

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**THE M/T “HEROIC IDUN” (NO.2) CASE**

**REPUBLIC OF THE MARSHALL ISLANDS / REPUBLIC OF EQUATORIAL GUINEA**

MEMORIAL OF THE REPUBLIC OF THE MARSHALL ISLANDS

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# MEMORIAL OF THE MARSHALL ISLANDS

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## PART I

### CHAPTER 1

#### INTRODUCTION

1. This present dispute between the Republic of the Marshall Islands (“**Marshall Islands**”) and the Republic of Equatorial Guinea (“**Equatorial Guinea**”) concerning the M/T “*Heroic Idun*” was submitted to a Special Chamber of the International Tribunal for the Law of the Sea (“**ITLOS**” or the “**Tribunal**”) pursuant to a Special Agreement dated 18 April 2023.

2. The dispute originates from the interception on 12 August 2022 of the M/T “*Heroic Idun*,” a vessel flagged in the Marshall Islands (IMO number: 9858058) (“*Heroic Idun*” or “**the Vessel**”), and her crew in the exclusive economic zone (“**EEZ**”) of São Tomé and Príncipe by an Equatoguinean naval vessel, the forcing of the Vessel at gunpoint into Luba anchorage off the coast of Bioko Island in Equatorial Guinea, the detention of the Vessel and her crew in Equatorial Guinea for 12 weeks (92 days) until 11 November 2022 and the unlawful transfer of the Vessel and her crew to Nigeria, where they were detained until 27 May 2023.

3. **Section I** of this Chapter briefly describes the procedural history and **Section II** sets out the structure of this Memorial.

#### I. Procedure

4. The Marshall Islands and Equatorial Guinea are both States Parties to the 1982 United Nations Convention on the Law of the Sea (“**UNCLOS**” or “**the Convention**”), having, respectively, acceded to the Convention on 9 August 1991 and ratified it on 21 July 1997.

5. As neither party had made declarations under Article 297, the Marshall Islands initiated arbitral proceedings under Articles 286-287 and Annex VII of the Convention by a Notification and Statement of Claim dated 18 December 2022.

6. Neither the Marshall Islands nor Equatorial Guinea has made any declaration pursuant to Article 287(1) of UNCLOS. Article 287(3) therefore applies, according to which:

A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

7. By Special Agreement dated 18 April 2023, which entered into force on the same date (“**the Special Agreement**”), the Marshall Islands and Equatorial Guinea agreed to transfer the dispute to a Special Chamber of ITLOS constituted in accordance with the Special Agreement, to be formed pursuant to Article 15(2) of the Statute of the Tribunal. The Parties requested that ITLOS accede to their request.

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8. By Order dated 27 April 2023 the Tribunal decided to accede to the request of the Marshall Islands and Equatorial Guinea to form a Special Chamber to deal with the dispute concerning the “*Heroic Idun*” and her crew, composed as follows:

President Judge Albert J. Hoffman

Judges Judge Maria Teresa Infante Caffi

Judge Kathy-Ann Brown

Judge ad hoc Mr Guðmundur Eiríksson (nominated by the Marshall Islands)

Judge ad hoc Mr Philippe Couvreur (nominated by Equatorial Guinea).

9. The Tribunal declared the Special Chamber as composed above duly constituted (“**the Chamber**”) and decided that the proceedings before the Chamber shall be governed by the provisions contained in the ITLOS Statute and Rules.

10. Following consultations with the Parties on 17 May 2023, by Order dated 19 May 2023, the President of the Chamber fixed the time limits for the filing of the Memorial by the Marshall Islands and the Counter-Memorial by Equatorial Guinea as 20 November 2023 and 20 May 2024, respectively. The time-limits for the Reply and the Rejoinder were left to be decided at a later stage.

11. The Special Agreement made no provision for preliminary objections. Accordingly, in accordance with paragraph 4 of the Order dated 27 April 2023, Article 97(1) of the ITLOS Rules applies. The time-limit for Equatorial Guinea to file preliminary objections expired on or about 17 July 2023, without Equatorial Guinea having filed any preliminary objections.

12. On 9 November 2023, the Marshall Islands made an application for an extension for filing the Memorial, to 18 December 2023. This was granted by the President of the Chamber by Order dated 16 November 2023. The present Memorial is submitted in accordance with the Orders of 19 May and 16 November 2023.

## II. Structure of the Memorial

13. The Memorial consists of five volumes. The present Volume I comprises the main text; the remaining four volumes contain the annexes.

14. Volume I is comprised of four Parts and eight Chapters.

15. Part II in Chapter 2 sets out the facts.

16. Part III, in Chapter 3, explains why the Chamber enjoys jurisdiction over this dispute and why the claims are admissible and, in Chapter 4, addresses the applicable law.

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17. The statement of the law, Equatorial Guinea's breaches of the law, are then set out in Part IV, in Chapters 5-7.

18. At its core, the dispute between the Marshall Islands and Equatorial Guinea concerns Equatorial Guinea's interception and diversion of the "*Heroic Idun*" and her crew in the EEZ of a third State, contrary to the principles of freedom of navigation and exclusive flag State jurisdiction, and the unlawfulness of all subsequent measures adopted by Equatorial Guinea in respect of the "*Heroic Idun*" and her crew. This claim is addressed in Chapter 5.

19. Without prejudice to that, Equatorial Guinea's conduct in respect of the "*Heroic Idun*" and her crew also involved other, distinct and separate breaches of the Convention and applicable law. Equatorial Guinea's excessive exercise of prescriptive jurisdiction in breach of the Convention is addressed in Chapter 6 of Part IV.

20. The remaining claims are addressed in Chapter 7, including the failure to respect the principles of reasonableness and humanity in the exercise of enforcement measures; breach of the obligation in Article 56(2) of UNCLOS to have due regard for the rights and duties of the Marshall Islands in relation to the penalty and fine that Equatorial Guinea imposed for alleged conduct in its EEZ; failure to respect the human rights of the crew; failure to comply with Equatorial Guinea's obligations under various International Maritime Organization ("**IMO**") instruments, in particular the Convention for the Safety of Life at Sea 1973, and its 1978 and 1988 Protocols (referred to collectively as "**SOLAS**"), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 ("**STCW**") and the Convention on the International Regulations for Preventing Collisions at Sea 1972 ("**COLREGS**"); breach of the obligation in Article 225 of UNCLOS to avoid adverse consequences in the exercise of enforcement measures against a vessel; failure to comply with the obligation to notify the flag State of enforcement measures against its vessel and crew; failure to comply with the obligation to release vessels promptly without undue delay; and breach of the obligation under general international law and Articles 279, 286, 288, 292 and 300 of UNCLOS to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings. Insofar as the Marshall Islands relies on international treaties and other applicable customary rules or principles of international law outside of the Convention, for example the International Covenant on Civil and Political Rights 1966 ("**ICCPR**"), and contends that Equatorial Guinea's conduct which is incompatible with those obligations breaches the Convention, the grounds on which it does so are explained in general terms in the applicable law section and set out in respect of each claim as relevant.

21. The remedies sought by the Marshall Islands are set out in Chapter 8 of Part IV.

22. The Memorial concludes with the Marshall Islands' Submissions.

23. It will be plain from the statement of the facts that the events giving rise to this dispute and the Marshall Islands' claims in this case took place across the maritime zones and territories of three States, Nigeria, São Tomé and Príncipe and Equatorial Guinea. What happened in Nigeria and the actions of various of its officials form part of the context and factual matrix and, in part, explain the damage and injuries suffered by the Marshall Islands as a consequence of Equatorial Guinea's wrongful acts. However, the subject matter of this dispute and the Marshall Islands'

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claims solely concerns the wrongfulness of Equatorial Guinea's conduct in respect of the Marshall Islands. The issues to be determined solely concern Equatorial Guinea's responsibility to the Marshall Islands for its wrongful acts in breach of the Convention and the legal consequences entailed by those wrongful acts.

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## PART II: THE FACTS

### CHAPTER 2

#### STATEMENT OF FACTS

##### I. The “*Heroic Idun*”

24. The “*Heroic Idun*” is a very large crude carrier (“VLCC”) with a double hull.<sup>1</sup> It was built in 2020 and has a gross tonnage of 156,237 metric tons. It is flagged in the Marshall Islands.<sup>2</sup>

25. The Vessel is owned by Idun Maritime Limited, an Isle of Man company (“**the Owners**”), which is also registered in the Marshall Islands as a “Foreign Maritime Entity.” It is managed by OSM Ship Management AS, a Norwegian company (“**the Managers**”).<sup>3</sup>

26. At the time of its interception and detention by Equatorial Guinea, the “*Heroic Idun*” was time chartered to Mercuria Shipping Pte Limited (“**Mercuria**”), a large international commodities trader, which sub-chartered the Vessel to BP Shipping Ltd (“**BP**”), British Petroleum’s commodities trading division.<sup>4</sup> (For ease of reference, Mercuria and BP are referred to together in this Memorial as the “**Charterers**.”) At the time of its interception and detention by Equatorial Guinea, the Vessel was carrying a 26-member crew of Indian, Sri Lankan, Filipino and Polish nationality.<sup>5</sup>

##### II. Events prior to the interception, diversion and detention of the “*Heroic Idun*” and crew

27. On 4 August 2022, the Vessel received voyage orders to load crude oil at Akpo Offshore Terminal (“**Akpo**” or the “**Terminal**”) in Nigeria’s EEZ on 8 August 2022.<sup>6</sup> Akpo is 71NM off the coast of Nigeria, south of the mouth of the Barbara River. The Vessel arrived near Akpo on the evening of 7 August 2022, requested and received permission from the Terminal to enter its waiting area, and then commenced drifting while waiting to load.<sup>7</sup>

28. The next day, on 8 August 2022, the Terminal notified the Master that there was no cargo nomination for the Vessel yet, so it asked the Master to move the Vessel 12 NM clear of the Terminal and wait there until the Terminal received the necessary nomination instructions.<sup>8</sup> The Master was very wary of drifting more than 10 NM away from the Terminal (i.e., more than 10 NM

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<sup>1</sup> First Witness Statement of the Master, 15 December 2023 (“**Master-1**”), paras. 7 and 10 (**Annex RMI/-1**). See a picture of the “*Heroic Idun*” at **Annex MT/-2**.

<sup>2</sup> Master-1, para. 10 (**Annex RMI/-1**).

<sup>3</sup> First Witness Statement of Eivind Kulblik, 13 December 2023 (“**Kulblik-1**”), para. 1 (**Annex RMI-2**).

<sup>4</sup> Master-1, para. 11 (**Annex RMI/-1**); First Witness Statement of Stephen Askins, 14 December 2023 (“**Askins-1**”), para. 6 (**Annex RMI/-3**).

<sup>5</sup> Master-1, para. 11 (**Annex RMI/-1**). A full crew list is annexed at **Annex RMI/-4**.

<sup>6</sup> Master-1, para. 20 (**Annex RMI/-1**).

<sup>7</sup> Master-1, para. 31 (**Annex RMI/-1**). See also the very high frequency (“VHF”) radio log of the Vessel for the period 23 July 2022 to 13 August 2022 (“VHF log”) at **Annex MT/-3**.

<sup>8</sup> Master-1, para. 38 (**Annex RMI/-1**); VHF log (**Annex MT/-3**).

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away from the floating storage and offloading unit (“FPSO”)<sup>9</sup> because he knew it would put the Vessel outside the ‘Maritime Identification Zone’ (“MIZ”) in a high risk area for piracy (“HRA”)<sup>10</sup> without the Terminal’s security cover.<sup>11</sup> The Master was able to persuade the Terminal that the Vessel should move only 10 NM away from the Terminal (that is, just outside the Terminal MIZ) and wait for clearance.<sup>12</sup> The Vessel stayed nearby the Terminal in accordance with Charterers instructions. Given the dangers of being in the HRA, the Master kept the engines of the Vessel ready in case she needed to speed up to escape a pirate attack, and he posted an extra lookout on the bridge.<sup>13</sup>

29. Later that evening, at 21:16 LT, an unidentified vessel approached and contacted the “*Heroic Idun*” on VHF radio purporting to be a Nigerian Navy “warship” / “patrol ship,” but the crew was unable to identify it as such.<sup>14</sup> The name given by the unidentified vessel was understood by the Master to be “*Agola*,” with a search online revealing no Nigerian naval ship of that name (in any event, the use of VHF radio alone is not sufficient to identify positively the name of a vessel).<sup>15</sup> Further, the ship could not be clearly seen in the darkness (there was no moon and the sky was cloudy):<sup>16</sup> the Master could only see the navigational lights on the ship.<sup>17</sup> Most importantly, the ship had its Automatic Identification System (“AIS”) turned off, a well-known indicator of suspicious activity.<sup>18</sup> The general concern was that the unidentified vessel could be a pirate vessel pretending to be the Nigerian Navy (and, indeed, its subsequent, erratic behaviour suggested as much).<sup>19</sup>

30. The Master of the “*Heroic Idun*” was asked a number of questions over VHF radio by the unidentified vessel, including whether he had the necessary clearance documents. He explained that he did not, which was why the “*Heroic Idun*” was slightly more than 10 NM outside the Terminal area (the Vessel was 10.4 NM away), until the clearances could be resolved. The unidentified vessel asked the “*Heroic Idun*” to turn around and follow it to Bonny Fairway Buoy in

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<sup>9</sup> An FPSO is a unit that processes the oil before being transferred by hose to a vessel.

<sup>10</sup> In general terms, an HRA refers to an area that is at a high risk of direct threats like piracy or war.

<sup>11</sup> This is clearly set out in the ‘Akpo Terminal Regulations and Procedures’ at **Annex MT/-14**. See also the ‘Akpo Security Instructions for Vessels in Akpo Field’ at **Annex MT/-15**, and Master-1, para. 39 (**Annex RMI/-1**).

<sup>12</sup> Master-1, para. 41 (**Annex RMI/-1**).

<sup>13</sup> Master-1, para. 49 (**Annex RMI/-1**).

<sup>14</sup> See the transcript of an audio recording on the vessel data recorder (“VDR”) on the “*Heroic Idun*” on the evening of 8 August 2022 (“VDR recording”) (**Annex MT/-26**).

<sup>15</sup> Master-1, paras. 59 and 79 (**Annex RMI/-1**).

<sup>16</sup> Master-1, para. 59 (**Annex RMI/-1**). See also, First Witness Statement of the Junior 3<sup>rd</sup> Officer, 8 June 2023 (“**Junior 3<sup>rd</sup> Officer-1**”), para. 8 (**Annex RMI/-8**); First Witness Statement of the Deck Cadet, 8 June 2023 (“**Deck Cadet-1**”), para. 8 (**Annex RMI/-9**); First Witness Statement of the Pumpman, 8 June 2023 (“**Pumpman-1**”), para. 7 (**Annex RMI/-16**).

<sup>17</sup> Master-1, para. 76(c) (**Annex RMI/-1**); Junior 3<sup>rd</sup> Officer-1, para. 8 (**Annex RMI/-8**).

<sup>18</sup> Master-1, para. 55 (**Annex RMI/-1**). See the “Best Management Practices to Deter Piracy and Enhance Maritime Security off the Coast of West Africa including the Gulf of Guinea” (“**BMP West Africa**”) at **MT/-6** and Quick Reference Cards at **MT/-7**.

<sup>19</sup> See Master-1, paras. 55 and 79(f) (**Annex RMI/-1**); First Witness Statement of the Chief Officer, 9 June 2023 (“**Chief Officer-1**”), paras. 18, 25, 27 and 32 (**Annex RMI/-5**). Pirates engaging in deception like this is common. For example, armed assailants disguised as member of Venezuela’s National Guard boarded a bulk carrier claiming they were searching for illegal drugs. Once on board, they robbed the crew (**Annex RMI/-36**).

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Nigeria, which is approximately 64.5 NM from Akpo, and said that the “*Heroic Idun*” would be “released” when it received all of the necessary clearances.<sup>20</sup>

31. The Master, the Chief Officer and the Managers tried to confirm the identity of the unidentified vessel with the Terminal, the local agents in Nigeria, the war risk insurers, and a Nigerian security company, but no one could confirm its identity, and everyone was of the view that the Master should not under any circumstances follow the unidentified vessel to Bonny Fairway Buoy. Their advice was that this was not normal practice for the Nigerian Navy, and the incident should be treated as an act of piracy.<sup>21</sup> The Master (and all those involved) at all times complied with, and were guided by, the BMP West Africa.

32. The Master informed the unidentified vessel that his instructions were not to follow it until the local agents could clarify the situation, and he proceeded to move further offshore as quickly as possible.<sup>22</sup> The ship responded that the “*Heroic Idun*” was “trying to resist arrest ... and we will be forced to use maximum force against you.”<sup>23</sup> The Master immediately told most of the crew to go to the citadel – the designated safe area in the steering gear room of the “*Heroic Idun*” where the crew seek safety in the event of a pirate attack.<sup>24</sup> The crew that remained on the bridge stayed away from the glass and wore bulletproof jackets and helmets.<sup>25</sup> The unidentified vessel said that if the “*Heroic Idun*” did not alter its course and stop its engines, “I am going to use maximum force ... .” It demanded the Master “[a]lter your course now otherwise I will open fire on your vessel.”<sup>26</sup> The unidentified vessel then made several failed attempts to board the “*Heroic Idun*,” and the “*Heroic Idun*” transmitted various mayday calls and distress alerts.<sup>27</sup>

33. The unidentified vessel aborted its attempts to board the “*Heroic Idun*” at around 22:36 LT. The “*Heroic Idun*” waited to make sure the unidentified vessel had in fact left before it cancelled its distress alerts. It continued proceeding at full speed to a safer area, further offshore.<sup>28</sup>

34. The Managers of the “*Heroic Idun*” notified the Marshall Islands, the flag State, of the attempted boarding, which in turn notified the Maritime Domain Awareness Trade - Gulf of Guinea (“**MDAT-GoG**”) and the International Maritime Bureau (“**IMB**”) Piracy Reporting Centre. The Managers also separately notified MDAT-GoG.<sup>29</sup>

35. The “*Heroic Idun*” continued moving further offshore on 9 and 10 August, sailing through the EEZs of Nigeria, São Tomé and Príncipe, and Equatorial Guinea. On 10 August, it commenced drifting, while it waited to return to Akpo to load oil. As it was sailing, IMB notified

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<sup>20</sup> Master-1, para. 60 (**Annex RMI/-1**); VDR recording (**Annex MT/-26**).

<sup>21</sup> Master-1, paras. 56, 62 (**Annex RMI/-1**).

<sup>22</sup> Master-1, para. 63 (**Annex RMI/-1**).

<sup>23</sup> Master-1, para. 63 (**Annex RMI/-1**); VDR recording (**Annex MT/-26**).

<sup>24</sup> Master-1, para. 64 (**Annex RMI/-1**); VDR recording (**Annex MT/-26**).

<sup>25</sup> Master-1, para. 79(d) (**Annex RMI/-1**); Chief Officer-1, para.24 (**Annex RMI/-5**).

<sup>26</sup> Master-1, para. 65 (**Annex RMI/-1**). VDR recording (**Annex MT/-26**).

<sup>27</sup> Master-1, paras. 68-69 (**Annex RMI/-1**). In his statement, the Master explains each of these systems of alerts. See also, Chief Officer-1, para. 31 (**Annex RMI/-5**), and the Global Maritime Distress and Safety System log of the Vessel at **Annex MT/-29**.

<sup>28</sup> Master-1, paras. 73-77 (**Annex RMI/-1**).

<sup>29</sup> Master-1, para. 78 (**Annex RMI/-1**) and the annexes referred to therein.

