in that period.

70. The Counter-Memorial pleads, however, that the date of "the institution of the proceedings" should be taken to be the date of the Applicant's Memorial on 19th June 1998.[187] That is incorrect. The institution of proceedings and the Applicant's memorial are entirely different matters. They are governed by different sub-sections of the Rules of the Tribunal. Within Section B, subsection 1 deals with "Institution of Proceedings" and subsection 2 with "Written Pleadings" including (in Article 60) the Applicant's Memorial. The reason advanced by the Republic of Guinea in support of the contention that these distinct steps should be treated as though they were one and the same is that "Before that date the Respondent had no possibility to pronounce himself on the dispute".[188] That is also incorrect. Had the Republic of Guinea not agreed, on 20th February 1998, that the International Tribunal should deal with all aspects of the merits, she would not have been precluded from raising an objection to jurisdiction or admissibility in advance of the Applicant's Memorial. On the contrary, she would be expected to raise any such objection at that stage; for as the International Court of Justice has observed, it is an essential point of principle that "a party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established".[189] (The same consideration applies to objections to admissibility).

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[185] The language follows that of Article 79(1) of the Rules of Procedure of the International Court of Justice.
[186] Annex 1 to the Memorial dated 19th June 1998, page 12.
[187] Paragraph 54.
[188] *Ibid*.
[189] *ICAO Council Case*, I.C.J. Rep. (1972) at 56.

71. In any event, even if the date of the institution of proceedings were taken to be identical with the date of the Applicant's Memorial, the 90-day period would have expired on 18th September 1998. No objection to jurisdiction or admissibility was made even within that time. The Republic of Guinea therefore pleads that the time limit for submitting objections to admissibility was "implicitly extended" when the International Tribunal granted the Guinean request for an extension of time for submitting her Counter-Memorial.[190] That submission is at variance with the terms of the Order of the Tribunal. The plea that if no such inference were made "the Respondent would have been deprived of essential rights of procedure"[191] is without foundation, for the reason given above: a State raising objection to the admissibility of an action can be expected to do so at an early stage.

72. The Republic of Guinea next submits that she is not precluded from raising objections to admissibility, despite the passage of 90 days from the date of institution of the proceedings, since it is for her to decide whether or not such objections should be raised as formal preliminary objections rather than during the determination of the merits.[192] Although the Republic of Guinea does not say so, her point might be taken to derive some support from the following words appearing in Article 97(1): "Any . . . objection the decision on which is requested before any further proceedings on the merits".

73. However, as the text of Article 97(1) indicates, and as is confirmed by comparison with its progenitor, Article 79(1) of the Rules of Procedure of the International Court of Justice, three distinct objections are there contemplated: (i) objections to jurisdiction of the Tribunal; (ii) objections to the admissibility of the application and (iii) any other objection, the decision upon which is requested before any further proceedings on the merits. (The final adjectival phrase qualifies the words "any other objection" only). In the practice of the Permanent Court and the International Court of Justice, the third genus comprises such matters as the submission that the claim as formulated falls outside the *compromis*[193] or that the nature of the dispute was such as to make it not justiciable.[194] It was with these matters that Dr Thirlway is understood to have been dealing at the passage, cited by the Republic of Guinea, when he spoke of the liberty of the Respondent State

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[190] Paragraph 54.
[191] *Ibid*.
[192] Paragraph 53.
[193] As in *Borschgrave*, P.C.I.J. Series A/B No. 72.
[194] See the judgment of Sir Gerald Fitzmaurice in the *Northern Cameroons* Case, I.C.J. Rep. (1963) page 100.

to raise the objection at any time.[195] Notwithstanding that author's practical experience of procedural matters, his comment cannot be taken to imply that Respondents are free, in the practice of the International Court of Justice, to raise objections to admissibility at any stage. The occasions when States have referred to issues of admissibility in the course of counter-memorials are few;[196] but it appears that these have usually, if not invariably, been cases in which Respondent States have reiterated at the merits stage an objection already made by way of preliminary objection. Commenting on those cases, Professor Rosenne observes:

> "While doubtless this practice can be explained always by persuasive diplomatic argumentation, justifying an attempt by the respondent to ensure that its version of the matter appears on the published record of the Court, there is certainly a jurisprudential difficulty in acknowledging the admissibility of a pleading which in effect says that notwithstanding the respondent's contention that it should not have to give an account of itself before the Court it will nevertheless insist on having its position placed on the record".[197]

St. Vincent and the Grenadines endorse that comment.

74. In his *Hague Lectures* Professor Hambro is more emphatic:

> "It might indeed be considered bad faith and almost contempt of Court if the State waited until the very last moment and permitted the other party or parties to present the memorial on the merits before it raised its preliminary objection".[198]

That view is shared by A. A. Cançado Trindade in his book on *The Application of the Rule of Exhaustion of Local Remedies in International Law*.[199] Without inviting the International Tribunal to dissent from the views expressed by Professor Hambro and Dr Cançado Trindade, St. Vincent and the Grenadines submits that in the present case it is safe to reach a conclusion adverse to the Republic of Guinea on more moderate grounds. A State which fails to make any objection to the admissibility of

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[195] *Encyclopaedia of Public International Law*, Max Planck Instituut, 1987, Vol. I page 180.
[196] This was done in the case of *Pajzs, Csáky and Esterházy*, P.C.I.J. Ser A/B No. 68 (1938); also in *Ambatielos*, I.C.J. Rep. (1953) page 10.
[197] *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 1983, 162.
[198] "The Jurisdiction of the International Court of Justice", 76 *Hague Recueil* (1950–I) 208–9.
[199] 1982, page 229.

the application within the period prescribed by the Rules of the Tribunal, but on the contrary agrees to authorise the International Tribunal to deal with "all aspects of the merits", cannot raise objections to admissibility for the first time in the course of a Counter-Memorial.

75. For these reasons St. Vincent and the Grenadines submits that the International Tribunal should rule that the Republic of Guinea is not entitled to raise objections to admissibility and should refrain from entertaining or considering them. Nevertheless, St. Vincent and the Grenadines respond to the submissions made by the Republic of Guinea, in respect of admissibility, strictly in the alternative to her primary submission that the International Tribunal should refrain from considering those issues.

4. The Effective Link

76. At two points in her Counter-Memorial,[200] the Republic of Guinea takes issue with a phrase in the Memorial[201] which spoke of the violation of "the right of St. Vincent and the Grenadines and vessels flying her flag". She objects that the freedoms of navigation for which UNCLOS provides are freedoms of States, not ships. It is respectfully submitted that this is a meritless point of terminology. It is elementary that with a few exceptions, public international law regulates the rights between States and other legal persons; but it is needlessly cumbersome to speak at every juncture of the rights of States in respect of vessels. For this reason UNCLOS itself speaks at numerous points about the rights of ships.[202] Most particularly, it provides in Article 111(8):

> "Where a ship has been stopped or arrested outside the territorial sea in the circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained."

St. Vincent and the Grenadines trusts that when she complained of violation of "the right of the M.V. *Saiga* not to be subject to the application or enforcement of Guinean customs duties or contraband laws in Guinea's exclusive economic zone"[203] the International Tribunal clearly understood

[200] Counter-Memorial paragraphs 57 and 72.
[201] Memorial dated 19th June 1998, Final Submissions, page 81.
[202] See for instance Article 17 "ships of all States . . . enjoy the right of innocent passage through territorial waters"; Article 38(1) "In the straits referred to in Article 37, all ships and aircraft enjoy the right of transit passage"; Article 52: "Subject to Article 53 and without prejudice to Article 50, ships of all States enjoy the right of innocent passage through archipelagic waters".
[203] Memorial dated 19th June 1998, paragraph 101.

that she was complaining of violation of her own right in international law to secure, in respect of vessels flying her flag, the right not to be subject to the application or enforcement of those Guinean laws in that zone.[204]

77. Invoking the final sentence of Article 91(1) of UNCLOS, which provides that "There must exist a genuine link between the State and the ship", the Republic of Guinea next contends that:

> "Without a genuine link between St. Vincent and the Grenadines and the M.V. *Saiga*, the Applicant's claim concerning violation of its right of navigation and the status of the ship is not admissible before the Tribunal *vis-à-vis* Guinea".[205]

If the point should arise for determination before the International Tribunal at all (*quod non*) it would be sufficient to respond that in the present case, the requirement of an "effective link" is amply established. There is annexed, as **Annex 6 to this Reply**, a copy of the Merchant Shipping Act 1982 of the St. Vincent and the Grenadines, from which the International Tribunal will see *inter alia* that unless the owner of a vessel is a Vincentian, it must be represented by a Vincentian company.[206] Through its representative within the jurisdiction of St. Vincent and the Grenadines, and in accordance with practices described hereafter, the Government of that country ensures its administrative oversight of the conduct of the vessel and secures compliance by the vessel of the rules prescribed by St. Vincent and the Grenadines, for the safety of the vessel and the welfare of her crew.

78. St. Vincent and the Grenadines is an active member of the International Maritime Organization ("I.M.O.") and a party to the following conventions:

(i) The International Convention for the Safety of Life at Sea ("S.O.L.A.S.") and the Protocol thereto, as amended;[207]

(ii) the International Convention on Load Lines 1966;[208]

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[204] The Republic of Guinea does not improve the terminology by insisting that she will confine her observations to "the Applicant's submission that its own freedom of navigation and related uses are violated": States do not navigate: they have rights and obligations in respect of vessels flying their flags.

[205] Counter-Memorial, paragraph 68.

[206] See section 9.

[207] London, 1st November 1974, 46 U.N.T.S. (1980); Protocol, London, 17th February 1978, U.K.T.S. 40 (1981); J.O.R.F. 30th May 1981; for amendments see in particular Misc. 25 (1982), Cmnd. 8741 (acceded 28th October 1983 and 13 July 1987).

[208] London, 5th April 1966, 640 U.N.T.S. 133 (acceded 29th April 1986).

(iii) the International Convention on Tonnage Measurement of Ships, 1969;[209]

(iv) the Convention on International Regulation for Preventing Collisions at Sea;[210]

(v) the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers ("S.T.C.");[211]

(vi) the Special Trade (Passenger Ships) Agreement, 1971;[212]

(vii) the Protocol thereto, on Space Requirements for Special Trade Passenger Ships, 1983.[213]

(iv) the International Convention for the Prevention of Pollution from Ships as modified by the Protocol thereto dated 17th February 1978, ("MARPOL") with all five Annexes;[214]

(vi) the International Convention on Civil Liability for Pollution from Ships.[215]

Among the other conventions to which she is a party is the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages.[216]

79. As the *travaux préparatoires* of UNCLOS demonstrate, the effective links contemplated in Article 91 were not to be confined rigidly to the nationality of the owner. Rather, the purpose of the effective link is to form the connection required for administrative purposes. The first two sentences of Article 91 repeat *verbatim* the International Law Commission's draft of 1956, of which the Commission itself stated:

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[209] London, 23rd June 1969, U.K.T.S. 50 (1982) (acceded 28th October 1983).
[210] London, 20th October 1972, U.K.T.S. 77 (1977); J.O.R.F. 8th July 1977 (acceded 28th October 1983).
[211] London, 7th July 1978, Misc. 6 (1979) (acceded 28th June 1995).
[212] London, 6th October 1971, U.K.T.S. 7 (1980), Cmnd. 7761 (acceded 31st May 1989).
[213] London, (acceded 31st August 1989).
[214] London, 2nd November 1973, Protocol, London, 17th February 1978 Misc. 26 (1974) (acceded 28th October 1983).
[215] Brussels, 29th November 1969, U.N.J.Y.B. (1969) 174 (acceded 19th April 1989).
[216] Brussels, 10th April 1926, 120 L.N.T.S. 187.

> "With regard to the national element required for permission to fly the flag, a great many systems are possible but there must be a minimum national element".[217]
>
> As regards the statement that there must be a genuine link between the State and the ship, the International Law [Commission] concluded that existing State practice governing permission to fly the flag was "too divergent to be governed by [a] few criteria"; and that States should continue to enjoy "a wide latitude" save that "the grant of its flag to a ship cannot be a mere administrative formality".[218]

80. For the purpose of securing administrative oversight of vessels flying her flag, St. Vincent and the Grenadines has authorized eleven reputable classification societies,[219] which act for numerous national registries, to inspect, survey and deliver the safety documents on behalf of St. Vincent and the Grenadines as provided by S.O.L.A.S. and MARPOL on the condition that the vessel complies with those conditions. Surveys are effected at least once a year, sometimes more frequently, according to the state of the vessel. Furthermore, of St. Vincent and the Grenadines has appointed a number of exclusive surveyors in various parts of the world who survey Vincentian vessels on an annual basis. In addition to all this, every vessel flying the Vincentian flag is compelled to maintain at least the minimum crew specified in the Minimum Safe Manning Certificate. Regulations are issued governing the victualling and living quarters aboard Vincentian ships: these are made available to the crew.[220]

81. The basis on which the Republic of Guinea considers herself able to assert that there is no effective link between the M.V. *Saiga* and St. Vincent and the Grenadines is that the owner is a company registered in Cyprus. By the express terms of UNCLOS, however, the effective link must be between the flag State and the vessel: not between that State and the owners (whether that means the registered corporate owners, or the majority of beneficial owners, or something else). The Republic of Guinea submits that

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[217] I.L.C. Ybk. (1956–II) 253 at 278.
[218] Ibid at 279.
[219] American Bureau of Shipping ("A.B.S."); Bureau Veritas ("B.V"); Germainscher Lloyd ("G.L."); Hellenic Register of Shipping ("H.R.S."); International Naval Surveys Bureau ("I.N.S.B."); Korean register of Shipping ("K.R.S."); Lloyds Register of Shipping ("L.R."); Nippon Kaiji Kyokai ("N.K.K."); Polski Register Statkow ("P.S.K."); Registro Italiano Navale ("N.R.N.") and Russian Maritime Register of Shipping ("R.S.").
[220] See **Annex 13 to this Reply**.

> "under Articles 94 and 217 of the Convention, a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State . . . the basis of this jurisdiction can be, for example, nationality or residence or domicile of the owner or operator of the ship".[221]

Article 94 imposes on flag States the duty to exercise effective jurisdiction and control in administrative, technical and social matters over ships flying its flag. Article 217 provides for the enforcement of applicable international rules by flag States. Neither requires that the owners of ships flying the flags of Contracting States should have the nationality or residence or domicile of those States. Had the parties intended to impose such a requirement in UNCLOS, they would have done so.

82. The proposition that an effective link is fully compatible with foreign ownership of a vessel is further confirmed by the United Nations Convention on Conditions for Registration of Ships, upon which the Republic of Guinea relies (notwithstanding the fact that neither she nor St. Vincent and the Grenadines are parties thereto and that it is not yet in force).[222] This envisages that national maritime administrations will exercise effective jurisdiction and control over ships flying their flags, with regard to identification and accountability of shipowners and with regard to administrative, technical, economic and social matters.[223] Specifically the Convention would not require the flag State to provide in its laws and regulations for the ownership of ships flying their flags: it contemplates the establishment of an effective link *either* by ownership *or in the alternative* by manning.[224] Where the effective link is to be established by manning, a "satisfactory part of the complement" would be nationals of the flag State, having regard *inter alia* to "the availability of qualified seafarers within the State of registration".[225] In the case of St. Vincent and the Grenadines, vessels flying the flag of that State must give preference to nationals of that State in respect of manning.

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[221] Counter-Memorial, paragraph 65.
[222] 7 *Law of the Sea Bulletin* (1986) 87.
[223] Article 1.
[224] Articles 8 and 9 respectively; see Article 7.
[225] See further S. Nandan and S. Rosenne, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III 108–9.

