INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**THE M/V "SAIGA" CASE**
**(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)**
**List of cases: No. 1**

PROMPT RELEASE

**JUDGMENT OF 4 DECEMBER 1997**

# 1997

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE DU NAVIRE «SAIGA»**
**(SAINT-VINCENT-ET-LES-GRENADINES c. GUINÉE)**
**Rôle des affaires : No. 1**

PROMPTE MAINLEVÉE

**ARRÊT DU 4 DÉCEMBRE 1997**

Official citation:

*M/V "SAIGA" (Saint Vincent and the Grenadines* v. *Guinea), Prompt release, Judgment, ITLOS Reports 1997,* p. 16

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*Navire «SAIGA» (Saint-Vincent-et-les-Grenadines c. Guinée), prompte mainlevée, arrêt, TIDM Recueil 1997,* p. 16

4 DECEMBER 1997
JUDGMENT

**M/V "SAIGA"**
**(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)**

PROMPT RELEASE

**NAVIRE «SAIGA»**
**(SAINT-VINCENT-ET-LES-GRENADINES c. GUINÉE)**

PROMPTE MAINLEVÉE

4 DÉCEMBRE 1997
ARRÊT

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**
YEAR 1997

4 December 1997

List of cases:
No. 1

# THE M/V "SAIGA" CASE
(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)

## JUDGMENT

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

In the M/V "SAIGA" case

*between*

Saint Vincent and the Grenadines,

*represented by*

Mr. Nicholas Howe, Solicitor, Partner, Stephenson Harwood, London, United Kingdom,

*as Agent;*

Mr. Yérim Thiam, Advocate, President of the Senegalese Bar, Dakar, Senegal,
Mr. Oliver Heeder, Attorney at Law, Partner, Büsing, Müffelmann & Theye, Bremen, Germany,

*as Counsel,*

and

Guinea,

*represented by*

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

*as Agent*;

Mr. Barry Alpha Oumar, Advocate, Conakry, Guinea,
Capt. Mamadou Salion Kona Diallo, Legal Adviser, Guinean Navy Headquarters, Conakry, Guinea,

*as Counsel*;

Capt. Ibrahim Khalil Camara, Commander, Naval Operations, Guinean Navy Headquarters, Conakry, Guinea,
Major Leonard Ismael Bangoura, Head of Customs Squad, Port of Conakry, Conakry, Guinea,
Mr. Mamadi Askia Camara, Head of Research and Regulations Division, Customs Service, Conakry, Guinea,

*as Advisers*,

THE TRIBUNAL,

composed as above,

after deliberation,

*delivers the following judgment:*

1. On 13 November 1997, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal by facsimile an Application under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") instituting proceedings against Guinea in respect of a dispute concerning the prompt release of the M/V *Saiga* and its crew.

2. Pursuant to article 24, paragraph 2, of the Statute of the Tribunal and to article 52, paragraph 2(a), and article 111, paragraph 4, of the Rules of the Tribunal, a certified copy of the Application was sent by special courier the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea, Conakry, and also in care of the Ambassador of Guinea to Germany.

3. In accordance with article 24, paragraph 3, of the Statute of the Tribunal, States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 19 November 1997, *inter alia* through Permanent Representatives to the United Nations.

4. The Application was entered in the List of cases under No. 1 and named the M/V "SAIGA".

5. The Application of Saint Vincent and the Grenadines included a request for the submission of the case to the Chamber of Summary Procedure. Guinea was duly notified by the Registrar in a note verbale dated 13 November 1997. Guinea did not notify the Tribunal of its concurrence with the request within the time-limit provided for in article 112, paragraph 2, of the Rules of the Tribunal.

6. In accordance with article 112, paragraph 3, of the Rules of the Tribunal, the President of the Tribunal, by Order dated 13 November 1997, fixed 21 November 1997 as the date for the opening of the hearing with respect to the Application, notice of which was communicated to the parties.

7. The original copy of the Application and documents in support were subsequently submitted by the Agent of Saint Vincent and the Grenadines in accordance with paragraph 10 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

8. By letter dated 20 November 1997 transmitted by facsimile the same day, the Minister of Justice of Guinea requested a postponement of the hearing on account of difficulties in the receipt of certain documentation.

9. In accordance with article 45 of the Rules of the Tribunal, the President of the Tribunal consulted the parties and ascertained their views with regard to the hearing.

10. Prior to the opening of the hearing, on 20 November 1997, the Tribunal held its initial deliberations in accordance with article 68 of the Rules of the Tribunal.

11. On 21 November 1997, the Tribunal opened the hearing at a public sitting at the City Hall in the Free and Hanseatic City of Hamburg and, by an Order of the same date, postponed the continuation of the hearing until 27 November 1997.