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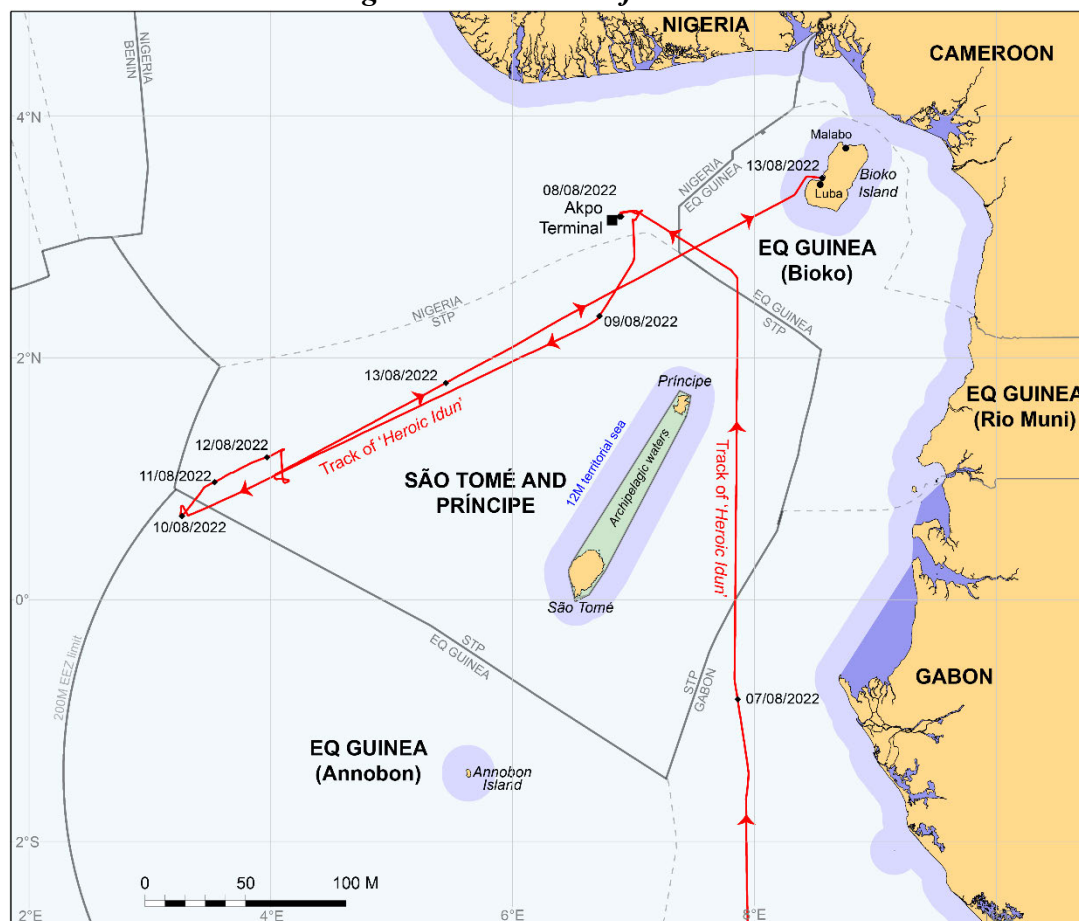
the Managers that it had managed to contact the Nigerian Navy, who had advised it that the unidentified vessel was in fact a naval patrol vessel named “Gongola.”<sup>30</sup>

36. On 11 August 2022, the Terminal informed the “*Heroic Idun*” that it had received the necessary clearance documents for the Vessel to load oil on 17 August, and so the “*Heroic Idun*” was allowed to enter its MIZ whenever she wished.<sup>31</sup> Because the Vessel was not due to load until 17 August 2022, it was safer for the Vessel to remain drifting further offshore. The “*Heroic Idun*” accordingly continued to drift in the EEZ of São Tomé and Príncipe on 11 and 12 August.<sup>32</sup>

### III. The interception and diversion of the “*Heroic Idun*” and crew by the Equatoguinean Navy

37. On 12 August 2022, while the “*Heroic Idun*” was drifting in the EEZ of São Tomé and Príncipe, it was approached by an Equatoguinean warship, the “*Capitan David*.” The location of this approach, and exercise of jurisdiction by way of assertion of, control over and detention of the “*Heroic Idun*” that followed in the EEZ of a third State are the central issue in this case.

**Figure 1 The track of the Vessel**



<sup>30</sup> Master-1, para. 81 (Annex RMI/-1).

<sup>31</sup> Master-1, para. 84 (Annex RMI/-1), Email: 11 August 2022 at 21:41 BST (Annex MT/-34).

<sup>32</sup> Master-1, para. 85 (Annex RMI/-1).

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38. The “*Heroic Idun*” was contacted on its VHF radio by the “*Capitan David*” at 12:37 UTC and asked to stop her engines.<sup>33</sup> The Master was on the bridge, and the crew could easily verify that the vessel was a naval vessel of Equatorial Guinea: it was daylight, there was good visibility, the vessel was large and grey, and her AIS was on and all data was displayed.<sup>34</sup> The Master said he would stop the “*Heroic Idun*”’s engines and asked for the reason for the request. No answer to the enquiry was given. Instead, the Master was asked by the “*Capitan David*” where the “*Heroic Idun*” was going or coming from. The Master explained that the “*Heroic Idun*” was drifting in the location awaiting a loading date. The “*Capitan David*” asked the Master again to stop the engines and said that the “*Capitan David*” was approaching the “*Heroic Idun*”’s port side. The Master of the “*Heroic Idun*” asked whether the “*Captain David*” would want to board the “*Heroic Idun*” or whether it was just for investigation. He was told “only for investigation.” The Master replied that he was stopping the engines, but that it would take some time for the “*Heroic Idun*” to stop.<sup>35</sup> As the crew waited on the “*Capitan David*” to approach, they did not think it was coming to intercept them and divert them under threat or force. They thought that the warship was patrolling the area as part of the security apparatus in the Gulf of Guinea and was coming to check on them.<sup>36</sup>

39. At 13:48 UTC, the “*Capitan David*” contacted the “*Heroic Idun*” again by VHF radio. By this time, the “*Capitan David*” was less than a mile away from the “*Heroic Idun*” and could be seen with the naked eye. The Master and crew could clearly see that the guns on the “*Capitan David*” were trained on the bridge and at the crew’s accommodation block under the bridge.<sup>37</sup>

40. The “*Capitan David*” then said over VHF radio that the “*Heroic Idun*” had to follow it to Malabo on Equatorial Guinea’s Bioko Island “for investigations.” The Master was not told why the “*Heroic Idun*” was being investigated or ordered to proceed to Malabo at gunpoint. The “*Capitan David*” then said that if the Master did anything suspicious, it had “orders to shoot.”<sup>38</sup> This alarmed the Master and crew: they believed the “*Capitan David*” would shoot, and they felt that they had to obey the “*Capitan David*’s” orders.<sup>39</sup> Indeed, as the relative positions of the two vessels altered, the canopy guns on the “*Capitan David*” altered to keep the “*Heroic Idun*” as a target.<sup>40</sup> The Master discussed what to do with the other crew on the bridge, including the Chief Officer, and they all agreed that they had no choice but to follow the vessel to Equatorial Guinea

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<sup>33</sup> Master-1, paras. 87-88 (**Annex RMI/-1**). See also the transcript of the recordings of the two exchanges between the “*Heroic Idun*” and the “*Capitan David*” (“**transcript of audio of “*Capitan David*” and the “*Heroic Idun*”**”) at **Annex MT/-35**.

<sup>34</sup> Master-1, para. 89 (**Annex RMI/-1**); Deck Cadet-1, para.11 (**Annex RMI/-9**).

<sup>35</sup> Master-1, para. 88 (**Annex RMI/-1**); transcript of audio of “*Capitan David*” and the “*Heroic Idun*” (**Annex MT/-35**).

<sup>36</sup> Master-1, para. 91 (**Annex RMI/-1**).

<sup>37</sup> Master-1, paras. 92-93 (**Annex RMI/-1**); Chief Officer-1, para. 44 (**Annex RMI/-5**); First Witness Statement of the 2<sup>nd</sup> Officer, 8 June 2023 (“**2<sup>nd</sup> Officer-1**”), para. 8 (**Annex RMI/-6**); First Witness Statement of the 3<sup>rd</sup> Officer, 9 June 2023 (“**3<sup>rd</sup> Officer-1**”), para. 7 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, para. 17 (**Annex RMI/-8**); First Witness Statement of Able Seaman No 1, 8 June 2023 (“**Able Seaman No 1-1**”), para. 8 (**Annex RMI/-17**); First Witness Statement of Able Seaman No 3, 8 June 2023 (“**Able Seaman No 3-1**”), paras. 9-10 (**Annex RMI/-19**).

<sup>38</sup> Master-1, para. 94 (**Annex RMI/-1**); transcript of audio of “*Capitan David*” and the “*Heroic Idun*” (**Annex MT/-35**).

<sup>39</sup> Master-1, para. 94 (**Annex RMI/-1**); Chief Officer-1, para. 44 (**Annex RMI/-5**); 2<sup>nd</sup> Officer-1, para. 9 (**Annex RMI/-6**); Junior 3<sup>rd</sup> Officer-1, para. 17 (**Annex RMI/-8**); Able Seaman No 1-1, para. 8 (**Annex RMI/-17**).

<sup>40</sup> 3<sup>rd</sup> Officer-1, para. 7 (**Annex RMI/-10**).

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because they could not risk that the “*Capitan David*” would fire at the bridge or the accommodation.<sup>41</sup>

41. At 13:49 UTC, the “*Capitan David*” gave the “*Heroic Idun*” a set of waypoints that he was told to follow and the speeds for each leg of the route. The Master asked for time to plot the route on the Electronic Chart Display and Information System, which was allowed. The “*Heroic Idun*” then proceeded to follow the waypoints which were passed to it.<sup>42</sup> The “*Capitan David*” took up station on the starboard quarter of the “*Heroic Idun*,” less than one mile away.<sup>43</sup>

42. For the duration of the escort, the guns on the “*Capitan David*” were manned and continued to be trained on the “*Heroic Idun*.”<sup>44</sup> The crew felt like they were under arrest<sup>45</sup> and feared for their lives.<sup>46</sup> At various times throughout the escort, the “*Capitan David*” contacted the “*Heroic Idun*” – for example, to tell the Master to turn on the lights on the deck at night so it could make sure the crew was not walking around, and to make the Master adjust the course of the “*Heroic Idun*” or alter its position.<sup>47</sup>

43. At around 14:23 LT on 13 August, the “*Heroic Idun*” was joined by another Equatoguinean naval vessel, the “*Wele Nzas*.” It also had armed personnel on board and had its guns trained on the “*Heroic Idun*.” For the remainder of the journey, the “*Capitan David*” was on the “*Heroic Idun*”’s starboard quarter, and the “*Wele Nzas*” was on her port quarter, each with their guns trained on the “*Heroic Idun*.”<sup>48</sup> A few hours before reaching Equatorial Guinea, the destination was changed from Malabo to Luba, another port on Bioko Island.<sup>49</sup>

44. The Marshall Islands was not notified of the interception and diversion of the “*Heroic Idun*” and her crew.

### IV. Detention of the “*Heroic Idun*” and crew in Luba and Malabo

#### A. Detention

45. The “*Heroic Idun*” arrived at the Luba anchorage on 13 August at 23:54 LT.<sup>50</sup> It was positioned about 1.3 NM off the Bioko coast. For the duration of the “*Heroic Idun*”’s and crew’s

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<sup>41</sup> Master-1, para. 94 (Annex RMI/-1); Chief Officer-1, para. 44 (Annex RMI/-5); 2<sup>nd</sup> Officer-1, para. 9 (Annex RMI/-6); Junior 3<sup>rd</sup> Officer-1, para. 17 (Annex RMI/-8); Able Seaman No 1-1, para. 8 (Annex RMI/-17).

<sup>42</sup> Master-1, paras. 96-97 (Annex RMI/-1); VHF log (Annex MT/-3).

<sup>43</sup> Master-1, paras. 96-97 (Annex RMI/-1).

<sup>44</sup> Master-1, para. 99 (Annex RMI/-1).

<sup>45</sup> For the avoidance of doubt, and as more fully explained below, the crew were never formally arrested by the Equatoguinean authorities (at this time or at any time while detained by Equatorial Guinea).

<sup>46</sup> Master-1, paras. 94, 100 (Annex RMI/-1); 3<sup>rd</sup> Officer-1, para. 8 (Annex RMI/-10).

<sup>47</sup> Master-1, paras. 101-102 (Annex RMI/-1); VHF log (Annex MT/-3).

<sup>48</sup> Master-1, para. 106 (Annex RMI/-1); 2<sup>nd</sup> Officer-1, para. 10 (Annex RMI/-6); Junior 3<sup>rd</sup> Officer-1, para. 19 (Annex RMI/-8); Deck Cadet-1, para. 13 (Annex RMI/-9).

<sup>49</sup> Master-1, paras. 101-102 (Annex RMI/-1); VHF log (Annex MT/-3).

<sup>50</sup> Master-1, para. 107 (Annex RMI/-1).

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detention in Equatorial Guinea, the “*Wele Nzas*” was positioned at Luba Bay to the west of the “*Heroic Idun*” to prevent the Vessel and her crew from trying to escape.<sup>51</sup>

46. On 14 August, 15 of the 26 crew members, including the Master, were disembarked on-shore under naval armed guard (ten crew members were disembarked first, then five more later that day). Eight armed guards came onboard the “*Heroic Idun*,” with two media camera crews, two customs officers and five inspectors. Inspections were carried out of the Vessel’s cargo tanks. These were in ballast, *i.e.*, not carrying any cargo, because it was on a voyage ready to load oil but had not yet done so.<sup>52</sup> The Chief Officer was forced by Equatoguinean authorities to give a recorded interview.<sup>53</sup>

47. The crew members who were disembarked were taken to Malabo, the capital of Equatorial Guinea, approximately an hour away by road. First, they were taken to a local police station. There, they were not provided with food, water or access to toilets, and police beat other prisoners in front of the crew in an attempt to intimidate them.<sup>54</sup> At around 23:00 LT, the crew were transferred to a government-owned facility on the edge of the city where they were detained (“**Detention Facility**”).<sup>55</sup> The crew were never formally arrested or informed of any legal charges against them. Nonetheless, they were detained and deprived of their liberty.<sup>56</sup>

48. The Detention Facility had no furniture or beds. No food or safe drinking water was supplied by the Equatoguinean authorities, and sanitation in the Detention Facility was poor. The local agents of the Managers and the company acting as the local representative of the protection and indemnity insurer (collectively, the “**local agents**”) provided the crew with some mattresses to sleep on (but not enough for all 15 crew members, so some crew members slept on the floor),<sup>57</sup> and with food and drinking water. At no stage in the almost three-month detention of the crew did the Equatoguinean authorities provide food or safe drinking water to the crew.<sup>58</sup> The Marshall Islands was not notified of the detention of the “*Heroic Idun*”’s crew.

49. The remaining 11 crew members were detained on the “*Heroic Idun*,” also under Equatoguinean naval armed guard.<sup>59</sup> This number was below the safe manning requirements for the Vessel under SOLAS<sup>60</sup> and meant the crew worked long, stressful shifts to keep the Vessel safe (for example, the Junior 3<sup>rd</sup> Officer kept watch for 12 hours on the bridge every single day for

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<sup>51</sup> Master-1, para. 107 (Annex RMI/-1).

<sup>52</sup> Kulblik-1, paras. 8-10 (Annex RMI/-2); Askins-1, para. 12 (Annex RMI/-3); Master-1, para. 108 (Annex RMI/-1).

<sup>53</sup> Chief Officer-1, paras. 47-48 (Annex RMI/-5).

<sup>54</sup> Master-1, paras. 110-114 (Annex RMI/-1); 2<sup>nd</sup> Officer-1, para.10 (Annex RMI/-6); 3<sup>rd</sup> Officer-1, para. 11 (Annex RMI/-10).

<sup>55</sup> Master-1, para. 114 (Annex RMI/-1).

<sup>56</sup> See, e.g., Master-1, paras. 115 and 120 (Annex RMI/-1); 2<sup>nd</sup> Officer-1, para. 17 (Annex RMI/-6); Askins-1, para. 14 (Annex RMI/-3).

<sup>57</sup> Deck Cadet-1, para.19 (Annex RMI/-9); First Witness Statement of the Chief Engineer, 8 June 2023 (“**Chief Engineer-1**”), para. 8 (Annex RMI/-7).

<sup>58</sup> Kulblik-1, para. 13 (Annex RMI/-2); Master-1, para. 116 (Annex RMI/-1; 2<sup>nd</sup> Officer-1, para. 15 (Annex RMI/-6); 3<sup>rd</sup> Officer-1, para.12 (Annex RMI/-10).

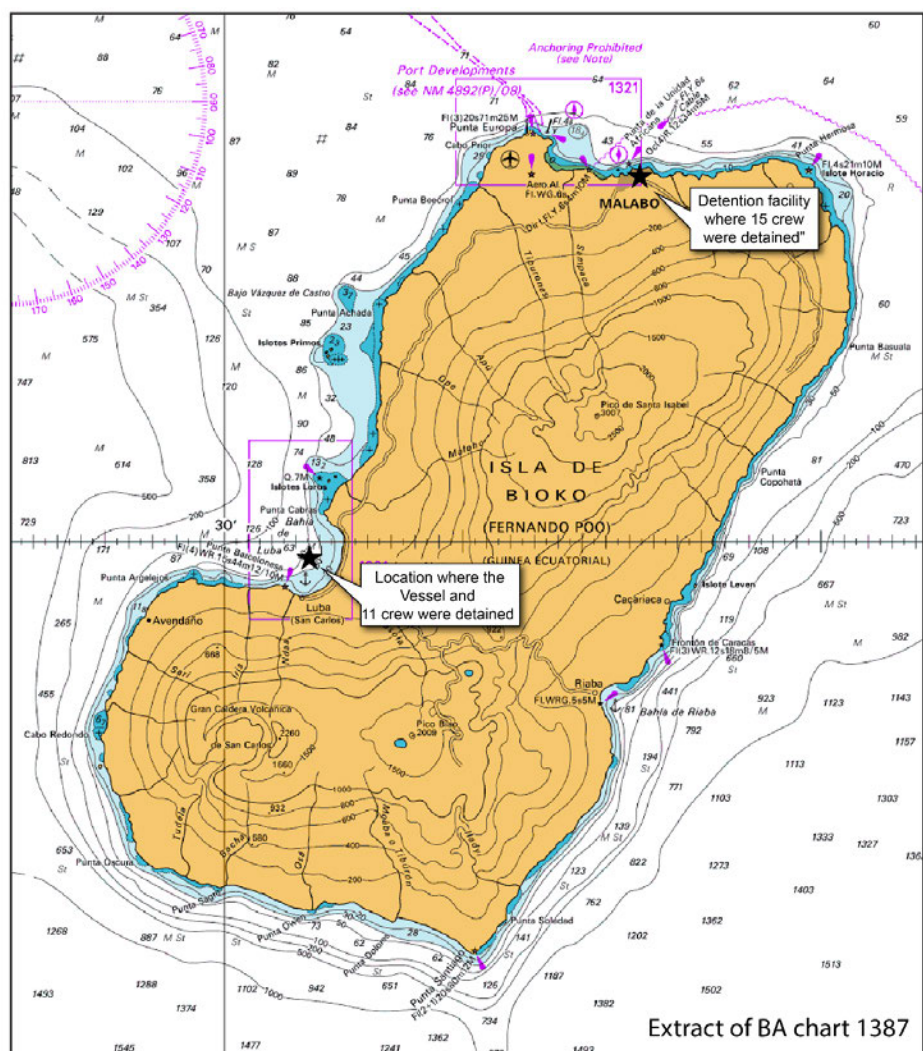
<sup>59</sup> Kulblik-1, para. 13 (Annex RMI/-2); Chief Officer-1, paras. 46, 49 (Annex RMI/-5).

<sup>60</sup> The Vessel’s safe manning requirement was 15 persons, with the necessary “grades/capacities” specified in the Vessel’s Minimum Safe Manning Certificate (see Annex VB/-2).

## MEMORIAL OF THE MARSHALL ISLANDS

three months).<sup>61</sup> The 8-10 Equatoguinean naval guards on board each carried guns, and many were on drugs or under the effect of alcohol most of the time. The atmosphere was extremely tense.<sup>62</sup> Again, the Marshall Islands as the flag State of the “*Heroic Idun*” was never notified of the detention of the Vessel and her crew onboard the Vessel in Equatorial Guinea.

**Figure 2 Map of Bioko Island**



50. On 16 August 2022, the Marshall Islands Maritime Administrator wrote to the Governor of Luba in Equatorial Guinea, the senior regional political figure for Luba Bay where the “*Heroic Idun*” and 11 of the crew were detained, expressing concern regarding the detention of the “*Heroic*

<sup>61</sup> Junior 3<sup>rd</sup> Officer-1, para. 26 (Annex RMI/-8).

<sup>62</sup> Chief Officer-1, para. 46 (Annex RMI/-5); Deck Cadet-1, para.16 (Annex RMI/-9); First Witness Statement of the Electrician, 9 June 2023 (“Electrician-1”), para. 13 (Annex RMI/-14).

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*Idun*” and noting that the actions of Equatorial Guinea were in violation of UNCLOS.<sup>63</sup> The Governor of Luba did not respond.

### B. Investigations

51. On 17 August 2022, the Master of the “*Heroic Idun*” was questioned at length, for approximately 11 hours, without legal representation, by the Equatoguinean naval authorities and the local prosecutor, as were the Chief Engineer and the 2<sup>nd</sup> Officer.<sup>64</sup> The interviews largely focused on the actions of the Vessel when it briefly sailed through the EEZ of Equatorial Guinea on 9/10 August while it was waiting to return to Akpo. The authorities told the Master that he should have been flying an Equatorial Guinea flag when in Equatorial Guinea’s EEZ and that he was wrong not to be flying the Marshall Islands’ flag. The Master told them that neither was correct: he was not required to fly a courtesy Equatoguinean flag when in its EEZ, and the name of the flag State was emblazoned in large letters on the stern of the Vessel. The crew were also briefly asked about their encounter with the Nigerian Navy on 8 August.<sup>65</sup> At the end of the interview, the Master was forced to sign a statement in Spanish even though he did not understand what was written.<sup>66</sup> No notification of the questioning was given by Equatorial Guinea to the Marshall Islands, the Owners, the Managers or their representatives.

52. On 22 August, the head Equatoguinean guard on the Vessel told the Chief Officer that the guards would be signed off on 23 August,<sup>67</sup> and on 23 August 2022, the Owners and their representatives were told by their local lawyers in Equatorial Guinea that the investigation by the Equatoguinean authorities was over.<sup>68</sup> The local lawyers were also informed that the Equatoguinean authorities were of the view that the crew was never under arrest, but simply placed at the disposal of the investigation.<sup>69</sup> This contrasts with the reality of the detention of the crew at the Detention Facility, under the supervision and control of armed Equatoguinean guards, and the detention of the remainder of the crew on the Vessel under Equatoguinean jurisdiction and control at Luba anchorage. In light of the information received from the Owners’ local lawyers, the Marshall Islands and the Vessel’s commercial operators expected that the Vessel and crew would be quickly released.<sup>70</sup>

53. On 26 August 2022, the Marshall Islands Maritime Administrator wrote to the Attorney-General of Equatorial Guinea expressing concern about the questioning of the Master, Chief Engineer and 2<sup>nd</sup> Officer of the “*Heroic Idun*” without formal charge, and the threat to the Vessel posed by the absence of the crew and failure to meet safe Manning requirements. The return of the

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<sup>63</sup> Letter from the Marshall Islands Maritime Administrator to the Governor of Luba, dated 16 August 2022 (**Annex SA/-6**) and Askins-1, para. 16 (**Annex RMI/-3**).