5 Nationality of Aggrieved Persons

83. The Republic of Guinea contends that in so far as she complains of the detention of the master of the vessel and of some of the crew and the infliction of injuries upon others, the application is inadmissible because:

> "No State may claim protection of persons in international law who are not its own nationals".[226]

84. It is of course a general rule one State cannot advance a claim against another before an international tribunal unless the former has a legal interest in the matter to which the proceedings relate; so that where the physical injury or suffering forming the basis of the claim was suffered by an individual the latter must ordinarily have the nationality of the claimant State.[227] It is no less clear that there are various exceptions to the second limb of this rule. In the case of *Reparations for Injuries*[228] the International Court of Justice stated that: "even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality." Among those exceptions in the rule whereby a State may advance claims in respect of seamen aboard vessels flying their flag.[229] It is upon that exception that St. Vincent and the Grenadines relies.[230]

85. Contrary to the submission of the Republic of Guinea,[231] the rule allowing a State to advance a claim in respect of injuries suffered by members of the crew of ships flying its flag is well established in international law. This rule has been referred to on three occasions by Judges of the International Court of Justice. In his dissenting opinion in the *Reparations for Injuries* Advisory Opinion, Judge Hackworth referred to:

> "The special situation of protected persons under certain treaties and that of seamen and aliens serving in the armed forces, all of whom are assimilated to the status of nationals . . ."[232]

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[226] Counter-Memorial, paragraph 74.

[227] See for example E. Borchard, *The Diplomatic Protection of Citizens Abroad*, 1915 pages 475–8; *Whitman's Digest of International Law*, 1963–75, Vol. III page 417; C. Joseph, *Nationality and Diplomatic Protection*, 1969.

[228] I.C.J. Rep. (1949) 174 at 181.

[229] See the reference above to I. Brownlie, *Principles of Public International Law*, 5th ed., 1998 page 482.

[230] Counter Memorial, paragraph 75, citing A. D. Watts, "The Protection of Alien Seamen", 7 I.C.L.Q. (1958) 691–697.

[231] Memorial dated 19th June 1998, page 66 note 28.

[232] I.C.J. Rep. (1949) 174 at 202. In oral arguments in this case, Mr. Feller, Principal Director of the

In that same case, Judge Badawi Pasha stated that the classes of cases envisaged by the exceptions referred to by the Court:

> "seem to relate to the protection of the flag and of armed forces, in which case protection extends to everyone in the ship or in the forces, independent of nationality."[233]

More recently, Judge *ad hoc* Riphagen, in the *Barcelona Traction Case* spoke of the concept of "functional protection" for "members of the crew of a vessel flying the flag of the State; members of the armed forces of a State; agents of the United Nations".[234]
According to him:

> "the protection of the activity as a whole, linked as such with a State, extends to persons who participate in that whole, irrespective of their nationality."[235]

86. The United States of America has on a number of occasions presented claims before international tribunals or directly against foreign States on behalf of foreign nationals who were injured whilst serving on ships flying the American flag.[236] Although the ground on which protection has sometimes been claimed has been the fact that the foreign seaman had declared his intention to become an American national,[237] these claims have not in

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Legal Department of the United Nations Secretariat, and Counsel for the United Nations Secretary General in the proceedings, stated that there are basis, other than nationality, on which a State may claim on behalf of an individual. He referred to "cases in which a State has made a claim on behalf of persons who are not its nationals but who stand in some other relation to it, for example, alien seamen. . . . These are all cases in which the nexus is not nationality, but some other basis on which the protection of the State may be invoked." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 Pleadings, Oral Arguments, Documents, page 88.

[233] I.C.J. Reports (1949) 174 at 206–7, note 1. Judge Badawi Pasha went on to say that in the case of protection of crew members of a ship flying the flag of a State, as with protection of members of armed forces, "the condition of nationality is satisfied . . ., its absence, in the case of one or more units or persons of a national entity, may be held to be covered by a principle of the indivisibility of the flag or of the armed forces." *ibid*.

[234] *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, (Belgium v. Spain), dissenting opinion of Judge *ad hoc* Riphagen, I.C.J. Rep. (1970) 3 at 346.

[235] *Ibid.*

[236] See the cases and incidents referred to below and referred to in *Hackworth's Digest of International Law*, (1942) Vol. IV 883–5; (1943) Vol. V 816–819; *Moore's Digest of International Law*, (1906) Vol. III 795–799.

[237] The Counter Memorial of Guinea, paragraph 75, asserts that "a careful scrutiny of international decisions and State practice undertaken in legal writing revealed that the predominantly American endeavours to protect aliens on vessels flying the American flag related in several cases to the special situation that the foreign seafarers had declared their intention to become American citizens". Citing A. D. Watts, "The Protection of Alien Seamen", 7 I.C.L.Q. (1958) 691–697.

all cases[238] been based on such an intention.[239] The United States successfully asserted competence to present claims either when the seaman had complied with the statutory provision dealing with declarations of intention to become naturalised[240] or when "the injury complained against must have been sustained while actually serving under and receiving the protection of the American flag".[241]

87. Confirmation of the fact that American practice in this regard extends to protection of all seamen serving on American vessels can be seen from a number of judicial decisions. In the case of *In Re Ross*, Mr. Justice Field of the U.S. Supreme Court, when considering the status of an alien who enlists on an American ship, stated that:

> "By such enlistment he becomes an American seaman – one of an American crew on board of an American vessel – and as such entitled to the protection and benefit of all the laws passed by Congress on behalf of American seamen and subject to all their obligations and liabilities. . . . He could then insist upon treatment as an American citizen and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born".[242]

88. In a number of cases decided by the court set up to distribute the fund paid to the United States by Great Britain as a result of the *Alabama Arbitration*,

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[238] In the diplomatic correspondence dealing with the detention by French and British authorities of August Piepenbrink, a German national serving on a U.S. vessel, the United States Secretary relied on the fact that Piepenbrink had declared his intention to become an American citizen, but also on the argument "that independently of any question of Piepenbrink's American citizenship, [the United States] Government insists that his removal from an American vessel on the high seas was without legal justification": 9 A.J.I.L. (Supp.) (1929) 353 at 354, 356. Piepenbrink was released by the French and British Governments "as a friendly act, while reserving the question of principle involved": *ibid*. 359.

[239] For example, in the Chinese incident referred to in *Hackworth's Digest of International Law* (1942) Vol. IV 884, there is no reference to any declaration to become an American citizen. It was held in *Nilson (U.S.) v. Germany* VII R.I.A.A. (1925) 176, that the fact that a foreign seaman had made a declaration of intention to become an American national did not entitle the United States to bring a claim on behalf of such a person to the U.S./Germany Mixed Commission. It was however, conceded that the claim was admissible as a matter of general international law. The Umpire stated that: "*The American Commissioner expresses the opinion that claims of the character here dealt with 'are recognized under international law as properly presentable internationally'. This may be conceded*." This Commission was however constrained by the terms of the Treaty of Berlin, to confine its award in the particular case to rights the United States may assert on behalf of its nationals "*not what claims it might have presented internationally under the rules of international law*": *ibid.* at 183.

[240] Section 2174 of the Revised Statutes of the United States provided that an alien seaman on an American vessel should "for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen."

[241] E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, 1915, page 478.

[242] 140 U.S. 453 at 472.

the court held that the flag protected the ship and every person and thing thereon not contraband. In *Schreiber v. U.S.* it was stated that:

> "This court has in oft-repeated instances made awards in favor of seamen who were not citizens or residents of this country, whose only title to protection arose from the fact that they were upon an American ship".[243]

This court was empowered to admit only those claims arising in favour of persons "entitled to the protection of the United States". As the court itself held:

> "The decisions of the court show that aliens shipping goods on American vessels during the rebellion, or employed at that time as seamen on vessels owned and registered in the United States . . ., were held to be entitled to 'the protection of the United States' . . ."[244]

89. The American Foreign Service Regulations issued in 1941 deleted all reference to seamen who have declared an intention to become American citizens and state that the term "American Seaman" includes "Aliens who have acquired and maintained the character of American seamen". The regulations further provide that:

> "An alien can acquire the character of an American seaman for the purposes of protection and relief under the laws of the United States only by shipping on a vessel of the United States in a port of the United States before a shipping commissioner. Having once acquired such status, he may thereafter reship on any American-owned vessel either in a foreign port or in a port of the United States without losing his rights and privileges as an American seaman".[245]

The Fishermen's Protective Act of the United States,[246] first passed in 1954, provides that if a United States vessel[247] is seized in a manner contrary to international law, the Secretary of State may take action for the protection of such vessel *and for the health and welfare of its crew*.[248] Crew here is not limited to the persons who are nationals of the United States.

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[243] *Ibid*. at 2352.
[244] *Ibid*., at 2360.
[245] See *Hackworth's Digest of International Law* (1942) Vol. IV 883.
[246] 22 U.S.C. §§ 1971–1980b.
[247] I.e., a vessel documented or certificated under U.S. law.
[248] § 1972 (i).

90. In the *McReady v. Mexico*, the United States brought a claim on behalf a crew member of vessel flying its flag. In order to satisfy the terms of the *compromis* which provided only for settlement of claims by American citizens, it was held that "unless . . . the contrary be expressly proved, the umpire considers that the claimant is entitled to be considered a citizen of the United States." However, the Umpire went on to hold that:

> "He [the umpire] is further of the opinion, which he believes is shared by many thinking persons, that seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve."[249]

91. The practice of presenting claims on behalf of foreign crew members of vessels flying the flag of the claimant State is not, of course, limited to the practice of the United States. It has been noted that in one of the earliest cases, "the umpire who considered that alien seamen were entitled to the protection of their flag state was English".[250] The same writer has also noted that in an opinion given by Sir W. Scott[251] to the British Government in 1804, it was asserted that a foreign seaman with British domicile and habitually employed in British navigation and commerce, "assumes the character of a British Mariner" and has the benefit of "all the advantages of British Protection and Navigation".[252] In addition, it is stated that an Italian instruction states that "inasmuch as an alien forms part of the crew of an Italian vessel, the Italian flag will protect him from all States".

92. The principle that the flag State may advance a claim in respect of injuries suffered by alien members of the crew has support in the writings of publicists. In addition to the works already cited, the principle is also referred to and approved in the works of Professor Parry,[253] Sir Gerald Fitzmaurice,[254] Professor Bishop[255] and Professor Brownlie.[256]

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[249] *Moore's Digest of International Arbitration* (1898) Vol. III, 2536–2537.

[250] A. D. Watts, 7 I.C.L.Q. (1958) at 697 referring to Sir Edward Thornton's decision in *McReady v. Mexico*, *Moore's Digest of International Arbitration* (1898) Vol. III, 2536–2537.

[251] At the time Judge of the English Admiralty Court.

[252] *Ibid.*, referring to Lord (A.) McNair, *International Law Opinions*, 1956, Vol. II 170 at 171 (not 172 as Watts says).

[253] C. Parry, "Some Considerations Upon the Protection of Individuals in International Law", 90 *Hague Recueil* (1956–II) 678 at 703.

[254] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law", 27 B.Y.I.L. (1950) 1 at 24–26.

[255] C. Bishop, "General Course on Public International Law, 115 *Hague Recueil* (1965–II) at 388: "In some instances the tie of service in the claimant state's military forces or on its vessels may be substituted for nationality as a basis for pressing international claims. . . ."

[256] I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, 482.

93. Finally the rule of international law permitting a flag State to advance claims in respect of injuries suffered by all crew members is founded on solid considerations of policy. Where a member of the crew of a vessel suffers personal injury or detention in consequence of an unlawful exercise of power by one State upon the vessel of another State, the wound or suffering inflicted upon the seaman is an aspect of the violation of the rights of the flag State. It increases the gravity of the infraction of the flag State's rights.[257] Further, the flag State has an interest in seeking to ensure that persons who work on vessels flying its flag are free from unlawful acts. It is only be ensuring such protection that the flag State can encourage and maintain registration of ships at its registry. Protection of this interest can only be effectively secured if the flag State is entitled to advance claims on behalf of all crew members on vessels flying its flag.

6 Exhaustion of Local Remedies

94. Last, the Republic of Guinea objects to the admissibility of certain of the claims advanced by St. Vincent and the Grenadines on the ground of failure to exhaust local remedies. She asserts that "The parties to this dispute have not agreed to exclude the local remedies rule in their 1998 Agreement as it already has been stated".[258] To that statement St. Vincent and the Grenadines takes vigorous objection. As has been explained,[259] the parties agreed on 20th February 1988 to submit all aspects of the merits to the International Tribunal forthwith, and the Republic of Guinea agreed to submit to that jurisdiction, since both parties had an interest in avoiding the delay that would be entailed by a further appeal; indeed in an attempt to secure payment of the sum US$400,000 without such delay the Guinean Agent stated to *Crédit Suisse* that the judgment of the *Cour d'Appel* was that of the Supreme Court, thereby demonstrating the Republic of Guinea's concluded view at the time that the legal process was to be treated as exhausted.[260]

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[257] In oral arguments in the *Reparation for Injuries*, Advisory Opinion, 1949 Pleadings, Oral Arguments, Documents, (pp. 124–5), Counsel for the United Kingdom, Mr (later Sir) Gerald Fitzmaurice, argued that "we have the principle that where an international person has an international duty owed to it, by reason of a treaty, it is entitled to make an international claim in respect of any breach of that duty." It was further argued that even if the person who suffered the direct loss as a result of the breach of duty was not a national, the State who's rights have been breached is entitled to bring a claim on behalf of the individual.

[258] Counter-Memorial, paragraph 79.

[259] *Supra* paragraph 58.

[260] Annex 38 to the Memorial dated 19th June 1998, pages 588 and 586 respectively.

95. Acknowledging that the local remedies rule does not apply to claims based primarily upon a direct breach of international law[261] the Republic of Guinea submits that the following claims are "based on rights of individuals and private legal entities whereas none of them relates to or is based upon a right of the flag State itself":

    (i) the right of the M.V. *Saiga* to enjoy freedom of navigation;

    (ii) damage sustained by the ship and personal injuries suffered by the master and the crew;

    (iii) return of the equivalent in US dollars for the discharged gasoil cargo;

96. The assertion that these claims are "based on rights of individuals and private legal entities" calls for some correction. UNCLOS itself speaks of compensation to be received by a ship for loss or damage that it may sustain in consequence of an unjustified arrest;[262] but before the International Tribunal the action is not instituted by the vessel *in rem* but by the State. When, therefore St. Vincent and the Grenadines claims compensation for violation of "the right of the M.V. *Saiga*"[263] she is obviously referring (in the customary brief phrase) to violation of her own right to secure, in respect of vessels flying her flag, freedoms for which UNCLOS provides.[264] Likewise her claim to be compensated for damage sustained by the ship and personal injuries suffered by the master and the crew is, in more technical and less customary language, a claim to be compensated for violation of her right to secure, in respect of the vessel and in the persons of the master and the crew, respect for the rules of international law. The same is true of her claim for compensation in respect of the seizure of the cargo.

97. A violation of the jurisdiction that a flag State enjoys in respect of vessels flying her flag occurs whenever the vessel is detained or boarded inconsistently with international law; but it is more egregious when the detention is effected by force or arms, is prolonged, entails lengthy detention of the master and the shooting and beating of the crew; and when a valuable cargo is seized. None of the claims advanced by St. Vincent and the Grenadines in this case is, strictly peaking, "based on rights of individuals". Individuals do not receive rights directly from UNCLOS. All these claims relate to or are based upon a right of the flag State itself".

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[261] Counter-Memorial, paragraph 81.
[262] Article 111(8).
[263] Memorial dated 19th June 1998, paragraph 101.
[264] See the reference to *Mavrommatis Palestine Concessions* case, paragraph 29, note 3 *supra*.