12. By letter dated 21 November 1997, the Registrar transmitted the said Order to the parties and informed the Minister for Foreign Affairs of Guinea that the Statement in response of Guinea, consistent with article 111, paragraph 4, of the Rules of the Tribunal, could be filed in the Registry not later than 24 hours before the date fixed for continuation of the hearing.

13. On 26 November 1997, Guinea transmitted by facsimile to the Tribunal its Statement in response. The same day, the Registrar sent a certified copy of the Statement in response to the Agent of Saint Vincent and the Grenadines. The original was filed in the Registry on 27 November 1997.

14. At two meetings with the representatives of the parties held on 26 and 27 November 1997, the President of the Tribunal ascertained the views of the parties as regards the procedure for the hearing and the presentation by each of the parties. The Agent of Saint Vincent and the Grenadines informed the President of its intention to call witnesses at the hearing. Pursuant to article 72 of the Rules of the Tribunal, information regarding those witnesses was transmitted to the Registrar on 26 and 27 November 1997.

15. On 26 and 27 November 1997, prior to the public sitting on 27 November 1997, additional written statements were filed in the Registry by the Agents of Saint Vincent and the Grenadines and of Guinea. The Registrar forthwith transmitted those statements to the other party.

16. At two public sittings held on 27 and 28 November 1997, the Tribunal was addressed by the following representatives of the parties:

*For Saint Vincent and the Grenadines:*
Mr. Nicholas Howe,
Mr. Yérim Thiam.
*For Guinea:*
Mr. Hartmut von Brevern,
Mr. Barry Alpha Oumar,
Capt. Ibrahim Khalil Camara,
Mr. Mamadi Askia Camara.

17. At the public sitting held on 27 November 1997, the following witnesses were called by Saint Vincent and the Grenadines and gave evidence:

Mr. Sergey Klyuyev, Second Officer of the M/V *Saiga* (examined by Mr. Thiam);
Mr. Mark Vervaet, ORYX Senegal S. A. (examined by Mr. Thiam).

A question was put by Mr. Barry Alpha Oumar to Mr. Vervaet who replied orally.

18. At the public sitting held on 27 November 1997, a map showing areas off the coast of Guinea was projected and commented on by the Agent of Saint Vincent and the Grenadines; a composite photograph of injured crew members of the M/V *Saiga* was also shown.

19. At a meeting held on 28 November 1997, the President of the Tribunal informed the Agents of the parties of the points or issues which the Tribunal would like the parties specially to address, in accordance with article 76 of the Rules of the Tribunal.

20. At the public sitting held on 28 November 1997, in replying to the first oral arguments made by each party on 27 November 1997, the parties also addressed the questions raised with the Agents of the parties by the President of the Tribunal. When doing so, the Agent of Saint Vincent and the Grenadines made reference to a map produced by him.

21. The presence of Their Excellencies Mr. Maurice Zogbélémou Togba, Minister of Justice of Guinea, Mr. Lamine Bolivogui, Ambassador of Guinea to Germany, and Mr. Lothar Golgert, Honorary Consul-General of Guinea in Hamburg, at the hearing and at consultations with the President of the Tribunal and the Registrar was noted.

22. Pursuant to article 67, paragraph 2, of the Rules of the Tribunal, copies of the Application and the Statement in response and documents annexed thereto were made accessible to the public from the date of opening of the oral proceedings.

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23. In the Application and in the Statement in response, the following submissions were presented by the parties:

*On behalf of Saint Vincent and the Grenadines,*
in the Application:

"The Applicant submits that the Tribunal should determine that the vessel, her cargo and crew be released immediately without requiring that any bond be provided. The Applicant is prepared to provide any security reasonably imposed by the Tribunal to the Tribunal itself, but in view of the foregoing seeks that the Tribunal do not determine that any security be provided directly to Guinea."

*On behalf of Guinea,*
in the Statement in response:

"Guinea committed no illegal act and no violation of the procedure; it sought and is still seeking to protect its rights. This is why it is requesting that it may please the Tribunal to dismiss the Applicant's action."

24. In their further statements, the following submissions and arguments were presented by the parties:

*On behalf of Saint Vincent and the Grenadines:*

"The Tribunal will be aware that under the Convention a coastal State is entitled to exercise limited and specific rights as a sovereign within its exclusive economic zone as prescribed in the Convention and in particular article 56 thereof. In this matter it is submitted that the Respondent has erred in two respects:

First, in so far as the Respondent may have jurisdiction over the "Saiga" pursuant to the provisions of the Convention, that it has failed to comply with the relevant provisions for the prompt release of the vessel and her crew upon the posting of a reasonable bond or other financial security;

Second, that the Respondent has wrongly purported to exercise sovereign jurisdiction within its exclusive economic zone beyond what is permitted by the Convention ... with the effect that it has interfered with the rights of others in its exclusive economic zone, including those of the "Saiga" flying the flag of the Applicant.