<sup>64</sup> Master-1, paras. 125-127 (**Annex RMI/-1**); 2<sup>nd</sup> Officer-1, para. 18 (**Annex RMI/-6**); Chief Engineer-1, para. 11 (**Annex RMI/-7**); Kulblik-1, para. 18 (**Annex RMI/-2**).

<sup>65</sup> Master-1, para. 125 (**Annex RMI/-1**); Kulblik-1, paras. 17-18 (**Annex RMI/-2**).

<sup>66</sup> Master-1, para. 127 (**Annex RMI/-1**).

<sup>67</sup> Kulblik-1, para. 19 (**Annex RMI/-2**).

<sup>68</sup> Askins-1, para. 18 (**Annex RMI/-3**).

<sup>69</sup> Askins-1, para. 18 (**Annex RMI/-3**).

<sup>70</sup> Kulblik-1, para. 19 (**Annex RMI/-2**).

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crew to the Vessel and the freeing of the Vessel were again requested.<sup>71</sup> The Attorney-General did not respond.

54. Instead, the Equatoguinean authorities facilitated the repeated questioning of various members of the crew by Nigerian officials, including on 31 August, 9 September, 15 September, and 20 September 2022. Unlike the interviews by Equatorial Guinea, these interviews focused on events in Nigeria's EEZ on 8 August. On each occasion, a request for attendance of a lawyer during questioning was made but was refused. No formal communications or correspondence was received by the Marshall Islands or the Owners, the Managers, or their representatives, from either the Equatoguinean or Nigerian authorities seeking permission for Nigerian officials to interview the crew or board the Vessel.<sup>72</sup>

55. On 8 September 2022, the flag State representative, Captain Mustapha (a contract inspector for the Marshall Islands Maritime Administrator based in the region, and appointed by the flag to represent it locally in the matter), met with the Director-General of Ports of Equatorial Guinea in charge of regulations and inspections.<sup>73</sup> On 13 September 2022, Captain Mustapha met with the Attorney-General of Equatorial Guinea in a further attempt to resolve the situation. Captain Mustapha was refused access to the Vessel and her crew. That same day, the Marshall Islands Maritime Administrator wrote again to the Attorney-General of Equatorial Guinea. It requested that Captain Mustapha be allowed to board the Vessel as a matter of priority. It repeated its concerns that legal representation was being denied to the crew when questioned and about the unsafe manning of the Vessel, noting the technical issues arising onboard. The return of the crew to the Vessel and the freeing of the Vessel were again requested.<sup>74</sup> The Attorney-General did not respond.

### C. The Fine

56. On or about 28 September 2022, the Ministry of Defence issued a fine of 1,312,000,000 F. CFA (West African Francs) – two million, one hundred and thirty-two Euros (€2,000,132) – to the Master (“**Fine**”).<sup>75</sup> The sum also purported to include the Navy's expenses incurred during the detention and custody of the Vessel in Luba. The Fine levying this sum stated that it was for the Vessel's illegal entry into the territorial waters of the Republic of Equatorial Guinea, sailing without flying any flag as well as sailing and remaining in the Exclusive Economic Zone of Annobón

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<sup>71</sup> Letter from the Marshall Islands Maritime Administrator to the Honorable Anatolio Nzang Nguema, Attorney-General, Republic of Equatorial Guinea, dated 26 August 2022 (**Annex SA/-9**). See also, *Askins-1*, para. 19 (**Annex RMI/-3**).

<sup>72</sup> *Kulblik-1*, paras. 23, 28, 32, 37-38 (**Annex RMI/-2**). See also, *Master-1*, paras. 129-131 (**Annex RMI/-3**); *Chief Officer-1*, para. 52 (**Annex RMI/-5**); *3<sup>rd</sup> Officer-1*, para. 14 (**Annex RMI/-10**); *Chief Officer-1*, para. 52 (**Annex RMI/-5**).

<sup>73</sup> First Witness Statement of William Gallagher, 17 December 2023 (“**Gallagher-1**”), para. 31 (**Annex RMI/-30**).

<sup>74</sup> Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 13 September 2022 (**Annex SA/-11**). See also, *Askins-1*, para. 22 (**Annex RMI/-3**).

<sup>75</sup> For simplicity, reference to the Fine includes all consequences deriving from this penalty (i.e., it is not limited to the monetary payment).

## MEMORIAL OF THE MARSHALL ISLANDS

Island, from August 9, 2022 around 2:58 p.m. and leaving on the 10<sup>th</sup> of the same month around 10:53 a.m., without having been given authorization by the National Maritime Authority.<sup>76</sup>

57. Assurances were given to the Master and the local agents by Equatoguinean Navy officials that payment of the Fine would see the “*Heroic Idun*” and her crew promptly released.<sup>77</sup>

58. For the avoidance of doubt, the facts indicated in the Fine were the only formal grounds that Equatorial Guinea ever provided to justify its conduct regarding the “*Heroic Idun*” and her crew.

59. The Owners considered this demand for payment to be both unjustified and extortionate. However, in the overriding interests of the safety and security of the Vessel and her crew, and the wellbeing of the crew (which was deteriorating, as explained below) the decision was taken by the Owners and their representatives to pay the sum in question and contest it later. Their primary concern was getting the crew and the Vessel out of an increasingly precarious, insecure, and uncertain situation.<sup>78</sup>

60. The sum of two million, one hundred and thirty-two Euros (€2,000,132) was paid on 4 October 2022,<sup>79</sup> but the crew continued to be detained.

61. On 18 October 2022, the Marshall Islands Maritime Administrator wrote to the Attorney-General of Equatorial Guinea again. It noted, *inter alia*, that the crew’s ongoing detention was now having a serious impact on their physical and mental wellbeing. It observed that the investigation was concluded, and the fine had been levied and paid (albeit because the “owners felt they had no choice but to pay to protect the well-being of the crew and to avoid deterioration of the vessel”). It then noted that, despite assurances by the Chief of Staff of the Navy, the Vessel had not been released as promised upon payment of the funds. The request for return of the crew to the Vessel and the freeing of the Vessel were again repeated.<sup>80</sup> The Attorney-General did not respond.

62. In late October, the local agents were informed by the Equatoguinean authorities that the Vice President had directed the “*Heroic Idun*” and her crew to be released after necessary paperwork was completed.<sup>81</sup> The 15 crew onshore were moved to a hotel (under armed guard) to await formal release.

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<sup>76</sup> Fine (Annex RMI/-40) and certified translation in English (Annex RMI/-41).

<sup>77</sup> Askins-1, para. 24 (Annex RMI/-3); Kulblik-1, para. 42 (Annex RMI/-2); Master-1, para. 133 (Annex RMI/-1).

<sup>78</sup> Kulblik-1, para. 42 (Annex RMI/-2); Askins-1, para. 26 (Annex RMI/-3).

<sup>79</sup> Askins-1, para. 27 (Annex RMI/-3) and signed proof of payment dated 5 October 2022 (Annex SA/-14).

<sup>80</sup> Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 18 October 2022 (Annex SA/-15). See also, Askins-1, para. 30 (Annex RMI/-3).

<sup>81</sup> Kulblik-1, paras.42-43 (Annex RMI/-2).

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### D. Continued detention and deterioration of the crew's conditions

63. Notwithstanding all the promises to release the crew and the Vessel on payment of two million, one hundred and thirty-two Euros (€2,000,132), Equatorial Guinea kept the “*Heroic Idun*” and crew in detention.

64. The Marshall Islands continued to protest Equatorial Guinea's actions and to seek the release of the Vessel and crew. It was around this time that it was anticipated that proceedings might need to be brought under UNCLOS. By a Note Verbale dated 28 October 2022, the Ministry of Foreign Affairs of the Marshall Islands requested that Equatorial Guinea resolve the dispute diplomatically, but it also informed Equatorial Guinea that, if no diplomatic resolution could be reached very shortly, the Marshall Islands would have to consider submitting the matter to the dispute settlement procedures under the Convention.<sup>82</sup> Equatorial Guinea did not respond to the Note Verbale.

65. As this was ongoing, the welfare of the crew continued to deteriorate. By this time, they had been detained for over two months in difficult conditions in the Detention Facility and onboard the Vessel. Various crew members succumbed to illnesses. One crew member had a seizure and was diagnosed with a suspected cyst in his head.<sup>83</sup> Another crew member was diagnosed with acute gastroenteritis, another with depressive anxiety disorder, another with lumbago, and another with impetigo.<sup>84</sup> Many of the crew, both onshore and on the Vessel, tested positive for malaria,<sup>85</sup> and other crew members succumbed to typhoid (some, on multiple occasions).<sup>86</sup> A crew member taken for medical treatment was put back in the Detention Facility without being retested for malaria, and was misdiagnosed three times.<sup>87</sup> The Master, along with others, was admitted to hospital on multiple occasions.<sup>88</sup> Several crew members expressed suicidal thoughts.<sup>89</sup> Many of the crew members in the Detention Facility also suffered severe physical pain from sleeping on the floor.<sup>90</sup>

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<sup>82</sup> Note Verbale EQ/01-22, from the Ministry of Foreign Affairs of the Republic of the Marshall Islands to the Ministry of Foreign Affairs, International Cooperation and Francophone Affairs, Republic of Equatorial Guinea, dated 28 October 2022, with a covering Note Verbale MI/22/EQ-1 from the Permanent Mission of the Republic of the Marshall Islands to the United Nations, New York, to the Permanent Mission of the Republic of Equatorial Guinea to the United Nations, New York, dated 31 October 2022 (**Annex SA/-16**); Askins-1, para. 26 (**Annex RMI/-3**).

<sup>83</sup> Pumpman-1, para.15 (**Annex RMI/-16**).

<sup>84</sup> Kulblik-1, paras. 30, 35 (**Annex RMI/-2**).

<sup>85</sup> Master-1, paras. 117, 119 (**Annex RMI/-1**); 3<sup>rd</sup> Officer-1, para. 13 (**Annex RMI/-10**); Chief Engineer-1, para. 9 (**Annex RMI/-7**); Pumpman-1, para.15 (**Annex RMI/-16**); Able Seaman No 1-1, para.14 (**Annex RMI/-17**); First Witness Statement of Motor Man No 3, 8/9 June 2023 (“**Motor Man No 3-1**”), para.14 (**Annex RMI/-26**).

<sup>86</sup> Master-1, paras. 117, 119, 138(**Annex RMI/-1**); 3<sup>rd</sup> Officer-1, para. 13 (**Annex RMI/-10**); Chief Engineer-1, para. 9 (**Annex RMI/-7**); Pumpman-1, para.15 (**Annex RMI/-16**); Able Seaman No 1-1, para. 14 (**Annex RMI/-17**); Motor Man No 3-1, para. 14 (**Annex RMI/-26**).

<sup>87</sup> Kulblik-1, para. 25 (**Annex RMI/-2**).

<sup>88</sup> Kulblik-1, paras. 25, 35, 40, 41, 43, 50, 52, 54, 64 (**Annex RMI/-2**).

<sup>89</sup> Master-1, para. 128 (**Annex RMI/-1**); Chief Engineer-1, para. 9 (**Annex RMI/-7**); Able Seaman No 1-1, para. 14 (**Annex RMI/-17**); First Witness Statement of Ordinary Seaman No 1, 8 June 2023 (“**Ordinary Seaman No 1-1**”), para. 19 (**Annex RMI/-20**).

<sup>90</sup> Master-1, para. 177 (**Annex RMI/-1**); Deck Cadet-1, para. 19 (**Annex RMI/-9**).

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The crew were accompanied by armed Equatoguinean guards for all medical visits, and consultations with medical staff were in Spanish, which meant the crew (none of whom spoke Spanish) could not understand what medication and injections they were given or their effects.<sup>91</sup>

66. The risks to the “*Heroic Idun*” were also increasing. There was frequent bad weather, including strong wind speeds, which meant that the Vessel could easily run aground in the shallow waters of Luba when drifting on her anchor.<sup>92</sup> Further, with a limited crew onboard, it was difficult to keep the Vessel running, so it suffered leaks and breakdowns. In trying to man the Vessel with insufficient crew, and address the problems that arose, the crew onboard greatly compromised their personal safety.<sup>93</sup> For example, the Electrician was electrocuted twice – both incidents were avoidable had the Vessel been properly manned.<sup>94</sup> Additional issues were also arising because the Vessel had been in the same anchor position since 13 August 2022, so the engine bilges were building up, the anchor chain was straining and twisting, and barnacles were growing on the hull. Addressing all of these issues required additional crew on board, but repeated requests to allow the crew detained at the Detention Facility to board the Vessel were refused.<sup>95</sup>

67. The Vessel was also at risk of suffering collisions from other vessels. For example, on 26 September, the “*Wele Nzas*” started to drag her anchor in the direction of the Vessel and came very close to the “*Heroic Idun*.”<sup>96</sup> Because the “*Heroic Idun*” was not safely manned (both in terms of the number of crew onboard and the necessary training of those who were there), it would have been very difficult, if not impossible, for the “*Heroic Idun*” to take any action to avoid a collision in a timely manner.<sup>97</sup> An accident was only avoided because the “*Wele Nzas*” was able to restore control, but she then performed a manoeuvre which was unnecessary and unsafe.<sup>98</sup> Further, large vessels calling at the port of Luba were unnecessarily forced to pass between the “*Heroic Idun*” and the “*Wele Nzas*.” On 27 October 2022, one such vessel passing through narrowly avoided colliding with the “*Heroic Idun*.”<sup>99</sup> A supply boat also caught fire alongside the Vessel, which the crew onboard the Vessel had to fight themselves, so that the Vessel did not catch fire.<sup>100</sup>

### V. Preparatory steps taken to transfer the “*Heroic Idun*” and crew to Nigeria

68. On or about 4 November 2022, the Marshall Islands learned that Equatorial Guinea, rather than releasing the Vessel and her crew as it had previously committed to do, had decided to hand the Vessel and her crew over to the Nigerian authorities.<sup>101</sup> The Equatoguineans gave no indication – formal or otherwise – to the crew, the Marshall Islands, the Owners, the Managers, or their

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<sup>91</sup> Master-1, para. 119 (Annex RMI/-1); 3<sup>rd</sup> Officer-1, para. 13 (Annex RMI/-10).

<sup>92</sup> Chief Officer-1, para. 50 (Annex RMI/-5); Kulblik-1, para. 74 (Annex RMI/-2).

<sup>93</sup> First Witness Statement of the 2<sup>nd</sup> Engineer, 9 June 2023 (“2<sup>nd</sup> Engineer-1”), para. 16 (Annex RMI/-11).

<sup>94</sup> Electrician-1, para. 22 (Annex RMI/-14).

<sup>95</sup> Kulblik-1, paras. 46, 72-75, 100(h) (Annex RMI/-2).

<sup>96</sup> First Expert Report of Voirrey Blount, 24 November 2023 (“Blount-1”), para.22 (Annex RMI/-37); Chief Officer-1, para. 50 (Annex RMI/-5); Kulblik-1, para. 77 (Annex RMI/-2).

<sup>97</sup> Blount-1, para.23 (Annex RMI/-37).

<sup>98</sup> Blount-1, para. 24 (Annex RMI/-37).

<sup>99</sup> Blount Statement, para.28 (Annex RMI/-37).

<sup>100</sup> Chief Officer-1, para. 55 (Annex RMI/-5); Electrician-1, para. 22 (Annex RMI/-14); Blount Statement, paras. 32-33 (Annex RMI/-37) (and see the video she annexes); Kulblik-1, para. 77 (Annex RMI/-2).

<sup>101</sup> Kulblik-1, para. 53 (Annex RMI/-2); Askins-1, para. 33 (Annex RMI/-3).

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representatives of the reasons for the transfer to Nigeria. Nor did they offer any explanation for their change of position in respect of the release of the Vessel and her crew. The transfer was not subject to any legal process.

69. The crew was distraught when they heard this news: many of them described this day, and the days that followed prior to their transfer to Nigeria on 11 November, as the worst days of their lives.<sup>102</sup>

70. The Marshall Islands Maritime Administrator immediately wrote to the Attorney-General of Equatorial Guinea and protested any transfer of the Vessel and her crew to Nigeria in strong terms. It also reiterated its request for the return of the crew to the Vessel and the freeing of the Vessel. The Marshall Islands Maritime Administrator stated that, in the absence of any positive response, it would be forced to commence proceedings under UNCLOS.<sup>103</sup>

71. On the afternoon of 5 November 2022, with the notable exception of the Chief Engineer, who was in hospital with chest pains, the remaining crew of the “*Heroic Idun*” onshore were forcibly returned to the Vessel and told that they would be sailing to Nigeria in the morning. A Nigerian naval vessel was waiting off the coast of Equatorial Guinea, and the crew of the “*Heroic Idun*” were told that the naval vessel was waiting to escort the Vessel and her crew to Nigeria.<sup>104</sup>

72. On 6 November, the crew did everything they could to try and stop the transfer of the Vessel to Nigeria: they were desperate for the prompt release application at ITLOS (which they knew was imminent) to stop the transfer. The crew were also concerned about technical issues on the Vessel because it had not sailed in almost three months, and they did want to leave without the Chief Engineer, who was still in hospital.<sup>105</sup>

73. Later that day, in response to the crew’s unwillingness to leave without the Chief Engineer, the Nigerian authorities went to the hospital to force the Chief Engineer to board the “*Heroic Idun*.” The Nigerian Naval Attaché spoke to the Managers on the telephone giving two options: the Chief Engineer could sign himself out of hospital, go onboard and tell the other engine crew how to sail the Vessel, or Nigeria would get a tugboat to tow the Vessel to Nigeria. It was clear to the Managers that the Nigerian authorities were not only prepared to take the Chief Engineer hostage but also to jeopardise the safety of the Vessel at sea.<sup>106</sup>

74. On 7 November, the Chief Engineer was sent back to the “*Heroic Idun*.” The Chief Officer was ordered to disembark the Vessel to be taken onboard an Equatoguinean naval ship; he was to be handed over to the Nigerian Navy at Equatorial Guinea’s territorial sea boundary. The Master objected, but the Chief Officer was forcibly removed from the Vessel and taken to the Equatoguinean naval vessel as a hostage.<sup>107</sup> At around this time, the flag State issued a detention

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<sup>102</sup> See, e.g., Master-1, para. 141 (Annex RMI/-1); 2<sup>nd</sup> Officer-1, para. 20 (Annex RMI/-6); Deck Cadet-1, para. 22 (Annex RMI/-9); 3<sup>rd</sup> Officer-1, para. 19 (Annex RMI/-10).

<sup>103</sup> Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 4 November 2022 (Annex SA/-18); Askins-1, para. 35 (Annex RMI/-3).

<sup>104</sup> Kulblik-1, para. 52 (Annex RMI/-2); Master-1, para. 143 (Annex RMI/-1).

<sup>105</sup> Master-1, paras. 144-145 (Annex RMI/-1); Kulblik-1, para. 54 (Annex RMI/-2).

<sup>106</sup> Kulblik-1, para. 56 (Annex RMI/-2).

<sup>107</sup> Chief Officer-1, para. 59 (Annex RMI/-5); Kulblik-1, para. 58 (Annex RMI/-2).

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order stating that the Vessel was not permitted to sail because it was not manned according to the Marshall Islands' minimum safe manning certificate and because its safety inspection was overdue.<sup>108</sup> The Master presented this to the Equatoguinean officers on board and continued to demand that the Chief Officer be returned. After about eight hours, the Chief Officer was returned, but the Equatoguinean officials said that the 15 crew who had come back to the Vessel would be taken ashore to a hotel until they made further decisions.<sup>109</sup>

75. At around 23:00 LT that day, the 15 crew members were taken off the Vessel. However, instead of taking them to a hotel, the Equatoguinean officials took them back to the Detention Facility, arriving around 03:00 LT on 8 November.<sup>110</sup> There, they were locked in small rooms without furniture and with toilets with no running water, given no food or water, and were not allowed to go outside.<sup>111</sup> The Master recorded a video of the conditions on his phone and begged for help.<sup>112</sup> Food and water were eventually provided by the local agents and the Indian Embassy on 8 November, and the crew were allowed to go outside briefly under armed guard.<sup>113</sup> The remaining crew on the Vessel remained under armed guard.

76. On 9 November, the 15 crew members in the Detention Facility were again taken to the quayside and their mobile phones were confiscated. They were then boarded onto the Equatoguinean naval vessel, "*Capitan David*," and held as hostages to try and force the remaining crew on the Vessel to sail to Nigeria. The crew onboard the "*Heroic Idun*" were instructed to sail, but the Chief Engineer refused to do so due to insufficient manning. At around 22:30 LT, the crew on the Equatoguinean naval vessel were abruptly given back their phones and taken to a hotel for the evening (where their freedom of movement remained restricted).<sup>114</sup>

77. As this was happening, the International Transport Workers' Federation and the Marshall Islands' raised the issue of the detention of the Vessel and her crew during the 106<sup>th</sup> Session of the IMO Maritime Safety Committee on 9 November.<sup>115</sup>

### VI. The issue of Prompt Release Proceedings

78. At 23:51 GMT on 9 November, faced with the rapidly deteriorating conditions of the crew of the "*Heroic Idun*," and with threats of the imminent unlawful transfer of the Vessel and her crew into the custody of Nigeria, the Marshall Islands instituted prompt release proceedings under Article 292 of UNCLOS against Equatorial Guinea ("**Prompt Release Proceedings**"). The Marshall Islands sought, *inter alia*, the safe and unimpeded departure of the Vessel and crew from

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<sup>108</sup> Flag State Detention Order (Annex WG/-7); Gallagher-1, para. 32 (Annex RMI/-30).

