# REJOINDER SUBMITTED BY GUINEA

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**ST. VINCENT AND THE GRENADINES**
v
**REPUBLIC OF GUINEA**

**The M/V "SAIGA" (No. 2) Case**

# REJOINDER

Submitted by the Republic of Guinea

28 December 1998

## INTRODUCTION

1. In accordance with the ORDER of the International Tribunal for the Law of the Sea (herein-after referred to as "the International Tribunal") dated 6 October 1998, the Republic of Guinea has the honour to submit the following Rejoinder to the Reply of St. Vincent and the Grenadines dated 19 November 1998.

2. For ease of cross-reference, these submissions address the various issues raised in the case in the same order as they were addressed in the Reply of the Republic of Guinea dated 16 October 1998.

3. In paragraph 4 of the Introduction of the Reply, St. Vincent and the Grenadines states that the Republic of Guinea would not have expressly contested in the Counter-Memorial various issues of fact, and concludes that Guinea must be taken to have assented to these facts. The Republic of Guinea rejects such conclusion. Guinea described recalled the facts of the dispute in Section 1 of the Counter-Memorial of 16 October 1998. Insofar as a submission by St. Vincent and the Grenadines is not discussed in the Counter-Memorial, this does not mean that the Republic of Guinea assents to the respective submissions. Only as far as the Republic of Guinea has explicitly assented to specific facts, they should be deemed to be undisputed. Guinea objects in particular to the following statements of St. Vincent and the Grenadines.

4. The fishing vessels supplied by the M/V "SAIGA" on 27 October 1997 were obliged to bunker only from approved service stations.

5. Whether there have been proceedings against the Masters or Operators of the trawlers, would have to be further investigated if this point is of relevance for the present dispute.

6. The M/V "SAIGA" was detected by the Guinean patrol boats before leaving the exclusive economic zone of Guinea. The exact time when the patrol boats had reached the M/V "SAIGA" will have to be further elucidated in the forth-coming hearings before the International Tribunal.

7. The medical reports relating to the two injured crew members are issued at dates several months after 28 October 1998. The medical status of the two crew members at the time right after the arrest of the M/V "SAIGA" will have to be further clarified in the upcoming hearing.

8. Members of the Guinean patrol boats did neither ransack the cabins of members of the crew of the M/V "SAIGA", nor did they lay claim to any items which were not theirs.

9. Whether the M/V "SAIGA" has been damaged by the Guinean patrol boats before she was arrested must be further clarified in the hearings before the International Tribunal.

10. The Captain and all crew members did not receive any order from Guinean customs or navy officials to remain on board of the M/V "SAIGA". They all were free to leave the ship after she has called the port of Conakry.

11. The Ministry of Foreign Affairs of the Republic of Guinea did not receive a copy of the bank guarantee of Crédit Suisse of 10 December 1997.

12. The Captain of the M/V "SAIGA" was sentenced by the Court of Appeal of Guinea on 3 February 1998 for having violated Guinean laws. The Judgement became final and enforceable because the Captain voluntarily did not appeal against it and accepted it. The Captain, as well as the owner and/or the charterer of the M/V "SAIGA" and St. Vincent and the Grenadines are now bound by the Judgement of 3 February 1998.

13. The earlier incident relating to the vessel "ALFA I" had no connection with forces of the Republic of Guinea.

## SECTION 1: FACTUAL BACKGROUND

### Section 1.1 No effective registration of the M/V "SAIGA"

14. St. Vincent and the Grenadines initially produced in Annex 13 of the Memorial a Provisional Certificate of Registry for the M/V "SAIGA" dated 14 April 1997 and a Permanent Certificate of Registry dated 28 November 1997. In Annex 7 of the Reply, there is now produced a declaration of the Maritime Administration of St. Vincent and the Grenadines in Geneva dated 27 October 1998. It is addressed "to whom it may concern" and confirms that the M/V "SAIGA" was registered under the flag of St. Vincent and the Grenadines on 12 March 1997 and would still be validly registered today, *i.e.* on 27 October 1998.

15. St. Vincent and the Grenadines argues that the M/V "SAIGA" had its nationality on the relevant date of 28 October 1997, because a vessel once registered under the flag of St. Vincent and the Grenadines remains so registered until deleted from the Registry.[1] This, however, is neither reflected in the 1982 Merchant Shipping Act of St. Vincent and the Grenadines, nor in the above-mentioned certificates of registry. The Provisional Certificate expressly states that it "expires on 12 September 1997." According to Section 37 of the Merchant Shipping Act, a provisional certificate of registry shall cease to have effect even earlier, namely before the expire of 60 days from the date of issuance of the certificate if the owner of the vessel failed to produced some documents. In any case, the latest date when the Provisional Certificate for the M/V "SAIGA" could have expired is 12 September 1997. Contrary to the assertion of St. Vincent and the Grenadines, there is no section in the Act that provides that a provisionally registered vessel remains registered until deleted from the Registry.

16. As a consequence, St. Vincent and the Grenadines is not able to fill the time gap between the expiry of the Provisional Certificate on 12 September 1997 and the date of permanent registration of the M/V "SAIGA" on 28 November 1997. The declaration produced in Annex 7 to the Reply is not adequate to fill this time gap. It only confirms the date when the M/V "SAIGA" was provisionally registered and that the vessel was registered on 28 October 1998. It does not, however, expressly state that the M/V "SAIGA" was registered in the time period between 12 September and 28 November 1997.

[1] Paragraph 24 of the Reply.

17. The further contentions of St. Vincent and the Grenadines are likewise unacceptable. The validity of the registration is neither a question of delivery of the certificate on board of the M/V "SAIGA", nor is it a question of an inspection of the ship register. It is, however, correct to assume that an inspection of the Ship Registry of St. Vincent and the Grenadines would eliminate any doubt that the M/V "SAIGA" was not registered on 28 October 1997.

18. Guinea asserts that the M/V "SAIGA" was a vessel without nationality at the time of its arrest by the Guinean Customs authorities. Consequently, St. Vincent and the Grenadines cannot claim the rights and obligations of a flag State with respect to the incident concerning the M/V "SAIGA" on 28 October 1998.

**Section 1.2 Owner of the M/V "SAIGA"**

19. Contrary to the statement made in paragraph 25 of the Reply, it is of relevance for a Maritime Register to know in which Commercial Registry the owner of a vessel is registered. Otherwise, no genuine link, as Article 91 of the United Nations Convention on the Law of the Sea (herein-after referred to as "the Convention") requires, would exist between the flag State and the vessel flying its flag. In this connection reference is made to paragraphs 56–71 of the Guinean Counter-Memorial.

**Section 1.3 Charterer of the M/V "SAIGA"**

20. St. Vincent and the Grenadines has now produced the Charter Party concerning the M/V "SAIGA".[2] It indicates that the charterer is a company with seat in the British Virgin Islands. In the statements of St. Vincent and the Grenadines either no mention has been made of this point[3] or the charterer was said to be "Lemania Shipping Group Ltd. based in Switzerland".[4]

**Section 1.4 Crew of the M/V "SAIGA"**

21. St. Vincent and the Grenadines referred to Tabona Shipping Company Ltd. as being the employer of the crew of the M/V "SAIGA". The "Seafarer's Conditions of Service" regarding the Second Officer Klyuyev name, however, Seascot Shipmanagement Ltd. as employer of the Officer.[5]

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[2] Annex 19 of the Reply.
[3] See, for example, paragraph 26 of the Reply.
[4] See, for example, paragraph 26 of the Memorial.
[5] Annex 8 of the Reply.

22. The "Seafarer's Conditions of Service" state under item 14 (Insurance) that "in the event of partial disability arising out of such accident the seafarer shall be entitled to compensation according to the insurer's Continental Scale". If the Second Officer has really suffered serious personal injuries as St. Vincent and the Grenadines alleges, he should have already received compensation by the insurance company. The same is agreed to in the Collective Fleet Agreement between Seascot Shipmanagement Ltd. and the Ukrainian Seafarers Association under no. 4.3.3. (Disability) which states that "A seafarer who suffers injury as a result of an accident whilst the employment of a Company . . . be entitled to compensation according to the provisions of this Agreement."[6] A Compensation Rates Table is attached to the Agreement as Annex 3, however, not produced by St. Vincent and the Grenadines.

**Section 1.5 Cargo-Owner**

23. St. Vincent and the Grenadines did not object to the Guinean contention that there is no justification to seek any damages for the Swiss company Addax B.V. Geneva Branch that is said to be the owner of the confiscated gasoil.[7]

24. Furthermore, Guinea wonders who the exact owner of the gasoil is, since Addax Bunkering Services Geneva is mentioned as addressee of an invoice from Adryx Oil Group N.V. concerning the gasoil transported by the M/V "SAIGA".[8]

**Section 1.6 Arrest of the M/V "SAIGA"**

25. Contrary to the assertion of St. Vincent and the Grenadines, it is of significance that the M/V "SAIGA" did not show her flag before and at the time of her pursuit and arrest by the Guinean customs authorities. Not knowing the flag State, the two Guinean patrol boats had to apply a stricter and more pre-cautious standard as regards the use of force to stop and arrest the M/V "SAIGA" which refused to follow the Guinean signals to stop.

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[6] *Ibid*.
[7] See paragraph 14 of the Counter-Memorial.
[8] Note de debit no. 229/09/97, Annex 19 of the Reply.

## SECTION 3*: ADMISSIBILITY

### Section 3.1 Guinea's right to contest the admissibility

26. Guinea puts forward three objections concerning the admissibility of the claims.[9] St. Vincent and the Grenadines asserts that Guinea is precluded from raising these objections assuming that the Exchange of Letters dated 20 February 1998 (herein-after referred to as the "1998 Agreement") excluded the raising of any objection concerning preliminary issues except in connection with Article 297(3 a) of the Convention.

27. Guinea rejects the allegation that she conceded, by concluding the 1998 Agreement, that she would not raise any objections to the admissibility of the claims and that she would be precluded from doing so in the proceedings on the merits. The 1998 Agreement was an agreement reached under the good offices of the President of the International Tribunal concerning the choice of procedure for the settlement of the present dispute. Its purpose was to transfer the dispute from an arbitral tribunal to the International Tribunal. Main argument for the transfer was the fact that the constitution of the arbitral tribunal would have unnecessarily delayed the settlement of the dispute and would have been much more costly than to resort to the standing International Tribunal with its existing servicing facilities and whose Members and staff are already remunerated. There is no argument why the Republic of Guinea should have agreed to preclude the raising of objections to the admissibility of the claims when it concluded an agreement concerning the choice of procedure. Had the parties not concluded the 1998 Agreement, recourse would have been made to arbitral proceedings in which the dispute concerning Guinea's right to contest the admissibility of the claims would never have arisen.

28. As has already been stated in paragraph 52 of the Counter-Memorial, the reference in paragraph 2 of the 1998 Agreement to the objection concerning the jurisdiction of the International Tribunal pursuant to Article 297(3 a) of the Convention, does not permit a conclusion *e contrario* that objections to the admissibility would have been waived. Since the 1998 Agreement essentially dealt with the jurisdiction of the International Tribunal, the parties felt it necessary to expressly mention objections concerning jurisdictional issues in the Agreement transferring the dispute to the International Tribunal, the more so since the Republic of Guinea had already raised the

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* *Numbering as in original [note by the Registry].*

[9] Paragraph 90 of the Counter-Memorial.

objection based on Article 297(3 a) of the Convention. Guinea would have put herself into contradiction with what she had maintained before, if this objection had not been expressly stated in the Agreement. Interestingly enough, it was Stephenson Harwood who initiated the inclusion of the reference to objections to the jurisdiction of the International Tribunal in the 1998 Agreement.[10]

29. St. Vincent and the Grenadines seems to conclude in paragraph 59 of the Reply that Guinea agreed to preclude objections to the admissibility of the claims because she was anxious to ensure payment of the US$400,000 as provided by the bank guarantee of Crédit Suisse and because she wanted to avoid any delay in the present proceedings. Guinea requests the International Tribunal not to follow this conclusion, since the Guinean attempts to receive payment for the release of the M/V "SAIGA" do not have any connection with the alleged preclusion of objections to the admissibility of the claims.

30. The Guinean position to release the vessel upon the payment of a customs fine predated the Judgement of the International Tribunal which imposed on St. Vincent and the Grenadines the obligation to issue a reasonable bank guarantee. This position should be without relevance for the present question. Similarly, the Guinean attempts to receive payment of the US$400,000 as provided by the bank guarantee, should not be brought into the context of any waiver of objections to the admissibility of the claims. As has been indicated in the letters of the Director of Customs of the Republic of Guinea and the Guinean Agent dated 16 and 18 February 1998, the payment of the US$400,000 was thought to be dependent on the issuance of a final decision of the Guinean adjudication and not, as St. Vincent and the Grenadines maintains, on the decision of the International Tribunal on the merits.[11] In Guinean opinion, the payment under the bank guarantee should have been effected after the time-limits to appeal against the Judgement of 3 February 1998 by the Guinean Court of Appeal had expired on 10 February 1998.[12]

31. That the Guinean Agent described in his letter to Crédit Suisse of 18 February 1998 the Judgement of the Court of Appeal as a Judgement of the Guinean Supreme Court is a slip based on the fact that the Guinean Court of Appeal

[10] See Annex 12 to the Reply, Letter from Stephenson Harwood to the Guinean Agent of 29 January 1997.
[11] See paragraph 43 of the Counter-Memorial.
[12] See paragraph 87 of the Counter-Memorial.

and Supreme Court use the same letter head. This slip should not serve as an argument that Guinea wanted to receive the US$400,000 as quickly as possible no matter whether the local remedies were exhausted or not. Fact is that the Judgement of the Court of Appeal had already become final at the time this letter was written. Insofar, the slip is irrelevant, since there is not significant difference with respect to the obligation to pay between a Judgement of the Supreme Court and a Judgement of the Court of Appeal which has become final because the convicted has failed to appeal against it.

32. That Guinea did not waive the raising of any objections to the admissibility of the claims, is further illustrated by the fact that she put forward the objection concerning the non-exhaustion of local remedies pursuant to Article 295 of the Convention during the hearings in the provisional measures proceedings on 24 February 1998.[13] This was only four days after the conclusion of the 1998 Agreement which St. Vincent and the Grenadines now claims to have excluded the raising of the objection. In the hearing of 24 February 1998, St. Vincent and the Grenadines did not advance this position. The only objection against the invoking of Article 295 of the Convention related to the fact that Guinea had advanced the argument only at the stage of oral proceedings and was therefore estopped from raising it.[14]

33. Paragraph 2 of the 1998 Agreement reads:

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

When interpreting this paragraph, recourse should be made to Article 31(1) of the Vienna Convention on the Law of Treaties, according to which "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 its object and purpose."