It is therefore submitted that the Tribunal may determine that the Respondent has failed to comply with the provisions of article 73, paragraph 2, of the Convention by not promptly releasing the "Saiga" and her crew upon the posting of a reasonable bond or other security, no such reasonable bond or other security having even been sought.

It is further submitted that the Tribunal may determine the amount, nature and form of bond or financial security to be posted for the release of the "Saiga" and her crew.... In this regard it is submitted

that it is also within the jurisdiction of the Tribunal to order that the "Saiga" be returned to her original state, that is with a cargo of gasoil on board, at the time of her prompt release and before any further bond or financial security is to be provided to secure her release."

*On behalf of Guinea:*

- "Messrs. Stephenson Harwood are not authorized according to article 110, paragraph 2, of the Rules of the Tribunal.
- It is doubtful whether Tabona Shipping Company Ltd. is the owner of the M/V Saiga.
- Article 73 of the Convention does not apply and there was no violation of this article by the Government of Guinea.
- Article 292 does not apply. The claimant has not alleged that the Government of Guinea has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. It is our understanding that article 292 only applies if for and on behalf of the State Party whose vessel has been detained, or on behalf of the owner of the vessel, a reasonable bond or other financial security has been posted or at least has been offered to the detaining State Party. No security or bond has been offered on behalf of the M/V Saiga.
- Article 292 of the Convention furthermore is not applicable, because the reference of the claimants as to article 73 of the Convention, which the detaining State allegedly has not complied with, is not an allegation in conformity with article 292. Article 73, paragraph 2, in conformity with article 292, paragraph 1, orders the prompt release of an arrested vessel and their crews only upon the posting of reasonable bond or other security. None has been posted by or on behalf of the M/V Saiga.
- If the Tribunal contrary to our opinion would answer its competence in the affirmative, then the Tribunal ... should determine that the allegation made by the Applicant is not well-founded. When arresting the M/V Saiga outside the Guinean waters the Government of Guinea made use of the right under article 111 of the Convention, namely the right of hot pursuit."

*

25. The events leading up to the present proceedings are as follows.

26. The M/V *Saiga* is an oil tanker flying the flag of Saint Vincent and the Grenadines. Its charterer at the relevant time was Lemania Shipping Group Ltd., registered in Geneva, Switzerland.

27. The certified extracts of the log book of the M/V *Saiga* were produced by Guinea and the entries therein were not contested by either party.

28. At the time of the incident with respect to which the Application is based, the M/V *Saiga* served as a bunkering vessel supplying fuel oil to fishing vessels and other vessels operating off the coast of Guinea.

29. In the early morning of 27 October 1997, the M/V *Saiga,* having crossed the maritime boundary between Guinea and Guinea Bissau, entered the exclusive economic zone of Guinea approximately 32 nautical miles from the Guinean island of Alcatraz. The same day, at the point 10°25'03" N and 15°42'06" W, between approximately 0400 and 1400 hours, it supplied gasoil to three fishing vessels, the *Giuseppe Primo*, the *Kriti* and the *Eleni S.*

30. On 28 October 1997, the M/V *Saiga* was arrested by Guinean Customs patrol boats. The arrest took place at a point south of the maritime boundary of the exclusive economic zone of Guinea. In the course of action, at least two crew members were injured. On the same day the vessel was brought into Conakry, Guinea, where the vessel and its crew were detained. Subsequently, two injured crew members were allowed to leave and the cargo was discharged in Conakry upon the orders of local authorities.

31. No bond or other financial security was requested by Guinean authorities for the release of the vessel and its crew or offered by Saint Vincent and the Grenadines. It was then that Saint Vincent and the Grenadines instituted the present proceedings under article 292 of the Convention.

32. An account of the facts relating to the arrest of the M/V *Saiga* and the charges against it was recorded by Guinean Customs authorities in a formal document headed "Procès-Verbal" bearing the designation "PV29" (hereinafter PV29). PV29 contains a statement obtained by interrogation by the Guinean authorities of the captain of the M/V *Saiga*.

33. In the course of the oral proceedings, the Tribunal was informed by the Agents of the parties that some of the crew members had left Guinea, that others remained on board and that the captain of the M/V *Saiga* was still detained.

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34. The statements of facts and the legal grounds presented by Saint Vincent and the Grenadines and Guinea in their written statements can be summarized as follows.

35. Saint Vincent and the Grenadines stated that the M/V *Saiga* did not enter the territorial waters of Guinea and that on 28 October 1997, from

0800 hours, it was drifting at 09°00' N and 14°59' W in the exclusive economic zone of Sierra Leone when it was attacked at about 0911 hours by two Customs patrol boats of Guinea. Saint Vincent and the Grenadines alleged that the Guinean authorities had no jurisdiction to take such action, that Guinea failed to notify the flag State of reasons for the detention and that Guinea did not comply with article 73, paragraph 2, of the Convention according to which "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security". According to the information contained in the Application, the owner of the M/V *Saiga* is Tabona Shipping Co. Ltd. c/o Seascot Shipmanagement Ltd., Glasgow, Scotland. The vessel is insured for a value of approximately 1.5 million United States dollars and was carrying a cargo of approximately 5,000 tons of gasoil of a value of approximately 1 million United States dollars.