98. It is the case, however, that St. Vincent and the Grenadines seeks to ensure that she shall be enabled to devote an appropriate portion of the damages that may be awarded by the International Tribunal in this case to the compensation of the natural and legal persons who suffered injury, detention and financial loss in consequence of the actions of the Republic of Guinea. Those natural and legal persons were subject to the protection of St. Vincent and the Grenadines. By taking into account the losses suffered by those natural and legal persons, when assessing the *quantum* of damage, the International Tribunal can put the Applicant State in a position to exercise her right to protect those who sail under her flag.

99. The Republic of Guinea later asserts[265] that "the alleged violation of the flag State's right to navigation is by no means preponderant to the claim concerning the cargo". St. Vincent and the Grenadines submits otherwise. A coastal State's act in seizing the cargo of a vessel engaged in navigation beyond its territorial waters and jurisdiction amounts to a violation of the flag State's right to secure, in respect of vessels flying its flag, peaceful navigation in accordance with the principles of international law.

100. The case for the Republic of Guinea on that point is not improved by her assertion that she was entitled to "exercise . . . territorial jurisdiction over the ship, its crew and cargo, while it was in port".[266] The vessel was in that port because it had been taken there, under force of arms, from a point well beyond the outermost reach of Guinean jurisdiction.

101. The Republic of Guinea's accepts the proposition that

> "international law requires also a link between the ship, its crew members and cargo, on the one hand and the coastal State on the other hand, as a condition for the exercise of the local remedies rule".[267]

More specifically she accepts, on the basis of the *Case Concerning the Aerial Incident*,[268] that the exhaustion of local remedies rule is only applied when the alien has created or is deemed to have created "a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned". It can scarcely be maintained that a vessel and its crew, who were fired upon in the exclusive economic

[265] Counter-Memorial, paragraph 83.
[266] *Ibid*.
[267] Counter-Memorial, paragraph 84.
[268] I.C.J. Rep. (1959), Pleadings, pages 531–2.

zone of Sierra Leone, damaged and injured there, and brought under force of arms and against their will to a Conakry, created a voluntary, conscious and deliberate connection between themselves and the Republic of Guinea. It is contended[269] that such a connection was established because on the preceding day the vessel entered the economic zone of Guinea "in order to conduct certain activities of an economic nature within the zones of Guinea" where the Republic of Guinea asserts "the coastal State's jurisdiction over its exclusive economic zone".[270]

102. Even if the bunkering had taken place within Guinean territorial waters, it may be considered doubtful that a vessel and its crew would be considered to have established a voluntary, conscious and deliberate connection between with the coastal State, so as to prevent the flag State from advancing a claim in respect of a violation of its rights, until local remedies had been exhausted. In the present case, however, it took place beyond territorial waters, in the exclusive economic zone. The claim of the Republic of Guinea to exercise jurisdiction in that zone generally is manifestly excessive. There is no obligation to exhaust local remedies in relation to an act done by the State having no jurisdiction in international law; for otherwise a State asserting exorbitant jurisdiction would thereby obtain for its own courts a compulsory jurisdiction in relation to the same matter.[271]

103. By Article 56(1)(b) of UNCLOS the coastal State has jurisdiction in the exclusive economic zone with regard to

> "(i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment."

The Republic of Guinea does not claim to have been exercising jurisdiction with regard to those matters. Moreover, even had she been doing so, she would have been obliged to "have due regard to the rights and duties of other States and . . . act in a manner compatible with this Convention".[272] Bearing in mind the fact that other States have the right under international law to engage in internationally lawful uses of the exclusive

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[269] Counter-Memorial, paragraph 85.
[270] *Ibid*.
[271] See Sir Gerald Fitzmaurice's article in 37 B.Y.I.L. (1961) 60.
[272] Article 56(2).

economic zone, and that those uses include the conduct of certain activities of an economic nature there,[273] it is not possible to maintain that a foreign vessel and its crew are deemed to have created "a voluntary, conscious and deliberate connection" between themselves and the coastal State when they engage in such activities in that area.

104. Finally it is settled law that the local remedies rule applies only where there is an effective remedy to exhaust.[274] By her Counter-Memorial the Republic of Guinea does not submit that St. Vincent and the Grenadines were either enabled by Guinean law or compelled by international law to appeal in the Guinean courts, either against her joinder to the *cédule de citation* or against any other act taken in respect of her. She claims that the master ought to have appealed to the Supreme Court but accepts[275] that the Supreme Court could not review findings of fact (including the finding, now accepted as false, that the *Giuseppe I, Kriti* or *Eleni G* were flying the Guinean flag). It is well established that the rule on exhaustion of local remedies does not require a claimant to appeal where his conviction turns on a finding of fact which a superior tribunal cannot review.[276] Finally in the words of no less an authority than Charles de Visscher (cited with approval by Judge Tanaka) :

> "A claimant cannot be required to exhaust justice in a State when there is no justice to exhaust".[277]

The state of literature and jurisprudence on that issue has recently been reviewed by Professor Brownlie who concludes that a fair number of writers[278] and arbitral awards[279] have been willing to presume ineffectiveness of remedies from the circumstances, for example on the basis of evidence that the courts were subservient to the executive.[280] Having regard to all the circumstances of the present case, including the account given by Maître Bangoura of the manner in which the Guinean authorities

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[273] See Article 57(1) preserving rights of other States in the exclusive economic zone.
[274] *Penevezys-Saldutiskis Railway Company Case*, P.C.I.J. Ser. A/B No. 76.
[275] Counter-Memorial, paragraph 87.
[276] See *Finnish Ships Arbitration*, III R.I.A.A. (1934) 1484 at 1535.
[277] "*Le déni de justice en droit international*", 52 *Hague Recueil* (1935–II) 423 at 424; quoted in *Barcelona Traction Case (Second Phase)* I.C.J. Rep. (1970) at 145.
[278] Citing M. Sørensen, *Manual of Public International Law*, 1968 589–90; Sir Robert Jennings and Sir Arthur Watts in *Oppenheim's International Law*, 9th ed. (1992) Vol. I at 361–2; C. F. Amerasinghe, *State Responsibility for Injuries to Aliens*, 1967, 242–4.
[279] Citing, e.g., *Forests in Central Rhodopie* (Merits) A.D. 1933–4 No. 39; *Brown Claim*, VI R.I.A.A. (1923) 20; *Velasquez Rodriquez Case*, Inter-American Court of Human Rights, 29th July 1988.
[280] I. Brownlie, *Principles of Public International Law*, 5th ed., 1998, 500.

and courts dealt with the master, vessel, cargo and crew;[281] the manner in which St. Vincent and the Grenadines were added to the *cédule de citation*; the speed with which the master was summonsed once the guarantee of US$400,000 had been posted; the speed and manner with which the *Tribunal de Première Instance* and *Cour d'Appel* proceeded to judgment thereafter; and the errors contained in those judgments, St. Vincent and the Grenadines submit that the master, owners and owners or consignees of the cargo were not, in any event, bound to exercise any right of appeal that they might have had.

SECTION 3: LEGAL ARGUMENTS

3.1 Guinea Has Violated Article 111 of the 1982 Convention ("Hot Pursuit") and in So Doing Used Excessive and Unreasonable Force

105. By her Memorial[282] St. Vincent and the Grenadines observed that the claim of the Republic of Guinea to have exercised the right to hot pursuit must fail on four grounds, any one of which would be sufficient. That submission derives some support from the comment of the International Tribunal, at paragraph 62 of its judgment dated 3rd December 1997, in which it stated that "the arguments put forward in order to support the existence of the requirements for hot pursuit are not tenable, even *prima facie*".[283] The correctness of that statement by the International Tribunal is challenged in the Counter-Memorial.[284]

(a) Hot Pursuit Did Not Begin Until After the M.V. *Saiga* Had Left Guinea's EEZ

106. The first of the four grounds advanced by St. Vincent and the Grenadines when contending that the Republic of Guinea must fail in her claim to have exercised the right to hot pursuit is that the pursuit did not begin until after the M.V. *Saiga* had left the exclusive economic zone. To this, and to the corresponding statement made by the International Tribunal, the Republic of Guinea responds:

> "This observation, however, rests on the assumption that Guinea exercised hot pursuit because of a violation of its laws and regulations *in*

[281] Annex 25 to the Memorial dated 19th June 1998 (not challenged by the Republic of Guinea).
[282] Memorial dated 16th June 1998, paragraph 87.
[283] Paragraph 62.
[284] Paragraph 137.

> *the contiguous zone*, whereas the Respondent alleges that the public order and essential public interest of Guinea *in its exclusive economic zone* form the basis for Guinea's exercising hot pursuit".[285]

The Republic of Guinea is emphatic on the point, asserting that "the pending violation of its essential public interests within its exclusive economic zone is a sufficient condition for hot pursuit under Article 111(2) of the Convention" and that hot pursuit provides the coastal State with enforcement jurisdiction against any violation of its laws and regulations which it is entitled to enforce within the exclusive economic zone.[286]

107. That argument is unsustainable. By its express terms, Article 111(1) of UNCLOS states:

> "Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State".

Since the Republic of Guinea accepts that this condition was not fulfilled, *cadit quaestio*.

108. The contention that Article 111(2) must be construed purposively, to enable the coastal State to exert beyond the exclusive economic zone any jurisdiction that pertained to it within that zone, fails upon at least two grounds,[287] one of which is that it proceeds on a false premise. The premise is that the Republic of Guinea enjoys within her exclusive economic zone the right to control and regulate the bunkering of vessels (irrespective of their flags). In fact, the Republic of Guinea has not notified the Secretary General of any exclusive economic zone pursuant to Article 75(2) of UNCLOS; nor does the law upon which she relies appear on its face apply within an exclusive economic zone; and (most importantly) neither UNCLOS nor any other principle of international law authorises a coastal State to impose a general prohibition on bunkering within its exclusive economic zone. The respective rights of coastal States and other States within the exclusive economic zone are set out in Part V of UNCLOS, particularly Articles 56 and 57 and most particularly Article 56(1)(b).

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[285] Counter-Memorial, paragraph 137.
[286] Article 139.
[287] The modern law of treaties does not recognize the principle of interpretation *ut res magis pereat quam valeat*, at least in the sense of warranting interpretation of a text contrary to express terms. See T. O. Elias, *The Modern Law of Treaties*, 1974,72 and 83; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., 1984, 114–154.

109. Similar objections apply to the Guinean assertion of a right to exercise hot pursuit

> "from its exclusive economic zone not only if its 'laws and regulations' are violated as maintained in Article 111(2) of the Convention but also in the case of a violation of its public order and public interest against which it has a customary right of self help".[288]

The Republic of Guinea here asserts a right acknowledged to be inconsistent with the express language of Article 111(2). Such a right cannot have its basis in UNCLOS both because it is impermissible to construe the Convention contrary to its explicit language and because the asserted right would leave the coastal State free to determine for itself what "public interest" it claims to have in an area of sea which is not subject to national sovereignty and to which there apply the principal rules of international law governing the high seas.[289]

110. The Republic of Guinea next asserts that

> "the pursuit of the M.V. *Saiga* was deemed to have begun since the launches had detected the ship on their radar and were pursuing it".[290]

The evidence from the Guinean reporting officer is that they discovered the M.V. *Saiga* on the radar at about 04.00 hours.[291] As the master stated, the M.V. *Saiga* left the Guinean exclusive economic zone at about 03.45 hours and as bridge order book confirms, at 04.00 hours the vessel was slightly south of that zone.[292] The Republic of Guinea now suggests that the statement of the master and the entry in the bridge order book are inconsistent since the M.V. *Saiga* has a speed of 10 knots.[293] The suggestion, apparently, is that if she were travelling at that speed, she would have been further distant from the southern extent of the Guinean exclusive economic zone than is shown in the bridge order book. The suggestion is based on a misreading of the Memorial, which states that at the material time the M.V. *Saiga* was travelling at a "steady speed"[294] or "at her own pace";[295] 10 knots is her maximum speed.[296]

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[288] Counter-Memorial, paragraph 140.
[289] See UNCLOS, Article 58(2).
[290] Counter-Memorial, paragraph 145.
[291] Annex 19 to the Memorial dated 19th June 1998, page 278.
[292] Annex 15 to the Memorial dated 16th June 1998, second log page, line 8 "Remarks".
[293] Counter-Memorial, paragraph 146.
[294] Memorial dated 19th June 1998, paragraph 32.
[295] Memorial dated 19th June 1998, paragraph 89.
[296] Memorial dated 19th June 1998, paragraph 95.

111. Since the M.V. *Saiga* left the Guinean exclusive economic zone at about 03.45 A.M. we may deduce that she was detected when already beyond the Guinean exclusive economic zone or, at best, that she was detected a little earlier than the reporting officer thought, when about to leave the exclusive economic zone. In either event, there was no "pursuit"; for the M.V. *Saiga* travelled at a steady speed until 04.24 hours when she reached her rendezvous, in the exclusive economic zone of Sierra Leone, where she lay drifting for some hours before being attacked.

112. It is of no avail to plead that according to some authors visual contact is unnecessary for the purposes of hot pursuit and radar contact sufficient.[297] There must still be a violation and a pursuit, which must follow without unreasonable delay. That point is made by the two authors on whom the Republic of Guinea relies. In particular, Craig H. Allen, on the very page quoted by the Respondents, writes:

> "The term 'hot pursuit' suggests that any pursuit must follow closely upon a violation. Immediate commencement of hot pursuit is not an inflexible requirement. Pursuit need not be commenced the moment a violation is detected; however, an unreasonable delay between detection of the violation and commencement of pursuit will cast doubt on the pursuit's legitimacy".[298]

The Republic of Guinea does not now contend that the 'hot pursuit' followed the bunkering at point 10º25 degrees North, 15º43 West, appreciating, no doubt, that the period intervening between that event and 04.00 hours on 28th October was such as to amount to an unreasonable delay. She cannot, on the other hand, maintain that there was 'hot pursuit' in relation to the bunkering due to take place at 09º North, 15º West, since this had not yet occurred and in any event the position is beyond even the exclusive economic zone of the Republic of Guinea, so that there could not on any view be a violation of Guinean law.

113. "As a subsidiary argument" the Republic of Guinea invokes Article 111(4) of UNCLOS which provides:

> "Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the

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[297] This is the point made by N. M. Poulkantzas in *The Right of Hot Pursuit in International Law*, 1969 at 202 and by H. Craig Allen in *Doctrine of Hot Pursuit: A Functional Interpretation Adoptable to Emerging Maritime Law Enforcement Technologies and Practices*, 20 Ocean Development and International Law (1989) 309 at 318.

[298] *Ibid*.

> ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf".

The contention now advanced[299] is that the M.V. *Saiga* had been working together with other craft as a mother ship and that:

> "in this situation of extended constructive presence, the hot pursuit could commence as long as the fishing vessels remained within the exclusive economic zone even if the M.V. *Saiga* was already outside this zone".[300]

The Republic of Guinea fails to identify the fishing vessels using the M.V. *Saiga* as a mother ship or the evidence on which she relies for the proposition that they were at the material time within the Guinean exclusive economic zone. Assuming *arguendo* that the *Giuseppe I, Kriti* or *Eleni G* were at the material time within the Guinean exclusive economic zone, it would remain necessary for the Republic of Guinea to show that these vessels (or at least one of them) and the M.V. *Saiga* were "working as a team and using the ship pursued as a mother ship". Not only does that expression imply that the mother and daughter vessels were engaged on a joint enterprise with some degree of continuity,[301] ordinarily occurring when the mother ship hovers outside territorial waters to participate along with daughter vessels in the commission of an offence there or ashore,[302] but in the words of Article 111(4):

> "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".