34. St. Vincent and the Grenadines maintains that both the ordinary meaning of the terms used in paragraph 2 of the 1998 Agreement, in particular

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[13] See uncorrected transcript of hearing on 24 February 1998, pp. 43–45.
[14] *Ibid*.

the words "dealing with all aspects of the merits (. . .) and the objection as to jurisdiction raised by the Government of Guinea's Statement of response . . .", as well as its object and the purpose reveal that the parties agreed that no objections to the admissibility of the claims could be raised in the present proceedings.[15]

35. Guinea strongly opposes this interpretation. The words "a single phase" indicate that the proceedings on the merits were intended not to be split up into different procedural phases. Consequently, it is clear that the parties thought of procedural phases that could have been separated from or could have suspended the proceedings on the merits. Otherwise, the term "in a single phase" would be superfluous. Guinea wonders which other procedural phases but the preliminary phase according to Article 97 of the Rules of the International Tribunal (hereinafter referred to as "the Rules") could have been alluded to by inserting this term in the 1998 Agreement. Prompt release proceedings and provisional measures proceedings, as procedural phases distinct from the merits, were already carried out or in the process of being carried out before the International Tribunal at the time of the conclusion of the 1998 Agreement. Other incidental proceedings, in particular the preliminary proceedings according to Article 96 of the Rules, are not to be carried out in a procedural phase distinct from the proceedings on the merits or are without relevance for the present dispute. It must be concluded that only the preliminary procedural phase according to Articles 97 of the Rules could have been meant when referring to "a single phase" in the 1998 Agreement. The Rules do not mention any other procedural phase distinct from the merits which theoretically could have been invoked by the parties in the present case. While it is true that the ordinary meaning of the "merits" of a case does not include objections to the admissibility of a claim, the usage of the term "merits" has to be read in the present case in the context with the words "a single phase".

36. Moreover, the word "merits" has to be interpreted in light of the preceding prompt release proceedings and the provisional measures proceedings being carried out at the time of or shortly before the conclusion of the 1998 Agreement. Guinea asserts that the term "merits" has to be read in contrast to these proceedings, thereby not making a distinction between the ultimate merits and any objections to the admissibility of the claims.[16] In this context, it is important to recall that many writers have pointed at the close

[15] See paragraphs 63–67 of the Reply.
[16] See for example the wording of Article 292(3) of the Convention or paragraph 50 of the Judgement of the International Tribunal of 4 December 1998.

connection between objections to the admissibility of a claim and the merits.[17]

37. *Fitzmaurice* wrote on the uncertainty of the term "merits":

> "Where one jurisdictional issue leads to another, and the first jurisdictional issue is whether the tribunal has jurisdiction to determine the second, then the second issue might, in relating to the first, be said to constitute the 'merits' of the case."[18]

He points at the *Ambatielos* Case where the International Court of Justice had to decide in a first phase of the case whether it had jurisdiction to pronounce on the arbitrability of the dispute under the terms of a certain arbitral instrument. After having determined the arbitrability, the Court considered and pronounced on it in a second phase of the case. *Fitzmaurice* concluded:

> "In relation to these two particular sets of proceedings, taken as a whole, it is clear that this second phase, though it dealt with a jurisdictional issue, constituted the 'merits' of the case, because it did not deal with the jurisdiction of the Court itself, this having already been decided in the first phase (which was accordingly, strictly and solely jurisdictional)."[19]

38. Similarly, *Verzijl* commented on the ambiguities of the definition of the term "merits":

> "[Since there are] two kinds of merits involved in this case, which is very confusing, I intend to distinguish them by writing *'merits'* where Great Britain's obligation to arbitrate is at stake, and *merits* where allusion is made to the validity of the claim of Mr. Ambatielos."[20]

39. Insofar as the Guinean interpretation as set out in paragraph 35 above might differ from what constitutes the ordinary meaning of the term "merits", Guinea invokes Article 31(4) of the Vienna Convention on the Law of Treaties which prescribes that "a special meaning shall be given to a term if it is established that the parties so intended."

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[17] Fitzmaurice, *The Law and Practice of the International Court of Justice*, (1986), pp. 448–449; Rosenne, *The Law and Practice of the International Court 1920–1996*, (1997), p. 865 and p. 887; Brownlie, *Principles of Public International Law*, (1990), p. 477.

[18] *Ibid*.

[19] *Ibid*.

[20] Verzijl, in: Nederlands tijdschrift voor internationaal recht, 1953, p. 58 at p. 60.

As seems to be undisputed between the parties, object and purpose of the 1998 Agreement was to transfer the jurisdiction from an arbitral tribunal to the International Tribunal, the reasons for the transfer having been explained in paragraph 35 above. There is no argument why Guinea should have excluded the raising of objections to the admissibility of the claims.

40. When interpreting paragraph 2 of the 1998 Agreement, account should also be made of the fact that Guinea raised an objection to the admissibility of the claims already four days after the conclusion of the 1998 Agreement and that St. Vincent and the Grenadines objected against it with completely different arguments than it does now. As *Brownlie* wrote[21] in the context of Article 31(3 b) of the Vienna Convention on the Law of Treaties, "subsequent practice by individual parties also has some probative value."

41. The words "in a single phase" contained in paragraph 2 of the 1998 Agreement imply that the parties excluded that recourse would be made to the proceedings provided in Article 97 of the Rules. In other words, the parties agreed in line with the *ratio* of Article 97(7) of the Rules that objections to the admissibility of the claims should be dealt with in the framework of the proceedings on the merits.

42. Furthermore, Guinea opposes the argument that she was precluded from raising the objections in the Counter-Memorial on the basis of Article 97(1) of the Rules in light of another consideration: As has been already stated in paragraph 53 of the Counter-Memorial, it is for her to decide whether or not objections to the admissibility of the claims should be raised as formal preliminary objections in accordance with Article 97(1) of the Rules.

43. Guinea disagrees with the arguments made in paragraphs 72 and 73 of the Reply. The third category of objections mentioned in Article 97(1) of the Rules, namely any "objection the decision upon which is requested before any further proceedings on the merits", does not only relate to such matters as the submission that the claim as formulated falls outside the *compromis*, or that the nature of the dispute was such as to make it not justiciable, as St. Vincent and the Grenadines seems to suggest. *Rosenne* noted that the first two categories of objections did not comprise objections to the admissibility of a submission or a claim as formulated in the Memorial. Those objections would fall in the scope of the third category.[22] In this

[21] Brownlie, *Principles of Public International Law*, (1990), p. 629.
[22] Rosenne, *Procedure in the International Court of Justice, A Commentary on the 1978 Rules of the International Court of Justice*, (1983), p. 161.

context it is important to observe that Guinea raised objections to the admissibility of the claims and not, as paragraph 71 of the Reply suggests, against the admissibility of the action of St. Vincent and the Grenadines, in other words against the Application as such. Guinea contends that the third category, in particular the word "requested", supports the argument made in the preceding paragraph.

44. Irrespective of this interpretation, there have been several cases before the Permanent Court of International Justice and the International Court of Justice where States treated preliminary issues to the jurisdiction and admissibility in the Counter-Memorial or where such issues were determined after the case had been heard on the merits.[23] *Rosenne* pointed at the non-exhaustive character of preliminary objections before the Permanent Court of International Justice and the International Court of Justice, in the sense that whether or not matters of jurisdiction[24] have been raised at the stage envisaged for preliminary objections, they may still be raised later, even by the Court *proprio motu*.[25] He also concluded that State practice seemed to have adopted this approach.[26]

45. The Permanent Court of International Justice said in the *Minority Schools* Case with respect to the provision for preliminary objections at the time, Article 38 of the 1926 Rules:

> "The object of this article was to lay down when an objection to the jurisdiction may be validly filed, but only in cases where the objection is submitted as a preliminary question, that is to say, when the Respondent asks for a decision upon the objection before any subsequent proceedings on the merits. It is exclusively in this event that the article lays down what the procedure should be and that this procedure should be different from that on the merits."

And:

> "The raising of an objection by one Party merely draws the attention of the Court to an objection to the jurisdiction which it must ex officio consider. A Party may take this step at any stage of the proceedings."[27]

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[23] For example the *Pajzs, Csáky, Esterházy, Ambatielos, Northern Cameroons, Nottebohm, Norwegian Loans, South West Africa, Barcelona Traction* Cases.

[24] Objections as to the admissibility of claims should be thought to have been included in this statement, since Rosenne obviously does not make any distinction between matters of jurisdiction and matters concerning the admissibility of the claims.

[25] Rosenne, *The Law and Practice of the International Court 1920–1996*, (1997), pp. 909–915.

[26] *Ibid*., p. 915.

[27] PCIJ, A 15 (1928), pp. 22–23.

46. Another precedent for the non-exhaustive character of preliminary objections is the *ICAO Council Appeal* Case, where objections to the jurisdiction of the International Court of Justice were raised only at the stage of the oral proceedings when the respondent had exhausted its ability to raise preliminary objections and without there having been a preliminary objections phase. The Court reasoned in its Judgement:

> ". . . the Court must first deal with certain objections to its own jurisdiction to entertain India's appeal which have been advanced by Pakistan. India, for her part, contests the right of Pakistan to do this, because the objections concerned were not put forward at an earlier stage of the proceedings before the Court as 'preliminary' objections under Article 62 of the Court's rules (1946 edition). It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits. The Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*. The real issue raised by the present case was whether, in the event of a party's failure to put forward a jurisdictional objection as a preliminary one, that party might not thereby be held to have acquiesced in the jurisdiction of the Court. However, since the Court considers its jurisdiction to be established irrespective of any consent of Pakistan's on that basis, it will now proceed to consider Pakistan's objections."[28]

The Court then examined in detail (nine pages) the grounds on which the Court considered that its jurisdiction had been established and even took a separate vote to reject Pakistan's objections to the Court's competence.

47. Another precedent for the non-exhaustive character of the procedure pursuant to Article 97 of the Rules is the *Nottebohm* Case where the respondent had filed three objections to the admissibility of the claim which were admitted by the Court although the Court had already issued a Judgement on preliminary objections.[29]

48. On an auxiliary basis, Guinea maintains its arguments made in paragraphs 53–54 of the Counter-Memorial. Contrary to the statement made in paragraph 71 of the Reply, Guinea is of the opinion that it belongs to the essential rights of the respondent to be furnished with a pleading on the merits of a case before he has to advance preliminary objections. The

[28] ICJ Reports 1972, p. 42 at p. 52.
[29] ICJ Reports 1955, p. 4 at p. 12.

International Court of Justice seems to have recognised this principle in the *Aerial Incident of 3 July 1988* Case when having stated:

> "While a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, it may nevertheless file its objection earlier."[30]

49. *Rosenne* endorses this principle and adds that "it will be rare that the application alone will be sufficient to elucidate questions of jurisdiction or admissibility.[31] In this context it is interesting to note that the statement by *Hambro* as cited in paragraph 74 of the Reply is immediately followed by the following passage:

> "It might be added that this has in fact happened and it may of course be done in completely good faith. In certain cases pending before the Court it might indeed be very difficult for a State to decide whether it wants to file a preliminary objection or not, and it might happen that a State would not be in a position to do so before it had read very carefully the memorial of the other party."[32]

50. Guinea requests the International Tribunal to believe that it submitted the objections to the admissibility of the claims in the Counter-Memorial in good faith, since it is and was her understanding that she was entitled to do so under the 1998 Agreement. Besides Guinea submits that it would be unfair if she was precluded from raising the objections, since it was only in the Memorial that St. Vincent and the Grenadines fully elaborated its claims, in particular the ones for compensation and satisfaction, for the first time.

**Section 3.2 Genuine Link**

51. The proposition made in the Reply that St. Vincent and the Grenadines is "complaining of violation of her own right in international law"[33] adds little to the solution of this dispute, if it is not made clear which claims are

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[30] ICJ Reports 1989, p. 132 at p. 134.
[31] Rosenne, *Procedure in the International Court of Justice, A Commentary on the 1978 Rules of the International Court of Justice*, (1983), p. 161.
[32] Hambro, *The Jurisdiction of the International Court of Justice*, in: Recueil des Cours, Académie de Droit International, 1950 (I), pp. 208–209.
[33] Paragraph 76 of the Reply.

based on St. Vincent and the Grenadines' freedom and right of navigation,[34] and which are based on its right to exercise diplomatic protection for a ship flying its flag, because the latter require the exhaustion of local remedies pursuant to Article 295 of the Convention.[35]

52. The Applicant State's submissions are inconsistent on this point. On the one hand the Reply mentions with respect to the genuine link that St. Vincent and the Grenadines

> "was complaining 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."[36]

In the same strand it has been pointed out in the context of the exhaustion of local remedies that

> "None of the claims advanced by St. Vincent and the Grenadines in this case is, strictly [s]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."[37]

On the other hand it is noted in the context of the nationality of aggrieved persons:

> "[W]here the physical injury or suffering *forming the basis of the claims* was suffered by an individual the latter must obviously have the nationality of the claimant State" (emphasis added).[38]

53. This and the following propositions made with respect to the nationality of the claim[39] would be redundant if it were not for diplomatic protection. That St. Vincent and the Grenadines is in fact advancing also claims concerning damage suffered by the shipowner, the Master and members of the crew and by the cargo owner will further be elaborated in the context of the local remedies rule.[40]

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[34] Articles 58(1), 87, 90 of the Convention.
[35] Therefore it appears to be neither "a meritless point of terminology" nor "needlessly cumbersome" (paragraph 76 of the Reply) to distinguish between both kinds of claims.
[36] Paragraph 76 of the Reply.
[37] Paragraph 97 of the Reply.
[38] Paragraph 84 of the Reply.
[39] Paragraphs 85–93 of the Reply.
[40] See below Section 3.4 of the Rejoinder.

54. In either situation, *i.e.* when St. Vincent and the Grenadines is claiming a violation of its freedom or right of navigation or exercising diplomatic protection for the M/V "SAIGA", the genuine link is a condition for the admissibility of its claims. A State is not bound to recognise a claim based on an alleged violation of the freedom or right of navigation, if it is not required to recognise the nationality of the ship because of a missing genuine link, neither is it bound in this situation to recognise the right of the flag State to exercise diplomatic protection for the ship.

55. The *first question* with respect to the genuine link relates to its concept and function. Maintaining its views stated in the Counter-Memorial,[41] the Republic of Guinea does not share the Applicant's opinion with respect to the concept of the genuine link.[42] The 1982 Convention distinguishes between the "genuine link" (Art. 91(1)) and the obligation of the State to "effectively exercise jurisdiction and control" over the ship (Art. 94(1)). The existence of a genuine link is a condition for the grant of nationality to a ship, whereas the mentioned obligation follows from the grant of the nationality to that ship. However, notwithstanding this distinction,[43] if granting nationality to a ship implies taking over the mentioned international obligation, the exercise of an effective jurisdiction and control over the ships is an inherent aspect of the concept of the genuine link.[44] Every State is free to determine the conditions to grant nationality to its ships within the limits of the genuine link.