<sup>109</sup> Chief Officer-1, para. 59 (Annex RMI/-5); Master-1, paras. 146-147 (Annex RMI/-1).

<sup>110</sup> Master-1, para. 147 (Annex RMI/-1); Kulblik-1, para. 59 (Annex RMI/-2).

<sup>111</sup> Master-1, paras. 147-148 (Annex RMI/-1); Messman No 1-1, para. 21 (Annex RMI/-28); Kulblik-1, para. 60 (Annex RMI/-2).

<sup>112</sup> Master-1, para. 44 (Annex RMI/-1); Transcript of video recording of Master in Detention Facility (Annex MT/-44).

<sup>113</sup> Master-1, paras. 148-149 (Annex RMI/-1); Kulblik-1, para. 60 (Annex RMI/-2).

<sup>114</sup> Master-1, paras. 150-153 (Annex RMI/-1); Kulblik-1, paras. 61-62 (Annex RMI/-2).

<sup>115</sup> The statements made by the International Transport Workers' Federation and the Marshall Islands, and a response by Nigeria, are available at Annex SA/-17. See also, Gallagher-1, para. 33 (Annex RMI/-30).

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Equatorial Guinea, and to prevent Equatorial Guinea from transferring the Vessel and crew into the control or custody of the Nigerian authorities as Equatorial Guinea was preparing to do.

79. On the morning of 10 November, the crew at the hotel were taken back to the quayside. They were kept there for the entire day without any food, water or access to toilets.<sup>116</sup> A senior officer in the Equatoguinean Navy threatened the crew by pointing his gun at them when they expressed their unwillingness to sail without two crew members who were hospitalised at the time.<sup>117</sup> The crew on the Vessel were told to prepare the Vessel for departure. The Equatoguinean Navy then took the crews' mobile phones as well as the satellite phones from the Vessel.<sup>118</sup> A member of the crew collapsed and was taken to hospital.<sup>119</sup>

80. At 16:07 LT on 10 November, the Registrar of ITLOS informed the Marshall Islands that a certified copy of the application for prompt release had been transmitted to Equatorial Guinea.<sup>120</sup>

81. Despite the fact that the prompt release application had been filed at ITLOS and transmitted to Equatorial Guinea, Equatorial Guinea continued with the transfer of the Vessel and crew to Nigeria.

### VII. The removal of the Vessel and crew to Nigeria despite the Prompt Release Proceedings

82. On the evening of 10 November, the 15 crew members onshore were forced by Equatoguinean Navy officials to board a Nigerian naval vessel, "*NNS Oji*," to be held as hostages to try and force the remaining crew on the Vessel to sail to Nigeria. The crew onboard the "*NNS Oji*" were forced to sleep on the floor on the evening of 10 November.<sup>121</sup>

83. On the morning of 11 November, at 08:00 LT, the "*NNS Oji*" was alongside the "*Heroic Idun*." A Nigerian flagged tugboat was in port and another Nigerian naval vessel was outside the port.<sup>122</sup> At approximately 10:30 LT, the Equatoguinean Navy personnel left the Vessel and were replaced by heavily-armed guards from the Nigerian Navy Special Boat Service. They demanded that the crew start the engines, failing which they threatened to take them to Nigeria on the Nigerian naval vessel and to tow the Vessel to Nigeria. In fear, and to avoid the Vessel being further damaged by being improperly towed to Nigeria, the crew started the engine.<sup>123</sup> The crew who had been held hostage onboard the "*NNS Oji*" were then forced to return to the Vessel, so it could sail to Nigeria.<sup>124</sup>

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<sup>116</sup> Master-1, para. 154 (Annex RMI/-1).

<sup>117</sup> First Witness Statement of the 4<sup>th</sup> Engineer, 9 June 2023 ("4<sup>th</sup> Engineer-1"), para. 23 (Annex RMI/-13).

<sup>118</sup> Kulblik-1, para. 64 (Annex RMI/-2).

<sup>119</sup> Kulblik-1, para. 64 (Annex RMI/-2).

<sup>120</sup> Askins-1, para. 41 (Annex RMI/-3); ITLOS Registrar acknowledging receipt of the Prompt Release Application (Annex SA/-24).

<sup>121</sup> Master-1, para. 155 (Annex RMI/-1); Kulblik-1, para. 66 (Annex RMI/-2).

<sup>122</sup> Kulblik-1, para. 67 (Annex RMI/-2).

<sup>123</sup> Kulblik-1, paras. 67-68 (Annex RMI/-2); Master-1, para. 156 (Annex RMI/-1).

<sup>124</sup> Master-1, para. 156 (Annex RMI/-1).

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84. In light of this, the Marshall Islands Maritime Administrator wrote a letter to ITLOS at 09:21 BST, notifying it of these concerning developments and requesting it to call upon Equatorial Guinea to refrain from taking any steps that would aggravate the situation and risk prejudice to the safety, security and wellbeing of the crew and safety and security of the Vessel.<sup>125</sup> ITLOS transmitted this letter to Equatorial Guinea that same day.<sup>126</sup> The President of ITLOS also fixed 24 November 2022 as the date for the opening of oral proceedings in the Prompt Release Proceedings.<sup>127</sup>

85. At approximately 14:00 LT on 11 November, the Vessel was forced to sail. The Vessel was accompanied by the Equatoguinean vessel, “*Wele Nzas*” and two heavily-armed Nigerian naval vessels, the “*NNS Ikkiné*” and “*NNS Oji*.”<sup>128</sup> The armed guards from the Nigerian Navy Special Boat Service were on the “*Heroic Idun*” during the voyage to Nigeria, and two guards were always present on the bridge. All of the Vessel’s movements, courses and speeds were dictated by the “*NNS Oji*.” The crew was forced to sleep in the recreation room, so they could be guarded easily.<sup>129</sup> The entire journey was extremely stressful for the crew, and their every movement had to be reported to the Nigerian guards on the Vessel.<sup>130</sup>

86. The “*Heroic Idun*” arrived at Bonny anchorage at 13:06 LT on 12 November. For the avoidance of doubt, Bonny anchorage is in the piracy HRA.<sup>131</sup>

87. The Agent for the Marshall Islands in the Prompt Release Proceedings subsequently notified the President of ITLOS that, notwithstanding the commencement of Prompt Release Proceedings and the transmission to Equatorial Guinea of the prompt release application, Equatorial Guinea had caused the Vessel and her crew to be transferred into the jurisdiction, control and custody of Nigeria on 11 November 2022. This rendered moot the Prompt Release Proceedings, and thus the Marshall Islands was compelled to discontinue them.<sup>132</sup>

### VIII. Detention and treatment of the “*Heroic Idun*” and crew in Nigeria

88. The “*Heroic Idun*” and her crew were subsequently detained in Nigeria from 10 November 2023 to 27 May 2023, and charged with various offences (which changed over time). For the avoidance of doubt, these charges are not the subject matter of these proceedings. In any event,

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<sup>125</sup> Letter from the Marshall Islands’ Maritime Administrator to the Registrar of ITLOS dated 11 November 2022 (**Annex RMI/-31**).

<sup>126</sup> Letter from the Registrar of ITLOS to the Marshall Islands’ Maritime Administrator dated 11 November 2022 (**Annex RMI/-32**).

<sup>127</sup> Order of the President of ITLOS dated 11 November 2022 (**Annex RMI/-33**).

<sup>128</sup> Master-1, para. 157 (**Annex RMI/-1**); 2<sup>nd</sup> Officer-1, para. 23 (**Annex RMI/-6**); Junior 3<sup>rd</sup> Officer-1, para. 37 (**Annex RMI/-8**).

<sup>129</sup> Master-1, para. 158 (**Annex RMI/-1**); 3<sup>rd</sup> Officer-1, para. 20 (**Annex RMI/-10**).

<sup>130</sup> Master-1, para. 159 (**Annex RMI/-1**); First Witness Statement of the 3<sup>rd</sup> Engineer, 8 June 2023 (“**3<sup>rd</sup> Engineer-1**”), para. 27 (**Annex RMI/-12**).

<sup>131</sup> Master-1, para. 160 (**Annex RMI/-1**).

<sup>132</sup> Letter from the Marshall Islands’ Maritime Administrator to the ITLOS Registrar dated 14 November 2022 (**Annex RMI/-34**). The President issued an order discontinuing the Prompt Release Proceedings on 15 November 2022 (**Annex RMI/-35**).

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the charges do not justify the conduct of Equatorial Guinea and cannot be relied upon by Equatorial Guinea to preclude the wrongfulness of its conduct.

89. The crew remained on the Vessel (except when they had to attend court) under Nigerian Navy armed guard for the entirety of this period. For the first month or so, the crew were not allowed to leave the accommodation block or go on the deck.<sup>133</sup> At all times during their detention, communication was severely restricted: they were not allowed access to their phones other than to call home under the supervision of the guards for short periods of time (five to ten minutes every two to three weeks initially, and only in English).<sup>134</sup> The only other means of communication was *via* emails from the Master's computer on the bridge, but all emails were monitored and had to be signed-off on by the Nigerian Navy before they could be sent.<sup>135</sup> The crew were also denied access to their local lawyers in Nigeria (except on hearing days, when they saw them in court).<sup>136</sup>

90. The health of the crew continued to deteriorate. In addition to the physical ailments impacting the crew (e.g., body pain and high blood pressure), the mental health of the crew was rapidly deteriorating. Almost all of the crew members reported insomnia,<sup>137</sup> anxiety,<sup>138</sup> stress,<sup>139</sup>

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<sup>133</sup> Master-1, para. 165 (**Annex RMI/-1**); Kulblik-1, para. 85(a) (**Annex RMI/-2**).

<sup>134</sup> Master-1, para. 165 (**Annex RMI/-1**); Kulblik-1, para. 85(c) (**Annex RMI/-2**); Chief Officer-1, para. 64 (**Annex RMI/-5**).

<sup>135</sup> Master-1, para. 165 (**Annex RMI/-1**); Kulblik-1, para. 85(a) (**Annex RMI/-2**).

<sup>136</sup> Master-1, para. 167 (**Annex RMI/-1**); Kulblik-1, para. 85(b) (**Annex RMI/-2**); Chief Officer-1, para. 64 (**Annex RMI/-5**).

<sup>137</sup> 3<sup>rd</sup> Officer-1, para. 17 (**Annex RMI/-10**); Pumpman-1, para. 19 (**Annex RMI/-16**); Chief Officer-1, para. 51 (**Annex RMI/-5**); Electrician-1, para. 15 (**Annex RMI/-14**); Able Seaman No 1-1, para. 14 (**Annex RMI/-17**); First Witness Statement of Able Seaman No 2, 9 June 2023 ("**Able Seaman No 2-1**"), para. 16 (**Annex RMI/-18**); Able Seaman No 3-1, para. 19 (**Annex RMI/-19**); Ordinary Seaman No 1-1, paras. 14, 29 (**Annex RMI/-20**); First Witness Statement of Ordinary Seaman No 2, 8 June 2023 ("**Ordinary Seaman No 2-1**"), paras. 15, 32 (**Annex RMI/-21**); First Witness Statement of Ordinary Seaman No 3, 8 June 2023 ("**Ordinary Seaman No 3-1**"), paras. 14, 29 (**Annex RMI/-22**); First Witness Statement of the Fitter, 8 June 2023 ("**Fitter-1**"), paras. 31, 33 (**Annex RMI/-23**); First Witness Statement of Motorman No 1, 9 June 2023 ("**Motorman No 1-1**"), para. 13 (**Annex RMI/-24**); First Witness Statement of Motorman No 2, 9 June 2023 ("**Motorman No 2-1**"), para. 23 (**Annex RMI/-25**); Chief Cook-1, paras. 12, 30 (**Annex RMI/-27**); Messman No 1-1, paras. 15, 32 (**Annex RMI/-28**); Junior 3<sup>rd</sup> Officer-1, para. 38 (**Annex RMI/-8**); Deck Cadet-1, para. 31 (**Annex RMI/-9**); 2<sup>nd</sup> Engineer-1, para. 22 (**Annex RMI/-11**); 3<sup>rd</sup> Engineer-1, para. 35 (**Annex RMI/-12**); 4<sup>th</sup> Engineer-1, para. 32 (**Annex RMI/-13**); First Witness Statement of the Engine Cadet, 8 June 2023 ("**Engine Cadet-1**"), para. 28 (**Annex RMI/-15**); Motorman No 3-1, para. 35 (**Annex RMI/-26**); Messman No 2-1, para. 28 (**Annex RMI/-29**).

<sup>138</sup> 3<sup>rd</sup> Officer-1, paras. 17, 25 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, paras. 27, 38 (**Annex RMI/-8**); Pumpman-1, paras. 19, 27 (**Annex RMI/-16**); Fitter-1, para. 23 (**Annex RMI/-23**); Messman No 1-1, para. 32 (**Annex RMI/-28**); Deck Cadet-1, para. 26 (**Annex RMI/-9**); 4<sup>th</sup> Engineer-1, para. 32 (**Annex RMI/-13**); Ordinary Seaman No 2-1, para. 32 (**Annex RMI/-21**); Motorman No 2-1, para. 31 (**Annex RMI/-25**); Motorman No 3-1, para. 35 (**Annex RMI/-26**).

<sup>139</sup> 2<sup>nd</sup> Officer-1, para. 19 (**Annex RMI/-6**); 3<sup>rd</sup> Officer-1, paras. 17, 25 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, paras. 26, 38 (**Annex RMI/-8**); Electrician-1, para. 15 (**Annex RMI/-14**); Able Seaman No 2-1, para. 29 (**Annex RMI/-18**); Able Seaman No 3-1, para. 17 (**Annex RMI/-19**); Ordinary Seaman No 1-1, para. 14 (**Annex RMI/-20**); Ordinary Seaman No 3-1, para. 13 (**Annex RMI/-22**); Fitter-1, para. 22 (**Annex RMI/-23**); Motorman No 1-1, para. 13 (**Annex RMI/-24**); Chief Cook-1, para. 12 (**Annex RMI/-27**); Messman No 1-1, para. 32 (**Annex RMI/-28**).

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depression,<sup>140</sup> and/or mental trauma.<sup>141</sup> The ongoing detention of the crew was also causing their family members extreme stress and depression, particularly as they were being depicted as ‘oil thieves’ by the Nigerian media.<sup>142</sup>

91. While the Vessel and crew were detained, lawyers acting on behalf of the Owners were trying to secure the release of the Vessel and her crew on the basis of a plea bargain. A plea bargain was the preferred option not because of any acceptance of guilt (it was at all times clear to everyone involved that the crew had done nothing wrong), but because the view formed at that time by the Owners was that a plea bargain was the best, and most likely the quickest, way to secure the release of the Vessel and her crew.<sup>143</sup>

92. The Owners’ lawyers were finally able to arrange a meeting with the Director of Public Prosecutions (“DPP”) in February 2023. They had three formal meetings thereafter. In the course of those meetings, it became clear to the Owners that the Nigerian Navy was intent on prosecuting the Vessel and her crew (or at least obtaining a significant sum of money from the Owners), even though they expressly acknowledged that the ordeal all arose out of a misunderstanding.<sup>144</sup>

93. On 27 April 2023, the DPP and the Owners agreed and signed a plea bargain. In the plea bargain, Nigeria agreed to drop all of the charges against the crew, and the Vessel agreed to plead guilty to a minor offence under section 16(5)(b) of the Suppression of Piracy and Other Maritime Offences Act and the Miscellaneous Act, 2019. The Vessel also agreed to pay a statutory fine of five million Naira (approximately five thousand British pounds (£5,000)) and fifteen million US dollars (\$15,000,000) as ‘restitution’, and to make an apology in Lloyd’s List. Although Owners did not recognise any guilt on the part of the Vessel or her crew, they considered this the only realistic option for their release.<sup>145</sup> For the avoidance of doubt, the Marshall Islands was not involved with, or party to, the plea bargain.

### IX. Release of the Vessel and crew

94. Finally, after various needless delays, on 27 May 2023, the Vessel and her crew were released. Additional crew joined the Vessel in Nigeria to assist with sailing the Vessel to Cape

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<sup>140</sup> Able Seaman No 3-1, para. 19 (**Annex RMI/-19**); Messman No 1-1, para. 32 (**Annex RMI/-28**); Chief Officer-1, para. 67 (**Annex RMI/-5**); Electrician-1, para. 37 (**Annex RMI/-14**); Ordinary Seaman No 1-1, para. 14 (**Annex RMI/-20**); Fitter-1, para. 23 (**Annex RMI/-23**).

<sup>141</sup> 3<sup>rd</sup> Engineer-1, para. 23 (**Annex RMI/-12**); 4<sup>th</sup> Engineer-1, paras. 18, 32 (**Annex RMI/-13**); Able Seaman No 2-1, para. 16 (**Annex RMI/-18**); Able Seaman No 3-1, para. 19 (**Annex RMI/-19**); Ordinary Seaman No 1-1, paras. 14, 29 (**Annex RMI/-20**); Fitter-1, paras. 31, 33 (**Annex RMI/-23**); Motorman No 1-1, paras. 21, 25-26 (**Annex RMI/-24**); Motorman No 2-1, para. 23 (**Annex RMI/-25**); Messman No 1-1, paras. 15, 32 (**Annex RMI/-28**); Messman No 2-1, para. 18 (**Annex RMI/-29**); Pumpman-1, para. 13 (**Annex RMI/-16**); Able Seaman No 1-1, para. 21 (**Annex RMI/-17**); Chief Cook-1, para. 30 (**Annex RMI/-27**).

<sup>142</sup> 2<sup>nd</sup> Officer-1, para. 29 (**Annex RMI/-6**); 3<sup>rd</sup> Officer-1, para. 29 (**Annex RMI/-10**); 4<sup>th</sup> Engineer-1, para. 35 (**Annex RMI/-13**); Pumpman-1, para. 33 (**Annex RMI/-16**); Able Seaman No 1-1, para. 25 (**Annex RMI/-17**); Able Seaman No 2-1, para. 30 (**Annex RMI/-18**); Ordinary Seaman No 1-1, para. 33 (**Annex RMI/-20**); Motorman No 1-1, para. 26 (**Annex RMI/-24**); Motorman No 2-1, para. 36 (**Annex RMI/-25**); Chief Cook-1, para. 32 (**Annex RMI/-27**); Messman No 2-1, para. 30 (**Annex RMI/-29**).

<sup>143</sup> Askins-1, para. 55 (**Annex RMI/-3**).

<sup>144</sup> Askins-1, para. 57 (**Annex RMI/-3**).

<sup>145</sup> Askins-1, para. 57 (**Annex RMI/-3**).

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Town. They left Nigeria on 28 May 2023 and arrived in Cape Town on 7 June 2023. On arrival, the crew received medical attention, before being flown home on 8 June 2023 to be reunited with their families.<sup>146</sup>

95. In total, the Vessel and her crew were detained for almost 10 months (289 days) as a direct consequence of Equatorial Guinea's wrongful conduct.

### **X. The Marshall Islands' attempts to engage with Equatorial Guinea**

96. As described above and detailed further below, from 16 August 2022, the Marshall Islands made regular and repeated attempts, through a range of channels and at various levels, to engage with Equatorial Guinea regarding the dispute. Aside from meetings on 8 September 2022 and 13 September 2022, between the Marshall Islands' representative and, respectively, the Director-General of Ports of Equatorial Guinea in charge of regulations and inspections and the Attorney-General, there was no response by Equatorial Guinea.

97. The Marshall Islands' communications and correspondence with Equatorial Guinea include the following:

- a. By letter of 16 August 2022, the Marshall Islands Maritime Administrator wrote to the Governor of Luba expressing concern regarding the detention of the "*Heroic Idun*." The letter requested, "as it appears that the actions taken are in violation of [UNCLOS], in particular Articles 97 and 110" an explanation of the actions taken by Equatorial Guinea and the immediate return of the crew to the Vessel and the immediate release of the Vessel.<sup>147</sup>
- b. By letter dated 26 August 2022, the Marshall Islands Maritime Administrator wrote to the Attorney-General of Equatorial Guinea, again requesting the return of the crew to the Vessel and the immediate release of the Vessel. Concerns were expressed about the questioning of the Master, Chief Engineer, and 2<sup>nd</sup> Officer, the detention of the crew and Vessel without formal charge, and the threat to the Vessel posed by the absence of the crew and failure to meet safe manning requirements under SOLAS.<sup>148</sup>
- c. On 8 September 2022, a representative of the Marshall Islands Maritime Administrator met with the Director-General of Ports of Equatorial Guinea in charge of regulations and inspections in a further attempt to resolve the situation.
- d. On 13 September 2022, the Marshall Islands Maritime Administrator wrote again to the Attorney-General of Equatorial Guinea requesting the return of the crew to

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<sup>146</sup> Kulblik-1, paras. 90-96 (**Annex RMI/-2**); Askins-1, para. 59 (**Annex RMI/-3**);

<sup>147</sup> Letter from the Marshall Islands Maritime Administrator to the Governor of Luba, dated 16 August 2022 (**Annex SA/-6**).