On the Republic of Guinea's account, that condition was not met. Assuming the hot pursuit to have begun, as the Republic of Guinea maintains, at 04.00 hours and assuming further that the Guinean authorities had satisfied themselves, by such practicable means as were be available, that

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[299] Counter-Memorial, paragraph 149.

[300] *Ibid*.

[301] W. C. Gilmore, "Hot Pursuit and Constructive Presence in Canadian Law Enforcement", 12 Marine Policy (1988) 105 at 110–111.

[302] These were the circumstances of the cases cited by the Republic of Guinea: *R v. Sunila and Soleyman* 28 D.L.R. (1986) 450 and *R v. Mills and Others*, described by W. C. Gilmore in "Hot Pursuit: the Case of R v. Mills and Others", 44 I.C.L.Q. (1995) 949.

the *Giuseppe I, Kriti* or *Eleni G* (or some other as yet unidentified daughter ship) was then within the Guinean exclusive economic zone, it would still have been necessary for the Guinean authorities to give a visual or auditory signal to stop before commencing the pursuit. It would also have been necessary that the signal should be given at a distance which enables it to be seen or heard by the M.V. *Saiga*. The Republic of Guinea does not appear to claim that her patrol boats emitted signals to the M.V. *Saiga* before 04.00 hours on 28th October 1997; and in any event visual or auditory signals would obviously have been inaudible over a distance of some two hundred miles.

(b) The Purported Exercise of Hot Pursuit Was Interrupted

114. St. Vincent and the Grenadines submitted in her Memorial that the purported exercise of the right of hot pursuit by the Republic of Guinea was interrupted, for on the assumption that the bunkering was carried out within the Guinean contiguous zone between 04.00 hours and 13.50 hours on 27th October 1997, the first viewing of the M.V. *Saiga* was by radar at 04.00 hours the next day.[303] The Republic of Guinea does not contend that there was uninterrupted pursuit beginning within the contiguous zone.[304]

(c) The Competent Authorities of Guinea Did Not Have Good Reason to Believe that the M.V. *Saiga* Had Violated its Laws and Regulations

115. At Section 1.3 above St. Vincent and the Grenadines has expanded on her submission that the competent authorities of Guinea did not have good reason to believe that the M.V. *Saiga* had violated her laws and regulations.

(d) There Was No Violation of the Rights for the Protection of which Guinea's Contiguous Zone was Established

116. Since the Republic of Guinea accepts that her claim to have been exercising a right of hot pursuit was not grounded upon acts done within the contiguous zone, St. Vincent and the Grenadines find it unnecessary to expand upon their submission that there was no violation of the rights for the protection of which Guinea's contiguous zone was established.

[303] Memorial dated 19th June 1998, paragraphs 89–90.
[304] Counter-Memorial, paragraph 137.

3.1.2 Guinea Violated the Obligation Not to Use Excessive Force in Detaining the Saiga

117. There are two aspects to the dispute between the parties on the question whether the use of Guinean force was reasonable. The first concerns the prelude to the boarding of the M.V. *Saiga*. The master of that vessel states that he neither heard nor saw any auditory or visual signs to stop. In his words:[305]

> "On October 28 at 8.30 I located targets in my radar at about 11.5 miles. I was watching them during 6–10 minutes and there were two targets proceeding fast toward us. Remembering warning about "oil hunters" off Guinea, I was afraid and gave order to the engine to move. When the distance from the targets was about 1–2 miles, I heard shooting. *I did not hear or see any warning by VHF, sound or light signal from that boats*. I closed the bridge doors, put auto pilot on, announced there was piracy's attack and everybody should go to the engine room".

This is consistent with the account given by the Second Officer who stated that the first he knew of the incident was when:

> "I heard like hitting nuts but I heard automatic firing and then in two or three minutes later or maybe more, because I was thinking, I heard the announcement of the captain that there is a piracy attack of the vessel and all the crew should proceed downstairs to the engine room".[306]

118. St. Vincent and the Grenadines invites the International Tribunal to prefer the account given by those two officers to the allegation now made by the Republic of Guinea that the patrol vessels

> "communicated with the M.V. *Saiga* on an international channel. The patrol boats identified themselves and asked the M.V. *Saiga* to stop. However, the M.V. *Saiga* did not halt. The patrol boats then transmitted acoustic signals and were even ringing the bell on board the launch, but the M.V. *Saiga* still did not stop. The patrol boats even gave visual warnings which were ignored by the M.V. *Saiga*. Instead it crossed the border to Sierra Leone".[307]

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[305] Annex 17 to the Memorial dated 19th June 1998 page 263. The account is confirmed by his statement at Annex 18 to the same Memorial, page 264.
[306] Mr. Kluyev, Prompt Release Proceedings, transcript, pages 10–11.
[307] Counter-Memorial, paragraph 16.

That appears to amount to an elaboration of the Republic of Guinea's evidence. According to the *Procès-Verbal* the reporting officer merely claimed to have "signalled our identity in advance" and to have continued to order the vessel to heave to.[308] That was the evidence on which the *Tribunal de Première Instance* relied.[309] However, both the reporting officer's account and the elaboration of it in the Guinean Counter-Memorial lack credence. In the case of the reporting officer's account, St. Vincent and the Grenadines has previously drawn attention to deficiencies in it.[310] In the case of the more elaborate account now given in the Counter-Memorial, the International Tribunal will that it is alleged that radio communications, acoustic and visual signals and the ringing of the bell preceded the point when the M.V. *Saiga* "crossed the border to Sierra Leone" (meaning, apparently, the exclusive economic zone appurtenant to that State's territorial waters). If that were so, the warnings would have had to be given at a time when the patrol boats were some two hundred miles distant. The visual and auditory signals would have been invisible and inaudible; and it is not credible that the Guinean vessel would have sent a radio signal to the M.V. *Saiga* instructing her to stop at a time when the latter was either already in the Sierra Leonean exclusive economic zone or (on the Guinean account) very close to it; and the Guinean launches were some hours away from her.

119. After quoting without contradiction the master's statement that the master heard shooting from the Guinean patrol vessels when they were about 1–2 miles away, the Counter-Memorial asserts:

> "The ship did not obey upon the blank shots being the customary signal to stop and show the flag at sea".[311]

St. Vincent and the Grenadines first responds that the customary signal to stop and show the flag at sea is rather a blue and black chequered flag, or any of the other signals mentioned in the Memorial dated 19th June 1998.[312] Second, the claim that the shots were "blank" now appears to be advanced in the Counter-Memorial for the first time. It may be contrasted with the evidence given to and accepted by the *Tribunal de Première Instance* which recorded that in the case of the patrol boats:

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[308] *Procès-Verbal*, Annex 19 to the Memorial dated 19th June 1998, page 278.
[309] Annex 29 to the Memorial dated 19th June 1998, page 418.
[310] See paragraph 35 above.
[311] Paragraph 153.
[312] Paragraph 96, page 40, note 4.

> "it was necessary for them to fire over the ship causing damage to the latter's windows".[313]

In determining what confidence it can place in the claim that the Guinean agents merely fired "blanks" the International Tribunal will take account not only of the late stage at which the claim was advanced but also of the fact that the shots had sufficient velocity to shatter the windows of the bridge of an oil tanker at a distance of 1–2 miles.

120. The second aspect to the dispute between the parties on the question whether the use of Guinean force was reasonable concerns actions of the Guinean armed forces aboard the M.V. *Saiga*. While maintaining generally that the use of "small calibre gunfire was a necessary means of instruction indicating the order to stop and show the flag",[314] the Republic of Guinea does not challenge the account given by St. Vincent and the Grenadines of the misconduct of the Guinean forces on board the vessel. There has in particular been no denial of the statements that

> "Armed personnel fired light machine guns at doors and locks in an indiscriminate manner to gain access to the accommodation, cabins and ultimately the engine room. On entering the engine room they opened fire again and sprayed bullets without regard for the ship's personnel on the lower platforms".[315]

Nor is there any denial of the statement that the Guinean armed forces thereby shot and injured two of the crew of the M.V. *Saiga* (except that in the face of medical evidence describing the gravity of the injuries, the Republic of Guinea characterises them as "slight").[316] Save by making a general denial of theft[317] and denying that there is proof of any damage to the vessel",[318] the Republic of Guinea has not responded to the evidence that her armed forces threatened to kill the cook, putting a gun to his head;[319] that many of the crew were poorly treated by the armed personnel, had their cabins ransacked and personal possessions including

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[313] Annex 29 to the Memorial dated 19th June 1998, page 418.
[314] Counter-Memorial, paragraph 153.
[315] Memorial dated 19th June 1998, paragraph 35. The statement there made is supported by the account given by the master immediately thereafter: Annex 18, page 264.
[316] Counter-Memorial paragraphs 153–4 and 181. She also challenges the admissibility of the claim advanced on behalf of these two men: paragraphs 73–89.
[317] Paragraph 183.
[318] Counter-Memorial, paragraph 176.
[319] Memorial dated 19th June 1998, paragraph 37, supported by statement of Mr Kluyev, Prompt Release Proceedings, transcript, pages 10–11.

money taken; and that a number of minor injuries were sustained by members of the crew.[320] The complaint of the subsequent attack on the vessel and crew by men with knives, on 30th January 1998, while the vessel was in Guinean custody, has elicited no denial, nor comment at all, from the Republic of Guinea.[321]

3.2 Guinea Has Violated Rights to Enjoy Freedom of Navigation and Other Internationally Lawful Uses of the Sea

121. St. Vincent and the Grenadines contends that the Republic of Guinea was not entitled to apply or enforce its customs laws to the M.V. *Saiga*, first, because those laws do not apply beyond the territorial sea of the Republic of Guinea (3.2.1) and, second, because the application and enforcement of these laws was contrary to the UNCLOS (3.2.2).

3.2.1 Guinea's customs and contraband laws do not apply in its exclusive economic zone

122. In response to the submission made by St. Vincent and the Grenadines that the Guinean laws invoked against the M.V. *Saiga* and its master do not apply beyond the territorial sea,[322] the Republic of Guinea responds that this

> "miss[es] the point, and that the principles of international law on which the Republic of Guinea claims to have based its actions against the M.V. *Saiga* do not require it to extend its laws to its exclusive economic zone".[323]

It is submitted that the Republic of Guinea is in error in asserting that the absence of any domestic legislation giving it jurisdiction to apply and enforce its customs laws in its exclusive economic zone is of no consequence. This is so for three reasons.

123. First, the Republic of Guinea contends that its actions against the M.V. *Saiga* were justified under Article 58(3) of UNCLOS, which requires

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[320] Memorial dated 19th June 1998, paragraph 40, supported by account of master, Annex 18 pages 264–5.

[321] Annex 38 to the Memorial dated 19th June 1998 page 579. That the Republic of Guinea is responsible irrespective of the identity of the attackers has not been brought into dispute. That a State is responsible for ensuring that a foreign vessel, which it has been detained, is protected against attack can scarcely be doubted. See on this subject K. Strupp, *Der Völkerrechtliche Delikt*, 48 *et seqq.*

[322] Memorial dated 19th June 1998, paragraphs 106–113.

[323] Counter-Memorial, paragraph 114. Cf. also paragraph 134.

foreign ships to "comply with the laws and regulations adopted by the coastal State". The M.V. *Saiga* cannot be accused of failing to comply with the customs laws of the Republic of Guinea in the exclusive economic zone if in fact (as is the case) no such laws have been adopted for the Republic of Guinea's exclusive economic zone.

124. Second, the absence of domestic legislation is relevant to the question of hot pursuit. Article 111(1) of the 1982 Convention provides that hot pursuit may only be undertaken "when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State". Even if hot pursuit began in the Republic of Guinea's exclusive economic zone, which St. Vincent and the Grenadines disputes,[324] such pursuit could not be valid if there were no laws or regulations in existence which the M.V. *Saiga* could have violated.

125. Third, if the customs laws of the Republic of Guinea do not extend to its exclusive economic zone, then the purported findings of the courts of the Republic of Guinea that the M.V. *Saiga* had violated those laws, were clearly an abuse of the judicial process and aggravate the injury suffered by St. Vincent and the Grenadines.

3.2.2 The Application and Enforcement of the Customs Laws Beyond its Territorial Waters by Guinea Violates the 1982 Convention

(a) Bunkering is a Freedom of Navigation Right

126. In its Memorial dated 19th June 1998, St. Vincent and the Grenadines submitted that bunkering is an aspect of the freedom of navigation or an internationally lawful use of the sea related thereto, which under Article 58(1) of UNCLOS all ships, including the M.V. *Saiga* enjoy in the exclusive economic zone of the Republic of Guinea.[325] In its Counter-Memorial the Republic of Guinea has sought to counter this submission by arguing that a distinction should be drawn between navigation and trade, and that bunkering falls within the latter. Secondly, it is argued that bunkering is related to fishing, not to navigation; and that the M.V. *Saiga* was engaged purely in a commercial activity.[326]

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[324] *Supra*, paragraph 64.
[325] Memorial dated 19th June 1998, paragraphs 115–120.
[326] Counter-Memorial, paragraphs 96–101.

127. The distinction that the Republic of Guinea seeks to draw between navigation and commercial activity is not tenable. Apart from warships and pleasure craft, all navigation is a form of commercial activity, being usually the carriage of goods or passengers for profit or the exploration or exploitation of the resources of the sea and its bed. Furthermore, in the case of passenger ships, a good deal of commercial activity takes place on board while the vessel is in progress, for example, the sale of meals or duty-free goods to passengers. No State denies access of such ships to its exclusive economic zone or even its territorial sea simply because such commercial transactions are being carried out, nor in the exclusive economic zone do States seek to extend their customs laws to such ships. There seems no good reason why a distinction should be made between a commercial activity taking place on one vessel and a commercial activity taking place between two vessels (as is the case with bunkering). In any case the Republic of Guinea concedes that the bunkering of vessels in transit through its exclusive economic zone is permissible.[327] It is illogical to regard such an activity as not being a commercial activity but related to navigation and therefore permissible, while considering the bunkering of fishing vessels to be a commercial activity and therefore impermissible. In both cases the essence of the activity is the same. Only the character of commercial activity of the recipient of the supplies differs.

128. In support of the purported distinction between freedom of navigation and freedom of commerce the Republic of Guinea relies on the *Oscar Chinn* case.[328] The point at issue in that case was the interpretation of provisions in the Convention of St. Germain dealing with fluvial navigation. Not only did the case turn on an entirely different treaty; it turned on vitally different principles. Freedom of navigation on a river is an exception to the riparian State's territorial sovereignty, whereas freedom of navigation on the seas takes place in an area which lies beyond States' sovereignty. No distinction between commercial activities and rights of navigation in the exclusive economic zone is drawn in UNCLOS.

129. The Republic of Guinea next seeks to draw a distinction between supplying fuel and receiving fuel. It is asserted that the latter is a freedom of the seas whereas the former is not.[329] This distinction is also untenable. The supplying of fuel by one vessel to another on the seas has a long history, and as far as the researches of St. Vincent and the Grenadines have

[327] Counter-Memorial, paragraphs 101–102.
[328] P.C.I.J. Series A/B, No. 63.
[329] Counter-Memorial, paragraph 97.

been able to ascertain, the engagement in that activity by vessels of one State within the exclusive economic zone of another has never been the subject of objection by a State other than the Republic of Guinea. State practice indicates that it must be a lawful use of the seas, or to use the language of the 1958 and 1982 Conventions, a "freedom" of the seas. That freedom must be enjoyed by the supplier as well as the recipient of the fuel. In both cases it is an aspect of the freedom of navigation or related to it.