56. As it has been mentioned in the Counter-Memorial,[45] the obligation of an effective jurisdiction and control of the flag State presupposes the possibility of employing not only legislative jurisdiction over the ship (which follows from the registration) but also enforcement jurisdiction over its owner or operator in order to enforce the relevant laws and regulations concerning the ship. The flag State has not sufficient means at its disposal, when neither the shipowner or operator nor the cargo owner fall within the reach of its competent enforcement organs.[46] In such situation the State

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[41] Paragraph 59–68 and 72 of the Counter-Memorial. With respect to paragraph 8 of the Reply, it shall be made very clear at this point, however, that the Republic of Guinea has at no time intended and will not impute of anything the maritime register of St. Vincent and the Grenadines generally, with respect to the whole of the vessels flying her flag. The Respondent's view expressed in the Counter-Memorial relate only to this pending dispute and are strictly confined to the particular situation of the M/V "SAIGA".

[42] Paragraphs 76–82 of the Reply.

[43] The term "effective link" used in the Reply tends to confuse the difference; see page 54 and paragraph 77, p. 56, of the Reply.

[44] Paragraph 62 of the Counter-Memorial.

[45] Paragraphs 63–65 of the Counter-Memorial.

[46] See H. Meyers, *The Nationality of Ships.* The Hague 1967, p. 251.

*cannot* effectively exercise jurisdiction over the ship because it cannot enforce its laws and regulations *vis-à-vis* the responsible owner or operator abroad.

57. That ownership is an essential requirement of the concept of the genuine link in the modern law of the sea follows also from Article 235(2) of the Convention. The obligation stipulated in this provision, no doubt, is an obligation of the flag State as well. Recourse in its national courts "in respect of damage caused by pollution of the marine environment by natural or juridical persons under [its] jurisdiction" can only be available, if the responsible shipowner or operator is a resident or has its *siège social* in the flag State, because otherwise there would be no respondent to the damage claim in this State.

58. Moreover, for example, recent IMO practice is also in line with this. In order to avoid any lack of enforcement jurisdiction the International Safety Management Code[47] requires a Safety Management System (SMS) to be established by "the company", which is defined as the shipowner or any person, such as the manager or bareboat charterer, who has assumed responsibility for operating the ship. The flag State cannot exercise jurisdiction over a "company" which is outside its jurisdiction.

59. Article 91(1) of the Convention states that there must exist a genuine link "between the State and the ship".[48] This would not mean that the shipowner always must be a national of the flag State, but that the flag State can effectively exercise jurisdiction (including enforcement jurisdiction) over the shipowner or operator in order to fulfil its obligations in international law. For this purpose residence or, in the case of a juridical person, its seat, domicile or incorporation in the flag State is sufficient.

60. In the light of this, the observation in the Reply that "the requirement of an 'effective link' is amply established"[49] by St. Vincent and the Grenadines is missing the point. It is not at issue that St. Vincent and the Grenadines is a Member State of the IMO and a State Party to several international conventions[50] nor that it may have authorised several classification societies and appointed a number of surveyors.[51] The question is whether or not

[47] ISM Code of IMO became mandatory for all tankers as of 1 July 1998.
[48] Paragraph 81 of the Reply.
[49] Paragraph 78 of the Reply.
[50] Paragraph 78 of the Reply.
[51] Paragraph 80 of the Reply.

the ownership requirements of international law are complied with. As the M/V "SAIGA" is owned by the "Tabona Shipping Co., Ltd of Nicosia, Cyprus",[52] its owner is obviously "registered according to law" in Cyprus and its main office is apparently "situated outside" St. Vincent and the Grenadines. In this situation section 9(3) of the Merchant Shipping Act 1982 of St. Vincent and the Grenadines[53] requires for the registration of the M/V "SAIGA" merely that the owner "has a registered agent" in St. Vincent and the Grenadines. This is interpreted by the Applicant State that the owner "must be represented by a Vincentian company".[54]

61. This "registered agent" and its functions have not yet been identified and there is still no evidence that the owner of the M/V "SAIGA" is under the effective jurisdiction of St. Vincent and the Grenadines. Therefore the existence of a genuine link between the flag State and the ship has not been established in this case.

62. Notwithstanding the foregoing, even if manning of the ship would be considered as an alternative condition to ownership for the purpose of the genuine link, as mentioned in the Reply[55] and envisaged in the United Nations Convention on Conditions for Registration of Ships, the M/V "SAIGA" would neither comply with this condition because it had a completely foreign crew, none of which was a citizen or resident of St. Vincent and the Grenadines. Moreover, the "Tabona Shipping Co, Ltd.", *i.e.* the Cypriot owner of the ship, is acting as employer of the crew[56] through the "Seascot Ship Management Ltd." of Glasgow, UK, which is again not a Vincentian company.

63. The *second question* relates to the legal consequences with respect to diplomatic protection if the genuine link is lacking. The Respondent State submits that it is not bound to recognise diplomatic protection asserted by the flag State in this situation, because a State may exercise diplomatic protection only for a ship having its nationality. Registration "is merely evidence of nationality and is not creative of it", as Professor *O'Connell*[57] has rightly observed. Accordingly Professor *Brownlie's* view[58] is shared at this point, when he states:

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[52] Paragraph 25 of the Reply with further reference.
[53] Annex 6 of the Reply.
[54] Paragraph 77 of the Reply.
[55] Paragraph 82 of the Reply.
[56] Annex 8 to the Reply.
[57] D. P. O'Connell, *The International Law of the Sea*, edited by I. A. Shearer, Oxford 1984, Vol. II, p. 761; calling this view "still prevalent".
[58] I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford 1998, p. 495.

> "In general the principle of real or genuine link supported in the *Nottebohm* case[59] ought to apply here, and there is evidence for the view that *bona fide* national ownership, rather than registration or authority to fly the flag, provides the appropriate basis for the protection of ships."[60]

In the same line the American Law Institute commented:

> "A State may, however, reject protection by the flag State when the flag State has no genuine link with the ship."[61]

64. Recent State practice is in conformity with this doctrine. When the United States intended to extend their protection to 11 tankers flying the flag of Kuwait in 1987, the ownership of the ships was transferred from the Kuwaiti company to a company registered in Delaware, USA, so that the United States could grant the ships its nationality and right to fly its flag.[62]

65. The submission that the Republic of Guinea, for the reasons mentioned above, is not bound to recognise St. Vincent and the Grenadines' diplomatic protection concerning the M/V "SAIGA" relates also to the Master and crew of the ship as well as to the cargo.

**Section 3.3 Nationality of aggrieved persons**

66. St. Vincent and the Grenadines expressly relies upon the exception to the rule that a State may only exercise protection on behalf of persons having its nationality.[63] Without contesting the existence of such exception in international law,[64] the Respondent State maintains its view that the exception of foreign seamen on board a ship does not apply in this case.

67. In order to rejoin the reference to jurisprudence, State practice and doctrine now put forward in the Reply,[65] the following arguments are submitted in addition to the propositions contained in the Counter-Memorial.[66] The reference to foreign seamen made by Judges *Hackworth* and *Badawi*

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[59] ICJ Reports 1955, p. 4.
[60] A. D. Watts, *The Protection of Merchant Ships*, BYIL Vol. 33 (1957), pp. 73–83.
[61] The American Law Institute, *Restatement of the Law Third, The Foreign Relations of the United States*, Vol. 2 (1987), § 501, Comment b, p. 11.
[62] See the documents in ILM Vol. 26 (1987), p. 1430, 1450 seq.
[63] Paragraph 84 of the Reply.
[64] Paragraph 75, 1st sentence, of the Counter-Memorial.
[65] Paragraphs 85–92 of the Reply.
[66] Paragraphs 74–78 of the Counter-Memorial.

*Pasha* in the *Reparation for Injuries* Advisory Opinion and by Judge *ad hoc Riphagen* in the *Barcelona Traction* Case of the International Court of Justice[67] cannot be considered as subsidiary means for the determination of the mentioned exception from the rule. Ships or seamen constituted neither in the Advisory Opinion nor in the Judgement a part of the subject matter or related in any way to the case. In addition, like in scholarly publications mentioned in the Reply,[68] the reference to foreign seamen appears as copying of a traditional view rather than being the result of a legal scrutiny of the issue.

68. This traditional view, which is also maintained in the predominantly American jurisprudence and in arbitral awards referred to in the Reply,[69] sets out from a specific legal and factual situation that has changed since the so-called "flags of convenience" have emerged in the 1950s. The "British Mariner" mentioned already in Sir *W. Scott's* opinion of 1804 was a "foreign seaman with British domicile",[70] whereas the foreign crew members of the M/V "SAIGA" had no domicile in St. Vincent and the Grenadines. The "American seaman"[71] was a foreign seaman serving on an American ship, the nationality of which was based on American ownership, whereas the M/V "SAIGA" was owned by a Cypriot company and its crew was managed by a Scottish company.

69. The Reply refers also to the "principle of the indivisibility of the flag or of the armed forces" mentioned by Judge *Badawi Pasha* in a footnote to his Dissenting Opinion in the *Reparation for Injuries* Advisory Opinion.[72] Taking the perspective of the flag State, this principle implies that the nationality of the seaman is of no relevance, when the nationality of the ship is not disputed.[73] However, its application when the flag State could not exert enforcement jurisdiction over the owner or operator of the ship, and respectively over the foreign seamen, would be begging the question. A State not bound to recognise the protection of the flag State on behalf of the foreign owner or operator of a ship, is neither bound to recognise the

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[67] Paragraph 85 of the Reply.
[68] Paragraph 92 of the Reply.
[69] Paragraphs 86–91 of the Reply.
[70] Paragraph 91 of the Reply.
[71] See, *e.g.*, paragraphs 87, 89 of the Reply.
[72] ICJ Reports 1949, p. 206/207 note 1.
[73] After emphasizing the bond of nationality as an essential condition of the exercise by a State of the right to bring an international claim on behalf of the victim, the mentioned footnote proceeds: "On the other hand, the classes of cases envisaged in the Opinion 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."

protection on behalf of foreign seamen employed on that ship. Protection on behalf of a foreign seaman presupposes effective jurisdiction over that foreign seaman. This principle, no doubt, is in conformity with "solid considerations of policy",[74] because any State can easily establish the conditions of a genuine link to the ship through its laws and regulations, and it cannot rely on its national laws for not having established that link.

70. Lastly, and in addition to the propositions made in the Counter-Memorial with respect to the foreign cargo owner,[75] the exception of foreign seamen from the fundamental rule of the nationality of claims does not apply to claims on behalf of foreign ship owners or foreign cargo owners.[76] Exceptions to such a fundamental rule of international law have to be construed in a narrow sense. This strictly excludes here an application to other persons than aggrieved seamen.[77]

**Section 3.4 Exhaustion of local remedies**

71. It is common ground that any claim of the flag state based on the exercise of diplomatic protection for the shipowner, crew or cargo owner may be submitted to the International Tribunal only after local remedies have been exhausted (Article 295 of the Convention). The Applicant State contests the necessity of an exhaustion of local remedies in this dispute for seven different reasons the *first* being that the parties have agreed "that the legal process was to be treated as exhausted."[78] Guinea objects to this view for the reasons already submitted in paragraph 79 of the Counter-Memorial and further explained in section 3.1 of this Rejoinder.

72. *Second*, in order to avoid any application of the local remedies rule, St. Vincent and the Grenadines is emphatic on the point that when claiming

> "compensation for violation of 'the right of the M/V *Saiga*' 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."[79]

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[74] Paragraph 93 of the Reply.
[75] Paragraph 77 of the Counter-Memorial.
[76] According to paragraph 26 of the Reply the charterer of the M/V "SAIGA" was the *Lemania Shipping Group Ltd.* It is common ground that this was not a Vincentian company.
[77] This limitation has a tenable reason. States are normally not inclined to protect their nationals working on ships that fly a foreign flag, whereas shipowners and cargo owners are in a better economic position to protect their property against damage or loss.
[78] Paragraph 94 of the Reply.
[79] Paragraph 96 and similar in paragraph 97 of the Reply.

Nevertheless, after this proposition the Reply proceeds:

> "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 rights 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."[80]

This has been explained further in paragraph 98 of the Reply as follows:

> "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."

73. Contrary to this proposition the Respondent State submits that a claim advanced merely for a violation of the flag State's freedom and right of navigation does not entail compensation for the ship, crew and cargo. In such case the flag State could demand compensation only for damage suffered by itself or one of its organs, but not for damage suffered by private entities such as shipowners, crew or cargo owners. If St. Vincent and the Grenadines nevertheless demands compensation for "losses suffered by those natural and legal persons" in these proceedings before the International Tribunal, this is not merely a question of "the *quantum* of [its own] damage" but constitutes an exercise of diplomatic protection on behalf of the shipowner, crew and cargo owner against Guinea. This exercise of protection presupposes the exhaustion of local remedies[81] in conformity with Article 295 of the Convention.

74. *Third*, the same is true insofar as St. Vincent and the Grenadines seeks compensation for the M/V "SAIGA" according to Article 111(8) of the Convention.[82] This article provides that in the case of an unjustified hot pursuit *the ship* "shall be compensated for any loss or damage that may have been sustained thereby." Article 110(3) contains verbatim the same rule of com-

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[80] Paragraph 96 of the Reply.
[81] See N. M. Poulantzas, *The Right of Hot Pursuit in International Law*, Leyden 1969, p. 262.
[82] No. (iii) of the Submissions; see also paragraph 94 of the Memorial, paragraph 96 footnote 1 of the Reply.

pensation of a foreign ship upon an unfounded visit on the high seas.[83] The claim of "the ship" can only be submitted to an international court or tribunal by way of diplomatic protection. The ship is not a legal entity in international law. Accordingly "the ship" is a generic term used in Article 111(8) of the Convention to indicate the legal interests of the owner and crew. On the basis of this provision the flag State can seize the International Tribunal only by way of diplomatic protection on behalf of the ship.[84] On the other hand, in contradistinction to Articles 111(8) and 110(3), the Convention attributes the right of compensation in Article 106 directly to the *flag State*: In the case of seizure of a ship on suspicion of piracy without adequate grounds, the seizing State "shall be liable *to the State* the nationality of which is possessed by the ship"[85] for any loss or damage caused by the seizure. There is no room for an exhaustion of local remedies under Article 106, whereas claims based on Article 111(8) (or respectively on Article 110(3)) of the Convention are *e contrario* subject to the local remedies rule. This is also recognised in legal writing[86] about the 1958 Geneva Convention on the High Seas which contained almost verbatim the same provisions on this point.[87]

75. *Fourth*, the Applicant State alleges that there was no "voluntary, conscious and deliberate connection" between the ship and Guinea.[88] One could assume, for example, the lack of such connection if a ship in distress would have called at a port. But for the reasons elaborated in the Counter-Memorial,[89] this connection has been duly established here because the M/V "SAIGA" had been voluntarily in the Guinean exclusive economic zone and was escorted into the Port of Conakry by Guinean authorities. A ship being in port because of justified enforcement measures can not be in a better legal position in respect of the local remedies rule than a ship calling at the port on its own.