<sup>148</sup> Letter from the Marshall Islands Maritime Administrator to the Honorable Anatolio Nzang Nguema, Attorney-General, Republic of Equatorial Guinea, dated 26 August 2022 (**Annex SA/-9**).

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the Vessel and the immediate release of the Vessel, and repeating concerns about safe manning of the Vessel.<sup>149</sup>

- e. On the same day (13 September), a representative of the Marshall Islands Maritime Administrator met with the Attorney-General of Equatorial Guinea in yet a further attempt to resolve the situation.<sup>150</sup>
- f. On 18 October 2022, the Marshall Islands Maritime Administrator wrote again to the Attorney-General of Equatorial Guinea requesting the return of the crew to the Vessel and the immediate release of the Vessel. It noted that the crew's ongoing detention was having a serious impact on their physical and mental wellbeing and that at least four crew members had caught malaria and there was a typhoid outbreak onboard. It also noted that, despite assurances by the Chief of Staff of the Navy, the Vessel was not released as promised upon payment of the Fine.<sup>151</sup>
- g. By Note Verbale dated 28 October 2022, conveyed by cover of Note Verbale dated 31 October 2022, the Ministry of Foreign Affairs of the Marshall Islands referred to and repeated the serious concerns expressed in its letters dated 26 August, 13 September and 18 October. It noted that the actions taken on 12 August interfered with its rights under UNCLOS, including Articles 58(1)-(2), 87, 97 and 110, and customary international law, that the flag State was not informed of any actions taken, that the Equatoguinean authorities had no jurisdiction under international law to intercept and detain the "*Heroic Idun*" and her crew, and that Equatorial Guinea's actions breached the crew's human rights and the SOLAS requirements for safe operation of the Vessel. It noted that the efforts to resolve the dispute diplomatically had been unsuccessful, and that if no diplomatic solution could be reached very shortly, the Marshall Islands would have to consider submitting the dispute to the procedures under UNCLOS.<sup>152</sup>
- h. On 4 November 2022, the Marshall Islands Maritime Administrator wrote again to the Attorney-General of Equatorial Guinea, protesting in strong terms any transfer of the Vessel and her crew into the custody of Nigeria and requesting the return of the crew to the Vessel and the immediate release of the Vessel. It noted that, in the

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<sup>149</sup> Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 13 September 2022 (**SA/-11**).

<sup>150</sup> Askins-I, para. 21 (**Annex RMI/-3**).

<sup>151</sup> Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 18 October 2022 (**Annex SA/-15**).

<sup>152</sup> Note Verbale EQ/01-22, from the Ministry of Foreign Affairs of the Republic of the Marshall Islands to the Ministry of Foreign Affairs, International Cooperation and Francophone Affairs, Republic of Equatorial Guinea, dated 28 October 2022, with a covering Note Verbale MI/22/EQ-1, from the Permanent Mission of the Republic of the Marshall Islands to the United Nations, New York, to the Permanent Mission of the Republic of Equatorial Guinea to the United Nations, New York, dated 31 October 2022 (**Annex SA/-16**).

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absence of any positive response, the Marshall Islands would be forced to commence proceedings under UNCLOS.<sup>153</sup>

- i. By a Note Verbale dated 14 November 2022, the Ministry of Foreign Affairs of the Marshall Islands reiterated that the conduct of the Equatoguinean authorities was in breach of UNCLOS, “including but not limited to the freedom of navigation and exclusive flag State jurisdiction provisions of the Convention, including, *inter alia*, Articles 58, 87, 89, 92 and 97, both in and of themselves and in the light of human rights obligations binding upon Equatorial Guinea in respect of those in service of the vessel.” It further noted that, as Equatorial Guinea had failed to address these concerns, the Marshall Islands had had no alternative but to initiate proceedings before ITLOS for prompt release of the Vessel and her crew. It also protested the transfer of control and custody of the Vessel and her crew to Nigeria outside any lawful process, and notwithstanding the commencement of the proceedings and formal communication of the application to Equatorial Guinea by ITLOS on 10 November 2022. It noted that this “is a violation of basic principles of good faith, including under Article 300 of the Convention, and of the institutional system of dispute settlement under UNCLOS” and stated that the Marshall Islands intended to pursue these breaches by way of proceedings under Annex VII of UNCLOS.<sup>154</sup>

98. In addition to the interventions by the Marshall Islands, the Managers also wrote to the Attorney-General of Equatorial Guinea on 16 September 2022, expressing, *inter alia*, concern about the conditions of the crew and their questioning by Nigerian authorities without legal representation.<sup>155</sup>

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<sup>153</sup> Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 4 November 2022 (**Annex SA/-18**).

<sup>154</sup> Note Verbale EQ/02-22, from the Ministry of Foreign Affairs of the Republic of the Marshall Islands to the Ministry of Foreign Affairs, International Cooperation and Francophone Affairs, Republic of Equatorial Guinea, dated 14 November 2022 (**Annex SA/-30**).

The Marshall Islands also sent formal correspondence to others, including Nigeria, in an effort to resolve the situation, including the following: Letter from the Marshall Islands Maritime Administrator to Vice Admiral Awwal Zubairu Gambo, Chief of Naval Staff, dated 18 August 2022 (**Annex SA/-7**); Letter from the Marshall Islands Maritime Administrator to the Honorable Dr Bashir Jamoh, Director General of the Nigerian Maritime Administration and Safety Agency, dated 30 August 2022 (**Annex SA/-10**); Letter from the Marshall Islands Maritime Administrator to the Honorable Dr Bashir Jamoh, Director General of the Nigerian Maritime Administration and Safety Agency, dated 4 November 2022 (**Annex SA/-19**); Letter from the Marshall Islands Maritime Administrator to the Honorable Dr. Paul Adalikwu, Secretary General, Maritime Organisation of West and Central Africa, dated 6 November 2022 (**Annex SA/-21**); Note Verbale NG/01-22, from the Ministry of Foreign Affairs and Trade of the Republic of the Marshall Islands to the Ministry of Foreign Affairs of the Republic of Nigeria, dated 11 November 2022, with a covering Note Verbale from the Permanent Mission of the Republic of the Marshall Islands to the United Nations Office and other international organisations to the Permanent Mission of the Federal Republic of Nigeria to the United Nations Office and other international organisations, dated 11 November 2022 (**Annex SA/-28**); Note Verbale NG/02-22, from the Ministry of Foreign Affairs and Trade of the Republic of the Marshall Islands to the Ministry of Foreign Affairs of the Republic of Nigeria, dated 14 November 2022 (**Annex SA/-31**); and Letter from the Marshall Islands Maritime Administrator to the Honorable Dr Bashir Jamoh, Director General of the Nigerian Maritime Administration and Safety Agency, dated 24 December 2022 (**Annex SA/-45**).

<sup>155</sup> Letter from the Managers to the Equatorial Guinea Attorney-General, dated 16 September 2022 (**Annex EK/-36**).

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99. On none of the abovementioned occasions was there a response by the Equatoguinean authorities to the Marshall Islands' attempts to have the Vessel released, ameliorate the conditions of the Vessel and the crew, or to resolve the dispute.

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### PART III: JURISDICTION, ADMISSIBILITY & APPLICABLE LAW

100. In this Part, Chapter 3 addresses jurisdiction and admissibility. Chapter 4 addresses the law applicable to the present dispute.

#### CHAPTER 3

#### JURISDICTION & ADMISSIBILITY

##### I. The Chamber enjoys jurisdiction over this dispute

101. As recalled in Chapter 1, the Parties agreed to transfer this dispute to the Chamber and the time-limit for Equatorial Guinea to file preliminary objections under Article 97(1) of the Rules of the Tribunal expired on or about 17 July 2023, without Equatorial Guinea having filed any preliminary objections.

102. It is recalled that Article 279 of UNCLOS, in section 1 of Part XV, provides that:

States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

103. Article 286 provides that “... any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction” under section 2 of Part XV of UNCLOS.

104. Article 288(1) in turn provides that “[a] court or tribunal ... shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.” A dispute exists where there is a disagreement on a point of law or fact,<sup>156</sup> which is it is demonstrated is positively opposed by the other party.<sup>157</sup> *Expressis verbis* is not required: positive opposition can be inferred from the failure of a State to respond to a claim

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<sup>156</sup> The classic test is that set out in *Mavrommatis Palestine Concessions*, Judgment No. 2 of 30 August 1924, P.C.I.J., Series A, No. 2, at p. 11, where the Court held a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests.”

<sup>157</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962, p. 319, at p. 328. The Tribunal has affirmed the application of this case law in the context of claims brought under UNCLOS: see, e.g. *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44 (“**Norstar, Preliminary Objections Judgment**”), at para. 85, referring to *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan) Provisional Measures*, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at para. 44.

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in circumstances where a response is called for.<sup>158</sup> In order for ITLOS to be able to entertain jurisdiction over a dispute, the dispute must have existed at the time of commencement of the proceedings.<sup>159</sup>

105. These requirements have been met.

106. There is a dispute. The Marshall Islands raised its claims repeatedly with Equatorial Guinea, prior to the transmission of its Notification and Statement of Claim under Annex VII to Equatorial Guinea on 18 December 2022 and the commencement of these proceedings with the Special Agreement dated 18 May 2023, as set out above in paragraph 97 of Chapter 2. Equatorial Guinea failed to respond, when in the circumstances a response was plainly called for.<sup>160</sup>

107. The dispute concerns the interpretation and application of the Convention. The Marshall Islands contends that Equatorial Guinea's conduct in respect of the "*Heroic Idun*" and her crew violated its freedom of navigation and exclusive flag State jurisdiction in breach of Articles 87 and 92, which are cornerstones of the Convention. The dispute also concerns breaches of various of the other provisions of the Convention, including Articles 2(3), 56(2), 58(2), 98, 225, 279, 286, 288, 292 and 300.

108. The Marshall Islands recognizes that a number of its claims under the Convention invoke or rely on customary rules and principles of international law and treaties outside the Convention. The customary rules or principles of international law relied on or asserted in this case include the principles of reasonableness and humanity in the exercise of enforcement measures, customary human rights and the general principles or rules of customary law concerning the minimum standard of treatment of prisoners or other detainees, the obligation to notify the flag State of enforcement measures against its vessels and their crew, the obligation to release vessels promptly without undue delay, and the obligation to preserve rights and not aggravate a dispute pending proceedings. Equatorial Guinea's treaty obligations relied on include the ICCPR, the African Charter of Human and Peoples' Rights ("**African Charter**") and the IMO treaties (such as SOLAS, the STCW and the COLREGS). That does not preclude the Chamber exercising its jurisdiction over these claims.

109. Insofar as the claims concern Equatorial Guinea's obligations under other treaties, the compatibility of Equatorial Guinea's conduct with its obligations, as well as with relevant customary rules and principles of international law, is relevant to the "gateway" provisions (see paragraph 126 below), which require Equatorial Guinea to exercise its rights in accordance with the Convention and other rules of international law (Articles 2(3), 58(2), 87(1) and 235(1)) and with due regard to interests and rights and duties of, *inter alia*, the Marshall Islands (Articles 56(2), 87(2) and 230(3)).

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<sup>158</sup> *Norstar, Preliminary Objections Judgment*, at para. 99, recalling the case law of the International Court of Justice ("**ICJ**").

<sup>159</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4 ("**Louisa, Judgment**"), at para. 151.

<sup>160</sup> *Norstar, Preliminary Objections Judgment*, at para. 99.

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110. As explained in more detail in Chapter 4 on applicable law, the Chamber may, in addition, have recourse to customary rules and principles of international law outside of the Convention by virtue of Article 293 of UNCLOS.

111. In addition, and as confirmed by the Annex VII tribunal in the *Chagos Marine Protected Area*, the Chamber enjoys jurisdiction over specified international rules and standards for the protection and preservation of the marine environment, e.g., SOLAS, the STCW and the COLREGS, pursuant to Article 297(1)(c).<sup>161</sup> The IMO treaties also fall within the category of generally accepted international rules and regulations incorporated by reference into various UNCLOS provisions, such as Article 94, which in turn form part of the relevant context for the interpretation of other provisions of the Convention, including Article 225. The Chamber enjoys jurisdiction accordingly.

112. The requirement in Article 283(1) that “[w]hen a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means” has also been met.<sup>162</sup>

113. As detailed in paragraph 97 above, from 16 August 2022 the Marshall Islands Maritime Administrator repeatedly raised the dispute with Equatorial Guinea and sought release of the Vessel and crew. The Marshall Islands expressly invited discussion of the dispute in a Note Verbale dated 28 October 2022, in which the Ministry of Foreign Affairs of the Marshall Islands informed the Ministry of Foreign Affairs of Equatorial Guinea that it remained “ready to discuss” the matter of the “*Heroic Idun*” with Equatorial Guinea, but also advised that if no diplomatic solution could be reached very shortly, the Marshall Islands would have to consider submitting the dispute to the judicial procedures under UNCLOS. Equatorial Guinea did not reply. On 4 November 2022, the Marshall Islands Maritime Administrator wrote again to the Attorney-General of Equatorial

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<sup>161</sup> *Arbitration regarding the Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015 (2018) XXXI R.I.A.A. 359 (“**Chagos Marine Protected Area, Award**”), at para. 316.

<sup>162</sup> The principles governing the application of Article 283 developed in the case law of ITLOS and Annex VII tribunals may be summarised as follows: (a) Article 283 cannot be understood as an obligation to negotiate the substance of the dispute (*Norstar, Preliminary Objections Judgment*, at para. 208; *Chagos Marine Protected Area, Award*, at para. 378); (b) the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute (*Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10 (“**Land Reclamation in and around the Straits of Johor, Provisional Measures Order**”), at para. 38; *Norstar, Preliminary Objections Judgment*, at para. 213; *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, p. 58 (“**Louisa, Provisional Measures Order**”), at para. 58); (c) a Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted (*MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at para. 60; *Land Reclamation in and around the Straits of Johor*, Provisional Measures Order, at para. 47; “*ARA Libertad*” (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, at para. 71; “*Arctic Sunrise*” (*Netherlands v. Russia*), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230 (“**Arctic Sunrise, Provisional Measures Order**”), at para. 76; *Louisa, Provisional Measures Order*, at para. 63; *Norstar, Preliminary Objections Judgment*, at para. 216); and (d) the absence of a response from one Party to an attempt by another Party to exchange views on the means of settlement of a dispute arising between them does not prevent a finding that the requirements of Article 283 have been fulfilled (*Norstar, Preliminary Objections Judgment*, at para. 214).

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Guinea and repeated its request that the Vessel and crew be released immediately and stated that, in the absence of a positive response, the Marshall Islands would be forced to commence proceedings under UNCLOS. Again there was no response.

114. Aside from the meetings on 8 and 13 September 2022 between the representative of the Marshall Islands Maritime Administrator, Captain Mustapha, and, respectively, Equatorial Guinea's Director-General of Ports in charge of regulations and inspections, and Attorney-General, which did not lead to any step being taken towards an agreed method of solving the dispute, Equatorial Guinea failed to engage with any of the Marshall Islands' attempts to discuss the dispute or its settlement.

115. Equatorial Guinea instead aggravated the dispute further by transferring the "*Heroic Idun*" and crew into the custody and control of Nigeria on 11 November 2022, after the Marshall Islands' repeated attempts to engage with Equatorial Guinea invoking UNCLOS and seeking release of the Vessel and crew, and after the Marshall Islands had made an application to the Tribunal for prompt release of the Vessel and crew.<sup>163</sup>

116. On 14 November 2022, the Ministry of Foreign Affairs of the Marshall Islands protested Equatorial Guinea's conduct in the strongest terms and informed it that the Marshall Islands intended to pursue Equatorial Guinea's breaches of UNCLOS by way of proceedings under Annex VII to the Convention.<sup>164</sup> Equatorial Guinea did not reply. As held by the Tribunal in the *M/V "Norstar"*, the absence of a response from one Party to an attempt by another Party to exchange views on the means of settlement of a dispute arising between them does not prevent a finding that the requirements of Article 283 have been fulfilled.<sup>165</sup>

### II. The claim is admissible

117. The Marshall Islands was not required to exhaust local remedies under Article 295 before commencing proceedings under the Convention.<sup>166</sup>

118. The principles governing the application of Article 295 may be summarised as follows:

- a. When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies

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<sup>163</sup> The Note Verbale refers to the prompt release application being initiated on 10 November and communicated to Equatorial Guinea on 10 November. The application was filed shortly before midnight GMT on 9 November 2022. According to correspondence from the Tribunal, the application was communicated to Equatorial Guinea on 10 November 2022.

<sup>164</sup> *Norstar*, *Preliminary Objections Judgment*, at para. 99, recalling the case law of the ICJ.

<sup>165</sup> *Norstar*, *Preliminary Objections Judgment*, at para. 214.

<sup>166</sup> Article 295 of UNCLOS provides that "[a]ny dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section [section 2 of Part XV] only after local remedies have been exhausted where this is required by international law." The Tribunal in the *M/V Virginia G* noted that "[i]t is a well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection" (*M/V "Virginia G" (Panama/Guinea-Bissau), Judgment*, *ITLOS Reports 2014*, p. 4 ("*Virginia G, Judgment*"), at para. 153).

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rule, it is necessary to determine which element is preponderant.<sup>167</sup> This requires an examination of the nature of the rights which the claimant State claims have been violated, to establish whether the claimants were acting in diplomatic protection or vindicating rights belonging to the State applicants;

- b. Alleged violations of the right to freedom of navigation and of the right not to be subject to the criminal courts of a foreign State amount to a direct injury to the rights of the flag State.<sup>168</sup> When these rights are engaged, the claim of the claimant State as a whole is brought on the basis of an injury to the State itself;<sup>169</sup>
- c. When a claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged injury to the State, these claims are not subject to the rule of exhaustion of local remedies;<sup>170</sup>
- d. In any event, for the rule of exhaustion of local remedies to apply, there must be a jurisdictional connection between the State purporting to exercise jurisdiction, and the natural and juridical persons that are said to have suffered damage.<sup>171</sup> If the respondent State was purporting to act on a basis not permitted under the Convention, there is no such jurisdictional connection.

119. Local remedies were not required to be exhausted by the Marshall Islands in this case, for any one or more of the following reasons:

- a. First, the Marshall Islands is seeking to vindicate the rights of the Marshall Islands under the Convention and customary international law, including quintessential flag-State rights, such as freedom of navigation and exclusive flag State jurisdiction.
- b. Second, the claim for damage to the natural and juridical persons connected with the ship arises from the injury to the Marshall Islands.
- c. Third, and in any event, there was and is no jurisdictional connection between those persons and Equatorial Guinea, since it was only as a consequence of an unlawful interception and diversion in the EEZ of a third State that the Vessel and crew came to be within Equatorial Guinea's territory, custody and control and subject to its enforcement measures, for the reasons set out in Chapter 5 of Part IV.

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<sup>167</sup> *Virginia G, Judgment*, para. 157.

<sup>168</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10 (**"Saiga (No.2), Judgment"**), para. 97; *Virginia G, Judgment* para. 157; *Norstar, Preliminary Objections Judgment*, para.270.

<sup>169</sup> *Virginia G, Judgment*, para. 157.

<sup>170</sup> *Saiga (No.2), Judgment*, para. 98; *Virginia G, Judgment*, para.158; *Norstar, Preliminary Objections Judgment*, para. 271.

<sup>171</sup> *Saiga (No.2), Judgment*, para. 100. This principle is now reflected in draft Article 15(c) of the International Law Commission (**"International Law Commission"**)'s Draft Articles on Diplomatic Protection 2006 (in *Yearbook of the International Law Commission (2006)*, Vol. II (Part 2), p. 26, at p. 46) (**"Draft Articles on Diplomatic Protection"**).

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- d. Finally, there was no jurisdictional connection between the Vessel and crew and Equatorial Guinea's purported exercise of prescriptive jurisdiction in its application of Articles 10, 12 and 698(2)(b) and (c) of Law No.2/2020 of 8 July, and Article 581 of the Community Code of the Merchant Navy, as set out in Chapter 6 of Part IV.<sup>172</sup>

120. Accordingly, for the reasons set out above, the Marshall Islands' claims against Equatorial Guinea are admissible.

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<sup>172</sup> In the circumstances it is unnecessary to address whether there were any reasonably available local remedies to provide effective redress or any whether any local remedies provided a reasonable possibility of redress (the exception to the local remedies rule set out in Article 15(a) of the Draft Articles on Diplomatic Protection). For the avoidance of any doubt, the Marshall Islands' position is that there were no reasonably available and effective domestic remedies or any that provided a reasonable prospect of redress.

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## CHAPTER 4

### APPLICABLE LAW

121. Article 293(1) of the Convention provides that “[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”

122. The following propositions can be drawn from the wording of Article 293(1) and other provisions of the Convention as interpreted and applied by the Tribunal and Annex VII tribunals constituted under UNCLOS.

