handcuffed, but subsequently released without charge. The bailiff sued for assault and wrongful imprisonment. An assistant recorder held that the police officer was entitled to act as he had, since there were reasonable grounds to fear that a breach of the peace would otherwise occur. An appeal was allowed, and a number of principles articulated. The power of arrest for breach of the peace is now an exceptional one, only to be exercised in the clearest of circumstances against a person not at the time acting unlawfully. The threat must come from the person about to be arrested. His conduct must clearly interfere with the rights of others; its natural consequence must be violence from a third party which was not wholly unreasonable; and the conduct of the person to be arrested must be unreasonable. Applying these principles, it was plain that the bailiff was perfectly within his rights to act as he did. He was not interfering with the rights of the debtor in any way unlawfully. If anything, the recalcitrant debtor would have been the cause of the unlawful violence were any used.

The principles thus articulated are greatly to be welcomed. They might, perhaps, make the task of the policemen on the spot slightly more difficult. But they might also alert the police to the fact that the protection of free speech is not merely a matter of discretion but of obligation on their part, and the unfortunate *Duncan* v. *Jones* will have been trimmed to size.

A.T.H. SMITH

ITLOS FLAGS ITS INTENT

THE M/V "SAIGA" (No. 2) (*Saint Vincent and the Grenadines* v. *Guinea*) (1999) 38 I.L.M. 1323 was, on the facts if not on the docket, the continuation and conclusion of *The M/V "Saiga"* 110 I.L.R. 736, the first case to be heard by the International Tribunal for the Law of the Sea (ITLOS) established under the 1982 Convention on the Law of the Sea. The cases arose out of an incident in which the *Saiga*—a Cypriot-owned, Scottish-managed and Swiss-chartered tanker flying the flag of Saint Vincent and the Grenadines—was detected refuelling fishing vessels at sea ("bunkering") in the Exclusive Economic Zone, and in violation of the customs laws, of Guinea. Guinean patrol craft forcibly arrested the *Saiga*, injuring a Ukrainian crewman and a Senegalese painter, and escorted the ship to port, where its Ukrainian master was convicted of customs offences. As well as a suspended sentence of

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six months' imprisonment, the court imposed a substantial fine, seizing the vessel and confiscating its cargo by way of guarantee.

In the earlier "*Saiga*" case, on the question of prompt release, the Tribunal found for Saint Vincent and the Grenadines. But it was not until just before an order on provisional measures, in the first phase of *The M/V "Saiga" (No. 2)*, that the Guinean authorities actually released the vessel.

At the merits stage, Saint Vincent and the Grenadines asked the Tribunal to adjudge and delcare, *inter alia*, that (subject to limited exceptions found in the Convention) the customs and contraband laws of Guinea were in no circumstances to be applied or enforced in its Exclusive Economic Zone; that the actions of Guinea in attacking the *Saiga* and its crew, in arresting and detaining the ship, and in removing its cargo of gasoil violated the right of Saint Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in the Convention; and that Guinea was liable for damages as a result of the alleged violations.

Guinea challenged the claim's admissibility on the grounds of the nationality of the ship at the time of arrest. It was undisputed that a provisional certificate of Vincentian registration had expired and so, at least on its face, had the *Saiga*'s entry in the ships register of Saint Vincent and the Grenadines. According to Guinea, this denied the former State standing to bring the case.

The ship's nationality assumed added importance in the light of two rulings later in the judgment. First, as to the flag State's right to seek reparation for loss or damage caused to its ships by the acts of other States, the Tribunal held that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant." Second, the Tribunal held that the rule codified in Article 95 of the Convention—that local remedies must be exhausted before a State may bring a claim against another by way of diplomatic protection—did not apply. This was not a case of diplomatic protection: the alleged breaches by Guinea were all direct violations of the rights of Saint Vincent and the Grenadines as a flag State under the Convention. Nor were local remedies required to be exhausted where, as here (as held later), the acts complained of took place outside the respondent State's jurisdiction.