36. Guinea contended that the Application had not been submitted in conformity with article 110 of the Rules of the Tribunal and that article 292 of the Convention was not applicable to the case. Guinea stated that the M/V *Saiga* was involved in smuggling, an offence under the Customs Code of Guinea, and that the detention had taken place after the exercise by Guinea of the right of hot pursuit in accordance with article 111 of the Convention. In this respect, it was alleged that the Guinean authorities had ordered the M/V *Saiga* to stop on 28 October 1997 at about 0400 hours, that the Guinean patrol boats started their pursuit at the point 09°22' N and 13°56'03" W and that the M/V *Saiga* was brought under control at the point 08°58' N and 14°50' W. Guinea questioned also the identity of the real owner of the vessel.

*

37. The Tribunal will commence by considering the question of its jurisdiction under article 292 of the Convention to entertain the Application. Article 292 of the Convention reads as follows:

> "*Article 292*
>
> *Prompt release of vessels and crews*
>
> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal

accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.

2. The application for release may be made only by or on behalf of the flag State of the vessel.
3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

38. In order to establish that the Tribunal has jurisdiction, it is necessary to verify certain conditions.

39. In this regard, the Tribunal first notes that Saint Vincent and the Grenadines and Guinea are both States Parties to the Convention. Saint Vincent and the Grenadines ratified the Convention on 1 October 1993 and Guinea ratified the Convention on 6 September 1985. The Convention entered into force for Saint Vincent and the Grenadines and Guinea on 16 November 1994.

40. Article 292 of the Convention requires that an application may be submitted to the Tribunal failing agreement of the parties to submit the question of release from detention to another court or tribunal within 10 days from the time of the detention.

41. The detention of the M/V *Saiga* and its crew commenced on 28 October 1997. On 11 November 1997, a letter was sent by facsimile to the Minister for Foreign Affairs of Guinea by Stephenson Harwood, Solicitors. In this letter, Stephenson Harwood informed the Minister for Foreign Affairs of Guinea that they had received "authority from the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines to proceed against the Government of Guinea before the International Tribunal for the Law of the Sea" and invited him "to secure the release of the vessel and crew ... immediately".

42. No reply was given to the above-mentioned letter and no agreement was reached between the parties to submit the question of the release to

another court or tribunal. The Tribunal finds therefore that the Application has met the requirement mentioned in paragraph 40 above.

43. Guinea maintains that the Agent of Saint Vincent and the Grenadines was not authorized in accordance with article 110, paragraph 2, of the Rules of the Tribunal, and questions the identity of the owner of the vessel.

44. Pursuant to article 110 of the Rules of the Tribunal, an application for prompt release of a vessel and its crew may be made by or on behalf of the flag State of the vessel. In this regard, the Tribunal notes that on 18 November 1997 a certified copy of the authorization of the Attorney General of Saint Vincent and the Grenadines on behalf of the Government of Saint Vincent and the Grenadines to the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines and the original of the authorization of the Commissioner for Maritime Affairs to the Agent were submitted to the Registrar and form part of the record. The Tribunal therefore dismisses the objection of Guinea. As far as the ownership of the vessel is concerned, the Tribunal notes that this question is not a matter for its deliberation under article 292 of the Convention and that Guinea did not contest that Saint Vincent and the Grenadines is the flag State of the vessel.

45. For the above reasons, the Tribunal finds that it has jurisdiction under article 292 of the Convention to entertain the Application.

*

46. Having dealt above with the question of the jurisdiction to entertain the Application, the main issue to be resolved by the Tribunal is whether the Application is admissible, that is, whether it falls within the scope of the other requirements set out in article 292 of the Convention.

47. The proceedings for prompt release of vessels and crews are characterized by the requirement, set out in article 292, paragraph 3, of the Convention that they must be conducted and concluded "without delay" and by the nature of their relationship to domestic proceedings and other international proceedings.

48. The Rules of the Tribunal give effect, in various ways, to the provision mentioned above that applications for release be dealt with without delay. Article 112, paragraph 1, provides that the Tribunal give priority to applications for prompt release over all other proceedings before the Tribunal. Article 112, paragraph 3, provides for the setting of the earliest possible date for an oral hearing, but not exceeding ten days from the receipt of the application. The same paragraph sets out the general rule that the oral hearing shall last no longer than one day for each party. Article 112, paragraph 4, provides that the judgment of the Tribunal shall be adopted as soon as possible and read at a sitting to be held not later than ten days after the closure of the oral hearing.