76. *Fifth*, in this connection it is also alleged that "[t]here is no obligation to exhaust local remedies in relation to an act done by the State having no jurisdiction in international law."[90] This is manifestly a *petitio principii*,

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[83] Similarly, in the case of damage or loss attributable to them arising from unjustified enforcement measures in environmental matters, Article 232, 2nd sentence, of the Convention stipulates that "States shall provide for recourse in their courts for actions in respect of such damage or loss."

[84] In paragraph 96 of the Reply it is rightly mentioned that "before the International Tribunal the action is not instituted by the vessel *in rem* but by the State."

[85] Article 106 of the Convention; emphasis added.

[86] Poulantzas, *The Right of Hot Pursuit in International Law*, Leyden 1969, p. 263.

[87] Article 23(7) on hot pursuit and Article 22(3) on visit as against Article 20 on piracy.

[88] Paragraphs 101–103 of the Reply.

[89] Paragraph 83–85 of the Counter-Memorial.

[90] Paragraph 102 of the Reply.

because an exhaustion of local remedies which shall precede an international dispute cannot be made subject to the result of this dispute. Apart from this, Guinea maintains that it had jurisdiction for its actions against the M/V "SAIGA".

77. *Sixth*, reconfirming that the exhaustion of local remedies is only required in the case of diplomatic protection,[91] Guinea maintains its view that the Master of the M/V "SAIGA" failed to take recourse against the Judgement of 3 February 1998 of the Cour d'Appel to the Cour Suprême of Guinea.[92] Being a regular instance in court proceedings,[93] a further appeal from the decision of a court of appeal on questions of law only constitutes a necessary station in the exhaustion of local remedies.

78. In the same context, the Judgement of 3 February 1998 did not "turn on a finding of fact which a superior tribunal cannot review", as it has now been assailed by the Applicant State.[94] The nationality of the GIUSEPPE I, KRITI or ELENI G fishing on the basis of a Guinean fishing license was merely a marginal detail in the proceedings before the Guinean courts upon which the said Judgement did not rest. For example, Maître *Bangoura*, Counsel for the defence of Captain *Orlof*, did not even mention it in his comprehensive "Declaration" of 13 February 1998[95] listing up the alleged procedural and substantive defaults of the Guinean courts in the proceedings against the Master of the M/V "SAIGA". On the other hand, in the light of the allegations contained in this declaration, one should have expected the defence counsel to appeal to the Cour Suprême for review of the Cour d'Appel's Judgement of 3 February 1998.

79. *Seventh*, the Applicant State, mentioning (notably as an example) circumstances "that the courts were subservient to the executive" and referring in that very context to alleged circumstances concerning the case of the Master of the M/V "SAIGA" before Guinean courts, lastly submits "that the master, owners and owners or consignees of the cargo were not, in any

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[91] Therefore questions concerning the mentioning of St. Vincent and the Grenadines in the *cèdule de citation* or any other act taken in respect of the flag State itself (paragraph 104 of the Reply) would not be subject to the local remedies rule.

[92] Paragraph 87 of the Counter-Memorial.

[93] It is for example usual in legal systems of the European continent and others deriving therefrom. The French law, for example, accordingly distinguishes between *appelation* and *revision*, and the German law between *Berufung* and *Revision*.

[94] Paragraph 104 of the Reply.

[95] Annex 26 to the Memorial. The Republic of Guinea has at no time acknowledged the facts alleged or the views taken in this declaration by the defending counsel. As far as they might have been relevant for this dispute, they have been challenged in the proper context (as against the submission made in note 1 to paragraph 104 of the Reply).

event, bound to exercise any right of appeal that they might have had".[96] The Republic of Guinea rejoins with particular emphasis that such general allusions lacking any substance are extremely unusual in friendly relations between sovereign States. They are completely out of order in a dispute before the International Tribunal.

### Section 3.5 Conclusions

80. For the reasons elaborated in the indicated sections of this Rejoinder, the Republic of Guinea maintains its submissions contained in paragraph 90 of its Counter-Memorial in respect of the admissibility of the claims (however, with the correction of a minor formatting error):[97]
   - Guinea is not precluded by the 1998 Agreement nor by Article 97(1) of the Rules from contesting the admissibility of the claims (section 3.1 of this Rejoinder);
   - as the genuine link between the flag State and the ship is missing, Guinea is not bound to recognise diplomatic protection on behalf of the M/V "SAIGA", its crew or the owner of the cargo before the International Tribunal (section 3.2 of this Rejoinder);
   - the flag State may not assert claims against Guinea on behalf of foreign seamen, neither on behalf of the foreign shipowner or the foreign cargo owner (section 3.3 of this Rejoinder);
   - effective local remedies available in Guinea have not been exhausted in respect of claims asserted on behalf of the Master, the crew, the shipowner and the cargo owner of the M/V "SAIGA" (section 3.4 of this Rejoinder).

## SECTION 4: LEGAL ARGUMENTS

81. It may be useful to recall at this stage the following submissions made in the Counter-Memorial:
   - Guinea contends that it could apply its customs laws to the M/V "SAIGA";[98]
   - that its enforcement measures upon the ship were justified under the right of hot pursuit (Article 111 of the Convention);[99]
   - that the force used thereby was necessary and reasonable.[100]

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[96] Paragraph 104 of the Reply.
[97] The sentence after the second dash must read: "– the claim relating to the M/V 'Saiga's' right of navigation, also because of the missing genuine link (para. 72 of this Counter-Memorial);".
[98] Paragraph 117 of the Counter-Memorial.
[99] Paragraph 150 of the Counter-Memorial.
[100] Paragraphs 151–154 of the Counter-Memorial.

## Section 4.1 The application and enforcement of Guinea's customs laws in its exclusive economic zone

### *Section 4.1.1 The irrelevance of Article 75(2) of the Convention*

82. Before turning to the legal foundations of Guinea's jurisdiction over the M/V "SAIGA", Guinea states that, contrary to allegations made in the Reply,[101] its exclusive economic zone is noted in the relevant publications of the United Nations at least since 1992.[102] Apart from this, even a violation of the duties stipulated in Article 75(2) of the Convention, which Guinea denies, would not affect the existence of the Guinean exclusive economic zone. Neither would it preclude Guinea from imposing its laws upon foreign ships in the zone or from invoking them before the International Tribunal.[103]

### *Section 4.1.2 Guinea's customs and other laws apply in its exclusive economic zone*

83. First of all, Guinea strongly objects to the allegations made in paragraphs 122 to 125 of the Reply. It contends again[104] that its customs laws and other laws forming the legal basis for the measures taken against the M/V "SAIGA" and for the proceedings against its Master before the Guinean law courts apply to its exclusive economic zone. The applicable laws are specified in paragraphs 7 to 9 of the Counter-Memorial to which reference is made here.

84. For reasons of clarification two arguments shall be added at this point: First, isolated from its direct context, *i.e.* the application of the principle of protection of the public interest, the quotation of a half sentence from paragraph 114 of the Counter-Memorial has been misconceived by the Applicant State[105] in a way not meant by Guinea. Paragraph 114 of the Counter-Memorial does in no way deal with the question whether or not Guinea has extended the application of its laws to the exclusive economic zone.

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[101] Paragraphs 20, 108 of the Reply.

[102] Office of Ocean Affairs and the Law of the Sea*: The Law of the Sea, National Claims to Maritime Jurisdiction, Excerpts of Legislation and Table of Claims*, United Nations. New York, 1992, p. 59.

[103] There is no provision similar to Article 102(2) of the UN Charter in the Convention, neither is the International Tribunal an organ of the United Nations.

[104] Referring to its "public order" including its customs laws, Guinea has already contended this in its Counter-Memorial *e.g.* in paragraphs 101, 137.

[105] Paragraph 122 of the Reply.

85. Second, the International Tribunal, no doubt, has jurisdiction to consider whether or not the Guinean laws are applied in conformity with *international law*. A legal scrutiny of measures and decisions of Guinean authorities or law courts in respect of *Guinean law*, however, is beyond its competence because the International Tribunal does not apply domestic law of the parties.[106]

*Section 4.1.3 Off-shore bunkering is no navigation*

86. Turning to a mayor legal issue here, it shall first be summarised that, on the one hand, Guinea considers bunkering of fishing vessels in the exclusive economic zone not as fishing or exercising any other sovereign right of the coastal State in its exclusive economic zone.[107] Accordingly its measures against the M/V "SAIGA" don't rest directly upon Article 56(1) of the Convention. On the other hand, it contests[108] the opinion of the Applicant State that

> "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."[109]

It also claims that it is by no means clear which alternative of Article 58(1) is referred to by the Applicant State.[110] Moreover Guinea still denies the view that "the matter would fall to be determined in accordance with Article 59"[111] of the Convention if Article 58(1) would not apply. Article 59 apparently would presuppose a lacuna in the law which is not present here. Nevertheless the Respondent State maintains its reservation in respect of the application of this article made in the Counter-Memorial.[112]

87. As to the nature and legal qualification of the M/V "SAIGA's" bunkering activities St. Vincent and the Grenadines now contends that "[t]he supplying of fuel by one vessel to another on the seas has a long history" and that "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

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[106] Paragraph 134 of the Counter-Memorial.
[107] Paragraphs 106–108 of the Counter-Memorial.
[108] So already in paragraphs 95, 105 of the Counter-Memorial.
[109] Paragraphs 130, 133 of the Reply.
[110] However, paragraph 133 (ii) of the Reply refers more specifically to an "internationally lawful use of the sea related to navigation".
[111] Paragraph 134 of the Reply.
[112] Paragraphs 110 and 111 of the Counter-Memorial.

a State other that the Republic of Guinea."[113] From this it concludes: "The practice of States shows that bunkering is a lawful activity on the high seas."[114] Against this view Guinea considers off-shore bunkering of fishing vessels in the exclusive economic zone, which is in dispute here, as a recent business being not older than the exclusive economic zones. It also contends that the practice of States is inconclusive on this point. On the one hand it is generally known that developing countries often have practical reasons to be reluctant in this respect, only to mention the lack of vessels and trained officials for the control and occasionally also political influence from fishing nations. On the other hand it should be taken into account that already at the second session of the Third United Nations Conference on the Law of the Sea 18 African States submitted a draft according to which the coastal State should have exclusive jurisdiction within the exclusive economic zone, *inter alia*, for the purpose of "control and regulation of customs and fiscal matters related to economic activities in the zone."[115] A similar proposal had been submitted earlier by Nigeria,[116] which demonstrates that especially African States were well aware of the problem at an early stage of the Conference. That these drafts have not been included in the overall compromise concerning the exclusive economic zone at the Conference allows no formal conclusion whatsoever. It seems to be sufficient to mention that African States have obviously not given up their opinion in this point, as the Guinean practice reveals.

88. Contrary to the views now contained in the Reply[117] and in addition to its own elaboration,[118] Guinea considers the legal distinction between navigation as a means of communication and selling bunkers as a commercial activity as sound. This distinction is known, for example, to international law,[119] to European Communities Law,[120] and to the domestic law of St. Vincent and the Grenadines[121] as well. It is logical to make a difference

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[113] Paragraph 129 of the Reply.

[114] Paragraph 133(i) of the Reply.

[115] Draft articles on the exclusive economic zone submitted by Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, the Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, the United Republic of Cameroon, the United Republic of Tanzania and Zaire, Article 3 (c); Official Records of the Third United Nations Conference on the Law of the Sea, vol. III, document A/CONF.62/C.2/L.82.

[116] Revised draft articles on the exclusive economic zone submitted by Nigeria, *ibid*. document A/CONF.62/C.2/L.21/Rev.2; Article 1(2)(f).

[117] Paragraphs 126–133 of the Reply.

[118] Paragraphs 93–105 of the Counter-Memorial.

[119] Suffice to mention that the WTO Treaty does not yet apply to shipping.

[120] See Articles 9 seq. on free trade as against Article 84(2) of the EC Treaty on international shipping.

[121] The Merchant Shipping Act 1982 (Annex 6 to the Reply) defines and thus applies to "vessels" as meaning "anything constructed ore used for the carriage on, through or under water of persons or property and includes [. . .] any ship or boat used in navigation" (section 2), whereas the Act does not deal with aspects of trade.

between selling and buying bunkers here, because in this context only selling amounts to trade. It is equally sound to distinguish between selling bunkers to fishing vessels in the exclusive economic zone and to other vessels in transit to the zone because the latter is not related to fishing and does not affect the interests of the coastal State. That selling goods on board a ship in the exclusive economic zone neither would needs no further explanation.

89. How and why the 1982 Convention is distinguishing between navigation and other activities appears to be an important question of this dispute. The more specific activity is prevailing over the freedom of navigation and determining the applicable rules under the Convention. Examples are abundant: Navigation of a fishing vessel ends, when it is going to take up its fishing activities in the exclusive economic zone; a research vessel commencing marine scientific research activities in the zone is no longer enjoying the freedom of navigation; neither would a vessel that is supplying off-shore installations, for this is off-shore cabotage reserved to the coastal State; any activity for the economic exploration or exploitation of the exclusive economic zone could equally be mentioned here. Generally speaking, the Convention takes the specific purpose of an activity conducted by the ship within the zone and its effect upon the coastal State into account in order to determine whether or not this activity is navigation or related to navigation.

90. Accordingly the freedom of navigation ends when a ship is taking up any commercial activity within the zone, if this activity is a prerogative of the coastal State. It is common ground that the principal purpose of the M/V "SAIGA's" activities in Guinea's exclusive economic zone was selling bunkers to fishing vessels; it was not merely the carriage of bunkers over seas. Bunkering had taken place in Guinea's contiguous zone, which forms an integral part of its exclusive economic zone, and a new meeting point for further bunkering activities was envisaged in the exclusive economic zone. The ship remained in the zone for this purpose and left it only, when the original meeting point was no longer considered to be "safe". It left the zone only a few miles ready to return for other bunkering activities at any time. Therefore the primary purpose of the M/V "SAIGA's" presence in the exclusive economic zone of Guinea was bunkering, *i.e.* trade, not navigation.

91. Furthermore, in order to qualify these bunkering activities in the exclusive economic zone, one has to take into account that they were related to fishing because the M/V "SAIGA" served fishing vessels in the zone. The Applicant State has now conceded that, if a vessel (this includes the M/V "SAIGA") "supplied a fishing vessel with fishing gear or brought

some of the catch from the fishing vessel. These would be activities related to fishing."[122] Any such distinction between selling fishing gear to fishing vessels and gas oil to fishing vessels is simply not tenable in this situation. Both are equally needed for the fishing activities. In addition gas oil is also needed for the transportation of the catch. In either case the primary purpose of the supply is enabling the fishing vessel to fulfil its principal purpose which is fishing. That off-shore bunkering is directly improving the conditions of the fishing vessels has already been explained.[123] Accordingly the bunkering activities of the M/V "SAIGA" in the exclusive economic zone of Guinea were not "related to navigation" but to the operation of fishing vessels.