130. If, as St. Vincent and the Grenadines contends, bunkering is an aspect of or related to the freedom of navigation, it is a freedom exercisable in the exclusive economic zone, consistently with Article 58(1) of UNCLOS, if it is "compatible with other provisions" thereof. Although she has set out reasons why she considers that it is in her interest to discourage bunkering of fishing vessels within her exclusive economic zone so as to maximise her revenues from taxation, the Republic of Guinea has failed to identify provisions in UNCLOS with which bunkering is incompatible. Even if a coastal State could apply its customs laws to bunkering, as the Republic of Guinea contends and St. Vincent and the Grenadines denies, that would not make bunkering incompatible with provisions in UNCLOS. Rather, such laws would regulate bunkering, thereby presupposing that its exercise in principle was permissible. Furthermore, as already pointed out, the Republic of Guinea concedes that the bunkering of vessels in transit in its exclusive economic zone is permissible, thereby admitting that bunkering as such is a compatible activity.

131. The Republic of Guinea next contends that the bunkering of fishing vessels is a use of the sea related to fishing, not to navigation.[330] The primary purpose of bunkering fishing vessels is to provide them with the fuel necessary to complete a fishing expedition, that is, to navigate from the home ports to the fishing grounds, to fish there, and then return to port. If bunkering allows a fishing vessel to spend more time fishing, that is an incidental consequence. The primary purpose of the bunkering is to provide a fishing vessel with the wherewithal for locomotion, that is for navigation, not for fishing. It would be different if a vessel supplied a fishing vessel with fishing gear or bought some of the catch from the fishing vessel. These would be activities related to fishing.

132. It is thought that the real point of contention between the parties is not whether bunkering *per se* is permissible in the exclusive economic zone,

[330] Counter-Memorial, paragraph 104.

but whether a coastal State may extend its customs legislation to the bunkering of fishing vessels taking place in the zone. However, UNCLOS does not give rise to a dichotomy between matters over which a coastal State has jurisdiction in its exclusive economic zone and the freedoms of navigation enjoyed by other States. For example, other States' freedom of navigation is subject to a coastal State's jurisdiction in respect of pollution found in Part XII of the Convention. Thus even if it were open to the Republic of Guinea to regulate the bunkering of ships in its exclusive economic zone, other than for purposes described in Article 56(1)(b) of UNCLOS (*quod non*) such jurisdiction would not be inconsistent with the maintenance of other States' right to engage in bunkering as an aspect of freedom of navigation. This is borne out in general terms by the second half of Article 58(3) of UNCLOS which provides that in exercising their rights other States shall comply with the laws and regulations adopted by the coastal State in accordance with the Convention.

133. At this stage it may be useful to summarise the arguments of St. Vincent and the Grenadines as to why bunkering is an aspect of the freedom of navigation or an internationally lawful use of the sea related thereto, and therefore permissible in the exclusive economic zone under Article 58(1) of the Convention.[331]

(i) The practice of States shows that bunkering is a lawful activity on the high seas. It must be regarded as falling within the high seas freedom of navigation or related to it.

(ii) It follows from Article 58(1) that bunkering must be a lawful activity of other States within the exclusive economic zone provided that it is compatible with the other provisions of the Convention. There is nothing to suggest that there is not such compatibility. Furthermore, the one illustrative example given in Article 58(1) of an internationally lawful use of the sea related to navigation is "uses . . . such as those associated with the operation of ships." This phrase appears wide enough to include bunkering.

134. Even if, contrary to the submissions of St. Vincent and the Grenadines, bunkering did not fall within the concept of the freedom of navigation or other internationally lawful uses of the sea related thereto, and so was not a right of other States in the exclusive economic zone under Article 58(1)

[331] Cf. Memorial dated 19th June 1998, paragraphs 117–120.

of UNCLOS, it would not follow that it was necessarily impermissible in the exclusive economic zone. Since bunkering would fall within neither the rights of other States nor of the coastal State, the matter would fall to be determined in accordance with Article 59.

(b) Guinea's Rights and Jurisdiction As A Coastal State Are Limited to Those Connected with the Exploitation and Management of the Natural Resources Within the Zone

135. Since the Republic of Guinea placed some reliance (at least initially) upon the contention that the M.V. *Saiga* was within her contiguous zone when she bunkered the *Giuseppe I, Kriti* and *Eleni G*[332] but now declares that "the public order and essential public interest of Guinea in its exclusive economic zone form the basis for Guinea's exercising hot pursuit"[333] her submissions will be considered, first, by reference to rules relating to exclusive economic zone and, second, by reference to rules relating to the contiguous zone.

Exclusive Economic Zone

136. In so far as she relies on rules relating to the exclusive economic zone, the Republic of Guinea must show that the application of its customs legislation to foreign vessels in that zone is expressly authorised by UNCLOS. There is no residual jurisdiction for the coastal State. This is underlined by Article 58(3) of the Convention which in providing that other States in exercising their rights in a coastal State's exclusive economic zone "shall comply with the laws and regulations adopted by the coastal State," specifies that such laws and regulations must be adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

137. The Republic of Guinea has conceded that the purported application of her customs laws to the exclusive economic zone was not based on its sovereign rights to conserve and manage the living resources of the zone and associated jurisdiction (Articles 56(1)(a), 62(4) and 73 of the Convention).[334] Equally, she has conceded that the purported application was not based on her sovereign rights with regard to other activities for the

[332] St. Vincent and the Grenadines contests the claim that those waters fell within a *notified* contiguous zone: See paragraph 3(iii) above.
[333] Counter-Memorial, paragraph 137.
[334] Counter-Memorial, paragraphs 106–107.

economic exploitation of the zone (Article 56(1)(a)).[335] She has sought to base the purported application of her customs laws to its exclusive economic zone on the "other rules of international law" referred to in Article 58(3). The rule of international law thus invoked is variously described as protection of its public interest or as self-help (as a form of necessity).[336]

138. If what the Republic of Guinea is referring to here is the doctrine of necessity, this does not appear relevant in the present case. As the International Law Commission confirms in its Draft Articles on State Responsibility,[337] necessity excuses what would be an unlawful act only where

> "(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act did not seriously impair an essential interest [of the other State]".

Apart from the fact that necessity can only justify an individual act, rather than a general policy (such as extending customs laws to the exclusive economic zone), the action taken against the M.V. *Saiga* can hardly be said to be the "only means of safeguarding an essential interest" of the Republic of Guinea against "a grave and imminent peril". First, while the loss of revenue to the Guinean authorities as a consequence of fishing vessels obtaining fuel from the M.V. *Saiga* (rather than buying it in a Guinean port) might be regarded as an "essential interest", the seizure of the M.V. *Saiga* was not the "only means" of safeguarding that interest. An alternative and more acceptable means would be for the Republic of Guinea to seek to include in the bilateral treaties that it concludes with other States to permit the latter's vessels to fish in Guinea's zone an obligation on such vessels to obtain fuel in a Guinean port and not from a bunkering vessel. Secondly, it can hardly be claimed that the loss of revenue to the Republic of Guinea constitutes a "grave and imminent peril".

139. The Republic of Guinea cites three examples to justify its alleged doctrine of self-help: the United Kingdom's minesweeping operations at issue in the *Corfu Channel* case;[338] action against unauthorised broadcasting; and intervention against shipping casualties threatening pollution. The *Corfu Channel* case yields no assistance to the Republic of Guinea: even if a loss

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[335] Counter-Memorial, paragraph 108.
[336] Counter-Memorial, paragraphs 112–115.
[337] I.L.C. Ybk., 1980, Volume II, part 2, pp. 32–52.
[338] I.C.J. Rep. (1949) 1.

of revenue from tax on fuel were considered to be a danger equal to an uncharted minefield on straits used in international navigation, the fact would remain that the International Court of Justice disapproved of the United Kingdom's resort to self-help in mine-sweeping. In the cases of action against unauthorised broadcasting and the prevention of pollution arising from marine casualties, specified action by coastal States is expressly authorized treaty. This suggests that there is no general right of self-help in the way contended by the Republic of Guinea: if it were otherwise such treaty provisions would not be necessary.

140. St. Vincent and the Grenadines therefore concludes that there is no rule of international law permitting a State "to protect itself against unwarranted economic activities in its exclusive economic zone that considerably affect its public interest".[339] The Republic of Guinea appears to be asserting a residual jurisdiction for coastal States in its exclusive economic zone: something which is contrary to UNCLOS. Furthermore, given that a coastal State has only enforcement jurisdiction (and not legislative jurisdiction) in respect of customs matters in its contiguous zone, it would be odd if a coastal State could claim both legislative and enforcement jurisdiction in its exclusive economic zone,[340] which would be the consequence if the Republic of Guinea's arguments were correct. There is therefore no legal basis on which the Republic of Guinea can apply and enforce its customs laws in its exclusive economic zone.

Contiguous Zone

141. Since the Republic of Guinea accepts that her claim to have been exercising a right of hot pursuit was not grounded upon acts done within the contiguous zone[341] it is by no means clear what conclusion she seeks to draw from her claim that she has a right to apply customs law in that zone.[342] Since, however, that claim is advanced, it is here addressed.

142. By Article 33(1) of UNCLOS, a coastal State may in its contiguous zone exercise the control necessary to

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[339] Counter-Memorial, paragraph 112.

[340] Indeed, one of the main reasons for retaining the contiguous zone in the law of the sea after the introduction of the exclusive economic zone was that it gives coastal States powers and controls which are not included in the exclusive economic zone. See M. H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Volume II (1993), p. 270.

[341] Counter-Memorial, paragraph 137.

[342] Counter-Memorial, paragraphs 122–131.

(i) prevent infringement of its customs . . . laws and regulations within its territory or territorial sea;

(ii) punish infringement of the above laws and regulations committed within its territory or territorial sea."

Accordingly, in order to be able to exercise control over the M.V. *Saiga* in its contiguous zone, the Republic of Guinea must be able to show either that it was necessary to do so in order to prevent infringement of its customs laws by the M.V. *Saiga* in its territorial sea or that it was necessary to do so in order to punish infringement of its customs laws committed by the M.V. *Saiga* within its territorial sea.

143. As regards the second alternative, it is common ground between the parties that the M.V. *Saiga* never entered the Republic of Guinea's territorial sea.[343] Therefore, this alternative is irrelevant. As regards the first alternative, the Republic of Guinea, in order to be able to justify her actions on this basis, would have to produce some evidence to show that she had reason to believe that an infringement of her customs laws was about to be committed within her territorial sea was likely. The Republic of Guinea has produced no such evidence. Instead, she has argued at some points that she took action to prevent an anticipated infringement in her exclusive economic zone[344] and has asserted at other points that she enjoyed legislative jurisdiction in respect of customs matters within its contiguous zone, so that violation of such laws justified the Republic of Guinea in exercising a right of hot pursuit and arresting the vessel.[345]

144. St. Vincent and the Grenadines rejects the Republic of Guinea's assertion that a coastal State has legislative jurisdiction within its contiguous zone. The provisions of Article 33 of UNCLOS concerning the nature of the coastal State's jurisdiction within its contiguous zone follow *verbatim* those of Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[346] The plain wording of Article 24 shows that the coastal State's powers in the contiguous zone are limited to enforcement only. This is supported by the *travaux préparatoires*: in particular, a proposal to give the coastal State legislative jurisdiction in its contiguous zone was not accepted by the 1958 Conference.[347]

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[343] Memorial dated 19th June 1998, paragraph 128.
[344] See for example Counter-Memorial, paragraphs 141–2.
[345] Counter-Memorial, paragraphs 124–130.
[346] Geneva, 29th April 1958, 516 U.N.T.S. 205.
[347] See generally A.V. Lowe, "The Development of the Concept of the Contiguous Zone" 52 B.Y.I.L. (1981) 52 109 at 159–69.

145. It is true that since 1958 some States have claimed legislative jurisdiction within the contiguous zone and that a similar position has been taken by some municipal courts.[348] As regards the latter, such courts usually make it clear that they are applying customary international law, not the 1958 Convention. As to the former, most (if not all) such States are not parties to the 1958 Convention. Their legislation may therefore be relevant to the question of customary law, but it cannot be regarded as examples of State practice relevant to interpretation of the 1958 Convention.

146. No attempt was made during the Third United Nations Conference on the Law of the Sea to add legislative jurisdiction to a coastal State's powers within its contiguous zone.[349] That the coastal State's jurisdiction within its contiguous zone is limited to enforcement is supported not only by the plain meaning of the wording of Article 33 and the *travaux préparatoires* but also by several other provisions of the Convention.[350]

147. First, Article 27(5) of UNCLOS provides that a coastal State may not arrest a foreign ship passing through its territorial sea in respect of offences committed before the ship entered the territorial sea. If a coastal State had legislative jurisdiction in its contiguous zone, this would mean that a ship that committed an offence there would be immune from coastal State jurisdiction if it subsequently entered the territorial sea, but could be subject to hot pursuit and arrest in the exclusive economic zone or on the high seas. This would be absurd.

148. Second, Article 111(1) and (2) of UNCLOS speak of violations of the coastal State's laws and regulations when referring to hot pursuit from the territorial sea, exclusive economic zone and continental shelf, but in referring to hot pursuit from the contiguous zone speak of "violation of the rights for the protection of which the zone was established". This implies a difference between the coastal State's jurisdiction in the territorial sea, exclusive economic zone and continental shelf and that in the contiguous zone, i.e. a distinction between both legislative and enforcement jurisdiction on the one hand, and enforcement jurisdiction only on the other hand.

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[348] Counter-Memorial, paragraphs 127–128.

[349] M. H. Nordquist (ed.), *The United Nations Convention on the Law of the Sea 1982. A Commentary*, Volume II (1993), pp. 366–76.

[350] Cf. Article 31 of the Vienna Convention on the Law of Treaties which provides that in interpreting a treaty provision regard must be had to its context.

149. Third, Article 303(2), in giving States jurisdiction in respect of archaeological and historical objects in its contiguous zone, states that removal of such objects from the zone may be presumed to "result in an infringement within its . . . territorial sea" of its laws. If a coastal State had legislative jurisdiction within its contiguous zone, such a formulation would not have been necessary. Article 303 could simply have stated that removal was an infringement of the coastal State's laws (i.e. an infringement within the contiguous zone).

150. The arguments put forward by the Republic of Guinea in paragraphs 125–130 of its Counter-Memorial seem essentially to amount to two propositions:

(i) that a coastal State ought, for reasons of policy, to have legislative jurisdiction in its contiguous zone; and

(ii) that coastal States' jurisdiction in the contiguous zone is wider under customary international law and includes legislative jurisdiction.

As to the first, policy considerations cannot prevail over the clear wording of Article 33. As to the second, the Republic of Guinea would have to show, first, that there was sufficient practice and *opinio iuris* to give rise to the customary rule alleged; and, secondly, that such a rule would apply as between parties to UNCLOS. It is submitted that the Republic of Guinea has failed to show either of these points.

3.3 Guinea Has Violated Articles 292(4) and 296 of UNCLOS (Prompt Release)

151. St. Vincent and the Grenadines set out in her Memorial[351] the grounds on which she submits that the Republic of Guinea has violated Articles 292(4) and 296 of UNCLOS, governing Prompt Release. The Applicant State's position on that issue is further summarised in section 1.5 above, governing "The Bank Guarantee". In considering this question the International Tribunal should recall the following essential dates:

(i) On 4th December 1997 the International Tribunal ordered that "Guinea shall promptly release the M.V. *Saiga* and its crew from detention"; decided that release shall be upon the posting of a reasonable

[351] Memorial dated 19th June 1998, paragraphs 139 to 158.

bond or security and decided that the security shall consist of the gasoil discharged from the M.V. *Saiga* plus US$400,000 to be posted in the form of a bank guarantee, or in another form if agreed by the parties.