49. As regards the relationship of the proceedings under article 292 of the Convention to domestic proceedings, article 292, paragraph 3, states that the prompt release proceedings shall be "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". This provision should be read together with the provision of the same paragraph stating that the Tribunal "shall deal only with the question of release" and with the provision of paragraph 4 according to which "upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew". Consequently, this provision means that, while the States which are parties to the proceedings before the Tribunal are bound by the judgment adopted by it as far as the release of the vessel and the bond or other security are concerned, their domestic courts, in considering the merits of the case, are not bound by any findings of fact or law that the Tribunal may have made in order to reach its conclusions.

50. The independence of proceedings under article 292 of the Convention vis-à-vis other international proceedings emerges from article 292 itself and from the Rules of the Tribunal. The Rules deal with the proceedings for the prompt release of vessels and crews in a separate section (section E of Part III). These proceedings are thus not incidental to proceedings on the merits as are the proceedings for interim measures set out in article 290 which in the Rules are dealt with in section C of Part III, on "incidental proceedings". They are separate, independent proceedings. It cannot, however, be excluded that a case concerning the merits of the situation that led to the arrest of the M/V *Saiga* could later be submitted for a decision on the merits to the Tribunal or to another court or tribunal competent according to article 287 of the Convention. In the view of the Tribunal, this circumstance does not preclude it from considering the aspects of the merits it deems necessary in order to reach its decision on the question of release, but it does require that the Tribunal do so with restraint.

51. The possibility that the merits of the case may be submitted to an international court or tribunal, and the accelerated nature of the prompt release proceedings, considered above, are not without consequence as regards the standard of appreciation by the Tribunal of the allegations of the parties. The Tribunal in this regard considers appropriate an approach based on assessing whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purposes. By applying such a standard the Tribunal

does not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion. The standard indicated seems particularly appropriate in view of the fact that, in the proceedings under article 292, the Tribunal has to evaluate "allegations" by the applicant that given provisions of the Convention are involved and objections by the detaining State based upon its own characterization of the rules of law on the basis of which it has acted. It is clear to the Tribunal that it cannot base itself solely in this connection on the characterizations given by the parties. It can be added that applying such standard allows the Tribunal in the short time available to exercise the restraint referred to in paragraph 50 above.

52. As regards the requirement of alleged non-compliance with the provisions of the Convention for the prompt release of vessels upon the posting of a reasonable bond or other financial security, three provisions of the Convention correspond expressly to this description: article 73, paragraph 2; article 220, paragraphs 6 and 7; and, at least to a certain extent, article 226, paragraph 1(c).

53. Saint Vincent and the Grenadines, in relying upon article 292 of the Convention, refers to articles 73, 220 and 226. As an alternative, Saint Vincent and the Grenadines also relies on what could be termed a non-restrictive interpretation of article 292. According to this interpretation the applicability of article 292 to the arrest of a vessel in contravention of international law can also be argued, without reference to a specific provision of the Convention for the prompt release of vessels or their crews. Contravention of article 56, paragraph 2, of the Convention has been quoted in this respect by Saint Vincent and the Grenadines. In the view of Saint Vincent and the Grenadines, it would be strange that the procedure for prompt release should be available in cases in which detention is permitted by the Convention (articles 73, 220 and 226) and not in cases in which it is not permitted by it.

54. Guinea argues that the reference made by the Saint Vincent and the Grenadines to article 73 of the Convention is unfounded because a bond has not been posted and that article 292 is not applicable to the case which, in its opinion, concerns smuggling. Guinea in its oral statements argues that the arrest of the M/V *Saiga* was legitimate as it was executed at the conclusion of hot pursuit following a violation of customs laws in the contiguous zone of Guinea.

55. Saint Vincent and the Grenadines has not pursued its arguments concerning the applicability of articles 220 and 226 of the Convention. It remains therefore to consider the question of the applicability of article 73. Article 73 reads as follows:

"*Article 73*

*Enforcement of laws and regulations of the coastal State*

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

56. In light of article 73 of the Convention and the contentions of Saint Vincent and the Grenadines, the question to be considered can be stated as follows: is "bunkering" (refuelling) of a fishing vessel within the exclusive economic zone of a State to be considered as an activity the regulation of which falls within the scope of the exercise by the coastal State of its "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone"? If this were the case, violation of a coastal State's rules concerning such bunkering would amount to a violation of the laws and regulations adopted for the regulation of fisheries and other activities concerning living resources in the exclusive economic zone. The arrest of a vessel and crew allegedly violating such rule would fall within the scope of article 73, paragraph 1, of the Convention and the prompt release of the vessel and crew upon the posting of a reasonable bond or other security would be an obligation of the coastal State under article 73, paragraph 2. In case such prompt release is not effected by the coastal State, article 292 could be invoked.