*Section 4.1.4 The M/V "SAIGA" had to comply with the laws and regulations adopted by Guinea for its exclusive economic zone*

92. Certainly a crucial issue in this dispute is the question coached in the words of the Applicant State,[124] "whether a coastal State may extend its customs legislation to the bunkering of fishing vessels taking place in the zone." Summarising its arguments St. Vincent and the Grenadines offers the following answer:[125]

> "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."

As an essential reason for this it has been contended before:[126]

> "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. [. . .] 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."

93. Guinea contests both the presumption and the conclusion of this opinion for two reasons:

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[122] Paragraph 131 of the Reply.
[123] Paragraph 104 of the Counter-Memorial.
[124] Paragraph 132 of the Reply.
[125] Paragraph 133(ii) of the Reply.
[126] Paragraph 132 and similar in paragraph 136 of the Reply.

First, it excludes the possibility of new activities in the zone which have not been expressly provided for in the 1982 Convention.
Second, it excludes any other interpretation of Article 58(3) than that offered by the Applicant State.

94. As to the *first*, whatever the term "dichotomy" should mean in this context, the 1982 Convention contains indeed a principal separation between the coastal States' sovereign rights and jurisdiction in its exclusive economic zone and the freedom and rights of navigation of the flag State. What the Convention does not provide, however, is an express, detailed and conclusive regulation for all present and future activities in the exclusive economic zone including those which were unknown or of minor importance in 1982. If the Applicant State's view would be tenable on this point, Article 59 of the Convention would be redundant.[127] Apart from that, such view is not in conformity with the practice of coastal States. A recent report on State practice[128] points out that especially African States do either explicitly recognise international law as the standard for determining any additional rights beyond those specifically provided for in Article 56 of the Convention or retain other unspecified rights and jurisdiction in their exclusive economic zone related to the sovereign rights over the resources. The latter describes exactly what Guinea is claiming.

95. Guinea contests also the legal consequence implied in the Applicant State's opinion that any activity within the exclusive economic zone which is not expressly reserved for the coastal State falls under the freedom of navigation. It maintains its view[129] that this is a grave misconception of the *sui generis* status of the exclusive economic zone provided in Article 55 of the Convention.

96. Turning to the question of the legal basis of its measures against the M/V "SAIGA", the Republic of Guinea is adding the following to its submissions already made.[130] First of all it shall be pointed out that it is not at issue here whether or not Guinea has generally extended its customs laws to its exclusive economic zone, as the Applicant State is apparently inclined to contend,[131] but whether the specifically limited application and

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[127] See already paragraph 94 of the Counter-Memorial.
[128] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs: *The Law of the Sea, Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea*, United Nations. New York, 1994, pp. 40–41.
[129] Paragraph 94 of the Counter-Memorial.
[130] Paragraphs 110–117 of the Counter-Memorial.
[131] See *e.g.* Paragraph 140 of the Reply: "There is therefore no legal basis on which the Republic of Guinea can apply end enforce its customs laws in its exclusive economic zone."

enforcement of the customs laws *with respect to off-shore bunkering in the zone* is justified in international law.[132]

Moreover, sharing the general view that Article 58(3) of the Convention is a provision which shall strike a balance between the rights of the coastal State and the freedom of navigation of the flag State,[133] one should nevertheless take into consideration that the reference to the "rights and duties of the coastal State" in this provision makes only sense,[134] if it includes also its rights and duties in customary law. It seems further to be common ground that the coastal State can adopt only such laws and regulations under Article 58(3) that are compatible with Part V of the Convention. With respect to the laws and regulations which the flag States have to take due regard of in the exclusive economic zone, this includes again those which are adopted "in accordance with [. . .] other rules of international law". It has rightly been observed that

> "[t]he coastal State cannot justify the adoption of laws and regulations that exceed its powers under Part V by invoking 'other rules of international law'."[135]

But Article 58(3) of the Convention recognises that the coastal State can adopt rules in accordance with international law, including rules of customary law, if they are compatible with Part V of the Convention.

97. Guinea contends in this context that its customs laws have been adopted in accordance with the customary principle of self-protection in the case of grave and imminent perils which endanger essential aspects of its public interest. The arguments advanced against the existence of the mentioned principle of customary law are by no means convincing.[136] So are the argu-

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[132] This difference between the general application of customs, fiscal, sanitary and immigration regulations of the coastal States under Article 33 of the Convention and the very limited and specific application of the customs laws on offshore bunkering in the exclusive economic zone here is completely in line with the reason to retain the contiguous zone in the 1982 Convention as mentioned in the Commentary quoted in footnote 1 to paragraph 140 of the Reply.

[133] See T. Treves, *Navigation*, in: R.-J. Dupuy/D. Vignes (Eds.), *A Handbook on the Law of the Sea*, Vol. 2, 1991, p. 890.

[134] Professor Treves, *loc. cit.*, rightly points to the fact that the reference serves no purpose if it is confined to the laws and regulations which the coastal State may adopt while remaining within the limits which these rights are recognized as having.

[135] S. N. Nandan/S. Rosenne/N. R. Grandy (Eds.), *United Nations Convention on the Law of the Sea 1982 A Commentary*, Volume II (1993), Article 58, 58.10(e), p. 565.

[136] As to paragraph 139 of the Reply: The ICJ disapproved of the minesweeping in the *Corfu Channel* Case because this constituted an unreasonable violation of Albania's territorial sea. The mentioned treaty provisions are a codification of customary international law.

ments concerning its application in this context.[137] There were no more adequate and in particular no more reasonable means in the given situation of the Guinean exclusive economic zone. The Applicant State has now amply submitted that bunkering is a large and important business,[138] which even more explains the considerable fiscal losses a developing country like Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone.[139]

98. In addition it should also be remembered that the fiscal interests of the coastal State are by no means the only ones that are affected by unregulated off-shore bunkering in its exclusive economic zone. There are, *inter alia*, also environmental interests endangered by such unwarranted activities. This is also conceded in the Memorial[140] when it is observed:

> "For example, it is usually preferable not to bunker in the territorial waters of a state because duties may be payable *and there may be more severe penalties if there is a spillage*" (emphasis added).

This statement presupposes the risk of a spillage which actually is much higher in the case of off-shore bunkering than in the case of bunkering in port. Therefore the regulation of this activity off its coast in order to keep this risk at a minimum not only in its territorial but also in its exclusive economic zone must remain with the coastal State.

99. Finally, the mentioned principle of international law is not incompatible with Part V of the Convention. On the contrary, it helps to balance the interests of the coastal State against that of the flag State in the exclusive economic zone in a most reasonable and equitable manner which is perfectly in harmony with the spirit of the 1982 Convention. It does not affect the freedom of navigation. Instead it impedes economic activities that are undertaken under the guise of navigation but are different from communication. They are closely related to fishing activities in the exclusive economic zone. The principle of the protection of its important public interests enables the coastal State to regulate all aspects of fisheries in its exclusive economic zone in conformity with its fiscal interests. Lastly it should be added here that it would not exclude the possibility of future off-shore bunkering in the exclusive economic zone on the basis of a permission obtained from the coastal State.

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[137] Paragraph 138 of the Reply.
[138] Paragraph 5 and Annex 2 to the Reply.
[139] Paragraphs 101, 116 of the Counter-Memorial.
[140] Paragraph 8 of the Memorial.

*Section 4.1.5 Guinea could exercise legislative and enforcement jurisdiction in its contiguous zone*

100. It is clearly of relevance in this dispute that the M/V "SAIGA" violated the Guinean customs laws when she bunkered the "GIUSEPPE I", "KRITI" and "ELENI G" on 27 October 1997 at a point which is not only in Guinea's exclusive economic zone, as has been conceded,[141] but also in its contiguous zone off the island of Alcatraz. The violation of the customs laws in the contiguous zone is an aggravating circumstance which caused the Guinean customs authorities to undertake measures against the M/V "SAIGA" as long as she remained in the exclusive economic zone because further violations of the customs laws had to be expected.

101. Against the observation of the Applicant State,[142] the Republic of Guinea states that is has duly proclaimed a contiguous zone of 24 nautical miles in Article 13 of its law of 30 November 1995.[143] The proclamation of a contiguous zone does not require publication of charts or lists of co-ordinates, neither must any lists or charts be deposited with the Secretary-General of the United Nations. Contrary to the territorial sea, the exclusive economic zone, the continental shelf of the Area,[144] there is no such obligation under Article 33 of the 1982 Convention. As the contiguous zone is measured from the normal baseline (Article 5 of the Convention), which is the low-water line along the coast of Alcatraz, there is in particular no obligation under Article 16 of the Convention because this provision applies only to straight baselines.

102. Against the arguments advanced by the Applicant State,[145] Guinea maintains its view that it can apply and enforce its customs laws in its contiguous zone in international law as well.[146] Considering the long and scholarly publications on the contiguous zone,[147] it appears by no means clear what the true meaning of the original Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone[148] was. Already

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[141] Paragraph 4(iii) of the Reply.
[142] Paragraph 4(iii) of the Reply.
[143] Navigation maritime et fluvial, mer territoriale et domaine public maritime; Journal Officiel de la Republique de Guinée, 30 Novembre 1995, p. 7; reproduced in Annex 8 to the Memorial.
[144] See Articles 16, 75, 76(9), 84, 134(3) of the Convention.
[145] Paragraphs 144–149 of the Reply.
[146] There is no doubt that it has such jurisdiction in its constitutional law, because otherwise it would not even be able to control ships in the contiguous zone.
[147] Compare, *e.g.*, D. P. O'Connell, *The International law of the Sea*, 1984, Vol. II, pp. 1035–1061; R. R. Churchill/ A. V. Lowe, *The Law of the Sea*, 2nd Ed. 1988, pp. 112–119.
[148] UNTS, Vol. 516, p. 205.

under the 1958 Convention States have interpreted Article 24 in connection with customary international law,[149] on the basis of which they have always exercised legislative and enforcement jurisdiction in their contiguous zone.[150] Article 24 of the 1958 Convention has been followed almost verbatim in Article 33 of the 1982 Convention. In spite of the well known practice of States, the Third United Nations Conference on the Law of the Sea did obviously not see any reason to alter the original text of the provision on the contiguous zone with a view to prevent the customary practice under the 1982 Convention. Therefore States may also under Article 33 of the Convention apply and enforce their customs laws in their contiguous zone against foreign ships.

103. Apart from this, the systematic arguments advanced by the Applicant State against Guinea's legislative and enforcement jurisdiction in its contiguous zone are because of the following reasons not tenable. Under the 1982 Convention the contiguous zone is no longer a part of the high seas but of the exclusive economic zone, with which it is overlapping. Accordingly the exception in Article 27(5) of the Convention[151] in respect of "laws and regulations adopted in accordance with Part V" relates also to laws and regulations adopted in accordance with Article 33 of the Convention. The reference to Article 111(1) and (2) of the Convention[152] appears to be question begging in this point. The possibility of a more simple formulation of Article 303(2) of the Convention[153] is no argument for or against the application of customs laws in the zone.

After all Guinea maintains its view that the M/V "SAIGA" violated its customs laws when it bunkered fishing vessels in its contiguous zone.

**Section 4.2 The hot pursuit was justified**

104. While the fact that the M/V "SAIGA" supplied fishing vessels with bunkers on 27 October 1997 in its contiguous zone is not in dispute, there is first of all the question arising whether the Republic of Guinea is relying upon its right of hot pursuit after a violation of its customs laws within

[149] An interpretation of a treaty provision in connection with customary law is a recognized method under Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (UNTS Vol. 1155, p. 331), which is applicable on Article 33 of the 1982 Convention.

[150] See Churchill/Lowe, *The Law of the Sea.*, p. 117, and paragraphs 127–128 of the Counter-Memorial. As a matter of fact, this has not been contested in the Reply, see *ibid.* paragraph 145.

[151] Paragraph 147 of the Reply.

[152] Paragraph 148 of the Reply.

[153] Paragraph 149 of the Convention.

its contiguous zone or its exclusive economic zone. However, this question is of lesser importance if one takes into account that a violation of the customs laws within the contiguous zone is concomitantly a violation of the same customs laws applying in the exclusive economic zone. Therefore it is contended that hot pursuit has accordingly been undertaken on the basis of Article 111(2) of the Convention as will be elaborated below. Nevertheless, for the case that the International Tribunal would not share this view, the Republic of Guinea reserves its right to submit alternatively that the hot pursuit could have also been undertaken only upon the violation of its customs laws within its contiguous zone.

105. As they are no isolated events the violation of Guinean customs laws by the M/V "SAIGA" and the subsequent undertakings of the Guinean authorities in order to stop and search the ship have to be considered in their factual and legal context. As a matter of fact, after having bunkered the fishing vessels in the contiguous zone, the M/V "SAIGA" sailed towards another meeting point in Guinea's exclusive economic zone in order to supply other fishing vessels there. Only after receiving order to leave the zone, because this meeting point was considered "not safe", the ship headed towards a point south of the boundary line to the exclusive economic zone of Sierra Leone. This means, until this order the M/V "SAIGA" remained within Guinea's exclusive economic zone for the purpose of continued bunkering activities. Moreover the ship had not been ordered to leave the zone because its bunkering of vessels which were fishing in the Guinean exclusive economic zone should end. Instead the ship merely should undertake bunkering at an apparently "safer" point, but it should proceed supplying those fishing vessels with bunkers.

106. The laws and regulations of the coastal State applicable in this situation did not apply exclusively in the contiguous zone here, neither may they be considered only under the aspect of Guinea's public interest.[154] The Guinean customs laws apply to bunkering activities of foreign ships not only in the contiguous zone of Guinea but also in its exclusive economic zone. Both zones have been duly established, as has been demonstrated.[155] The contiguous zone overlaps with the exclusive economic zone, so that a violation of customs laws through bunkering in the contiguous zone constitutes also a violation of the same laws in the exclusive economic zone. This has certain effects upon the conditions under which hot pur-

[154] Paragraph 109 of the Reply is ignoring that also the "public order" has been referred to, which includes the laws of the coastal State.

[155] See above sections 4.1.1 and 4.1.5 of this Rejoinder as against paragraph 108 of the Reply.

suit may be undertaken in respect of the ship remaining in the exclusive economic zone.

107. Turning to the conditions for undertaking the hot pursuit against the M/V "SAIGA", it should be remembered that the competent customs authorities knew that the ship had violated the Guinean customs laws in respect of off-shore bunkering already in the contiguous zone, and that they had good reason to believe that the ship was going to violate the same laws in the exclusive economic zone beyond the contiguous zone as well. Accordingly it has been contended that the pursuit commenced when the M/V "SAIGA" was still within the exclusive economic zone of Guinea.