(ii) On 10th December 1997 St. Vincent and the Grenadines posted bank guarantee No 309537197 with the Guinean Agent who on the following day responded "that the Government of Guinea considers this bank guarantee not to be reasonable because it is drafted in English" and raising other concerns. On the same day he was supplied with a warranted translation and response to his other concerns. He returned the guarantee on 20th January 1998.[352]

(iii) On 28th January 1998 St. Vincent and the Grenadines posted a new guarantee "in accordance with the requirements of the Minister of Justice of Guinea and forwarded directly to him in Conakry".[353]

(iv) The vessel and crew were not released until 28th February 1998.[354]

152. In view of this chronology St. Vincent and the Grenadines submits that the Republic of Guinea failed to comply with the order of the International Tribunal dated 4th December 1997 requiring that the vessel and crew should be released "promptly". The first basis on which the Republic of Guinea contends otherwise is that the guarantee was posed with the Agent of the Republic of Guinea rather than in Conakry. Since this argument is advanced at two stages in the Counter-Memorial, St. Vincent and the Grenadines have responded to it in the context in which it was first raised (in Section 1.5 above).

153. The Republic of Guinea challenges the account given by St. Vincent and the Grenadines of statements made by the Guinean Agent by telephone on 11th December 1997.[355] The statements were made to Mr. N. Howe, who took a contemporaneous note of the words used by Mr. von Brevern. These are exhibited as **Annex 14 to this Reply**. As the notes show, Mr. von Brevern stated on 11th December 1997 that the M.V. *Saiga* would be released once he had received a translation of the bank guarantee; a

[352] Memorial dated 19th June 1998, Annex 38, pages 538, 545 and 567.
[353] Memorial dated 19th June 1998, Annex 38 page 572.
[354] Annex 31 to the Memorial dated 19th June 1998 and paragraph 71 thereof.
[355] Memorial dated 19th June 1998, paragraph 145; challenged in Counter-Memorial paragraphs 160–164.

statement making it clear that the word "claims" included all claims; and confirmation that the signatories were duly authorized. In his words, as transcribed contemporaneously, when these conditions were fulfilled "Then we get it". As the notes further show, it was on the following day that he telephoned to say that he had "additional problems", ending with the words "We are both sorry".

154. The case for the Republic of Guinea is not improved by the assertion, now made on behalf of that State, that her Agent could take no decision without instructions from Conakry.[356] At the material time, and particularly between 24th December 1997 and 2nd January 1998, the managers and charterers of the M.V. *Saiga* were engaged in detailed negotiations with the Government of Guinea, with a view to securing the release of the vessel following the positing of the letter of guarantee. (See the materials exhibited as **Annex 15 to this Reply**). The Government of Guinea was well aware of the posting of the guarantee. Moreover, a State party to UNCLOS engaged in litigation before the International Tribunal, having appointed an Agent for that purpose, must ensure that the latter is "in a position to bind his country in all that concerns the conduct of the case in the Court". It must make arrangements to invest him with appropriate authority or to ensure adequate means of communication; and cannot plead her failure to do so as a defence to the claim that it has failed to comply with the judgment of the International Tribunal.

155. Further, the International Tribunal's order that Guinea should promptly release the M.V. *Saiga* and her crew is self-contained and complete. It called for prompt action as from the date when it was communicated by the International Tribunal to the Republic of Guinea. The decision, that the release should be upon the posting of a reasonable bond or guarantee, imposed a separate obligation upon St. Vincent and the Grenadines, with which she complied. The duty of the Republic of Guinea to comply with the order of the International Tribunal was not conditional upon her receiving notification that St. Vincent and the Grenadines had complied with her obligation pursuant to the decision. Both parties were bound from the date of the judgment, in accordance with Article 124(2) of the Rules of the Tribunal, which provides:

> "The judgment shall be read at a public sitting of the Tribunal and shall become binding on the parties on the day of the reading".

[356] Counter-Memorial, paragraph 164.

156. The Republic of Guinea next pleads that it was under no obligation to release the vessel and crew because the wording of the guarantee posted on 10th December 1997 was not reasonable.[357] There is no substance in the objections now raised by the Republic of Guinea against the wording of the guarantee.

(i) First, objection is taken to a passage in the guarantee posted on 10th December 1997 recording that the International Tribunal ordered that "Guinea must release promptly the M.V. *Saiga* and the members of its crew currently detained or otherwise deprived of their liberty".[358] It is claimed that "St. Vincent and the Grenadines by such draft tried to prejudice the Republic of Guinea". The wording reflected the order of the International Tribunal "that Guinea shall promptly release the M.V. *Saiga* and its crew from detention". The words "or otherwise deprived of their liberty" are taken *verbatim* from paragraph 79 of the judgment: they were inserted to reflect the judgment faithfully. They were not inserted in an attempt to prejudice the Republic of Guinea. Moreover, although the Guinean Agent proposed on 12th December 1997 that the guarantee should refer to "members of its crew currently detained"[359] the Minister of Justice required that there should be no reference to the release of the crew at all, notwithstanding the express words of the International Tribunal.[360]

(ii) Second, objection was taken to a passage in the guarantee posted on 10th December 1997 stating that the M.V. *Saiga* was detained "for alleged violations of the laws of Guinea".[361] It is alleged "Here again St. Vincent and the Grenadines sought to prejudice the Government of Guinea". That allegation is incomprehensible. The Republic of Guinea has at all times been insistent that the M.V. *Saiga* was detained for alleged violations of Guinean law. The point is made in the Counter-Memorial where the Republic of Guinea states "the M.V. *Saiga* has been detained and its Master has been punished because of violation of Guinean customs laws".[362] The Guinean

[357] Counter-Memorial, paragraph 168.
[358] For wording of the guarantee, see Annex 38 to the Memorandum dated 19th June 1998, page 539; objection taken in Counter-Memorial, paragraph 168.
[359] Annex 38 to the Memorandum dated 19th June 1998, page 550.
[360] Annex 38 to the Memorandum dated 19th June 1998, pages 570 and 575.
[361] For wording of the guarantee, see Annex 38 to the Memorandum dated 19th June 1998, page 539; objection taken in Counter-Memorial, paragraph 168.
[362] Counter-Memorial, paragraph 132.

Agent took no objection to the reference to this wording;[363] and the Minister of Justice gave no reason for taking objection to it, for the first time, late in January 1998.[364]

(iii) Finally the Republic of Guinea states that "the bank guarantee of 28 January 1998 has been signed by a member of management and another representative of the bank. The authentication of the signatures has been notarially attested".[365] St. Vincent and the Grenadines understands this to indicate that the guarantee posted on 10th December 1998 could not be considered reasonable since the two signatures upon it were not notarially attested.[366] The guarantee was given in the usual form. Both signatures were stamped with signatories' names. Moreover, the Guinean Agent wrote 11th December 1997[367] "please aks [sic] *Crédit Suisse* to give *any prove* that both gentlemen Laurent Stockhammer and Gerard Mayer have the authority to sign for and on behalf of *Crédit Suisse*". The bank supplied that confirmation by fax on the same day.[368] The Agent of the Republic of Guinea did not declare himself dissatisfied with that confirmation, but then raised a series of further objections to the bank guarantee[369] upon which the Republic of Guinea does not now rely. It was only after the guarantee dated 10th December 1997 had been returned to the bank by the Republic of Guinea that the latter first demanded that signatories of a new guarantee should be notarised.[370]

157. The Republic of Guinea next contends that the refusal of *Crédit Suisse* to pay the sum of US $ 400,000 "shows very clearly that the wording of the bank guarantee obviously gives rise to uncertainties and therefore it was not and is not reasonable".[371] On the contrary, by its letter dated 19th February 1998, *Crédit Suisse* set out clearly its reason for failing to pay the sum upon demand by the Guinean Minister of the Economy and the Guinean Agent.[372] The guarantee provided for payment following a final enforceable decision of a final appeal court or the International Tribunal:

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[363] Annex 38 to the Memorandum dated 19th June 1998, page 541.
[364] Annex 38 to the Memorandum dated 19th June 1998, page 570.
[365] Counter-Memorial, paragraph 168.
[366] Annex 38 to the Memorandum dated 19th June 1998, page 547.
[367] Annex 38 to the Memorandum dated 19th June 1998, page 541.
[368] Annex 38 to the Memorandum dated 19th June 1998, page 545.
[369] Annex 38 to the Memorandum dated 19th June 1998, page 550.
[370] Annex 38 to the Memorial dated 19th June 1998, page 571.
[371] Counter-Memorial paragraphs 169–170.
[372] Annex 38 to the Memorial dated 19th June 1998, page 609.

"provided that your first demand is accompanied by a certified copy of such final enforceable judgment or decision . . ."

The Minister of the Economy and the Guinean Agent failed to supply "a certified copy of such final enforceable judgment or decision".

158. Further, it may be recalled that the language of the guarantee is that requested by the Guinean Minister of Justice[373] and (subject to addition of the word "enforceable")[374] it coincides *verbatim* with the wording proposed by the Guinean Agent on 12th December 1997.[375] It is therefore not open to the same Guinean authorities and Agent now to maintain that the wording is unreasonable.

159. The fact that the sum has not yet been is not due to any defect in the wording of the guarantee. It is due to the fact that the conditions for the payment of the guaranteed sum were not met prior to the judgment of the International Tribunal dated 11th March 1998. That judgment required 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 28th October 1997 and the prosecution and conviction of the master.

SECTION 4: DAMAGES

4.1 The Basis of the Claims for Compensation and Damages

4.1.1 Article 111(8) of the 1982 Convention

4.1.2 The Law of State Responsibility and Guinea's Obligation of Reparation

160. Article 111(8) of UNCLOS provides that where a ship has been stopped or arrested outside the territorial sea in the circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained. At paragraphs 164 to 176 of the Memorial dated 19th June 1998, St. Vincent and the Grenadines submitted that when assessing the *quantum* of damages

[373] Annex 38 to the Memorial dated 19th June 1998, page 572.
[374] This was done pursuant to the letter dated 30th January 1998: see Annex 38 to the Memorial dated 19th June 1998, page 573.
[375] Annex 38 to the Memorial dated 19th June 1998, page 553.

to be paid to a flag State of a vessel, which brings a claim pursuant to Article 111(8) and other provisions of the Convention, the International Tribunal should apply standards established by customary international law governing compensation for injuries to aliens. Among the principles to which reference was there made is that contained in Article 42 of the Draft Articles of the International Law Commission on State Responsibility[376] which provides that:

> "The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination".

161. While reiterating her objections to the admissibility of the present proceedings[377] and maintaining that she acted consistently with international law,[378] the Republic of Guinea does appear to not contest the proposition that, if the present claim were admissible and established, the standard to be applied in assessing compensation would be the standard established by general principles of international law. Accordingly on that aspect of the case St. Vincent and the Grenadines relies, without further elaboration, upon the arguments advanced at paragraphs 164 to 172 of the Memorial dated 19th June 1998. It is necessary to add only that the provision of full reparation in the form of compensation is particularly necessary in a case, such as the present, where the respondent State has committed internationally wrongful acts persistently and fails to give guarantees of non-repetition but, on the contrary, evinces an intention to continue to commit those acts, not only in relation to the applicant State but in relation to other States as well.[379]

162. As the International Tribunal is now aware,[380] notwithstanding the Order of 11th March 1998, the Republic of Guinea has prepared a draft decree "intended to close the current legal loophole in the refuelling of ships". That draft decree proposes to impose liabilities on those who engage in the bunkering of vessels within the Guinean exclusive economic zone and, in particular, to prohibit bunkering at sea, save pursuant to licences to be issued by the Guinean authorities. There are exhibited a copy of the

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[376] 37 I.L.M. (1998) 440.
[377] Counter-Memorial, paragraph 173.
[378] Counter-Memorial, paragraph 174.
[379] Counter-Memorial, paragraph 187.
[380] Dated 15th September 1998.

Draft Decree,[381] a copy of a letter from the National Director of Customs of the Republic of Guinea to the Minister of the Economy, relating to the draft decree[382] and a copy of the accompanying statement of purpose.

163. Nevertheless, the Republic of Guinea repeatedly invites the International Tribunal to take into account, when assessing damages, her contention that her acts were lawful.[383] St. Vincent and the Grenadines does not respond to that contention at this stage. Unless the International Tribunal has first decided that the acts of the Republic of Guinea were unlawful, it will not need to consider the *quantum* of damage at all. Submissions on *quantum* must therefore be addressed on the premise that the Guinean acts were unlawful.

4.2 The Quantification of the Claim

4.2.1 The Claim on Behalf of the Loss Or Damage to the Vessel and Owners Arising From the Detention and Arrest and its Subsequent Treatment

164. It is well established (and not apparently in dispute) as a proposition of international law that damages are payable by a State which is found by an international tribunal to have detained unlawfully a foreign vessel in respect of which a claim is properly brought by the claimant State.[384] Equally unassailable is the proposition that damages are payable in respect of detention in the event of a successful claim based on Article 111(8) of UNCLOS, dealing with violation of the rules relating to hot pursuit.

165. The Republic of Guinea submits, however, that the International Tribunal should dismiss the claim of the loss or damage to the vessel and owners

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[381] **Annex 16 to this Reply.**

[382] **Annex 17 to this Reply.**

[383] Counter-Memorial paragraph 180: "the Guinean measures were necessary and appropriate to stop the unwarranted bunkering activities"; paragraph 182: "bunkering activities are considered illegal in the Guinean exclusive economic zone"; paragraph 187: "the enforcement of customs legislation by a West African State . . . vessels that violate Guinean customs laws"; paragraph 198: "actions were neither excessive, nor did they insult the dignity and honour of St. Vincent and the Grenadines".

[384] See E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, 1915, page 98, note 5: "Claims have often been enforced on account of the unlawful detention of vessels" – citing *John S. Bryan (U.S.) v. Brazil, Moore's Digest of International Arbitration*, (1898) Vol. III at 4613; *Col. Lloyd Aspinwall (U.S.) v. Spain*, *ibid*., at 1007, 1014 ; *Good Return (U.S.) v. Chile, ibid*., 1466 (note); *Phare (France) v. Nicaragua, ibid*. at 4870; *Masonic (U.S.) v.* Spain, *ibid*. at 1055, 1062; Lottie *May (Gt. Brit.) v. Honduras*, For. Rel, 1899, 371; *Whaling vessels (U.S.) v. Russia*, For. Rel., 1902, App. I. See also I. Brownlie, *System of the Law of Nations: State Responsibility*, 1983, Part I at 76: Brownlie, at 78–79: "A variety of claims involve seizures of vessels by state agencies . . . on the high seas without justification according to the rules of customary international law or in breach of treaty obligations."

because "hardly any actual proof in terms of bills, receipts and statistics is given" and specifically "There is also no proof as to any damage to the vessel".[385]

166. Since there is ample evidence of the fact that Guinean forces caused damage to the vessel and detained it,[386] the statement made by the Republic of Guinea in her Counter-Memorial must be taken to mean that there is, in her contention, insufficient evidence (in terms of bills, receipts and statistics) of the costs of repairing the damage done.

167. There is now produced, as **Annex 19 to this Reply** a bundle of invoices demonstrating the cost of repairs to the vessel. There is also produced in the same bundle fresh copies of pages which were not legible in the version supplied to the Republic of Guinea.[387]

168. In any event, it is plain that in the practice of international tribunals documentary evidence of loss is not required in all cases. Reasonable inferences may be made by tribunals. In the interim measures decision of the *Trail Smelter arbitration (United States/Canada)*, the Tribunal stated that it was:

> "Mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in *Story Parchment Company v. Paterson Parchment Paper Company* (1931), 282 U.S. 555 as follows: 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate'".[388]

169. Professor Sandifer in his authoritative work has stated that:

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[385] Counter-Memorial, paragraph 176.