57. Arguments can be advanced to support the qualification of "bunkering of fishing vessels" as an activity the regulation of which can be assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living

resources in the exclusive economic zone. It can be argued that refuelling is by nature an activity ancillary to that of the refuelled ship. Some examples of State practice can be noted. Article 1 of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific of 23 November 1989 defines "driftnet fishing activities" as *inter alia* "transporting, transshipping and processing any driftnet catch, and co-operation in the provision of food, *fuel* and other supplies for vessels equipped for or engaged in driftnet fishing" (emphasis added). As documented by Saint Vincent and the Grenadines, Guinea Bissau, in its decree-law No. 4/94 of 2 August 1994, requires authorization of the Ministry of Fishing for operations "connected" with fishing and Sierra Leone and Morocco routinely authorize fishing vessels to be refuelled offshore.

58. Arguments can also be advanced, even though Guinea did not address this issue, in support of the opposite view that bunkering at sea should be classified as an independent activity whose legal regime should be that of the freedom of navigation (or perhaps – when conducted in the exclusive economic zone – that mentioned in article 59 of the Convention). The position of States with exclusive economic zones which have not adopted rules concerning bunkering of fishing vessels might be construed as indicating that such States do not regard bunkering of fishing vessels as connected to fishing activities. In support of this view it could also be argued that bunkering is not included in the list of the matters to which laws and regulations of the coastal State may, *inter alia*, relate according to article 62, paragraph 4, of the Convention.

59. It is not necessary for the Tribunal to come to a conclusion as to which of these two approaches is better founded in law. For the purpose of the admissibility of the application for prompt release of the M/V *Saiga* it is sufficient to note that non-compliance with article 73, paragraph 2, of the Convention has been "alleged" and to conclude that the allegation is arguable or sufficiently plausible.

60. However, Guinea holds the view that the arrest of the M/V *Saiga* was in conformity with international law and that its release cannot be claimed on the basis of article 292 of the Convention. According to Guinea: (a) the bunkering must be qualified as an infringement of its customs legislation; (b) the bunkering took place in its contiguous zone (less than 24 nautical miles from the island of Alcatraz); and (c) the arrest was justified because it was effected following the exercise of the right of hot pursuit according to article 111 of the Convention.

61. The allegation based on the right of hot pursuit does not meet the same requirements of arguability (or of being of a sufficiently plausible character) as the contention considered above. While the coordinates of the position of the M/V *Saiga* at the time of the bunkering of the fishing vessels the *Giuseppe Primo*, the *Kriti* and the *Eleni S.* in the log book of the M/V *Saiga* and the examination of the relevant maps suggest that the bunkering was in all likelihood carried out within the contiguous zone of Guinea, the arguments put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, are not tenable, even *prima facie*. Suffice it to say that according to PV29, the Procès Verbal of the Guinean authorities, the first viewing of the M/V *Saiga* by the Guinean patrol boats was by radar at 0400 hours on 28 October 1997, while the bunkering was carried out, according to the log book, between 0400 and 1350 hours on 27 October 1997. In PV29, as well as in its Statement of response, Guinea thus recognizes that the pursuit was commenced one day after the alleged violation, at a time when the M/V *Saiga* was certainly not within the contiguous zone of Guinea, as shown in the vessel's log book.

62. However, the Tribunal is not called upon to decide whether the arrest of the M/V *Saiga* was legitimate. It is called upon to determine whether the detention consequent to the arrest is in violation of a provision of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

63. It has already been indicated that laws or regulations on bunkering of fishing vessels may arguably be classified as laws or regulations on activities within the scope of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone. The question now to be addressed is the following: are there such laws and regulations in Guinea and, if so, is it relevant that Guinea qualifies them as "customs" or "smuggling" regulations? The main provisions that are relevant in this connection are those upon which the authorities of the detaining State relied at the time of arrest. It emerges from PV29 that the captain of the M/V *Saiga* is accused of a violation of article 40 of the Maritime Code and Law 94/007/CTRM of 25 March 1994 which prohibits unauthorized import, transport and distribution of fuel in the Republic of Guinea (article 1).

64. The notion that bunkering is seen as an activity ancillary to fishing and connected thereto is not unknown in the law of Guinea. Article 4 of Law 94/007/CTRM specifically makes it an offence for the owners of fishing boats holding a fishing licence issued by the Guinean Government to refuel or attempt to refuel by means other than those legally authorized. The Guinean Law 95/13/CTRM of 15 May 1995 (Code of Maritime

Fishing, published in the *Journal officiel de la République de Guinée* dated 10 June 1995) provides that the definition of "fishing" includes "operations connected to fishing" (article 3, paragraph 1), which are defined as including, *inter alia*, "the supplying of fishing vessels or any other activity of logistical support of fishing vessels at sea" (article 3, paragraph 1(c)). Article 60, paragraph 1(k), defines as "fishing violations" violations of rules concerning operations connected to fishing. Article 29 states that "operations connected to fishing" are subject to licence. As article 5 of Law 94/007/CTRM refers to a "licence for the supply of fuel other than that provided for in article 30 [now article 29] of the Code of Maritime Fishing", there is no doubt that the licence mentioned in article 29 may include the supply of fuel. Moreover, several provisions of Order No. 039 PRG/85 of 23 February 1985, General Regulations for the Implementation of the Maritime Fisheries Code of Guinea, mention operations for the "logistical support" of fishing (article 2, section 1(c) and section 7; article 4, section 2(c)) and subject them to authorization (article 12).