108. However, the time when the ship left the Guinean exclusive economic zone is contested between the parties. The Respondent State still alleges that the relevant time mentioned by the Master of the M/V "SAIGA" and noted in the bridge order book cannot be squared with other times and dates. First of all "about" 03.45 on 28 October 1997 is an approximation which indicates that the correct time has not been taken. This time has been noted by the Master of the ship while it was trying to leave the Guinean exclusive economic zone as soon as possible. Apart from that, it is by no means clear on the basis of which method the position of the ship at 04.00 hours has been taken.

109. Moreover, even if one would assume that the maximum speed of the M/V "SAIGA" was 10 knots,[156] as it has been contended now,[157] and which is contested because it would be slow for a tanker of her size, the "steady speed" of the M/V "SAIGA" or "her own pace" was certainly above the "three of four knots" which the ship could only sail under "damaged conditions resulting from enforced idleness", as it is mentioned in the Memorial.[158] Nevertheless, even under damaged conditions the M/V "SAIGA" would have sailed between 0.45 and 04.00 hours 1 nautical mile, which is the distance from the boundary line to the position noted in her Log Book at 00.40 hours. Assuming that she was sailing "her own pace" at a "steady speed" which, even under the circumstances conceded by the Applicant State, would certainly be *more* than 4 knots, the M/V "SAIGA" cannot have left the exclusive economic zone of Guinea at 00.45 hours, as the Master has suggested. In addition to that, the

[156] Nautical miles per hour.
[157] Paragraph 110 of the Reply.
[158] Paragraph 71 of the Memorial.

distance from the position noted in her Log Book for 04.00 hours and the meeting point, which the ship reached according to the Log Book at 04.24 hours, is about 4 miles, it must have sailed with a steady speed of 8 to 9 knots. Taking these facts into account one can assume that the M/V "SAIGA" would have left the Guinean exclusive economic zone on the morning of 28 October 1997 certainly not before 03.53 hours. Therefore Guinea maintains its view that at this time the ship it had been discovered by the radar of the pursuing launches.[159]

110. As to the begin of the pursuit, it is common ground that hot pursuit generally presupposes a violation of the coastal State's right applying in the very zone from where the pursuit commences. The pursuit "must follow without unreasonable delay" upon the violation, as mentioned in the Reply,[160] but it has also been correctly observed[161] that pursuit must not "immediately" commence. This means, it must not commence at the very moment, when the violation has been detected. On the other hand, however, there must not be an unreasonable delay between the detection of the violation and the beginning of the pursuit. Guinea contends that there was no unreasonable delay in the pursuit. The Guinean authorities started their mission in the afternoon of 27 October 1997 only a few hours after the violation of the customs laws had been discovered. The intermediate time was necessary for the preparation of a pursuit of the M/V "SAIGA" with small launches over night in the large exclusive economic zone. During the whole pursuit the authorities knew that the M/V "SAIGA" was still in the Guinean exclusive economic zone. Considering these circumstances and taking also into account that the legal institution of hot pursuit shall protect the fundamental interests of the coastal State in the compliance with its laws,[162] the pursuit was not unreasonably delayed. It was also not interrupted.

111. In addition Guinea maintains its view that radar is certainly a "practicable means as may be available" (Article 111(4) of the Convention). If the discovery of the ship by way of an electronic means, such as radar, is sufficient to start the pursuit, it would make hardly any sense to require a visual or auditory signal to stop in this situation. The ship violating the laws of the coastal State can also discover the pursuing ships on radar over a great distance, as the Master of the M/V "SAIGA" has confirmed

[159] Paragraph 146 of the Counter-Memorial.
[160] Paragraph 112 of the Reply.
[161] Paragraph 112 of the Reply.
[162] See generally Professor Treves, *op. cit.*, p. 856.

here, and it can escape very easily. Moreover a visual of auditory signal to stop appears not to be necessary when the ship is already trying to escape.

112. The Republic of Guinea invites the International Tribunal to share the view that the conditions of hot pursuit as submitted in the Counter-Memorial[163] and here were sufficiently fulfilled. If this should be not the case, the Republic of Guinea nevertheless maintains its view that lastly the mothership doctrine would apply, as it has been elaborated in the Counter-Memorial.[164] In order to sell its bunkers, which violated the Guinean laws, the M/V "SAIGA" operated together with fishing vessels that were fishing in Guinea's exclusive economic zone. In a mothership situation the requirement of a visual or auditory signal is certainly necessary, because the ship pursued is outside the zones of the coastal State where it usually cannot expect to be stopped and searched. These signals have been given here.

**Section 4.3 No excessive force was used against the ship, its Master or crew**

113. While the details of the force employed to stop and search the M/V "SAIGA" after the pursuit are contested between the parties, it appears to be sufficient from a legal point of view to repeat here that this executive force was necessary and reasonable for stopping and searching the ship under the circumstances given.[165] On the other hand, it should be noted that the Applicant State has not explained how to stop a ship without force if it is showing no flag and trying to escape under automatic pilot while the Master and crew is hidden in the engine room, so that there is no possibility to communicate with them at all. Knowing that Guinea considered off-shore bunkering in its zones illegal the M/V "SAIGA" tried to escape the control at its own risk, and thus it gave sufficient reason to use the necessary and reasonable force to stop the ship.

**Section 4.5 No violation of Articles 292(4) and 296 of the Convention**

114. St. Vincent and the Grenadines claims that Guinea violated the provisions of the Convention concerning prompt compliance with the Judgement of

[163] Paragraphs 136–148 of the Counter-Memorial.
[164] Paragraph 149 of the Counter-Memorial.
[165] Paragraphs 151–154 of the Counter-Memorial as against the views taken in paragraphs 117–120 of the Reply.

the International Tribunal of 4 December 1998 by not releasing the M/V "SAIGA" and its crew upon posting of a bank guarantee of Crédit Suisse on 10 and/or 11 December 1997. In addition to the arguments made in paragraphs 20–45 and 155–170 of the Counter-Memorial, Guinea requests the International Tribunal to dismiss the claim for the following reasons.

115. In its Judgement of 4 December 1997, the International Tribunal decided that the vessel and crew should be released upon the posting of a reasonable bond or other security. It determined that the security should consist *inter alia* of a letter of credit or bank guarantee in the amount of US$400,000. The Judgement does not contain any further detail concerning the security and the concrete steps to be taken to ensure its posting and the release of the vessel and crew. It was left to the parties to further specify the security, to formulate the appropriate wording for it and to find the concrete procedure for its posting and the release of vessel and crew. As a consequence it may be concluded that the parties had to find agreement concerning these issues, a notion that also seems to be reflected in Article 113(3) of the Rules.

116. Article 113(3) of the Rules indicates that agreement concerning the formulation of the wording of the security as well as other modalities concerning its posting should be sought between the Applicant and the detaining State. Guinea is not in accord with the arguments made in paragraphs 40–44 of the Reply, that her Agent in the judicial proceedings before the International Tribunal necessarily was the appropriate person to post the bank guarantee with, since Guinea herself was to give final approval of the wording of the guarantee. Guinea does not consider the finding of an arrangement concerning the concrete formulation and other modalities of a bank guarantee to be posted after and in accordance with a Judgement of the International Tribunal to be part of the judicial proceedings before it. The process of finding such arrangement is not regulated in the Rules and is a process for which the provisions of the Rules concerning the representation of parties by Agents do not apply.

117. Guinea strongly opposes the argument made in paragraphs 44, 153–154 of the Reply that her Agent was authorised to make a final decision with respect to the wording of the bank guarantee without having received prior instructions and/or approval by her. During the negotiations concerning the appropriate wording, the Guinean Agent acted both as a channel of communication between Stephenson Harwood and the Minister of Justice of the Republic of Guinea and at times as counsel of

the latter. At no point did the Agent assert that he had the authority to finally bind Guinea as has been made clear in the letters of the Guinean Agent to the Applicant dated 11, 12 and 15 December 1997.[166]

118. The negotiations concerning the bank guarantee were complicated by the fact that St. Vincent and the Grenadines sent the bank guarantee to the Agent in Hamburg instead to Conakry directly. Insofar a third person neither residing at the location of the Applicant nor of the detaining State Guinea became involved in the negotiating process. As has been shown in detail in paragraphs 29–30 and 33–34 of the Counter-Memorial, the communications between Hamburg and Conakry were considerably delayed due to technical difficulties with respect to telephoning and the transmission of documents. In fact, the Minister of Justice of the Republic of Guinea only received a copy of the bank guarantee of 10 and 11 December 1997 on 21 December 1997. Further delay was caused by the absence of competent persons on both sides during the relevant time of December 1997 and January 1998.[167]

119. Guinea did not unjustifiably delay reaching an agreement on the wording and other modalities of the bank guarantee. The examination of the guarantee with regard to the reasonableness of its form was considered to be of importance, in particular since the relations between the parties were not too amicable as was *inter alia* indicated by the rather combative hearings in the prompt release proceedings and the threat for further judicial proceedings at the outset of the negotiations in a manner that did not allow Guinea to comply as quickly as requested.[168]

120. The wish that the bank guarantee be issued in French was of great concern, since Guinea is a poor State without easily accessible adequate translation facilities. It was and is not understandable to Guinea why the bank guarantee had to be issued in English although it was addressed to a francophone country and issued by a francophone bank. St. Vincent and the Grenadines' refusal to issue the guarantee in French resulted in the need for authentication of the issued translation and led to confusing negotiations in French concerning an eventually English wording.[169] Of

[166] See Annex 38 of the Memorial.
[167] See, for example, letter of the Agent of St. Vincent and the Grenadines to the Guinean Agent dated 19 January 1998 (two weeks).
[168] See the account given in para. 27 of the Counter-Memorial.
[169] See, for example, exchange of letters between the Agent of Guinea and the Agent of St. Vincent and the Grenadines dated 22 January and 30 January 1998, see Annex 38 of the Memorial.

equal concern for Guinea was a proper authentication of the persons having signed the bank guarantee, a request which does not appear to be unusual in international proceedings. Finally, Guinea requested changes in the wording in particular with respect to the paragraphs of the guarantee giving a brief account of the facts of the case and of the findings in the Judgement of the International Tribunal of 4 December 1998. Especially in light of the procedural independence of the prompt release proceedings, Guinea had to be very cautious with respect to accepting the propositions and summary made by St. Vincent and the Grenadines in order not to be estopped from raising objections to them in the proceedings on the merits.

121. Guinea had the intention to comply with the Judgement of the International Tribunal for the prompt release of the M/V "SAIGA" and its crew. She did not unjustifiably delay reaching an agreement on the terms of the bank guarantee, as is also indicated by the fact that she did not object to the guarantee of 28 January 1998 although it was issued in English with a translation in French marked as "unofficial" and "non-committing" and although the authentication of the signatures by the Swiss notary public did not conform with the Guinean request to be furnished with an attestation of "the identity of the persons and their authorisation to act on behalf of Crédit Suisse.[170]

122. Neither did Guinea unjustifiably delay to release the M/V "SAIGA" and its crew after Crédit Suisse had sent the bank guarantee of 28 January 1998 to Conakry. It should be noted that St. Vincent and the Grenadines did not indicate when exactly the guarantee arrived in Guinea.

123. As has been explained in paragraph 45 of the Counter-Memorial, the release of the vessel and crew was delayed because of the refusal of the Master to sign the Deed of Release. Guinea disagrees strongly with the view expressed in paragraph 45 (v) of the Reply that the Master was requested to sign a confession. The Deed of Release[171] does not have the character of a confession. It bears the letter head of the Ministère de l'Economie et des Finances, Direction Nationale des Douanes and states that it was read out to the Master in the presence of his Counsels. At the same time, the Master was also assisted by the diplomatic representative of his country. The Deed simply states that it was agreed that (1) the

[170] See letter of the Guinean Agent to the Agent of St. Vincent and the Grenadines dated 22 January 1998, Annex 38 of the Memorial.
[171] See Annex 31 of the Memorial.

M/V "SAIGA" was ordered to be released, (2) several explicitly mentioned items and objects were returned to the Master, and (3) the Master acknowledged the receipt of the ship and the listed items. The Deed of Release has the nature of an official receipt for the vessel and the items to be released from Guinean custody, as had also been explained to the Master by the three present lawyers. The paragraphs in the preamble of the Deed do not justify the assumption that the Deed in fact constituted a confession. The paragraphs simply referred to facts concerning the affair and proceedings. The Deed does not contain one allegation or assumption or reasoning that the Master was asked to confess.

124. Neither should Guinea be reproached for having demanded payment of the US$400,000 after the Judgement of the Conakry Court of Appeal had become final on 10 February 1998.[172] Contrary to the opinion expressed by the Agent of St. Vincent and the Grenadines in the telephone conversation with the Guinean Agent on 19 February 1998,[173] payment under the bank guarantee has to be effected upon a final decision of a municipal court of the detaining State and not of the International Tribunal, as is indicated in Article 114(2) of the Rules.

125. To conclude, the fact that the M/V "SAIGA" and its crew were only released on 28 February 1998 was caused (1) by the Judgement of the International Tribunal of 4 December 1997 leaving the concrete steps to effect the release to the parties execution, (2) by communication difficulties of a technical nature, and (3) by both parties as has been set out above. The Republic of Guinea regrets that the vessel and its crew remained in the port of Conakry until this time. Guinea, nevertheless, strongly contests that she contributed to the delay in a manner that would justify a declaratory judgement with respect to a violation of Articles 292(4) and 296 of the Convention.

**Section 4.6 Conclusion**

126. The conclusions of the legal arguments can be summarized as follows:

- The Republic of Guinea has duly established her contiguous zone and her exclusive economic zone.
- She has extended the application of her customs laws and related laws in conformity with international law to both zones.

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[172] See paragraph 87 of the Counter-Memorial.
[173] See paragraphs 43 and 169 of the Counter-Memorial.

– She could impose these laws in both zones on the M/V "SAIGA" because off-shore bunkering is no navigation.
– The hot pursuit of the ship from the exclusive economic zone was justified under Article 111(2) of the Convention; Guinea reserves the right, however, to submit as an alternative that the hot pursuit would also be justified only on the basis of a violation of her laws in the contiguous zone.
– The force used to stop the M/V "SAIGA" was necessary and reasonable.
– Articles 292(4) and 296 of the Convention have not been violated.

## SECTION 5: DAMAGES

### Section 5.1 General remarks

127. The Republic of Guinea maintains its contentions made in Section 5 of the Counter-Memorial. The following arguments are made additionally.

128. Guinea not agree with the assumption that Article 111(8) of the Convention serves as legal basis for all the claims advanced. The Article expressly only mentions the ship as claimant, whereas the similar Article 106 of the Convention names the flag State as claimant. Since the ship as such does not possess any legal personality, it is to be assumed that claimant is the shipowner or charterer of the arrested ship.[174] These persons have, however, no standing before international courts or tribunals. Consequently, their claims have to be pursued by the respective flag State.