123. First, UNCLOS contains a number of provisions which make reference to, or incorporate by reference, other treaties, rules or regulations which are either directly identified by name or by genus. Examples include Article 301, which refers to “the principles of international law embodied in the Charter of the United Nations”; Articles 74(1)/83(1), which refers to Article 38 of the Statute of the ICJ; Article 108(1), which refers to “international conventions” concerning illicit traffic in narcotic drugs or psychotropic substances; Article 303(4), which refers to “other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature”; and Article 237, which refers to “special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment... ”

124. Several provisions incorporate by reference generally accepted international rules, standards, procedures and practices (sometimes referred to by the shorthand “GAIRS”).<sup>173</sup> GAIRS are generally understood to include, *inter alia*, the rules and regulations established under the umbrella of the IMO and its core treaty pillars,<sup>174</sup> namely SOLAS, the International Convention for the

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<sup>173</sup> Not all UNCLOS provisions use the same form of wording. Formulations include “generally accepted international rules and standards” (which is, strictly speaking, what GAIRS is an abbreviation for) (Articles 211(2), 211(5), 211(6)(c), 226), “generally accepted international rules or standards” (Article 21(2)), “generally accepted international regulations, procedures and practices” (Articles 39(2), 94(5)), “internationally agreed rules, standards and recommended practices and procedures” (Articles 207(1), 212(1)), “generally accepted international regulations” (Articles 21(4), 41(3), 53(8)), 94(2)(a)), “generally accepted international standards” (Article 60(5)-(6)), “generally accepted international rules and standards” (Articles 211(6)(c), 226(1)(a)), “generally accepted guidelines, criteria and standards” (Article 271), “generally accepted international standards established ... by the competent international organization” (Article 60(3)), “the applicable international rules and standards” (Article 228), “generally accepted international rules and standards established through the competent international organization or general diplomatic conference” (Article 211(2) and (5), “applicable international rules and standards established through competent international organizations or diplomatic conference” (Articles 213, 214, 216(1), 222), “appropriate procedures ... established, either through the competent international organization or as otherwise agreed” (Article 220(7)), “applicable international rules and standards[,] established through competent international organization or general diplomatic conference” (Articles 217(1) and (4), Article 218(1), “specified international rules and standards ... which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention” (Article 297(1)(c)).

<sup>174</sup> Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017) (“**Proelß Commentary**”), at p. 713; *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016 (2020) XXXIII R.I.A.A. 153 (“**South China Sea, Award**”), at para. 1083. On the relationship between the IMO and UNCLOS, see, Agustín Blanco-Bazán, in David Joseph Attard et al. (eds.), *The IMLI Treatise on Global Governance: Volume III: The IMO and Ocean Governance* (Oxford University Press 2018), Ch. 2, at pp. 33–34.

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Prevention of Pollution from Ships 1973 and its 1978 Protocol (“**MARPOL**”), the STCW, and the Maritime Labour Convention 2006 (“**MLC**”), which, although concluded under the auspices of the International Labour Organization (“**ILO**”), is considered the “fourth” IMO pillar.<sup>175</sup>

125. Provisions of the Convention which make reference to GAIRS made under the umbrella of the IMO include Articles 60, 211, 213, 214, 216, 217, 218, 220, 222, and 297(1)(c).<sup>176</sup> Article 94 refers not only to GAIRS made under the IMO, but is also intended to include reference to the ILO’s maritime labour conventions.<sup>177</sup>

126. Second, there are a number of provisions which do not make express reference to treaties by name or genus or to GAIRS, but to international law more generally. These include:<sup>178</sup>

- a. Article 2(3), which provides that “[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”
- b. Article 56(2), which requires that “[i]n exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.”
- c. Article 58(2), which provides that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”
- d. Article 87(1), which provides that, *inter alia*, “[f]reedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.”
- e. Article 87(2), which provides that “[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas.”
- f. Article 230(3), which requires that “[i]n the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.”

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<sup>175</sup> The Marshall Islands and Equatorial Guinea are both parties to SOLAS 1974 and its 1978 and 1988 Protocols, MARPOL 1973 and its 1978 Protocol, and the STCW. Equatorial Guinea is not a party to the MLC but is a party to several of the earlier conventions concerning crew welfare, including the Food and Catering (Ships’ Crews) Convention (1946) 264 U.N.T.S. 3792 and the Accommodation of Crews Convention (Revised) (1949) 160 U.N.T.S. 2109.

<sup>176</sup> References to “the competent international organization” are understood as referring to the IMO (Robin R. Churchill, ‘The 1982 United Nations Convention on the Law of the Sea’ in Donald R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), p. 24, at p. 31, fn. 37 (emphasis added)).

<sup>177</sup> See para. 94.8(f) of the commentary to Article 94 in Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff 1985) (“*Virginia Commentary*”), vol. III, at pp.147–148. More generally, the commentary explains that the conventions encompassed by Article 94 include, *inter alia*, SOLAS and the COLREGS. See paragraphs 287-289 below.

<sup>178</sup> Emphases added.

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- g. Article 235(1), which provides that “States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.”

127. These articles above are referred to in this Memorial as “gateway” provisions. Even though the interpretation and application of these provisions for the purpose of several of the Marshall Islands’ claims requires consideration of customary rules or general principles of international law or treaties and the compatibility of Equatorial Guinea’s conduct therewith, those claims are nevertheless properly characterized as claims under the Convention.

128. Third, it is well-established in the case law of the Tribunal and tribunals constituted under Annex VII of UNCLOS that the applicable law which tribunals may apply under Article 293 includes customary rules and general principles of international law. The customary rules and general principles of international law applied by tribunals under UNCLOS to date include general international law in relation to human rights,<sup>179</sup> the right to protest at sea,<sup>180</sup> the principle of reasonableness (necessity and proportionality) in law enforcement<sup>181</sup> and the principle of humanity<sup>182</sup> (which overlap with but are not limited to human rights principles), the use of force,<sup>183</sup> and the principle of non-aggravation of a dispute.<sup>184</sup> The Tribunal also established in the *M/V “Norstar”* that the applicable law for the purpose of Article 293 includes other provisions of the Convention.<sup>185</sup>

129. Fourth, these treaties, customary rules and general principles of international law may in addition be aids to interpretation in accordance with the rule of treaty interpretation reflected in Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties (“VCLT”). Article 293 and rules of treaty interpretation are frequently invoked together.<sup>186</sup>

130. These propositions concerning the applicable law inform the Marshall Islands’ statement of the law on which each of its claims are based, set out in Part IV, Chapters 5 to 7.

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<sup>179</sup> *Arbitration regarding the Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits of 14 August 2015 (2019) R.I.A.A. XXXII 205 (“*Arctic Sunrise, Merits Award*”), at para. 197.

<sup>180</sup> *Arctic Sunrise, Merits Award*, at para. 227.

<sup>181</sup> *Saiga (No.2)*, Judgment, at paras. 155–156; *Virginia G*, Judgment, at paras. 359–260; *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname (Guyana v. Suriname, Award)*, Award of 17 September 2007 (2012) XXX R.I.A.A. 1 (“*Guyana v. Suriname, Award*”), at para. 445; *Arctic Sunrise, Merits Award*, at para. 222; *Arbitration regarding the Duzgit Integrity (Malta v. São Tomé and Príncipe)*, Award of 5 September 2016 (2018) 173 I.L.R. 95 (“*Duzgit Integrity, Merits Award*”), at paras. 209 and 254.

<sup>182</sup> *Saiga (No.2)*, Judgment, at para. 155.

<sup>183</sup> *Saiga (No.2)*, Judgment, at para. 155; *Guyana v. Suriname, Award*, at paras. 405–406.

<sup>184</sup> *South China Sea, Award*, at para. 1173.

<sup>185</sup> *M/V “Norstar” (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10 (“*Norstar, Merits Judgment*”), at paras. 137–138.

<sup>186</sup> *Arctic Sunrise, Merits Award*, at paras. 197–198. The Marshall Islands and Equatorial Guinea are not parties to the VCLT, but it is well-established that Article 31 reflects customary international law (see, e.g. *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3, at para. 63 and the cases cited therein and, in this Tribunal, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4, at para. 372).

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### PART IV: BREACHES OF UNCLOS AND THEIR CONSEQUENCES

131. This Part contains four Chapters addressing Equatorial Guinea's breaches of UNCLOS and their legal consequences. **Chapter 5** addresses Equatorial Guinea's breaches of the Marshall Islands' freedom of navigation and exclusive flag State jurisdiction by taking enforcement action against the "*Heroic Idun*" on the high seas. **Chapter 6** addresses Equatorial Guinea's breaches of UNCLOS by an excessive exercise of prescriptive jurisdiction. **Chapter 7** deals with the rest of the Marshall Islands' claims concerning Equatorial Guinea's other breaches of the Convention and the applicable law. Part IV concludes with **Chapter 8**, setting out the remedies sought by the Marshall Islands.

#### CHAPTER 5

##### EQUATORIAL GUINEA BREACHED FREEDOM OF NAVIGATION AND EXCLUSIVE FLAG STATE JURISDICTION BY TAKING ENFORCEMENT ACTION AGAINST THE "*HEROIC IDUN*" ON THE HIGH SEAS

###### I. Introduction

132. The present chapter addresses the core of the Marshall Islands' claim against Equatorial Guinea, namely that by intercepting the "*Heroic Idun*" and her crew in the EEZ of a third State, and by diverting their course under the threat of the use of force, Equatorial Guinea breached the principles of freedom of navigation (addressed in **Section II**) and exclusive flag State jurisdiction (addressed in **Section III**). These principles constitute the foundation of modern law of the sea and correspond to quintessential flag State rights under the Convention. As a consequence of Equatorial Guinea's breaches of these principles, all the measures subsequently adopted by Equatorial Guinea lack any legal basis in UNCLOS and other international law, and are unlawful (addressed in **Section IV**).

###### II. Breach of freedom of navigation and the right to sail on the high seas

133. The law concerning freedom of navigation and the right to sail on the high seas is addressed under three headings. In this Section, sub-section A addresses the duty not to interfere with navigation and with the right to sail on the high seas; sub-section B addresses the duty to exercise freedom of navigation in good faith and have due regard to interests of other States; sub-section C addresses freedom of navigation in the relationship between two flag States in the EEZ of a third State. Finally, sub-section D addresses Equatorial Guinea's breach of freedom of navigation and the right to sail on the high seas.

###### A. The duty not to interfere with navigation and with the right to sail on the high seas

134. Article 87 of UNCLOS provides in relevant part:

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The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation (...).

135. Article 90 provides that: “[e]very State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.”

136. With respect to the relationship between Articles 87 and 90, the Annex VII tribunal in the *Enrica Lexie Incident* indicated that Article 90 is said “at least in part to reinforce the freedom of navigation provided for in Art. 87 with a specific right.”<sup>187</sup>

137. Freedom of navigation is “one of the oldest and most recognized principles in the legal regime governing ocean space” and “one of the pillars of the law of the sea.”<sup>188</sup> In his treatise *Mare Liberum* of 1609, the Dutch jurist Hugo Grotius asserted that “the oceans are incapable of appropriation by States and that the ships of any State should navigate freely across the world’s oceans.”<sup>189</sup>

138. Freedom of navigation involves “a positive and a negative aspect: positively, vessels of every State may freely navigate on the high seas; negatively, no State may exercise any authority against any vessel sailing under the flag of another State.”<sup>190</sup>

139. Despite its centrality to the legal order for the seas and oceans established by UNCLOS and in the customary international law of the sea which it codifies, the principle of freedom of navigation reflected in Article 87 of the Convention has only recently been considered in depth by ITLOS and Annex VII tribunals. Recent cases have provided the opportunity to distil in precise terms what type of State conduct is incompatible with freedom of navigation. Relevant decisions include the *M/V “Norstar”* and the “*Enrica Lexie*” Incident.<sup>191</sup>

140. In these decisions, both ITLOS and Annex VII tribunals have specified that a low threshold applies to establishing a breach of Article 87 of the Convention.<sup>192</sup> The *Enrica Lexie Incident* tribunal endorsed the proposition that freedom of navigation “provides ships of any State with the

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<sup>187</sup> “*Enrica Lexie*” Incident (*Italy v. India*) Perm. Ct. Arb. Case No. 2015-28, Award of 21 May 2020 (“*Enrica Lexie, Merits Award*”), at para. 1037, quoting from: *Proelß Commentary*, at p. 690. See also *Virginia Commentary*, vol. III, at p. 99, para. 90.1.

<sup>188</sup> Rüdiger Wolfrum, “Freedom of Navigation: New Challenges,” in M.H. Nordquist, T.T. Koh and J.N. Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff 2009), p. 79, at p. 80.

<sup>189</sup> Albert J. Hoffmann, ‘Freedom of Navigation’ (2011) Max Planck Encyclopedia of International Law, at para. 2.

<sup>190</sup> *Oscar Chinn (United Kingdom v. Belgium)*, Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63, p. 65, at p. 83; G. Gidel, *Le droit international public de la mer. Le temps de paix*, Vol. 1 (1932), p. 236.

<sup>191</sup> *Norstar, Merits Judgment; Enrica Lexie, Merits Award*.

<sup>192</sup> See, e.g., *Norstar, Merits Judgment*, at para. 222.

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right to traverse the high seas with no or minimal interference from any other State.”<sup>193</sup> The same low threshold applies to establishing a breach of Article 90.<sup>194</sup>

141. The test of “no interference or minimal interference” reinforces that any physical interference with the navigation of a foreign-flagged vessel on the high seas is incompatible with Article 87. The arbitral tribunal in the *Arbitration Between the Republic of Croatia and the Republic of Slovenia* explained that physical interference includes “boarding, arrest, detention, [or] diversion” of a vessel.<sup>195</sup>

142. This means that Article 87 “first and foremost protects the free movement of vessels on the high seas against enforcement measures by States other than the flag State or States so authorized by the latter.”<sup>196</sup>

143. In the *Enrica Lexie Incident*, the Annex VII tribunal underscored the connection between navigation, movement of a vessel, and physical interference. It found that Articles 87 and 90 are breached when a State causes a foreign-flagged vessel to change its intended direction or course, i.e., to alter its movement, on the high seas, by way of physical interference. It observed that:

In the Arbitral Tribunal’s view, the evidence on the record is clear that it was the act of shooting at the “St. Antony” by the Marines stationed on the “Enrica Lexie” that caused the “St. Antony” to *change direction and ultimately head back to shore*. The “St. Antony” was, both during and after the incident, *prevented from navigating its intended course*.

The shooting at the “St. Antony” amounted to physical interference with the navigation of the “St. Antony”. (...)

Accordingly, the Arbitral Tribunal concludes that by interfering with the navigation of the “St. Antony”, Italy acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention.<sup>197</sup> (emphasis added)

144. In its decision on the merits in the *M/V “Norstar,”* ITLOS went further. The Tribunal indicated that any type of interference with navigation, not only physical interference or enforcement action, constitutes a breach of freedom of navigation. It explained that:

As no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach

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<sup>193</sup> *Enrica Lexie, Merits Award*, at para. 468, citing Albert J. Hoffmann, ‘Freedom of Navigation’ (2011) Max Planck Encyclopedia of International Law, at para. 22.

<sup>194</sup> *Enrica Lexie, Merits Award*, at para. 1037.

<sup>195</sup> *Arbitration between the Republic of Croatia and the Republic of Slovenia (Croatia v. Slovenia) Perm. Ct. Arb. Case No. 2012-04, Final Award of 29 June 2017*, at para. 1129.

<sup>196</sup> *M/V “Norstar” (Panama v. Italy), Preliminary Objections, Judgment, Joint Separate Opinion of Judges Wolfrum and Attard, ITLOS Reports 2016*, p. 122, at para. 34.

<sup>197</sup> *Enrica Lexie, Merits Award*, at paras. 1041–1043.

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of the freedom of navigation, unless justified by the Convention or other international treaties. It goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of navigation. However, even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation.<sup>198</sup>

145. The Annex VII tribunal in the *Enrica Lexie Incident* further clarified what type of conduct falling short of physical or material interference may be contrary to freedom of navigation under UNCLOS. After noting that “interference may take physical or non-physical forms,”<sup>199</sup> the tribunal concluded that:

A breach of freedom of navigation may result from acts including (...) the threat (...) of force against a foreign vessel, or non-physical forms of interference whose effect is that of instilling fear in, or causing hindrance to, the exercise of the freedom of navigation.<sup>200</sup>

146. In reaching this conclusion, the tribunal recalled previous case law of law of the sea tribunals, including the decision of the Annex VII tribunal in *Guyana v. Suriname*, according to which a mere demand by a navy vessel that others should leave a certain area in 12 hours or “the consequences will be yours,”<sup>201</sup> constituted “a threat of the use of force in contravention of the Convention, the UN Charter and general international law.”<sup>202</sup> The *Enrica Lexie Incident* tribunal also quoted with approval the reasoning of Judge Laing in his separate opinion in *M/V “Saiga” (No.2)*, that “the enjoyment of ‘freedom of the seas’ is dependent on freedom from fear.”<sup>203</sup>

147. Exceptions to the principle of freedom of navigation on the high seas are extremely limited:

- (a) Article 110 of UNCLOS states that “a warship which encounters on the high seas a foreign ship (...) is not justified in boarding it unless” there are reasonable grounds for suspecting that the ship is engaged in piracy, the slave trade, unauthorised broadcasting (and the flag State of the warship has jurisdiction under Article 109) or the ship has the same nationality of the warship (but is flying a foreign flag or refusing to show its flag).<sup>204</sup>

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<sup>198</sup> *Norstar*, *Merits Judgment*, at para. 222.

<sup>199</sup> *Enrica Lexie*, *Merits Award*, at para. 469.

<sup>200</sup> *Enrica Lexie*, *Merits Award*, at para. 472.

<sup>201</sup> *Guyana v. Suriname*, *Award*, at para. 433, quoted in *Enrica Lexie*, *Merits Award*, at para. 471.

<sup>202</sup> *Guyana v. Suriname*, *Award*, at para. 445.

<sup>203</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, Separate Opinion of Judge Laing*, *ITLOS Reports 1999*, p. 154, at para. 29, quoted in *Enrica Lexie*, *Merits Award*, at para. 471.

<sup>204</sup> In addition to warships, Article 110 also applies to any other duly authorised ships or aircraft clearly marked and identifiable as being on government service (Article 110(5), UNCLOS).

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- (b) Article 111 concerning hot pursuit also proceeds on the basis that warships or military aircraft<sup>205</sup> may only interfere with the freedom of navigation of a foreign vessel on the high seas in the exceptional circumstances provided for in the Convention, and only where they comply with strict conditions.

148. It bears emphasizing that freedom of navigation prohibits enforcement action on the high seas even when this would be pursuant to a valid title of prescriptive jurisdiction in accordance with UNCLOS. That Equatorial Guinea did not have such a valid title in respect of conduct of the “*Heroic Idun*” on the high seas is explained in the next Chapter at section C. In any event, even where a State other than the flag State is entitled to regulate the conduct of, or on, foreign-flagged vessels, it cannot exercise enforcement jurisdiction in respect of such conduct when the foreign-flagged vessel concerned is on the high seas.<sup>206</sup>

### B. The duty to exercise freedom of navigation in good faith and have due regard to interests of other States

149. It is a feature of UNCLOS, and a consequence of the fact that the Convention sought to seek a balance between opposing interests of States, that when the Convention recognizes a right, it also sets out conditions for its exercise.

150. Article 87(1) of UNCLOS recognizes States’ rights to freedom of navigation “under the conditions laid down by this Convention and by other rules of international law.” Article 87(2) complements this provision, setting out the modalities by which freedom of navigation must be exercised in respect of other States seeking to exercise the same right.

151. According to Article 87(2), freedom of the high seas, including freedom of navigation:

shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas (...).

152. It is apparent from its formulation that Article 87(2) is intended to have a broad application: the duty to have due regard applies to “all States” and concerns the interests of all “other States” in the exercise of their rights of freedom of navigation. Article 87(2) therefore applies to the relationship between two flag States, when each of them is seeking to exercise freedom of

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<sup>205</sup> The right can also be exercised by ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect (Article 111(5), UNCLOS).

<sup>206</sup> For example, in *Enrica Lexie, Merits Award*, the Annex VII tribunal found that India, concurrently with Italy, had a valid title of prescriptive criminal jurisdiction in respect of an incident having occurred in the EEZ of India, involving an Italian flagged vessel and an Indian flagged vessel. The tribunal found that both countries possessed a valid prescriptive jurisdictional title as “the alleged offense was commenced on board the Italian vessel “*Enrica Lexie*” and completed on board the Indian vessel “*St. Antony*.” According to the tribunal (at para. 839), “pursuant to Article 58, paragraph 2, and Article 92, each Party has exclusive jurisdiction over their respective ship involved in the incident, namely, Italy over the “*Enrica Lexie*” and India over the “*St. Antony*.” Despite this, the tribunal investigated the question of whether India had exercised enforcement jurisdiction in respect of the Italian flagged vessel on the high seas. If established, this exercise of enforcement jurisdiction would have been unlawful, irrespective of the validity of India’s prescriptive jurisdiction concerning the incident.

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navigation on the high seas. As is explained below at paragraphs 161-164, in the relationship between two flag States, the high seas would include the EEZ of a third coastal State.

153. Annex VII tribunals have recently elucidated the meaning of “due regard.” The tribunal in the *Enrica Lexie Incident* noted:

As a general rule, the ordinary meaning of “due regard” does not contemplate priority for one activity over another. (...) Thus, the object and purpose of the obligation of “due regard” is to ensure balance between concurrent rights belonging to coastal and other States.<sup>207</sup>

154. In the *Chagos Marine Protected Area* arbitration, the Annex VII tribunal clarified that the obligation to have “due regard” must be assessed in the light of the specificity of the case, and having in mind a number of factors:

In the Tribunal’s view, the ordinary meaning of “due regard” calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.<sup>208</sup>

155. The Annex VII tribunal in *The South China Sea Arbitration (Philippines v. China)* agreed with this interpretation.<sup>209</sup>

156. Although these cases concerned the relationship between flag States and coastal States, the reasoning is equally applicable to the relationship between two flag States, neither of which is the relevant coastal State in respect of the area where they seek to exercise freedom of navigation.