65. From the pleadings and documents submitted by Guinea there also emerge indications that the violation of which the M/V *Saiga* was accused was seen as a violation concerning its rights in the exclusive economic zone.

66. Repeatedly, Guinea relies in its pleadings on article 40 of its Maritime Code, which defines Guinea's rights in the exclusive economic zone along the lines of article 56 of the Convention. Article 73 is part of a group of provisions of the Convention (articles 61 to 73) which develop in detail the rule in article 56 as far as sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone are concerned. In the context of a violation concerning the bunkering of fishing vessels, a reference to article 40 of the Guinean Maritime Code, in view of its textual correspondence with article 56 of the Convention, must be read as dealing with the matters covered by article 73 of the Convention.

67. In this connection it should be recalled that Guinea, in rejecting in its pleadings the argument of Saint Vincent and the Grenadines that article 73 applies, does not challenge directly the applicability of article 73 but rather confines itself to the argument that a bond had not been posted or offered.

68. PV29 includes article 40 of the Maritime Code among the provisions which the captain of the M/V *Saiga* is accused of violating. How could this indication be relevant unless it meant that the violations of the substantive provisions listed afterwards are violations that are such when committed in the exclusive economic zone, and, consequently, relate to matters concerning the rights and jurisdiction of the coastal State in such zone?

Moreover, PV29 begins by referring to information received by the Guinean patrol boat on the "illicit presence of a tanker in the exclusive economic zone of [Guinean] waters". How could the presence of a tanker in the exclusive economic zone be seen as illicit were it not for suspected violation of the sovereign rights and jurisdiction of Guinea in the exclusive economic zone?

69. Of the several matters encompassed in the sovereign rights and jurisdiction of Guinea in the exclusive economic zone to which article 40 of the Maritime Code refers through its connection with article 56 of the Convention, "sovereign rights to explore, exploit, conserve and manage the living resources" as mentioned in article 73 are the only ones that can be relevant in the present case in the light of the Guinean legislation referred to in paragraph 64 above and of the fact that it was fishing vessels that the M/V *Saiga* refuelled.

70. The allegation that the infringement by the M/V *Saiga* took place in the contiguous zone and that the vessel was captured legitimately after hot pursuit in accordance with article 111, paragraph 1, of the Convention was advanced by Guinea only at the final stage of oral proceedings. This makes the classification of the laws allegedly violated as relating to "customs" or "smuggling" rather doubtful. From the point of view of facts, the only indication that the bunkering of the fishing vessels took place in the contiguous zone is the position given in the M/V *Saiga*'s log book that became known to the Guinean authorities after, and not before, the arrest of the vessel. As late as in its Statement in response, Guinea indicated that the alleged infringement took place in its exclusive economic zone. As the position of the bunkering is close to the 24-nautical-mile limit measured from the low-water line of the island of Alcatraz, only a very accurate observation could have established that the bunkering took place in the contiguous zone. There is no evidence of such observation.

71. In light of the independent character of the proceedings for the prompt release of vessels and crews, when adopting its classification of the laws of the detaining State, the Tribunal is not bound by the classification given by such State. The Tribunal can, on the basis of the arguments developed above, conclude that, for the purposes of the present proceedings, the action of Guinea can be seen within the framework of article 73 of the Convention.

72. Why does the Tribunal prefer the classification connecting these laws to article 73 of the Convention to that put forward by the detaining State? The answer to this question is that the classification as "customs" of the prohibition of bunkering of fishing vessels makes it very arguable that, in view of the facts referred to in paragraphs 61 and 70 above, the Guinean authorities acted from the beginning in violation of international law, while the classification under article 73 permits the assumption that Guinea was convinced that in arresting the M/V *Saiga* it was acting within its rights under the Convention. It is the opinion of the Tribunal that given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter.

73. Having decided that the argument of Saint Vincent and the Grenadines based on article 73 of the Convention is well founded, it is unnecessary for the Tribunal to adopt a position on the non-restrictive interpretation of article 292 of the Convention referred to in paragraph 53 above.