[386] The Guinean court itself found, on the evidence of Guinean forces, that they fired at the M.V. *Saiga* "causing damage to the latter's windows" Annex 29 to the Memorandum dated 19th June 1998, page 418. The evidence of the master and Second Officer will be found at Annexes 17, 18 and 19 to the Memorial dated 19th June 1998 and in the Prompt Release Proceedings, transcript, pages 10–11.

[387] The Republic of Guinea mentions "pages 692 to 606 and pages 700 to 702". It is presumed that the reference should have been to 692 to 696 and 700 to 702.

[388] 33 A.J.I.L. (1939) 182 at 193.

> "Probably the most compelling reason for the refusal of international tribunals to apply restrictive rules in admitting and evaluating evidence has been the great difficulties involved in obtaining and preparing it. The constantly recurring complaint of tribunal after tribunal is that they are compelled to act upon the basis of meagre, incomplete, and unsatisfactory evidence. Agents and counsel have not infrequently been faced with nearly insuperable obstacles in the collection and preparation of evidence".[389]

170. It is no doubt trite to point out that most international tribunals have not utilised technical rules of evidence. As Professor Sandifer points out, they have usually preferred the best evidence available with the result that if documentary evidence is not available they have taken into account what other evidence is available to prove the claim made.[390]

4.2.2 The Claim for the Benefit of the Master and Crew, Including Personal Injury and Deprivation of Liberty

The Principle

171. It is well established (and not apparently in dispute) as a proposition of international law that damages are payable by a State which is found by an international tribunal to have detained unlawfully an alien in respect of whom a claim is properly brought by the claimant State.[391] In particular, there are certainly cases in which ships have been detained and international tribunals have awarded damages in respect of detention of crew members or other persons on board the vessel.[392] However, the Republic of Guinea then characterises as "exorbitantly high" the claim for damages of $267.150 for the benefit of the master and crew.

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[389] D.V. Sandifer, *Evidence Before International Tribunals*, 1975 at 22.

[390] *Ibid*., p. 202 *et seq.*

[391] I. Brownlie, *System of the Law of Nations: State Responsibility*, 1983, Part I at 76: "International claims for wrongful arrest and detention are a familiar aspect of diplomatic practice and international jurisprudence; E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, 1915 at 98–99: "On various occasions in the diplomatic history of the United States claims have been successfully prosecuted by the department of State or allowed by international commissions on the following grounds: unjust or unlawful arrest or detention . . ." See further *ibid*., 337.

[392] See *Nautilus Submarine Pearl Fishing Co., Owner of the Bark v. Mexico, Moore's Digest of International Arbitration*, (1898) Vol. IV, 3251; *Joseph Griffin v. Spain, ibid. at* 3252*; William H. Shaw v. Mexico, ibid.* at 3265; *Pratt's case, ibid.* at 3280; *Munroe's case, ibid.* at 3300.

The Method of Computation

172. In the case of the master, he was detained from 27th October 1997 to 28 February 1998: a period of 123 days, in respect of which St. Vincent and the Grenadines claims compensation at the rate of $250 per day plus $20,000 in respect of the emotional and psychological effects of his treatment by the Guinean authorities, which included threats at gun-point.[393]

Detention of the Master

173. The Republic of Guinea states that "moral damage should only be granted to the Master of the M.V. *Saiga*".[394] It is not clear whether the Republic of Guinea accepts that the sum claimed by St. Vincent and the Grenadines, in respect of the Master, is appropriate on the premise that he was unlawfully detained and threatened; but in any event it is submitted that on that premise the sum claimed is appropriate and should be awarded.

Detention of the Crew

174. In respect of the crew, also, the position of the Republic of Guinea is unclear. She states:

> "All other crew members were allowed to leave the detained vessel in due course. Consequently eleven crew members left the vessel and thirteen stayed voluntarily on board. Those are thus not entitled to any moral damages at all".[395]

While it is clear that the Republic of Guinea contests liability to pay damages to those members of the crew who remained with the master and the vessel, as a skeleton crew, throughout his detention, it is not clear whether she accepts that moral damages should be available for the other members of crew for so long as they were detained. As the Republic of Guinea confirms, they were allowed to leave only "in due course". Pending the expiry of the "due course", nine were detained for 21 days and eight for 45 days. St. Vincent and the Grenadines claims compensation for those members of the crew at the rate of $100 per day. The rate is consistent with the rate awarded by other international tribunals in similar cases.[396]

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[393] Memorial dated 19th June 1998, paragraph 187.
[394] Counter-Memorial, paragraph 179.
[395] *Ibid*.
[396] See the materials referred to in the preceding paragraph.

Nothing in the Counter-Memorial suggests that the claim is inconsistent with the rate at which damages for detention are currently awarded by international tribunals and commissions considering comparable cases.

175. The contention that the skeleton crew should received no compensation because they "stayed voluntarily on board" is at variance with good sense, with the Republic of Guinea's own arguments elsewhere; and with current international practice. It is at variance with good sense since a State which detains a vessel must expect that some at least of the crew will remain aboard in order to conduct essential maintenance, to provide a measure of security for it and to sail it once it is released. When such members of the crew ceased formally to be detained, they are detained *de facto* until the vessel and her master are released. The contention is at variance with the Republic of Guinea's own arguments since she contends elsewhere that damages will be reduced where the claimant State contributed to the loss by negligence.[397] It would be negligent in the extreme, and a probable cause of further loss, were the whole of the crew other than the master to abandon the vessel when it is seized and detained. The contention is at variance with current international practice since this demonstrates that unlawful *de facto* detention gives rise to a right of action in damages no less than *de jure* detention.

176. In *Kingdom of Sweden v. United States of America*, the arbitral tribunal stated that the word "detained" "obviously implies that, at the time the act of detention took place, the person or the thing subjected thereto was about to move and would have moved, but for the said measure".[398] In the same vein, it was held in *Underhill (U.S.) v. Venezuela*, that "without arrest and imprisonment, detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon".[399]

177. It has also been held, on several occasions, that a State will be liable for *de fact*o expulsion of an alien where there has been an ostensible voluntary departure from the State but where it is shown that the alien:

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[397] The point is made in the Counter-Memorial, paragraph 182. The principle of mitigation of damages has been recognised as a general principle of law by 2 Panels of the United Nations Compensation Commission. See *The Well Blowout Control Claim*, 109 I.L.R. 480 at 503–504. See also *Claims Against Iraq (Category "C" Claims), First Instalment*, 109 I.L.R. 206 at 389. This principle of mitigation of damages was also in issue in the *Gabcíkovo-Nagymaros Project (Hungary/Slovakia) Case*: "Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

[398] R.I.A.A. Vol. II, 1241 at 1260.

[399] R.I.A.A. Vol. IX, 155 at 160.

> "could reasonably be regarded as having no other choice than to leave and when the acts leading to his departure were attributable to the State".[400]

In *International Technical Products Corp. Iran*, the Iran – United States Claims Tribunal stated that it accepted:

> "in principle, the possibility that the constituent elements of expulsion ("removal, either 'voluntarily', under threat of forcible removal or forcibly") can be fulfilled in exceptional cases even where the alien leaves the country without being directly and immediately forced or officially ordered to do so. Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with principles of state responsibility".[401]

The Compensation Commission established to deal with breaches of international law by Iraq has also recognized the principle that the taking of hostages may be effected *de facto* and not only *de jure*.[402]

178. In short, international law looks at the substance, not the form. The attitude taken by international law to "*de facto* detention", like *de facto* expulsion, is consistent with its position with respect to "*de facto* nationalization".[403]

179. International law also recognizes that damages are recoverable in respect of acts done by a claimant to mitigate the losses resulting from unlawful State action. In *The Well Blowout Control Claim*, the Panel held that:

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[400] *Alfrend L.W. Short v. Islamic Republic of Iran* 16 Iran-United States Claims Tribunal Reports, 76 at 83–84.

[401] 9 Iran-United States Claims Tribunal Reports, 10 at 18. In two other cases, the Iran – United States Claims Tribunal spoke of "*de facto*" expulsions: See *Arthur Young & Company v. Islamic Republic of Iran*, 17 Iran-United States Claims Tribunal Reports, 245 at 258, para. 55; *Hilt v. Islamic Republic of Iran*, 18 Iran-United States Claims Tribunal Reports, 154 at 162.

[402] UN Doc. S/AC.26/1991/3 (18 October 1991), *reproduced* in 109 I.L.R. 575 at 576. For an application of these rules, see *Claims Against Iraq (Category "C" Claims), First Instalment*, 109 I.L.R. 206 at 292–305.

[403] See the Explanatory Note to the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 A.J.I.L., (1961) 558–559. See also G. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal", 88 A.J.I.L. (1995) 585; G. Aldrich, *The Jurisprudence of the Iran – United States Claims Tribunal*, 1996, 188–207; C. N. Brower & J. D. Brueschke, *The Iran-United States Claims Tribunal*, 1998, 377.

> "under general principles of international law relating to mitigation of damages, which have also been recognized by the Governing Council, the Claimant was not only permitted but indeed obligated to take reasonable steps to fight the oil-well fires in order to mitigate the loss, damage or injury being caused by those fires to the property of the Kuwaiti oil sector companies and the State of Kuwait".[404]

180. For these reasons it is submitted that St. Vincent and the Grenadines is fully entitled to claim in respect of the detection *de facto* of the skeleton crew for the whole of the period during which they remained with the master and the M.V. *Saiga*, detained *de jure* in Conakry.

The Two Most Seriously Wounded

181. To the claim for damages of $50,000 each for the two members of the crew who were most grievously injured, the Republic of Guinea responds that this is excessive since according to the account of the reporting officer, their injuries were slight.[405] The International Tribunal has medical evidence showing that Serguei Kluynev sustained gun-shot wounds, including one, approximately 8 centimetres long, requiring surgery under general anaesthetic as well as shrapnel wounds;[406] and that Djbril Niasse suffered gun-shot wounds to the chest, haemorrhaging in both 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 any thoracotomy[407] and that his severe psychological injuries have persisted.[408]

182. The sum claimed by St. Vincent and the Grenadines is consistent with sums awarded by the Inter-American Court of Human Rights and the European Court of Human Rights as moral or non-pecuniary damages in respect of similar violations.[409] It is also consistent with the standard recently established by the Compensation Commission established pursuant to Security Council Resolution 692 to determine the extent of the liability of Iraq for the acts declared illegal by Security Council Resolution 687.[410]

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[404] 109 I.L.R. 480 at 503–504.
[405] Counter-Memorial, paragraph 181.
[406] Annex 21 to the Memorial dated 19th June 1998 page 301.
[407] Annex 21 to the Memorial dated 19th June 1998 page 295.
[408] Supplementary Report dated 19th June 1998 **Annex 1 to this Reply**.
[409] Memorial dated 19th June 1998, footnote 42, page 72.
[410] See Governing Council Decision 8 – S/AC.26/1992/8 of 24th January 1992, reproduced in 109 I.L.R. 591.

183. It is also consonant with the guidelines set by the United Nations Compensation Commission ("U.N.C.C.") when making awards of damages consistently with general principles of international law to those who suffered in consequence of Iraq's invasion of Kuwait. Under the rules in Decision No. 8 of the Governing Council of the U.N.C.C., persons who suffer serious personal injury may be awarded up a maximum of US$15,000 in respect of mental pain and anguish from dismemberment, permanent significant disfigurement, or permanent loss or use or permanent limitation of use of a body organ, member, function or system. There is a total cumulative of $30,000 in respect of all mental pain and anguish. Nevertheless, it must be noted that this amount is itself exclusive of any amount that may be awarded in respect of actual loss that occurs due to serious personal injury. This further loss may arise from medical expenses,[411] or from other losses arising from the same event, e.g., loss of personal property, loss of income or business losses.[412] Thus, there is in theory, no limit to the amount that may be recovered for loss arising from serious personal injury except that where the loss is over and above mental pain and anguish that financial loss must be shown to have actually occurred.[413]

The Senegalese Painters

184. The Guinean claim that the three Senegalese painters are entitled to no compensation[414] is a repetition (under another guise) of her claim that the claim made in respect of their detention is inadmissible, since they were not members of the crew. St. Vincent and the Grenadines responded to this argument in the context of admissibility. Without repeating the point she refers the International Tribunal to the comments made in that context.[415]

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[411] As the Panel dealing with Category "C" claims (losses under US $100,000) remarked: "individuals may file claims for medical expenses incurred in connection with the claimant's personal injury, and for MPA [mental pain and anguish] resulting from the serious personal injury of the claimant." *Claims Against Iraq (Category "C" Claims-First Instalment)*, 109 ILR 305. That Panel noted in the same instalment of those claims that: "once the fact of injury has been proved, the presence of MPA [mental pain and anguish] may reasonably be assumed." *Ibid*. at 318.

[412] See *ibid*., pp. 222–223.

[413] Claims may be made under Category B for fixed payments of $2,500; claims may be made under Category C for losses under $100,000. Individual losses over $100,000 must be made under Category D. See *ibid*., p. 4.

[414] Counter-Memorial, paragraph 179.

[415] Paragraph 22.

Quantum of Damage for Detention

185. The Republic of Guinea contends that the amount claimed in respect of detention is inappropriate. Firstly, computation of damages for detention by using a daily rate is the norm in international claims. In the case of *Madame Julien Chevreau* (France v. Great Britain, 1931), after the arbitrator had assessed damages at a rate of £20 a day, he remarked that:

> "On this point the Arbitrator calls attention to the fact that the computation of damages according to a certain daily rate is but a practical means of avoiding arbitrary assessment. In principle, it is a question of determining, according to the individual circumstances of each case, the global sum which would give equitable compensation for the moral or material injury."

186. Secondly, the rates claimed are well within the range of those awarded by international tribunals. In this respect, a look at the awards reached by various claims commissions early this century shows that the sums claimed by St. Vincent and the Grenadines are eminently reasonable (especially when the figures awarded by those tribunals are adjusted for inflation).[416] In the *Topaze Case*, the Umpire in the British-Venezuelan Commission was asked to unofficially advise the Venezuelan Commissioner as to whether a particular claim for wrongful detention was excessive. The Umpire examined the amounts that had been awarded by international tribunals to persons who had been unlawfully detained. He looked at eighteen cases where damages had been awarded for unlawful detention. After having excluded two cases where unusually large sums had been awarded, the Umpire found that the average sum allowed was $161. Noting that there were six cases at $100 a day and five for more than $200, the Umpire decided that:

> "Judged by this analysis of the opinions of other arbitral tribunals, the sum of $100 seems to be the one most usually acceptable, while a sum less that [sic] is quite in a minority".[417]

The arbitrator then went on to state that:

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[416] For a summary of the sorts of amounts awarded by these tribunals for unlawful detention, see J. H. Ralston, *The Law and Procedure of International Tribunals*, 1926, 263–5.

[417] 9 R.I.A.A. 387 at 399. The date of this opinion is not recorded. However, the fact that the incident in respect of which the case was brought occurred in 1902 and the treaty setting up the Commission was signed in 1903 suggests that this case was decided in the first decade of the 20th century.

> "he can properly advise, unofficially, the honourable Commissioner for Venezuela that a sum not exceeding $100 a day is not an excessive demand, but approaches the minimum sum rather than the maximum sum allowed in cases for illegal arrest and detention, and is apparently the favored allowance by [. . ."]

187. In *Faulkner (U.S.A.) v. United Mexican States*, the tribunal cited with approval the opinion of the Umpire in *Topaze* and even increased the amount allowable for detentions in order to take account of inflation:

> "The Commission is willing to follow these precedents, but realizing how much the value of money has changed feels bound to increase them fifty per centum".[418]

Damages in that case was therefore calculated on the basis of $150 a day.