157. In addition to a duty to exercise rights consistently with international law, and with due regard to the rights and interests of other States, UNCLOS sets out that States Parties must act in accordance with good faith and not abuse rights that the Convention recognizes. Article 300 provides that:

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<sup>207</sup> *Enrica Lexie, Merits Award*, at para. 975.

<sup>208</sup> *Chagos Marine Protected Area, Award*, at para. 519.

<sup>209</sup> *South China Sea, Award*, at para. 742.

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States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

158. The *Virginia Commentary* to Article 300 of UNCLOS refers to abuse of rights as:

The exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed on that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognized in favor of that State.<sup>210</sup>

159. As held by ITLOS in the *M/V “Louisa,”* Article 300 is not a standalone provision. As stated by the Tribunal:

[I]t is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when “the rights, jurisdiction and freedoms recognised” in the Convention are exercised in an abusive manner.<sup>211</sup>

### C. Freedom of navigation in the relationship between two flag States in the EEZ of a third State

160. A coastal State has certain sovereign rights in its own EEZ that may, on defined and limited occasions, justify exercise of the coastal State’s enforcement jurisdiction over foreign-flagged vessels in that area, pursuant to Part V of UNCLOS.<sup>212</sup> No such rights exist, however, for a State in the EEZ of other States. From the perspective of a State purporting to exercise jurisdiction in the EEZ of a third State, that EEZ constitutes the high seas, and the relevant high seas provisions of the Convention are applicable. A State purporting to exercise jurisdiction in the EEZ of a third State cannot invoke rights conferred on the coastal State under Part V of UNCLOS.

161. Turning to the relevant UNCLOS provisions, when a flag State exercises freedom of navigation in the EEZ of a coastal State, this right *vis-a-vis* the coastal State is affirmed and regulated by Articles 58(1) and (2), read with Articles 87 and 90 of the Convention. Articles 58(1) and (2) provide, in relevant part, that:

(1) In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine

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<sup>210</sup> *Virginia Commentary*, vol. V, at p. 153.

<sup>211</sup> *Louisa, Judgment*, at para. 137.

<sup>212</sup> For example, Article 73(1) of the Convention provides: “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.”

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cables and pipelines, and other internationally lawful uses of the sea related to these freedoms (...).

(2) Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

162. Article 58(3) balances the rights of the flag State exercising freedom of navigation in the coastal State's EEZ, with the rights and interests of the coastal State, including as regards compliance with coastal State laws and regulations applicable to the EEZ. It provides that:

[I]n exercising their freedom of navigation pursuant to Article 58(1), States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

163. In the reciprocal relationship between two flag States both exercising freedom of navigation in the EEZ of a third coastal State, on the other hand, freedom of navigation is recognized and regulated by Articles 87 and 90 of the Convention alone. None of the provisions concerning the EEZ apply to this relationship.

### D. Breach

164. The present dispute engages freedom of navigation pursuant to UNCLOS in two separate, but related, ways:

- a. First, Equatorial Guinea interfered with the Marshall Islands' freedom of navigation contrary to UNCLOS.
- b. Second, Equatorial Guinea exercised its own freedom of navigation contrary to UNCLOS.

#### 1. *Breach of the Marshall Islands' freedom of navigation*

165. At the time of its encounter with the Equatoguinean Navy on 12 August 2022, the "*Heroic Idun*" was in the EEZ of São Tomé and Príncipe.

166. From the perspective of both the Marshall Islands and Equatorial Guinea, the EEZ of São Tomé and Príncipe constitutes the high seas. In the EEZ of São Tomé and Príncipe, *vis-à-vis* its relationship with Equatorial Guinea, the Marshall Islands enjoyed freedom of navigation and the right to sail pursuant to Articles 87(1) and 90 of UNCLOS, and Equatorial Guinea did not possess any coastal State rights conferred by Part V of UNCLOS.

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167. The Master of the Vessel explains in his evidence how the interception, diversion and detention of the “*Heroic Idun*” took place:<sup>213</sup>

At 13:48 UTC the *Capitan David* contacted us again. She was less than a mile away from us and could be seen clearly with the naked eye. The guns on the *Capitan David* appeared to be big cannons and were clearly trained on the bridge and at the crew’s accommodation block under the bridge. The *Capitan David* initially contacted me on VHF channel 16 but instructed me to switch VHF channels (“1-4, 1-4”) (**Annex MT/-35; Annex MT/-3**).

I switched channels and the *Capitan David* said that we had to follow it to Malabo “for investigations”. No details were given at this time about the reasons why we were being requested to follow her. The *Capitan David* then said that if we did anything suspicious, she had “orders to shoot” (**Annex MT/-35; Annex MT/-3**). This obviously alarmed us, and I believed that they would. We did not want to follow the *Capitan David* as no explanation was provided for this order. However, I felt that we had to obey the *Capitan David*’s orders as it was a warship with guns pointed towards us giving us orders and making threats. I was also reluctant to say too much to the *Capitan David* because her crew did not speak English well and I did not want to complicate matters and risk endangering our lives. I discussed what to do with the other crew on the bridge, including the Chief Officer. The atmosphere was tense, and we all agreed that we had no choice but to follow the vessel to Equatorial Guinea because we could not risk that they would fire at the bridge or our accommodation. At this point, we were only focused on getting out of this situation alive.<sup>214</sup>

168. The Marshall Islands wishes to draw attention in particular to the following facts:

- a. The “*Capitan David*’s” threat to use force was express and unequivocal. The “*Capitan David*” made it clear that it had “orders to shoot.”
- b. The “*Capitan David*” had its guns clearly trained against the “*Heroic Idun*” when it approached the “*Heroic Idun*,” communicated to the Master that it had “orders to shoot,” and diverted the Vessel to Malabo, preventing it from navigating on its original course.
- c. The “*Capitan David*” provided the “*Heroic Idun*” with a set of waypoints that they were told to follow, and the speed for each leg of the route.

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<sup>213</sup> Master-1, paras. 93-94 (**Annex RMI/-1**).

<sup>214</sup> See also, Chief Officer-1, paras. 41-45 (**Annex RMI/-5**); 2<sup>nd</sup> Officer-1, paras. 7-8 (**Annex RMI/-6**); 3<sup>rd</sup> Officer-1, paras. 7-8 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, paras. 17-18 (**Annex RMI/-8**); Deck Cadet-1, paras. 11-13 (**Annex RMI/-9**); 2<sup>nd</sup> Engineer-1, paras. 10-11 (**Annex RMI/-11**); 3<sup>rd</sup> Engineer-1, paras. 8-10 (**Annex RMI/-12**); Pumpman-1, para. 9 (**Annex RMI/-16**); Able Seaman No 1-1, paras. 8-9 (**Annex RMI/-17**); and Able Seaman No 3-1, paras. 9-11 (**Annex RMI/-19**).

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- d. The “*Capitan David*” did not give the Master any time to consult with the flag State, the Owners of the “*Heroic Idun*” or others interested in the operation of the Vessel to seek instructions from them on the orders received.<sup>215</sup> Faced with a threat of use of force by a military vessel, the Master immediately complied.
- e. The Master’s change of course of the “*Heroic Idun*” to Malabo was caused directly and exclusively by the conduct of the Equatoguinean Navy.<sup>216</sup>
- f. The “*Heroic Idun*” was escorted by Equatoguinean naval vessels. There can be no doubt that the purpose of the military escort was to restrain freedom of movement and prevent any possibility of escape of the “*Heroic Idun*,” so as to ensure apprehension of the Vessel.<sup>217</sup> The “*Capitan David*” kept close to the “*Heroic Idun*,” with its guns trained on it, which were continuously manned. Further, the escort by the “*Capitan David*” was joined by another naval vessel, the “*Wele Nzas*.” This vessel too, had its guns trained against the “*Heroic Idun*” and kept the “*Heroic Idun*” within shooting range.

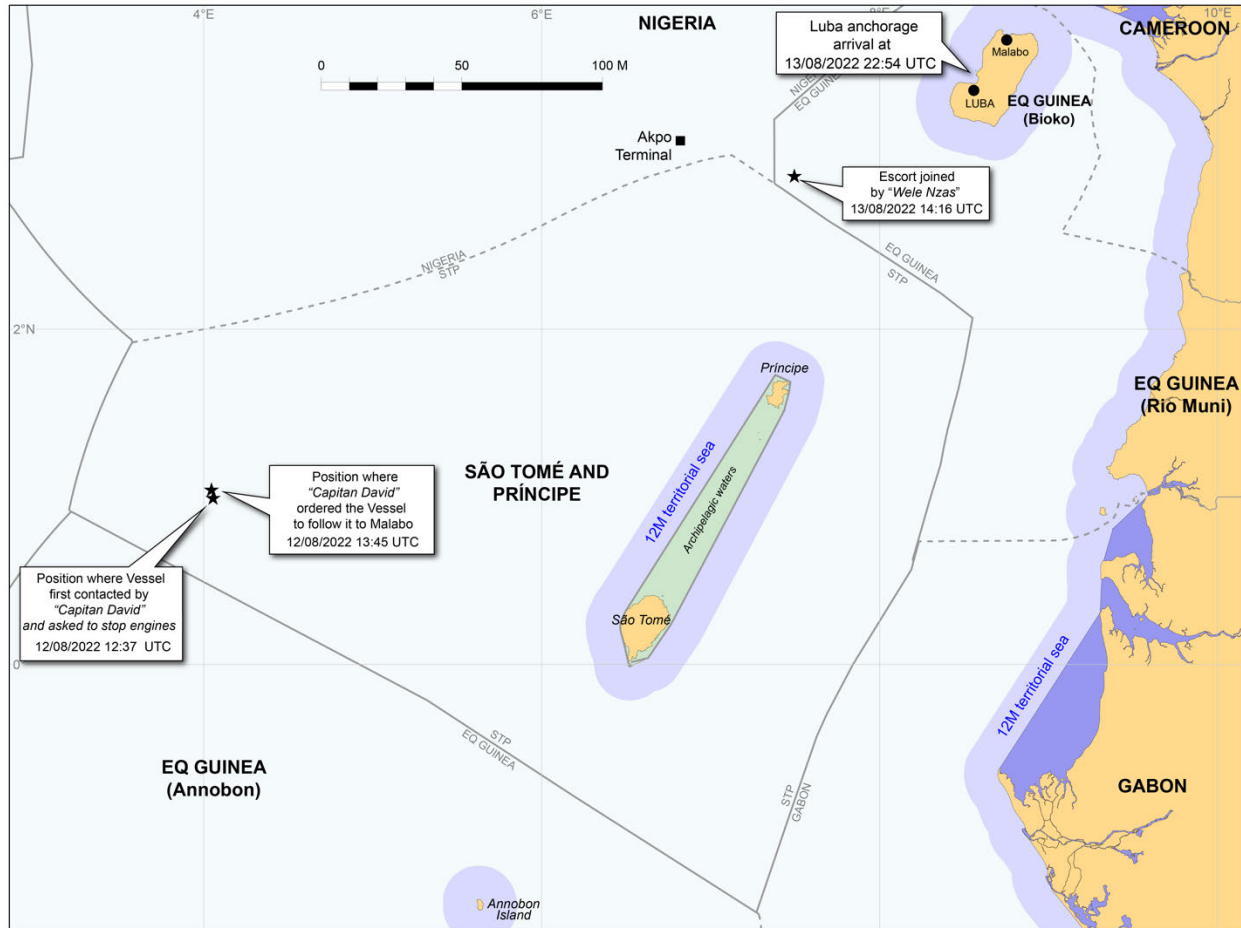
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<sup>215</sup> Cfr. *Enrica Lexie, Merits Award*, at paras. 479–480.

<sup>216</sup> Cfr. *Enrica Lexie, Merits Award*, at para. 504.

<sup>217</sup> Cfr. *Enrica Lexie, Merits Award*, at para. 503.

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**Figure 3 Location of diversion of the "Heroic Idun" by the Equatoguinean Navy**

169. Having regard to the above, Equatorial Guinea's conduct constitutes an instance of physical or material interference with navigation. An express threat to use force to compel a vessel to change its intended course is fundamentally incompatible with any concept of freedom of navigation. So is intercepting a vessel and placing it under military escort to restrict its freedom of movement and prevent it from resuming its originally planned course. The "minimal or no interference with navigation" test endorsed by law of the sea tribunals to establish a breach of Articles 87 and 90 is met on the facts of this case. Bar boarding and forcibly taking over a vessel, there could be no greater act of physical interference with freedom of navigation than what occurred in this case.

170. There is no legal basis in the Convention for Equatorial Guinea's exercise of enforcement jurisdiction over the "Heroic Idun" in the EEZ of São Tomé and Príncipe. None of the limited exceptions to freedom of navigation on the high seas apply to justify Equatorial Guinea's conduct.

171. For the reasons set out above, in undertaking enforcement action against the "Heroic Idun" on the high seas in the manner explained above, Equatorial Guinea breached Articles 87(1) and Article 90 of UNCLOS.

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### 2. *Breach by Equatorial Guinea of its obligations concerning the exercise of its own freedom of navigation*

172. In addition to having breached Article 87(1) and 90 by interfering with the Marshall Islands' freedom of navigation, Equatorial Guinea also breached Article 87(2) by exercising its own freedom of navigation in the EEZ of São Tomé and Príncipe contrary to UNCLOS.

173. The distinct and separate function of the two limbs of Article 87 in paragraphs 1 and 2 was affirmed by ITLOS in the *M/V "Norstar"*. Addressing Panama's contention (as the claimant State seeking to vindicate its rights of freedom of navigation), that Italy had breached the obligation of due regard under paragraph 2 of Article 87, the Tribunal observed:

This provision imposes an obligation of due regard upon a State in its exercise of the freedom of the high seas. The present dispute is concerned with Panama's exercise of the freedom of navigation with respect to its vessel, the *M/V "Norstar"*. There is no dispute related to Italy's exercise of the freedom of navigation. Accordingly, there can be no question of Italy's breach of the obligation of due regard. The Tribunal, therefore, finds that article 87, paragraph 2, of the Convention is not applicable in the present case.<sup>218</sup>

174. In the *M/V "Norstar"*, there was not, and could not have been, a dispute concerning Italy's exercise of freedom of navigation because no Italian vessel was involved in the arrest of the *M/V "Norstar"* on the high seas. Rather, enforcement measures were adopted by Spanish authorities, pursuant to Italy's request, once the *M/V "Norstar"* found itself voluntarily within Spanish jurisdiction.

175. By contrast, in the present case the "*Heroic Idun*" was intercepted and its course diverted by military vessels of Equatorial Guinea, engaging the direct responsibility of Equatorial Guinea under the Convention. There is, therefore, a dispute in the present case concerning the manner in which Equatorial Guinea exercised its own freedom of navigation in the EEZ of São Tomé and Príncipe, which engages Article 87(2).

176. For the reasons given in paragraphs 160-163 above, Article 87(2) is applicable to the relationship between the Marshall Islands and Equatorial Guinea as two flag States seeking to exercise freedom of navigation in the EEZ of a third State.

177. The Marshall Islands submits that Equatorial Guinea exercised its freedom of navigation as recognised in Article 87(1) without "having due regard" to the interests of the Marshall Islands in exercising its own freedom of navigation. In particular, in the light of the parameters set out by the Annex VII tribunal in *Chagos Marine Protected Area*, recalled in paragraph 155 above, the following submissions can be made:

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<sup>218</sup> *Norstar*, *Merits Judgment*, at para. 231.

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- a. The right held by Equatorial Guinea (freedom of navigation) is the same right held by the Marshall Islands, against which it had to be balanced.
- b. The Marshall Islands' right to freedom of navigation has the same importance as Equatorial Guinea's right to freedom of navigation under the terms of the Convention.
- c. Equatorial Guinea impaired the Marshall Islands' right to freedom of navigation entirely, and it resorted to a threat of the use of force to do so.

178. In the circumstances, Equatorial Guinea exercised its right to freedom of navigation in breach of Article 87(2) of the Convention.

179. Further or alternatively, Equatorial Guinea breached Article 300 read in conjunction with Articles 87(1) and 90, by having abused its right to freedom of navigation and to sail its vessels in the EEZ of São Tomé and Príncipe. In particular, Articles 87 and 90 do not recognize the right to sail and to exercise freedom of navigation for purposes of interfering with other States' rights to exercise their own freedom of navigation. Recalling the position of the *Virginia Commentary* on Article 300 of UNCLOS, Equatorial Guinea exercised its freedom of navigation for a "purpose not corresponding to the purpose for which that right was recognized in favour of" Equatorial Guinea.<sup>219</sup>

### III. Breach of exclusive flag State jurisdiction

#### A. Exclusive flag State jurisdiction

180. Conduct that is prohibited on the high seas by the "no interference or minimal interference" test applicable to freedom of navigation is also proscribed by the related principle of exclusive flag-State jurisdiction.

181. Article 92 of UNCLOS provides, in relevant part, that:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.

182. The principle of exclusive flag State jurisdiction has been recognized as an "essential adjunct (...) to the principle of the freedom of the seas."<sup>220</sup>

183. In the *M/V "Norstar,"* the Tribunal elucidated the connection between freedom of the seas, including freedom of navigation, and exclusive flag State jurisdiction, in the following terms:

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<sup>219</sup> *Virginia Commentary*, vol. V, at p. 153.

<sup>220</sup> ILC, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission (1956)*, vol. II, p. 265, at p. 279 (commentary to Article 30, para. 1); *Enrica Lexie, Merits Award*, at para. 524.

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[A]nother corollary of the open and free status of the high seas is that, save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas. Freedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation – could be subject to the jurisdiction of other States on the high seas (...)

This principle is clearly reflected in article 92 of the Convention (...).<sup>221</sup>

184. Exclusive flag State jurisdiction under Article 92 precludes, at a minimum, enforcement action against a foreign-flagged vessel on the high seas. In the *Arctic Sunrise*, in respect of the boarding and diversion of a Dutch-flagged vessel by Russian authorities in Russia's EEZ, the Annex VII tribunal found that:

Articles 92(1) and 58(2) of the Convention provide for the exclusive jurisdiction of a State over ships flying its flag in the EEZ, which include ships used for the exercise of the right to protest. As a result of the exclusive jurisdiction of the flag State over ships in the EEZ, a coastal State may only exercise jurisdiction, *including law enforcement measures*, over a ship, with the prior consent of the flag State (...)<sup>222</sup> (emphasis added)

185. While for purposes of the present Chapter it is sufficient to address the enforcement jurisdiction dimension of the principle of exclusive flag State jurisdiction, recent decisions of ITLOS and Annex VII tribunals confirm that Article 92 of UNCLOS concerns not only enforcement jurisdiction, but also prescriptive jurisdiction. Like freedom of navigation, exclusivity of flag State jurisdiction can therefore be breached by conduct falling short of enforcement action and physical interference. This is addressed in the next Chapter (Chapter 6).

### B. Breach

186. As set out in paragraphs 165-170 above, Equatorial Guinea took enforcement action against the "*Heroic Idun*" and her crew on the high seas, including by threatening the use of force. In so doing, Equatorial Guinea violated Article 92 of UNCLOS.

### IV. Lack of basis of the measures adopted by Equatorial Guinea subsequent to the interception on the high seas

187. Any measures adopted by a State following the unlawful interception and diversion of a foreign-flagged vessel on the high seas have no basis in UNCLOS and other international law.

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<sup>221</sup> *Norstar*, *Merits Judgment*, at paras. 216–217.

<sup>222</sup> *Arctic Sunrise*, *Merits Award*, at para. 231 (see also para. 333); *M/T "San Padre Pio" (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019*, *ITLOS Reports 2018–2019*, p. 375 ("*San Padre Pio, Provisional Measures Order*"), at paras. 106–108.

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188. This has been confirmed by the *Arctic Sunrise*, where the Annex VII tribunal held as follows:

[T]he Tribunal concludes that the boarding, seizure, and detention of the Arctic Sunrise by the Russian Federation on 19 September 2013 did not comply with the Convention. Accordingly, the Tribunal finds that Russia, as a coastal State, has breached obligations owed by it under Articles 56(2), 58(1), 58(2), 87(1)(a), and 92(1) of the Convention to the Netherlands as a flag State enjoying exclusive jurisdiction over the Arctic Sunrise in Russia's EEZ. *Given this conclusion, the Tribunal also finds that all law enforcement measures taken by Russia vis-à-vis the Arctic Sunrise subsequent to its unlawful boarding, seizure, and detention of the vessel have no basis in international law.*<sup>223</sup> (emphasis added)

189. In the *Arctic Sunrise*, these subsequent measures included: (a) opening a criminal case against the crew of the “*Arctic Sunrise*” by an “Investigation Committee;”<sup>224</sup> (b) carrying out of criminal investigations, under the supervision of a District Court;<sup>225</sup> (c) detaining members of the crew in detention facilities in Russia;<sup>226</sup> (d) searching the vessel and seizing documents on board;<sup>227</sup> (e) levying piracy charges against the crew by the Investigation Committee and District Court;<sup>228</sup> (f) seizing the “*Arctic Sunrise*” on grounds of it being a “criminal instrument;”<sup>229</sup> and (g) imposing of a fine of twenty thousand roubles (20,000) on the Master of the “*Arctic Sunrise*”, for the alleged commission of an administrative offence.<sup>230</sup>

190. For the avoidance of doubt, a State's exercise of jurisdiction that follows from an unlawful interception on the high seas is unlawful irrespective of whether the State had a valid title in UNCLOS to exercise prescriptive jurisdiction in respect of the conduct of a foreign-flagged vessel.