74. As a subsidiary argument, Guinea claims that it arrested the vessel in compliance with Security Council Resolution 1132 (1997) of 8 October 1997. In paragraph 6 of this resolution, the Security Council decides "that all States shall prevent the sale or supply to Sierra Leone, by their nationals or from their territories, or using their flag vessels or aircraft, of petroleum or petroleum products and arms and related materials of all types". According to Guinea, the M/V *Saiga* "hid in Sierra Leone waters" when pursued by the Guinean vessels for alleged infringements of Guinean law in Guinean waters (pleading of 27 November 1997). It does not, therefore, seem tenable that the purpose of Guinea was to prevent the M/V *Saiga* from performing illicit activities in Sierra Leone.

75. It remains for the Tribunal to consider the submission of Guinea that article 73 of the Convention cannot form a basis for the application because a bond or other security has not been offered or posted.

76. According to article 292 of the Convention, the posting of the bond or security is a requirement of the provisions of the Convention whose infringement makes the procedure of article 292 applicable, and not a requirement for such applicability. In other words, in order to invoke article 292, the posting of the bond or other security may not have been effected in fact, even when provided for in the provision of the Convention the infringement of which is the basis for the application.

77. There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable.

78. In the case under consideration Guinea has not notified the detention as provided for in article 73, paragraph 4, of the Convention. Guinea has refused to discuss the question of bond and the ten-day time-limit relevant for the application for prompt release has elapsed without the indication of willingness to consider the question. In the circumstances, it does not seem possible to the Tribunal to hold Saint Vincent and the Grenadines responsible for the fact that a bond has not been posted.

79. For the above reasons, the Tribunal finds that the application is admissible, that the allegations made by Saint Vincent and the Grenadines are well founded for the purposes of these proceedings and that, consequently, Guinea must release promptly the M/V *Saiga* and the members of its crew currently detained or otherwise deprived of their liberty.

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80. The Tribunal can then consider the question of whether a bond or other security must be posted and, if so, the nature and amount of the bond or security.

81. Such release must be effected upon the posting of a reasonable bond or other financial security. The Tribunal cannot accede to the request of Saint Vincent and the Grenadines that no bond or financial security (or only a "symbolic bond") should be posted. The posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings.

82. According to article 113, paragraph 2, of the Rules of the Tribunal, the Tribunal "shall determine the amount, nature and form of the bond or financial security to be posted". The most important guidance in this determination is the indication contained in article 292, paragraph 1, of the Convention that the bond or other financial security must be "reasonable". In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.

83. In considering such overall balance of amount, form and nature of the bond or financial security, the Tribunal must take account of the fact that the gasoil carried by the M/V *Saiga* has been discharged in the port of Conakry by order of the Guinean authorities. According to documents produced by Saint Vincent and the Grenadines and not contested by Guinea,

the discharge of the full load of the M/V *Saiga* of 4,941.322 metric tons of gasoil, of density 0.8560 at 15°C, was completed on 12 November 1997.

84. Taking into consideration the commercial value of the gasoil discharged and the difficulties that might be incurred in restoring the gasoil to the holds of the M/V *Saiga*, it is reasonable, in the view of the Tribunal, that the discharged gasoil, in the quantity mentioned above, shall be considered as a security to be held and, as the case may be, returned by Guinea, in kind or in its equivalent in United States dollars at the time of judgment.

85. In view of the circumstances, the Tribunal considers reasonable that to this security there should be added a financial security in the amount of four hundred thousand (400,000) United States dollars, to be posted in accordance with article 113, paragraph 3, of the Rules of the Tribunal, in the form of a letter of credit or bank guarantee, or, if agreed by the parties, in any other form.

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86. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

*Finds* that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed by Saint Vincent and the Grenadines on 13 November 1997.

(2) By 12 votes to 9,

*Finds* that the Application is admissible;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

(3) By 12 votes to 9,

*Orders* that Guinea shall promptly release the M/V *Saiga* and its crew from detention;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

(4) By 12 votes to 9,

*Decides* that the release shall be upon the posting of a reasonable bond or security;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

(5) By 12 votes to 9,

*Decides* that the security shall consist of: (1) the amount of gasoil discharged from the M/V *Saiga*; and (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this fourth day of December, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and the Government of Guinea, respectively.

(*Signed*) Thomas A. MENSAH,
President.
(*Signed*) Gritakumar E. CHITTY,
Registrar.

*President* MENSAH availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*Initialled*) T.A.M.

*Vice-President* WOLFRUM and *Judge* YAMAMOTO, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their collective dissenting opinion to the Judgment of the Tribunal.

(*Initialled*) R.W.
(*Initialled*) S.Y.

*Judges* PARK, NELSON, CHANDRASEKHARA RAO, VUKAS and NDIAYE, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their collective dissenting opinion to the Judgment of the Tribunal.

(*Initialled*) C.H.P.
(*Initialled*) L.D.M.N.
(*Initialled*) P.C.R.
(*Initialled*) B.V.
(*Initialled*) T.M.N.

*Judge* ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*Initialled*) D.H.A.