In determining the *Saiga*'s nationality, the Tribunal applied Article 91 of the Convention, codifying general international law, which leaves to each State exclusive jurisdiction over the grant of its nationality to ships. On the facts, the (perhaps credulous)

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Tribunal was persuaded that, under the law of Saint Vincent and the Grenadines, a vessel once registered remained so until deleted from the register. The expiry of a provisional certificate of registration and of an entry in the register did not deny a ship the Vincentian flag, a conclusion criticised in the separate and the dissenting opinions. As for other evidence deemed persuasive, the conduct of St Vincent and the Grenadines in acting as the *Saiga*'s flag State in every phase of the proceedings, and the fact that at no time before its counter-memorial did Guinea seek to challenge this, reinforced the Tribunal's conclusion that the vessel had Vincentian nationality.

Guinea, however, argued in the alternative that there was no "genuine link" between the *Saiga* and Saint Vincent and the Grenadines, even if the vessel *was* registered there. The requirement of a genuine link is found in Article 91 (1) of the Convention:

> Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Guinea denied any obligation to recognise the *Saiga*'s nationality; *vis à vis* Guinea, Saint Vincent and the Grenadines' claim would therefore not be admissible. This argument rested on the fact of the ship's foreign ownership, management and charter, and on the legal assertion that, in the absence of prescriptive and enforcement jurisdiction over the owner and operator of a ship, a flag State cannot fulfil its obligations under the Convention, and so has no genuine link with the vessel. Addressing this proposition, the Tribunal noted that Article 91 (1) did not provide the answer. Recalling, however, the *travaux préparatoires* of Article 5 (1) of the 1958 Convention on the High Seas, the precursor to Article 91 (1) of the Convention, the Tribunal pointed to the non-adoption in the final text of a draft requirement that "*for purposes of recognition of the national character of the ship by other States*, there must exist a genuine link between the state and the ship". The Tribunal concluded that:

> the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

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In sum, it was not open to Guinea to refuse to recognise the *Saiga*'s Vincentian nationality.

This conclusion of law is not without its problems. The Tribunal was right to consider the unadopted phrasing; it went too far in drawing so firm a conclusion. Redundancy is one plausible ground for the redraft: the *Nottebohm* case [1955] I.C.J. 4 had already done the omitted wording's job. More to the point, whatever *Nottebohm*'s status today, the overarching doctrine of good faith continues to condition a State's competence to grant its nationality. It is a condition enforceable by an international tribunal—indeed, a condition which might have been enforced in this case.

Yet the Tribunal had reason to be cautious. On the facts, it was not satisfied anyway that the evidence supported the denial of a genuine link; and Guinea never framed its argument as one of good faith. Invocation of that doctrine by the Tribunal would have been obiter, *proprio motu* and highly controversial. (It is not without relevance that the majority in the first "*Saiga*" case had been excoriated by an influential minority for just this sort of *sua sponte* bombshell.) The Tribunal was well aware of the political background to the case in the long-standing controversy over "flag of convenience" or "open registry" States. The ICJ had side-stepped the issue in the *Constitution of the Maritime Safety Committee of IMCO* advisory opinion [1960] I.C.J. 150; and, as noted by the Tribunal, three post-Convention treaties had left it unresolved.

In the event, having found the claim admissible, and applying the plain meaning of the Convention along with orthodox international jurisprudence, the Tribunal had little trouble in holding that Guinea had violated the rights of Saint Vincent and the Grenadines under the Convention. But although requested to do so by the parties, the Tribunal pointedly declined to declare on the widespread and lucrative practice of offshore bunkering.

On the whole, the Tribunal's judgment, if not altogether rigorous, stuck to the dispute at hand, avoiding gratuitous excursions into lawmaking. In its handling of general international law, *The M/V "Saiga" (No. 2)* should calm those concerned at the proliferation of international tribunals. ITLOS will follow the lead where this is clear and tread warily where it is not.

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