129. The claim of the shipowner or charterer comprises, according to Article 111(8) of the Convention, compensation for "any loss or damage" that was sustained by the unjustified exercise of the hot pursuit. In other words, any loss or damage is to be compensated under this Article that occurred to the shipowners or charterers as result of the pursuit and the stopping or arrest of the ship. Any loss or damage that was sustained as a result of subsequent actions not falling in the scope of Article 111 of the Convention would have to be compensated on the basis of the general rules of international State responsibility. Accordingly, claims concern-

[174] See for example Allen, *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices*, in: ODIL 20 (1989), p. 309 at p. 321.

ing compensation for damages arising from the removal of the cargo or the disputed attack on 30 January 1998 cannot be based on Article 111(8) of the Convention.

130. Moreover, Guinea asserts that Article 111(8) of the Convention concerns only claims of the shipowners or charterers. Claims on behalf of the Master or the crew do not automatically fall within the scope of Article 111(8). In Guinea's opinion they would only be comprised by that Article if the shipowners or charterers could claim the loss and damages sustained by the Master and the crew as their own, such being the case if the Master or the crew could claim compensation from them for loss or damages incurred in the orderly exercise of their job. Insofar as this is not the case, the claim for the benefit of the Master and the crew including personal injury and deprivation of liberty may only be based on the general rules of State responsibility.

131. From the fore-going, it is clear that the claim put forward by St. Vincent and the Grenadines does neither fall in the scope of Article 111(8) of the Convention.

132. In conclusion, Guinea submits that Article 111(8) of the Convention only serves as a legal basis for the claims submitted by St. Vincent and the Grenadines on behalf of the shipowners and charterers resulting from the pursuit and arrest of the M/V "SAIGA".

**Section 5.2 Claim on behalf of the loss or damage to the vessel arising from the detention and arrest and its subsequent treatment**

133. St. Vincent and the Grenadines has rightly referred to the reluctance of international adjudication in using restrictive rules in admitting and evaluating evidence and to the resort to the best evidence rule.[175] Guinea argues, however, that this practice should not be invoked to deny that international law requires in general that exact proof be furnished to support claims for compensation of actually occurred material damage.

134. *Professor Sandifer* has referred to international courts and tribunals having a more flexible approach with respect to admitting and evaluating evidence than municipal courts in the context of the difficulties international claims encompass in obtaining, preparing and evaluating evidence.[176] He

[175] See paragraphs 168–170 of the Reply.
[176] Sandifer, *Evidence Before International Tribunals*, (1975), p. 22.

mentions for example claims commissions which had to deal with a large number of claims at the same time involving complex questions of fact as having applied a less strict standard for the admission and evaluation of evidence. Other cases include situations where documentary evidence could not be discovered or was kept by a foreign State, or when a long period of time had elapsed between the events causing the damage and the submission of the dispute, or when long distances would have to be travelled to obtain the relevant evidence.[177]

135. Guinea contends that there must be special circumstances that justify the granting of compensation for actually occurred loss that has not properly been proved. In this connection, it is interesting to recall that the United Nations Compensation Commission demanded that:

> "claims for repair costs [for motor vehicles] above US$2,500 . . . must be documented by receipts, invoices, bills of sale, or other documentation from the vendor totalling the full amount claimed. An explanation by the claimant regarding his or her inability to provide the necessary documentation may be accepted as alternative support for the amount claimed."[178]

and that:

> "Claims for repair costs [for real property] for more than US$20,000 must have provided documentary evidence in the form of receipts, invoices, copies of bills or expert appraisals in support of the amount claimed. If the amount claimed is not fully supported by such documentary evidence, the claim is reduced accordingly, with reference to the amount for which documentary evidence has been submitted and the US$20,000 threshold . . ."[179]

The practice of the Compensation Commission is interesting, also in light of the fact that it acknowledged that Kuwait was no business culture in which receipts are commonly provided or kept, particularly when the amounts are small.

136. Guinea requests that St. Vincent and the Grenadines should only be awarded compensation under this head for damages exactly proved by

[177] *Ibid*., pp. 22–29.
[178] United Nations Compensation Commission, ILR 109 (1998), pp. 358–359.
[179] *Ibid*., p. 401.

documentary evidence. St. Vincent and the Grenadines only claims damages under this head which are economically assessable and can be comparatively easily documented. Neither exists one of the circumstances mentioned in paragraph 134 above that would justify a less strict standard for the admission and evaluation of the evidence, nor has St. Vincent and the Grenadines provided any explanation why she would be unable to provide full documentation of the alleged damages.

137. St. Vincent and the Grenadines has produced in Annex 19 of the Reply a bundle of documents and invoices which, however, does not serve to give full evidence of the damages claimed. Guinea finds that the material now produced lacks orderly preparation. Its examination is unreasonably difficult since, for example, there is little or no guidance given as to which invoice falls under which category of damage. Therefore, Guinea found herself unable to comprehend the calculations made by Seascot Shipmanagement Ltd. on behalf of Tabona Shipping Company in the amount of US$1,191,594. Apart from this, the following observations are made.

138. Various invoices and documents produced do not clearly indicate who exactly is to have suffered damages from the arrest and detention of the M/V "SAIGA". Guinea contends that it belongs to an adequate preparation of evidence for actually occurred material damages that the Applicant precisely shows whether the alleged damages were suffered by the ship owner or the charterer.[180] Moreover, Guinea asserts that St. Vincent and the Grenadines cannot claim as damages suffered as consequence of the arrest and detention of the M/V "SAIGA" expenses which the relevant companies would have had to pay anyway (*e.g.* maintenance costs).[181] Other invoices are not properly justified to be compensated by Guinea, be it that their connection to the Guinean actions is not sufficiently

[180] The Guinean concerns begin with the Time Charter Party dated 25 February 1997 which does not seem to be the original time charter party, as is indicated by the last drydock stated to have been in March 1997 (see Appendix I. of the Charter Party and the Bunkering Questionnaire). Moreover, the Time Charter Party states that the vessel shall be classed as Russian Register of Shipping and consequently the Master, Officers and crew of the M/V "SAIGA" were said to be Russian (see Bunkering Questionnaire). This was, however, not the case. Finally, the flag of the vessel is stated to be the one of St. Vincent and the Grenadines, although the M/V "SAIGA" was not so registered at that time. Other uncertainties concern the invoices concerning the time charter hire which are made by Seascot Shipmanagement Ltd. on behalf of Tabona Shipping Company Ltd. To Guinea it remains unclear whether the claimed amount was actually paid and whether the shipowners had a right under the Time Charter Party to claim the time charter hire in the case of detention.

[181] See, for example, several items listed in the invoices of Getma Guinee or the invoices for management fees of Seascot Shipmanagement Ltd.

explained[182] or that they predate the arrest of the M/V "SAIGA"[183] or are issued several months after the M/V "SAIGA" had left Conakry.[184]

**Section 5.3 Claim for the benefit of the master and crew, including personal injury and deprivation of liberty**

139. It is not in dispute that the Master of the M/V "SAIGA" was held in Conakry in the course of criminal proceedings having been instituted against him. Guinea contends, however, that he was not illegally detained. According to recent information the Master was never formally detained or put into pre-trial detention.[185] He was not prevented by the Guinean authorities from leaving the M/V "SAIGA", but stayed voluntarily on board of the vessel. The Judgement of the Conakry Court of Appeal of 3 February 1998 which sentenced the Master to a criminal fine on the grounds of contraband confirmed that it was not unlawful to hold him in the country. As has been stated in paragraph 87 of the Counter-Memorial, the Master failed to appeal against this Judgement before the Guinean Supreme Court and may consequently be deemed to have accepted the Judgement. Guinea rejects the allegation of St. Vincent and the Grenadines that the Master was illegally detained and finds that there is no reason to award any compensation for moral damages in this regard.

140. Insofar, as the International Tribunal regards the judicial proceedings against the Master to give grounds for the payment of moral damages, Guinea challenges the quantum of damages claimed by St. Vincent and the Grenadines. She finds the amount of US$250 per day of detention plus US$20,000 in respect of the emotional and psychological effects of his treatment by the Guinean authorities to be highly excessive and not warranted by international practice.

141. It remains unclear why St. Vincent and the Grenadines seeks compensation for the detention twice. The moral damage suffered from illegal detention usually consists of the mental pain and anguish suffered during this time. It is assumed that St. Vincent and the Grenadines aims at com-

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[182] See, for example, several items listed in the invoices of Getma Guinee, the air tickets of representatives of Seascot Shipmanagement Ltd., invoices concerning hotel accommodation, the "proforma invoice" of Seaglaze Marine Windows Ltd. dated 9 June 1998, the invoice of Dakar Marine dated 26 June 1998 (the sections except the "Repairs due to Gunfire Damage").

[183] See, for example, the invoice of Nera Ltd. to Seascot Shipmanagement Ltd. dated 22 October 1997.

[184] See, for example, the debit note of Addax Bunkering Services dated 7 July 1998 and the annexed invoices thereto.

[185] Insofar, the observation made in paragraph 179 of the Counter-Memorial is corrected.

pensation of exactly these damages when claiming the amount of US$250 per day of detention. At the same time, it requests US$20,000 to cover the emotional and psychological effects of his treatment during detention. Guinea submits that this latter claim should be included in the former.

142. In cases of illegal detention international judicial practice has often resorted to daily rates or to lump sums.[186] There is, however, no case known to Guinea where an arbitral tribunal has awarded compensation for the same claim on the basis of both a daily rate and a lump sum.

143. As regards the quantification of the damages claimed, Guinea notes that there exists little consistency in international judicial practice. Guinea contends that the rate most commonly awarded is US$100 per day of illegal detention.[187] A recent example of this practice is the United Nations Compensation Commission as has been shown in paragraph 188 of the Reply. The claim of St. Vincent and the Grenadines for more than US$50,000 for the Master of the M/V "SAIGA" also appears to be exorbitantly high in light of the establishment by the Commission of a ceiling of US$10,000 for mental pain and anguish resulting from illegal detention.

144. There are no indications of any factors that might justify any raise of the damages claimed above the amounts awarded most commonly. It is undisputed that the Master did not suffer any personal injury. Moreover, Guinea contests that the Master suffered any well-founded fear for his life during the arrest and subsequent detention. The United Nations Compensation Commission decided that "manifestly well-founded fear" for one's life should be compensated with up to US$5,000.[188] This term, the Commission further decided, should, however, be interpreted in a restrictive manner. Specifically, the term was only used "to mean a fear based upon clear indications that Iraqi authorities were seeking to kill or detain the individual in question or some group of which he or she was a member."[189] The allegation by St. Vincent and the Grenadines that the Master's life was threatened by the Guinean authorities pointing guns at him is contested. The account given by St. Vincent and the Grenadines is very thin and no evidence is provided to support this contention.[190] In

[186] Gray, *Judicial Remedies in International Law*, (1986), pp. 36–37.
[187] *Ibid.*, p. 36; see also paragraphs 174 and 186 of the Reply.
[188] United Nations Compensation Commission, Governing Council Decision 8, ILR 109 (1998), p. 592.
[189] *Ibid.*, Governing Council Decision 3, p. 575.
[190] Paragraph 172 of the Reply and paragraph 187 of the Memorial.

particular, the Master did not mention anything in this respect in his Memorandum as contained in pages 706–707 of the Annexes to the Memorial. The only reference to a crew member having been threatened with guns put at his head is made with respect to the cook.[191] Moreover, Guinea disputes any excessive force by her customs authorities during the arrest of the M/V "SAIGA", as has been stated in paragraph 113 above.

145. Further indication that the Master did not suffer manifestly well-founded fear for his life during the time of his detention lies in the fact that the Master refused to sign the deed of release of the M/V "SAIGA" of 13 February 1998 with the consequence that he continued to be detained for another period of more than ten days. Guinea contends that had the detention really been so threatening as St. Vincent and the Grenadines tries to give the impression, the Master would have taken the first opportunity offered to leave Conakry.

146. It may thus be concluded that the Master of the M/V "SAIGA" did not suffer any fear for his life during his detention by the Guinean authorities. But even if this was not so, it may be stated that such fear is not manifestly well-founded and that, in application of the standards established by the United Nations Compensation Commission, no compensation may be claimed on the grounds of such fear.

147. As has been stated in paragraph 179 of the Counter-Memorial, Guinea maintains that no member of the crew is entitled to compensation of moral damages on the grounds of illegal detention. Only the Master was detained due to criminal proceedings being instituted against him. All other crew members were allowed to leave the vessel upon arrival in the port of Conakry.[192] In particular, no passports of crew members were kept or other hindrances imposed to leave the vessel. Insofar there seems to be no dispute between the parties.

148. In paragraphs 175–180 of the Reply, St. Vincent and the Grenadines claims that the crew members were *de facto* detained until they left the M/V "SAIGA", a view which is not shared by the Republic of Guinea. Even if the notion of a *de facto* detention was accepted in general, it is obvious that detention always requires an element of force which Guinea

[191] Statement of the Second Officer Kluyev in the hearings in the prompt release proceedings on 27 November 1997, uncorrected transcipt, p. 12.

[192] See Statement in Response of the Republic of Guinea of 26 November 1997 (prompt release proceedings), Section IV.2.

asserts to be missing here. Without differentiating between formal and informal detention, the United Nations Compensation Commission defined detention to mean a situation where persons were held by force in a particular location. At the same time, the Commission decided that the term should be interpreted in a restrictive manner.[193] Consequently, the Panel did not consider persons that claimed to have been prevented from leaving Iraq or Kuwait because they were unable to obtain an exit visa or due to logistical and financial reasons to have been illegally detained.[194]

149. St. Vincent and the Grenadines contends that *de facto* detention exists when the "detained" person has no other choice but to stay in a particular location. Guinea submits that its authorities did not prevent the crew members except the Master from exercising this choice. Moreover, Guinea contests the relevance of the argument made in paragraph 175 of the Reply that a skeleton crew had to stay on board for maintenance and security purposes and in order to sail the vessel once it was released. Seascot Shipmanagement as employers of the crew could have exchanged the crew to undertake these functions. If the crew members remaining on board until the release of the M/V "SAIGA" had to stay on board, it may be assumed that the cause for this lies in logistical or financial considerations the employers might have had. Insofar, no direct causality exists between the arrest and the detention of the M/V "SAIGA" and the remaining of the crew on board.

150. Guinea argues that neither moral nor material damage was caused to the crew because they stayed on board of the vessel while it was detained in the port of Conakry. It lies in the nature of the duty of a crew of a ship that it stays on board of the ship, in particular while it is sailing. As regards the freedom to move there is no significant difference between a situation in which the crew stays on board while the ship is detained in a foreign port and the situation in which it is sailing. The definitions of the term "detention" cited in paragraph 176 of the Reply do not focus on this particular situation and, consequently, are not of much use in the present case.[195] St. Vincent and the Grenadines has not shown any indication that the crew's contracts had expired before the date of release of the M/V "SAIGA".

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[193] United Nations Compensation Commission, Governing Council Decision 3, ILR 109 (1998), p. 575.

[194] *Ibid*., p. 300.