188. The practice of the United Nations Compensation is the most recent relating to unlawful detention. Governing Council Decision No. 3 allows claimants to recover for mental pain and anguish on account of being taken hostage or being illegal detained in circumstances indicating an imminent threat to life. A claimant may also recover for mental pain and anguish where they have been forced to hide because of a manifestly well-founded fear for their life or of being taken illegally detained.[419] Governing Council Decision No. 8 sets out the amount that may be claimed in respect of such mental pain and anguish.[420] Under these rules, US$1,500 may be awarded to an individual who was taken hostage or illegally detained for more than three days, or for a shorter period in circumstances indicating an imminent threat to his or her life. Such a person may also be awarded $100 per day for each day detained beyond three. There is a ceiling of $10,000 for each claimant.

189. A claimant who, on account of a manifestly well-founded fear for his or her life or of being taken hostage or illegally detained may be awarded $1,500 for the first three days. A sum of $50 may be awarded for each subsequent day with a ceiling of $5,000 for each claimant.[421]

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[418] 4 R.I.A.A. 67.
[419] UN Doc. S/AC.26/1991/3 of 18th October 1991 – *Personal Injury and Mental Pain and Anguish*, reproduced in 109 I.L.R. 574.
[420] UN Doc. S/AC.26/1992/8 of 24th January 1992 – *Determination of Ceilings for Compensation for Mental Pain and Anguish*, reproduced in 109 I.L.R. 591.
[421] *Idem*.

Theft

190. In response to the claim for compensation in respect of personal possessions stolen from the vessel, the Republic of Guinea simply states that she "contests such theft" and that the amount claimed is excessive.[422] The International Tribunal is invited to accept the prompt and detailed evidence of the master and Second Officer and the written schedule prepared by them[423] conclude that the value placed upon those items by the Applicant State is consonant with their true worth or replacement cost. The Republic of Guinea is incorrect in stating that the listed items "consist mainly of clothes and shoes and small electric goods": as the International Tribunal will readily see,[424] the most valuable of the stolen items was cash (in various currencies) followed by bonded goods.

4.2.3 The Claim in Respect of Removal of the Cargo From the Vessel

191. The attention of the International Tribunal is drawn to the fact that the Republic of Guinea does not contest the claim of St. Vincent and the Grenadines that the cargo of the M.V. *Saiga* was removed from the vessel and sold for some US$3 million. Nor does she offer any defence to the arguments advanced by the Applicant State that she is entitled to be compensated in that amount, should she succeed on the merits. Accordingly if judgment is given in her favour on the merits, St. Vincent and the Grenadines are entitled to be awarded and to receive compensation of US$3 million under this head.

4.2.4 The Claim in Respect of Damages Or Loss Suffered by the State of Saint Vincent and the Grenadines

192. In respect of the damage done to her sovereignty and jurisdiction, independently of any sum by which she seeks to be in a position to compensate the owners and crew, St. Vincent and the Grenadines claims damages of $1 million. On this aspect of the matter, the Republic of Guinea contends that no moral damage should be awarded to the State, in its own right, contending that she has suffered no material loss and is not entitled to moral damages.

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[422] Counter-Memorial, paragraph 183.
[423] Annex 41 to the Memorial dated 19th June 1998 page 707.
[424] Annex 41 to the Memorial dated 19th June 1998 page 707.

193. On the issue of material loss, the Republic of Guinea appears to misunderstand the case advanced against her, for she pleads that St. Vincent and the Grenadines cannot receive her legal costs twice.[425] It is not, of course, suggested that she should. The loss suffered by the Applicant State in bringing a claim before an International Tribunal is not merely the legal costs but also the costs entailed by devotion of the time of her own ministers and officials to the matter. As was stated in the Memorial[426] "As a small country, these efforts have come at some cost, deflecting resources away from other activities, including at the highest levels". To this may be added another consideration: there is a cost, appreciable but difficult to quantify, borne by any State, and particularly by less populous one, when it is obliged to engage before an international tribunal in litigation with another State with which it would prefer, for material and non-material reasons, to maintain the most amicable relations.

194. Further, St. Vincent and the Grenadines has, consistently with the recommendation made by the International Tribunal on 11th March 1998, taken steps to ensure that vessels flying her flag shall refrain from exercising their right to bunker in the exclusive economic zone off the coast of the republic of Guinea. That has entailed cost, of which the Republic of Guinea states "this claim is no claim that St. Vincent and the Grenadines could advance on its own behalf".[427] On the contrary, it is submitted that this cost is properly to be claimed by St. Vincent and the Grenadines, which was the party to which the International Tribunal made its recommendation.

195. As regards compensation for the risk that Guinea's actions might lead owners to cease to register vessels under the flag of St. Vincent and the Grenadines, the Republic of Guinea submits that this is too remote.[428] While not claiming a separate award of damages under this head, St. Vincent and the Grenadines submits that the consideration to which she drew attention is not remote: where the public vessels of one State repeatedly attack those flying the flag of another and interfere with the latter's freedom of navigation, the International Tribunal, when assessing the *quantum* of damage, can and should take account of the possibility that shipowners might be less inclined to make use of the registry of the latter State. They may reason that their interests would be better served by making use of the registry of a State which is in a better position to guard

[425] Counter-Memorial, paragraph 186.
[426] Dated 19th June 1998, paragraph 196.
[427] Counter-Memorial, paragraph 191.

its vessels against attack, by use of a powerful navy, by economic force or other means.

196. On the issue of moral damages, the Republic of Guinea submits that there is insufficient basis in international practice for their award.[429] In particular, she argues that the *Rainbow Warrior* decision cannot be regarded as a precedent "since there existed prior agreement between the parties that France would pay compensation to New Zealand."[430] Since both *Rainbow Warrior* decisions support the power of a tribunal to award monetary compensation for moral and legal damage to a State, it is not clear to which of the decisions Guinea is referring. Nevertheless, the contention is not accurate in respect of either decision. In the arbitration by the Secretary General of the United Nations, France acknowledged an obligation to pay compensation for material injury only. She contested any obligation to pay compensation for moral damages, arguing that any compensation awarded:

> "could concern only the material damage suffered by New Zealand. In fact, according to constant legal precedent, in inter-state relations moral damage is compensated by the solemn recording of a breach of international law. . . . This being the case, the formal and unconditional offer of apologies by France compensates for the moral damage suffered by New Zealand and this damage could not in addition be the object of a pecuniary compensation".[431]

The decision of the Secretary General that France was bound to pay compensation over and above that required for material damage suffered is a decisive rejection of this argument. As was held by the arbitration tribunal in *Rainbow Warrior II*, the compensation awarded by the Secretary General was intended to cover all the damage New Zealand suffered, including material, moral and legal damage.[432] The award of compensation for moral and non-material damage was clearly not based on any prior agreement of France.

197. In the *Rainbow Warrior II*, the arbitral tribunal again confirmed that monetary compensation could be awarded for non-material injury. It is clear that the tribunal was laying down a principle of general application

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[428] Counter-Memorial, paragraph 188.
[429] Counter-Memorial, paragraphs 192–198.
[430] Counter-Memorial, paragraph 193.
[431] 19 R.I.A.A. 199 at 209.
[432] 82 I.L.R. 500 at 572.

in international law rather than one dependent on any agreement between the parties. It will be recalled that this holding related to separate acts than those considered by the Secretary General in the first arbitration. It cannot be doubted that in this second case there was absolutely no agreement by France to pay monetary compensation at all, irrespective of compensation for moral damage. Notwithstanding this, the tribunal stated that:

> "The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary General. It is true that such orders are unusual but one explanation of that is that these requests are relatively rare. . . . Moreover such orders have been made, for instance in the last case".[433]

198. In support of the proposition that moral damages are not available in favour of a State, the Republic of Guinea relies upon selected academic authorities, antedating the award in the *Rainbow Warrior*.[434] Even in the case of publications before the award in the *Rainbow Warrior*, however, other writers acknowledged that moral damages are available in favour of a State. For instance, Professor Riedel referred to the *I'm Alone* case as establishing a right to recover for moral injury without disapproving of that decision or of the right,[435] concluding expressly that

> "Damages may also be awarded in addition to satisfaction, when redress for insulting the national honour of the claimant State is in question."

A similar conclusion was expressed by Professor Schwarzenberger.[436] The tendency of writers to acknowledge that moral damages are available in favour of States has been particularly marked since the award in *The Rainbow Warrior*. In dealing with the types of damage and the forms of reparations, Professor Brownlie refers to

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[433] *Ibid.*, at p. 573.
[434] C. Parry, "Some Considerations Upon the Protection of Individuals in International Law", 90 *Hague Recueil* (1956–II) 653 at 674 *et seq*. C. Gray, *Judicial Remedies in International Law*, 1987, p. 43.
[435] *Encyclopaedia of Public International Law*, Max Planck Institut, 1992, Vol. I, 929 at 930.
[436] *International Law*, Vol. 1 (3rd ed.), 664 & 667.

> "the case where compensation is paid for a breach of duty which is actionable *without proof of particular items of financial loss, for example* the violation of diplomatic or consular immunity, trespass in the territorial sea or *illegal arrest of a vessel on the high seas*".[437]

He notes that the terminology of "moral" or "political" reparation used in such cases sometimes causes confusion but he emphasises that in such cases

> "the 'injury' is a breach of *legal* duty . . . and the only special feature is the absence of a neat method of qualifying loss, as there is, relatively speaking, in the case of claims relating to death, personal injuries and damage to property".[438]

He speaks of "compensation in the case of breaches of duty not resulting in death, personal injuries, or damage to or loss of property"[439] stating that, this sort of compensation may be regarded as pecuniary satisfaction.[440]

199. Commenting on the award in the *Rainbow Warrior*, Dr. Wexler, argues that "customary international law does not establish any set criteria on the limits to which an indemnity is subject."[441] She then goes on to argue that "there is legal precedent in favour of awarding an indemnity for moral damage suffered as a result of a wrongful act contrary to international law." Professor Davidson, similarly, supports the statement of the Tribunal in *Rainbow Warrior II* which recognises that monetary compensation may be available for moral and non-material injury.[442] He states that "although the tribunal did not refer to other decided cases where this question was in issue, it is nonetheless clear that its ruling is supported by arbitral practice". He goes on to argue that "indeed, it is apparent that monetary compensation is the preferred form of reparation in cases involving both direct and indirect international wrongs". Mr. Pugh aligns himself with Professor Brownlie in concluding that

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[437] I. Brownlie, *Principles of Public International Law*, 5th ed (1998), p. 461.
[438] *Idem*. Emphasis in original.
[439] *Ibid*., at p. 463.
[440] *Idem*. In another work, Professor Brownlie states that: "In the case of token payments for breaches of sovereignty by intrusions or other non-material loss, the role of payment is more or less that of providing 'pecuniary satisfaction'." See I. Brownlie, *System of the Law of Nations. State Responsibility*, Part I, 1983, 223.
[441] D.B. Wexler, "The Rainbow Warrior Affair: State and Agent Responsibility for Authorized Violations of International Law", 5 *Boston University International Law Journal* (1987) 389 at 406, citing the *Borchgrave case (Belgium/Spain)*, P.C.I.J. Ser A/B, No. 72, 158 at 166.
[442] J. Scott Davidson, "The *Rainbow Warrior* Arbitration Concerning the Treatment of the French Agents Mafart and Prieur", 40 I.C.L.Q. (1991) 446 at 455.

"While punitive damages are probably permitted in cases of unlawful resort to force, including unlawful penetration of territorial waters, 'it would be immaterial whether the surplus were regarded as a fine or exemplary damages'".[443]

200. In response to the point made by St. Vincent and the Grenadines in reliance upon the award in *Letelier and Moffatt*,[444] the Republic of Guinea pleads that in that case the moral damages were in favour of individuals. However, if moral damages can be awarded with respect to breaches of duty to the individuals there is no reason why they should not, in principle, be awarded with respect to breaches of duty owing directly to States. Objection cannot be taken on the ground that moral injury is of a nature that it can only be suffered by an individual and not by a State. It is clear that international law recognises that moral injury may be suffered by a State.[445] It is in respect of such injury that the remedy of satisfaction is thought to be particularly appropriate.[446] Such moral injury consists not only of injury to a State's honour and dignity but also "any non-material damage suffered by a State as a result of an internationally wrongful act".[447] The only controversy regarding moral injury to States relates to the form which reparation for such wrong may take. Since the type of injury is recognised and since monetary compensation for this form of injury, when suffered by individuals, is recognised there ought to be no opposition to monetary compensation being awarded for moral injury to a State. Indeed, the International Law Commission has recognised, in its Draft Articles on State Responsibility, that substantial and not only nominal damages may, in certain cases be the appropriate remedy when moral or non-material injury is caused by one State to another.[448]

4.2.4 Interest

201. The Republic of Guinea does not contest the claim for interest, to which accordingly St. Vincent and the Grenadines maintains that she is entitled.

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[443] M. Pugh, "Legal Aspects of the Rainbow Warrior Affair", 36 I.C.L.Q. (1987) 655 at 666, citing I. Brownlie, *International Law and the Use of Force by States*, 1963 at 148 and 153.

[444] 88 I.L.R. (1992) 727 at 735–6.

[445] See paragraphs 3–5 of the commentary to Article 45 of the Draft Articles on State Responsibility, adopted on First Reading by the International Law Commission, 37 I.L.M. (1998) 440.

[446] C. Gray, *Judicial Remedies in International Law*, 1987, p. 41.

[447] Paragraph 5 of the commentary to Article 45, Draft Articles on State Responsibility, adopted on First Reading by the International Law Commission.

[448] *Ibid*.

4.2.6 Legal Costs

202. Although asserting that she contests the sum specified by St. Vincent and the Grenadines for legal costs,[449] the Republic of Guinea gives no basis for doing so. In accordance with the terms of the Agreement dated 20th February 19[98], the International Tribunal is invested with authority to determine the legal costs. St. Vincent and the Grenadines requests the International Tribunal to award costs in her favour. The sum specified in the Memorial dated 19th June 1998 has, of course, now been exceeded; and may be expected to continue to increase as the present litigation continues. In common with the Republic of Guinea, St. Vincent and the Grenadines is prepared to substantiate its costs in such manner as the court may specify.[450]

SUBMISSIONS

FOR THESE REASONS St. Vincent and the Grenadines adheres to her request that the International Tribunal should adjudge and declare that:

(i) the actions of the Republic of Guinea violated 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;

(ii) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of UNCLOS, the customs and contraband laws of the Republic of Guinea may in no circumstances be applied or enforced in the exclusive economic zone of the Republic of Guinea;

(iii) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of UNCLOS in respect of the M.V. *Saiga* and is liable to compensate the M.V. *Saiga* according to Article 111(8) of UNCLOS;

(iv) The Republic of Guinea has violated Articles 292(4) and 296 of UNCLOS in not releasing the M.V. *Saiga* and her crew immediately upon the posting of the guarantee of US$400,000 on 10th December 1997 or in the subsequent clarification from *Crédit Suisse* on 11th December 1997;

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[449] Counter-Memorial, paragraph 186.
[450] Counter-Memorial, paragraph 199.

(v) The citing of St. Vincent and the Grenadines in proceedings instituted by the Guinean authorities in the criminal courts of the Republic of Guinea in relation to the M.V. *Saiga* violated the rights of St. Vincent and the Grenadines under UNCLOS;

(vi) . . .

(vii) the Republic of Guinea shall immediately repay to St. Vincent and the Grenadines the sum realized on the sale of the cargo of the M.V. *Saiga* and return the bank guarantee provided by St. Vincent and the Grenadines;

(viii) The Republic of Guinea shall pay damages as a result of such violations with interest thereon;

(ix) The Republic of Guinea shall pay the costs of the arbitral proceedings and the costs incurred by St. Vincent and the Grenadines.

[Signed]
BOZO DABINOVIC
Agent and Commissioner for Maritime Affairs
St. Vincent and the Grenadines

19th November 1998