[195] In fact, the definition by the arbitral tribunal in the *Kingdom of Sweden v. United States of America* Case concerned the detention of a ship (and not of the crew) and the definition of the *Underhill (U.S.) v. Venezuela* Case focussed on persons on the mainland.

Therefore, the claim on the grounds of deprivation of liberty should be dismissed, because the crew would have stayed on board of the vessel anyway. For the same arguments as made in paragraph 145 above, no moral damages should be awarded on the grounds of a manifestly well-founded fear for the lives of the crew members. Moreover, no material damages may be claimed for the crew, since the crew members continued to receive their salary as can be deduced from Annex 19 of the Reply.

151. As regards the claim for damages of US$50,000 for the injured crew members, Guinea requests the Tribunal to adjust the claimed amount to a reasonable level, if it is to be awarded at all.

152. St. Vincent and the Grenadines alleges that the injuries sustained by two crew members during the attack against the M/V "SAIGA" were serious. The United Nations Compensation Commission claimed defined the term "serious personal injury" to mean:

> "1 (a) Dismemberment;
> (b) Permanent or temporary significant disfigurement, such as a substantial change to one's outward appearance;
> (c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;
> (d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.
>
> 2. For purposes of recovery before the Compensation Commission, 'serious personal injury also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained.
>
> 3. 'Serious personal injury' does not include the following: bruises, simple strains and sprains, minor burns, cuts and wounds; or other irritations not requiring a course of medical treatment."[196]

Even if it could be assumed that the injuries sustained by the two crew members were "serious personal injuries", for example as falling under

[196] *Ibid*., Governing Council Decision 3, ILR 109 (1998), pp. 575–576.

category 1 (c) and/or (d), it should be noted that, comparatively, the injuries sustained would belong to the less serious categories of injuries listed in the Commission's definition.

153. Since it is undisputed that no permanent physical injuries were sustained by the crew members, it is misleading that St. Vincent and the Grenadines mentions in paragraph 183 of the Reply that the United Nations Compensation Commission established a ceiling of US$15,000 in respect of mental pain and suffering from dismemberment, permanent significant disfigurement, or permanent loss or use of permanent limitation of use of a body organ, member, function or system. It would have been more appropriate to cite the ceiling of US$5,000 for temporary significant loss of use or limitation of use of a body organ, member, function or system.[197] In this context, it is interesting to note that the ceilings adopted by the Compensation Commission do not seem to be less high than the levels of compensation awarded by international arbitral practice in similar cases if it can be stated that such uniform practice exists.[198]

154. St. Vincent and the Grenadines has correctly stated that the compensation of moral damages resulting from mental pain and anguish does not comprise or exclude compensation for actually occurred material loss that arose from the injury, if such loss has been proved to exist. In particular, since the medical expenses were paid by the shipowners, Guinea contends that the two crew members have not sustained any material loss arising from the injury. At least, St. Vincent and the Grenadines failed to indicate or prove any such loss.

155. In light of the above-said, Guinea submits that the amount of US$50,000 as compensation for each of the two injuries crew members is unreasonably high and, if compensation were to be awarded at all, the amount should be reduced to an amount under US$5,000.

156. Apart from these arguments, any award on the grounds of personal injury of the crew members should take into account the payment of any

[197] *Ibid*., Governing Council Decision 8, p. 592.

[198] For example, the Commission's daily rate for detention is US$1,500 for the first three days and US$100 for each subsequent day. This accords to compensatory standard awarded most often by arbitral tribunal as has been shown in para. 143 above. Similarly, the Commission established a ceiling of US$30,000 for compensation to a family unit whose spouse, child or parent suffered death. This amount is even higher than the recommended US$10,185 for the family of the drowned crew member in the *I'm Alone* Case, the case generally being regarded as a very favourable award for the claimant; RIAA, Vol. III, p. 1611 at p. 1618.

compensation under the employment contract, as has been pointed at in paragraph 22 above.

157. Furthermore, as has already been contended in paragraph 182 of the Counter-Memorial, the assessment of any damages to be awarded to the Master or members of the crew also should take into account that the M/V "SAIGA" entered the Guinean contiguous and exclusive economic zone with the knowledge that bunkering activities are considered by Guinea to be illegal and that the M/V "SAIGA" by doing so would run the risk of being pursued and arrested.

**Section 5.4 Claim in respect of damages or loss suffered by the State of St. Vincent and the Grenadines**

158. As far as material damages are concerned, St. Vincent and the Grenadines specified them to consist of the costs entailed by devotion of the time of her ministers and officials to the M/V "SAIGA" affair as well as of loss of profit with respect to a potential decrease in registration under her flag. Guinea continues to maintain that both specifications provide no adequate grounds for compensation.

159. Guinea submits that St. Vincent and the Grenadines has not sustained any compensable damage because its ministers and other officials had to devote time to the matter. In Guinean opinion it belongs to the responsibilities of ministers and public servants to deal with current State affairs which are often unpredictable. Guinea contends that the devotion of time to an international dispute falls within the normal profession of a minister or public servant. Compensation should not have to be paid for carrying out normal professional duties which are remunerated anyway. St. Vincent and the Grenadines did not claim to have employed extra public servants to deal with the matter. Guinea alleges that the main work on behalf of St. Vincent and the Grenadines concerning the M/V "SAIGA" affair was undertaken by Stephenson Harwood who were hired for exactly that purpose. It is for this reason that Guinea also contests that the M/V "SAIGA" affair has deflected governmental resources away from other activities. At any rate, if it had done so, it is claimed that the cause for this fact would lie in the own sphere of St. Vincent and the Grenadines for which Guinea is not responsible.

160. As regards the alleged loss of registration, Guinea observes that St. Vincent and the Grenadines has not made any comment on the argument put forward in paragraph 187 of the Counter-Memorial, namely that no reason-

able shipowner who is generally interested in registering under the flag of St. Vincent and the Grenadines would refrain from doing so because the Guinean enforcement actions were not directed solely against vessels flying the flag of St. Vincent and the Grenadines but against all vessels engaged in bunkering activities.

161. In light of this, Guinea also rejects the argument made in paragraph 195 of the Reply that shipowners might prefer to register with a flag State that can protect its vessels with a powerful navy, by economic force or other means. Guinea finds this argument without relevance for the present case, since this is a general problem of small flag States if it can be regarded as a problem at all.

162. Finally, Guinea re-emphasises that the claims for material damages of St. Vincent and the Grenadines in its own right should be dismissed on the grounds of their remoteness from the Guinean conduct and their vagueness and entirely speculative nature.[199]

163. As regards the claim for pecuniary satisfaction for moral damages allegedly suffered by St. Vincent and the Grenadines, it may be noted that the Reply does not contain one word against the Guinean contentions with respect to the questionable nature of the *I'm Alone* Case as a valid precedent for the present case.[200]

164. It has been a long doctrinal dispute whether substantial moral damages may be awarded to States in their own right. As has been shown by *Gray* in her particularly thorough research on international judicial practice, international courts and tribunals have been extremely reluctant in awarding such damages.[201] She concludes that, the *I'm Alone* Case, as disputed as it is with regard to its legal basis, is the only clear precedent for the award of such claim,[202] that is prior to the *Rainbow Warrior* Cases. Insofar it is not correct that *Davidson* states, as has been cited by St. Vincent and the Grenadines in paragraph 199 of the Reply, that monetary compensation is the preferred form of reparation in cases involving direct international

[199] See paragraphs 188–190 of the Counter-Memorial.
[200] See paragraphs 194–196 of the Counter-Memorial.
[201] Gray, *Judicial Remedies in International Law*, (1987), pp. 85–92.
[202] *Ibid*., pp. 43 and 86; see also Parry, *Some Considerations upon the Protection of Individuals in International Law*, in: Recueil des Cours, Académie de Droit International, 1956 (II), pp. 685, 689, 693–694; and Zemanek, *Die völkerrechtliche Verantwortlichkeit und die Sanktionen des Völkerrechts*, in: Neuhold/Hummer/Schreuer (eds.), Österreichisches Handbuch des Völkerrechts, Bd. 1, (1997), p. 446 at p. 461.

wrongs and that this was supported by arbitral practice.[203] Ironically, he refers to *Gray's* research in support of his argument, although she comes to a completely different conclusion in the same research.

165. In its Reply, St. Vincent and the Grenadines only refers to the *Rainbow Warrior* Cases as precedents for awards granting monetary compensation for moral damages suffered by States directly. While it is true that these cases are regarded by some writers and other legal authorities as giving grounds for such claims, Guinea submits that they nevertheless do not provide compelling authority for such assumption.

166. In 1986, the Secretary-General of the United Nations was requested by France and New Zealand to give a binding ruling with respect to their differences concerning the sinking of the Rainbow Warrior in Auckland Harbour by two French agents. The ruling was to be "both equitable and principled". Thus, *Pugh* writes:

> "It would be prudent to recognise that the settlement was as much discretionary as legal in character . . .[204] Jurists will note that the outcome of the inter-governmental dispute was based on an individual's concept of fairness, producing a ruling rather than a legal judgement. De Cuéllar resisted any attempt to imbue the case with theoretical significance or to refer to norms . . ."[205]

167. There is no doubt that the Secretary-General avoided to make a clear legal statement in his ruling with respect to the question of moral damages for direct injuries to States. While there was an argument between the parties as to the legality of such claims, France having contended that the compensation offered could only concern the material damage suffered by New Zealand, the Secretary General simply ruled:

> "New Zealand seeks compensation for the wrong done to it and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US$9 million, France that it should not be more than US$4 million. My ruling is that the French Government should pay the

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[203] Davidson, *The Rainbow Warrior Affair concerning the Treatment of the French Agents Mafart and Prieur*, in: ICLQ 40 (1991), p. 446 at p. 455.
[204] Pugh, *Legal Aspects of the Rainbow Warrior Affair*, in: ICLQ 36 (1987), p. 655 at p. 656.
[205] *Ibid*., p. 668.

sum of US$7 million to the Government of New Zealand as compensation for all the damage it has suffered."[206]

168. This decision does not pronounce on whether the compensation recommended was for material or immaterial damages. The fact that the recommended payment of US$7 million exceeds the French offer which was thought to cover material damages only, does not serve as proof for the legality of pecuniary satisfaction for direct moral damages to States, since the actually incurred material damages were not assessed at all. The amount of US$7 million was a compromise between the two parties and does not make clear whether it covers substantial moral damages.[207]

169. Also the *Rainbow Warrior II* Case does not serve as a firm precedent for the claim made by St. Vincent and the Grenadines although the arbitration tribunal considered "that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving . . . serious moral and legal damage, even though there is no material damage."[208] This statement was made as an *obiter dictum* not having binding character. The arbitration tribunal also acknowledged that such orders are unusual and that it had not heard the parties' arguments on the issue.[209] It is therefore reasonable to doubt any authoritative character of the above-mentioned statement of the tribunal.

170. Thus, Guinea contends that there is no firm judicial precedent for any award on substantive monetary satisfaction for direct moral damages of States.

171. Insofar as St. Vincent and the Grenadines might base its claim on Article 45(1) and (2 c) of the Draft Articles on State responsibility by the International Law Commission, Guinea submits that this article does not reflect customary international law. The most that can be argued is that it indicates developing law. The observations and comments by the Governments on the Draft Articles on State responsibility confirm this assumption. In particular, the Governments criticise that the draft article does not reflect that State practice seems to allow the payment of moral damages only as compensation for mental shock and anguish suffered (by

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[206] RIAA, Vol. XIX (1990), p. 199 at p. 213.
[207] See for example, comment of the German Government on Article 45 of the Draft Articles on State Responsibility by the International Law Commission, Document A/CN.4/488, p. 111, Footnote 85.
[208] ILR 82 (1990), p. 499 at p. 575.
[209] *Ibid.*

individuals).[210] Another point of disagreement is that the granting of substantive monetary satisfaction for direct moral injuries of States suggests a punitive function for satisfaction that is not supported by State practice or international judicial decisions.[211]

172. But even if Article 45 of the ILC Draft should be regarded as an indicator of customary international law, the claim by St. Vincent and the Grenadines for monetary satisfaction for the moral damages it alleges to have suffered as consequence of the Guinean actions is groundless. As Article 45(2 c) of the ILC Draft makes clear, substantive pecuniary satisfaction are only to be awarded in cases of gross infringement of the rights of the injured State. In its commentary, the International Law Commission has pointed to the exceptional character of this remedy and mentions the *Rainbow Warrior* Case as example for a gross infringement.[212]

173. This case is, however, not comparable with the present case. The *Rainbow Warrior* Case concerned the sinking of a ship in Auckland harbour by two French agents who had used false Swiss passports to enter New Zealand. The incident involved a violation of territorial sovereignty of New Zealand as well as the entry in that country by fraudulent means. The French actions caused serious public outrage both in New Zealand and the rest of the world.

174. The present case is completely different. Neither violated the Guinean authorities the territorial sovereignty of St. Vincent and the Grenadines, nor can it be claimed that Guinea deceived the M/V "SAIGA" in any way. Another important difference is that the M/V "SAIGA" was merely arrested and detained, whereas the "Rainbow Warrior" was sunk. Moreover, St. Vincent and the Grenadines did not expound that the arrest and the detention caused any public arousal in St. Vincent and the Grenadines or anywhere else.

175. As has been explained above, the Guinean authorities were enforcing its laws in the maritime zones off the Guinean coast with respect to an activity which has not been expressly regulated by the Convention. Article 59 of the Convention indicates that the balance of rights enjoyed by the coastal State and the international shipping community in the exclusive

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[210] See for example, comments by Germany and the United States, Document A/CN.4/488, pp. 111–112.
[211] See comments by Germany, Austria, the United States, *ibid*., pp. 111–114.
[212] ILC Yearbook, 1993, Vol. II, pp. 79–80.

economic zone is a matter of juridical and political delicacy. The question of the legal nature of bunkering in that zone is therefore one of controversy. In contrast thereto, the sinking of a ship in a harbour of another State is very clearly a grave violation of the State sovereignty. Furthermore, it should be mentioned in this context, that the M/V "SAIGA" voluntarily entered the Guinean exclusive economic zone for the purpose of bunkering with the knowledge the this activity was regarded unlawful by the Guinean authorities.

176. In case the Tribunal finds that the Guinean enforcement actions concerning the M/V "SAIGA" do not conform to international law, the Republic of Guinea submits for the above-mentioned reasons that its actions are not comparable to the sinking of the "RAINBOW WARRIOR" and do not constitute a grave violation of the rights of St. Vincent and the Grenadines.

SUBMISSIONS

FOR THESE REASONS, the Republic of Guinea adheres to her request that the International Tribunal should dismiss the Submissions of St. Vincent and the Grenadines in total and declares that St. Vincent and the Grenadines shall pay all legal and other costs the Republic of Guinea has incurred in the M/V "SAIGA" Cases nos. 1 and 2.

28 December 1998

[*Signed*]
HARTMUT VON BREVERN
Agent of the Republic of Guinea