191. If the Convention were interpreted in a manner that allowed a State to exercise jurisdiction that it might have under UNCLOS in respect of vessels intercepted on the high seas in breach of UNCLOS, the principles of exclusive flag State jurisdiction and freedom of navigation, and the protection that they afford from enforcement action on the high seas, would be rendered nugatory.

192. It follows from the preceding points that Equatorial Guinea's enforcement measures undertaken subsequent to its unlawful conduct on the high seas were without any legal basis and, accordingly, were also unlawful. These unlawful measures included the following:

- a. detaining the Vessel and crew and depriving the crew of their liberty for a period of almost three months, including: (i) confiscating the passports of the crew upon their arrival in Luba; (ii) detaining members of the crew either in the Detention Facility

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<sup>223</sup> *Arctic Sunrise, Merits Award*, at para. 333.

<sup>224</sup> *Arctic Sunrise, Merits Award*, at para. 106.

<sup>225</sup> *Arctic Sunrise, Merits Award*, at para. 116.

<sup>226</sup> *Arctic Sunrise, Merits Award*, at para. 109.

<sup>227</sup> *Arctic Sunrise, Merits Award*, at para. 110.

<sup>228</sup> *Arctic Sunrise, Merits Award*, at para. 113.

<sup>229</sup> *Arctic Sunrise, Merits Award*, at para. 116.

<sup>230</sup> *Arctic Sunrise, Merits Award*, at para. 117.

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or on board the Vessel, in each case under armed military guard; (iii) detaining the Vessel; and (iv) preventing the Vessel from leaving, including through the detention of her crew, by placing armed guards onboard and by blocking the port exit with the Equatoguinean naval vessel, the “*Wele Nzas*”;

- b. subjecting the crew and Vessel to “investigations,” including the recorded interview of the Chief Officer on 14 August 2022 and the prolonged questioning of the Master, Chief Engineer, and 2<sup>nd</sup> Officer on 17 August 2022. The Equatoguinean authorities also facilitated the questioning of members of the crew by the Nigerian authorities, including on 31 August, 9 September, 15 September, and 20 September 2022;
- c. imposing a fine of approximately two million Euros (€2 million) on the Master of the “*Heroic Idun*” for alleged offenses committed in the EEZ of Equatorial Guinea (payment of which was indicated as a necessary condition for the release of the Vessel and crew); and
- d. forcibly transferring the “*Heroic Idun*” and her crew into the custody and control of Nigeria for transport to Nigeria.

193. Without prejudice to this submission, the conduct by Equatorial Guinea concerning the “*Heroic Idun*” and her crew was also an excessive exercise of prescriptive jurisdiction in breach of UNCLOS. This is addressed in the next Chapter.

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## CHAPTER 6

### EQUATORIAL GUINEA BREACHED UNCLOS BY AN EXCESSIVE EXERCISE OF PRESCRIPTIVE JURISDICTION

#### I. Introduction

194. The Fine imposed on the Master of the “*Heroic Idun*” demonstrates that Equatorial Guinea purported to exercise jurisdiction in respect of alleged conduct of the Vessel in the EEZ of Equatorial Guinea.

195. Having regard to this, and without prejudice to Chapter 5, Equatorial Guinea also breached UNCLOS because it enacted and implemented criminal and other laws in respect of activities of the “*Heroic Idun*” in its EEZ without any basis in UNCLOS, and in direct contravention of UNCLOS.

196. Accordingly, even if – *quod non* – the “*Heroic Idun*” had not been unlawfully diverted on the high seas and the enforcement measures subsequently adopted by Equatorial Guinea did not already lack legal basis as a consequence, Equatorial Guinea’s exercise of jurisdiction would nonetheless be unlawful in the light of the rules governing a coastal State’s prescriptive jurisdiction in its EEZ.

197. This Chapter is organized as follows. **Section II** addresses the law concerning prescriptive jurisdiction, and the ways in which it may be exercised contrary to UNCLOS. **Section III** explains that measures adopted on the basis of unlawful prescriptive jurisdiction are themselves unlawful. **Section IV** then sets out Equatorial Guinea’s unlawful exercises of prescriptive jurisdiction in breach of UNCLOS.

#### II. Prescriptive jurisdiction contrary to UNCLOS

198. In the *Enrica Lexie Incident*, the Annex VII tribunal explained the notion of prescriptive jurisdiction as follows:

One may distinguish between prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction. Prescriptive jurisdiction is the authority of a State to make laws in relation to persons, property, or conduct; adjudicative jurisdiction is the authority of a State to apply law to persons or things; and enforcement jurisdiction is the authority of a State to exercise its power to compel compliance with law. Under international law, the exercise of jurisdiction by a State entails an element of prescribing laws, rules, or regulations over conduct, or applying or enforcing such laws, rules, or regulations over persons or property.<sup>231</sup>

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<sup>231</sup> *Enrica Lexie, Merits Award*, at para. 526.

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199. ITLOS in the *M/V “Virginia G”* confirmed that tribunals constituted under UNCLOS may pronounce on the lawfulness of a State’s law-making, namely “whether, *in enacting* or implementing its law, a State Party has acted in conformity with the Convention.”<sup>232</sup>

200. There are at least three ways in which a State’s exercise of prescriptive jurisdiction (i.e., enacting laws, in the language of ITLOS in the *M/V “Virginia G”*) can be incompatible with UNCLOS:

- a. when it has no basis in UNCLOS, having regard to the general allocation of jurisdictional powers under the Convention;
- b. when it is expressly prohibited by UNCLOS, as it usurps the jurisdictional powers that the Convention confers to a State, to the exclusion of all other States; and
- c. where UNCLOS’s allocation of prescriptive jurisdiction is respected but the provisions of a domestic law or regulation are nevertheless incompatible with UNCLOS because of their content.

Each of these is addressed in turn below.

- A. The State’s exercise of prescriptive jurisdiction is without a positive basis in UNCLOS

201. UNCLOS is a comprehensive legal regime governing the law of the sea. The Convention was “[p]rompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea.”<sup>233</sup> This is particularly the case in relation to the rules that govern the rights and duties of States Parties in the maritime zones regulated by UNCLOS.

202. In respect of these maritime zones, the Annex VII tribunal in the *South China Sea* explained that the Convention was intended “to provide a complete basis for the rights and duties of the States Parties.”<sup>234</sup> The tribunal indicated that:

Building on prior international law and the 1958 Conventions on the Law of the Sea, the Convention establishes limits for maritime entitlements and sets out the rights and obligations of coastal States—as well as other States—within such maritime zones. Articles 2 through 32 of the Convention govern the rights and obligations of States within the territorial sea and limit the extent of the territorial sea to 12 nautical miles. *Articles 55 through 75 of the Convention provide for the creation of an exclusive economic zone and limit its extent to 200 nautical miles.* Articles 76 to 85 of the Convention govern the rights and obligations of States to the continental shelf, generally limit the continental shelf to 200 nautical miles, and set out technical criteria according to which some States may

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<sup>232</sup> *Virginia G*, at para. 227 (emphasis added).

<sup>233</sup> UNCLOS, Preamble (emphasis added).

<sup>234</sup> *South China Sea, Award*, at para. 245.

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claim a continental shelf beyond 200 nautical miles. Articles 86 through 120 and 133 through 191 of the Convention govern the rights and obligations of States in the high seas and in the Area of seabed beyond the limits of national jurisdiction. *The Convention thus provides—and defines limits within—a comprehensive system of maritime zones that is capable of encompassing any area of sea or seabed.* (...) Moving from the text to the context of exclusive economic zone rights, the Tribunal recalls its earlier observation (...) *that the system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of sea or seabed. The same intention for the Convention to provide a complete basis for the rights and duties of the States Parties* is apparent in the Preamble, which notes the intention to settle “all issues relating to the law of the sea” and emphasises the desirability of establishing “a legal order for the seas.”<sup>235</sup> (emphasis added)

203. As regards a coastal State’s EEZ, the basic principle is, therefore, that the State’s authority, including to adopt laws, must find a justification under the Convention. In the absence of such a justification, the coastal State’s extension of rights, jurisdiction and authority in the EEZ must be considered as unlawful.

204. The rights that a coastal State enjoys in its EEZ are limited. They are set out in general terms in Part V of the Convention. The coastal State’s exercise of prescriptive jurisdiction in its EEZ must find an anchoring in these rights, in order to be lawful. Article 56(1) provides that in the EEZ, the coastal State has:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
  - (i) the establishment and use of artificial islands, installations and structures
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

205. ITLOS in the *MV “Saiga” (No.2)*, addressing Guinea’s extension of its custom laws to the EEZ, confirmed that an exercise of prescriptive jurisdiction by a coastal State without a basis

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<sup>235</sup> *South China Sea, Award*, at paras. 231, 245.

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(a “justification,” in the words of the Tribunal) in UNCLOS is in breach of the Convention. It ruled as follows:

The Tribunal needs to determine whether the laws applied or the measures taken by Guinea against the *Saiga* are compatible with the Convention. In other words, *the question is whether, under the Convention, there was justification for Guinea to apply its customs laws in the exclusive economic zone within a customs radius extending to a distance of 250 kilometres from the coast.*

The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea (articles 2 and 21). In the contiguous zone, a coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. (article 33, paragraph 1) In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). *In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above. (...)*

*The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention.*<sup>236</sup> (emphasis added)

206. The closed and complete nature of a coastal State’s jurisdictional rights in its EEZ, and the requirement that they find a basis in UNCLOS, has been subsequently confirmed by the Tribunal in a number of decisions. In the *M/V “Virginia G,”* ITLOS concluded that the regulation of bunkering in the coastal State’s EEZ was lawful only in so far as the activity concerned the supply of gasoil to fishing vessels because UNCLOS confers rights on the coastal State in respect of the living resources of the EEZ.<sup>237</sup>

207. On the question of whether the coastal State had the right to regulate bunkering other than in respect of fishing vessels, ITLOS held that the coastal State did not have such competence, “unless otherwise determined in accordance with the Convention.”<sup>238</sup> The unlawfulness of a coastal State’s exercise of prescriptive jurisdiction in respect of bunkering without basis in the Convention has been confirmed by ITLOS in the *M/V “Norstar”* and (in the context of provisional measures) in the *San Padre Pio*.<sup>239</sup>

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<sup>236</sup> *Saiga (No.2), Judgment*, at paras. 126–127, 136.

<sup>237</sup> According to ITLOS, “[t]he regulation by a coastal State of bunkering of foreign vessels fishing in its [EEZ] is among those measures which the coastal State may take in its [EEZ] to conserve and manage its living resources under Article 56 of the Convention read together with Article 62, paragraph 4, of the Convention” (*Virginia G, Judgment*, at para. 217).

<sup>238</sup> *Virginia G, Judgment*, at para. 223.

<sup>239</sup> *Norstar, Merits Judgment*, at paras. 219–220; *San Padre Pio, Provisional Measures Order*, paras. 106–108.

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208. For the reasons indicated above, a coastal State seeking to regulate conduct in its EEZ beyond the limited grounds provided for in UNCLOS acts in breach of Article 56(1) of the Convention. Further, the exercise of prescriptive jurisdiction engages Article 89 of UNCLOS, which provides that “[n]o State may validly purport to subject any part of the high seas to its sovereignty.”

209. According to the *Virginia Commentary*, Article 89 emphasizes that “beyond the outer limit of the territorial sea, the principle of ‘no sovereignty’ is an inherent part of the law of the sea as a whole.”<sup>240</sup> Article 89 does not prohibit only *de jure* annexation of the EEZ, but the language “purport to subject (...) to (...) sovereignty,” together with freedom of the high seas, demonstrate that Article 89 was designed to capture, and prohibit, a wider range of State conduct. The purported extension of criminal jurisdiction is the quintessential manifestation of State power and, accordingly, has the effect of subjecting the EEZ to sovereignty of the coastal State, in breach of Article 89.

### B. The coastal State’s exercise of prescriptive jurisdiction is prohibited by UNCLOS

210. The second way in which a coastal State’s exercise of prescriptive jurisdiction may be contrary to UNCLOS is where it not only lacks basis in UNCLOS, but is expressly prohibited by UNCLOS. This occurs when a State usurps the prescriptive jurisdiction that UNCLOS reserves on an exclusive basis to another State.

211. In this regard, Article 92 of UNCLOS, which is applicable in the EEZ by virtue of Article 58(2), provides that a vessel on the high seas is subject to the exclusive jurisdiction of the State whose flag it flies, “save in exceptional cases expressly provided for in international treaties or in this Convention.” From the perspective of all States other than the flag State, Article 92 is a prohibitive rule: it prohibits them – including, therefore, the coastal State – from exercising jurisdiction in respect of a foreign-flagged vessel in the coastal State’s EEZ.

212. ITLOS and Annex VII tribunals have confirmed that the reservation of jurisdiction to the flag State concerns not only enforcement, but also prescriptive jurisdiction.<sup>241</sup>

213. ITLOS in the *M/V “Norstar”* found that:

This principle [freedom of navigation] prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas.<sup>242</sup>

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<sup>240</sup> *Virginia Commentary*, vol. III, at p. 96, para. 89.9(c).

<sup>241</sup> Albert J. Hoffmann, ‘Freedom of Navigation’ (2011) Max Planck Encyclopedia of Public International Law, at para. 22. See also, Doris König, ‘Flag of Ships’ (2009) Max Planck Encyclopedia of Public International Law, at para. 25: “[O]n the high seas, vessels are subject to the exclusive jurisdiction and control of the flag State. This rule of customary international law is codified in Article 92(1) [UNCLOS]. As a rule, other States have no right to exercise prescriptive, enforcement, and adjudicative jurisdiction over foreign ships on the high seas.”

<sup>242</sup> *Norstar, Merits Judgment*, at para. 225.

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214. This was affirmed in the following passage of the decision of the Annex VII tribunal in the *Enrica Lexie Incident*:

[T]he principle of exclusive flag State jurisdiction under the Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations in respect of such a ship. The Arbitral Tribunal also recalls in this respect the observation of ITLOS in *M/V “Norstar”* that the principle of exclusive flag State jurisdiction “prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas.”<sup>243</sup>

215. A coastal State’s exercise of prescriptive jurisdiction in respect of the conduct of foreign-flagged vessels in the EEZ is therefore in breach of exclusive flag State jurisdiction pursuant to Articles 92 and 58(2) of UNCLOS, unless justified by UNCLOS or other relevant international treaties.

216. Save for limited exceptions, it also contravenes freedom of navigation, in breach of Articles 87 and 58 of the Convention.

217. As noted above, the principles of exclusive flag State jurisdiction and freedom of navigation are closely connected. As explained by the UN ILC in its 1956 Articles Concerning the Law of the Sea with Commentaries:

The absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State and that it is subject to the jurisdiction of that State.<sup>244</sup>

218. ITLOS has affirmed that “the principle of exclusive flag State jurisdiction is an inherent component of the freedom of navigation under article 87 of the Convention.”<sup>245</sup>

219. As discussed at Chapter 5, Section II above, any form of interference with navigation can result in a breach of freedom of navigation. Given the “minimum or no interference” test discussed at paragraphs 139-147 above, any exercise of prescriptive jurisdiction that targets navigation or any other activity that falls into the regime of freedoms of the high seas, applicable to the EEZ by virtue of Article 58, constitutes an interference in breach of Articles 87 and 58.

220. This is affirmed by ITLOS in the *M/V “Norstar.”* The Tribunal held that Italy’s exercise of prescriptive jurisdiction over bunkering activities of foreign-flagged vessels on the high seas –

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<sup>243</sup> *Enrica Lexie, Merits Award*, at para. 527.

<sup>244</sup> ILC, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission (1956)*, vol. II, p. 265, at p. 279 (commentary to Article 30, para. 1).

<sup>245</sup> *Norstar, Merits Award*, at para. 225.

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which had constituted the basis for the arrest and prosecution of the *M/V “Norstar”* – was itself in breach of Article 87:

[T]he principle of exclusive flag State jurisdiction is an inherent component of the freedom of navigation under article 87 of the Convention. This principle prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State *but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas.* (...) [I]f a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties.<sup>246</sup> (emphasis added)

221. The finding of the Tribunal in the *M/V “Norstar”* concerning prescriptive jurisdiction was affirmed by the Annex VII tribunal in the *Enrica Lexie Incident*.<sup>247</sup>

### C. The coastal State’s exercise of prescriptive jurisdiction is on its face incompatible with UNCLOS

222. The third way in which the adoption of legislation can be incompatible with UNCLOS is where UNCLOS’s allocation of prescriptive jurisdiction is *prima facie* respected, but the provisions of a domestic law or regulation are nevertheless incompatible with UNCLOS because their content conflicts with what is required by the Convention.

223. For instance, Article 56(1) of UNCLOS recognizes the coastal State’s sovereign rights in respect of the exploitation of living resources of the EEZ, including as regards prescribing laws. Article 61 authorizes the coastal State to “determine the allowable catch of the living resources in its exclusive economic zone.” However, this exercise of prescriptive jurisdiction is not unlimited: Article 61 prohibits overexploitation of the living resources. A coastal State’s law that sets an allowable catch which is plainly incompatible with the principles of sustainable management of living resources would be an exercise of prescriptive jurisdiction in breach of UNCLOS, because although *prima facie* it falls within the coastal State’s subject matter jurisdiction because it describes an allowable catch, its content conflicts with Article 61.

224. That the exercise of prescriptive jurisdiction can violate international law in this manner has been affirmed by the UN ILC in its commentary to Article 12 of the Articles on Responsibility of States for Internationally Wrongful Acts (“**Articles on State Responsibility**”), entitled “Existence of a breach of an international obligation.” The Commission observed that:

The question often arises whether an obligation is breached by the enactment of legislation by a State, *in cases where the content of the legislation prima facie*

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<sup>246</sup> *Norstar, Merits Award*, at para. 225.

<sup>247</sup> See *Enrica Lexie, Merits Award*, at para. 473, where the tribunal, addressing prescriptive jurisdiction, found that the exercise of jurisdiction over a foreign ship on the high seas, unless justified by the Convention or other international treaties, is generally agreed to constitute a breach of freedom of navigation.

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*conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases. Certain obligations may be breached by the mere passage of incompatible legislation.*<sup>248</sup> (emphasis added)

### III. Measures adopted on the basis of unlawful prescriptive jurisdiction are themselves unlawful

225. Measures adopted on the basis of unlawful prescriptive jurisdiction are themselves unlawful. This was affirmed in the *MV “Saiga” (No.2)*. After finding that Guinea’s extension of its customs laws in the EEZ was incompatible with UNCLOS (as referred to above), ITLOS held that all subsequent measures adopted pursuant to that unlawful exercise of prescriptive jurisdiction were contrary to UNCLOS:

[H]owever essential Guinea’s interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to *extend its customs laws to parts of the exclusive economic zone*. The Tribunal, therefore, finds that, *by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the Saiga, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.*<sup>249</sup> (emphasis added)

226. Measures adopted pursuant to an unlawful exercise of prescriptive jurisdiction are unlawful irrespective of where they were adopted, including in areas subject to the State’s full sovereignty. This was affirmed by the Tribunal in the *M/V “Norstar,”* where it said:

The tribunal acknowledges that the locus of enforcement matters in assessing the applicability or breach of article 87. It does not follow, however, that the locus of enforcement is the sole criterion in this regard. (...) [E]ven when enforcement is carried out in internal waters, article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them.<sup>250</sup>

### IV. Breach

227. The Fine which Equatorial Guinea imposed on the Master of the “*Heroic Idun*” on 23 September 2022, notified on 28 September 2022, sets out the reasons and purported legal basis of

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<sup>248</sup> General Commentary to the Articles on State Responsibility, in *Yearbook of the International Law Commission (2001)*, vol. II (Part 2), p. 31, at pp. 55 and 57 (commentary to Article 12, paras. 2 and 12).

<sup>249</sup> *Saiga (No. 2), Judgment*, at paras. 135–136.

<sup>250</sup> *Norstar, Merits Judgment*, at para. 226.

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Equatorial Guinea's exercise of jurisdiction. The Fine concerned alleged conduct of the "*Heroic Idun*" in the EEZ of Equatorial Guinea.

228. The Fine states (in a certified English translation from the Spanish original), in relevant part:

[W]hereby at around 1 p.m. last August 12, 2022, the warship from the Navy of Equatorial Guinea, "C.C. David Eyama ANGÜE OSA," intercepted the ship M/T HEROIC IDUN, with IMO No. 9858058, registered in the Marshall Islands and captained by the Indian citizen called [redacted] and other members of its Crew respectively, upon its illegal entry into the territorial waters of the Republic of Equatorial Guinea, sailing without flying any flag as well as sailing and remaining in the Exclusive Economic Zone of Annobón Island, from August 9, 2022 around 2:58 p.m. and leaving on the 10th of the same month around 10:53 a.m., without having been given authorization by the National Maritime Authority: which facts are set forth and penalized in Articles 581 of the Community Code of the Merchant Navy [Código Comunitario de la Marina Mercante] (attached to regulations 03/01UEAC088-CM06, adopted by the Council of Ministers of the CEMAC [Central African Economic and Monetary Community] in a meeting held in Bangui on August 3, 2001) (CEMAC CODE) and 10, 12 and 698.2 b) and c) of Law No. 2/2020 dated July 8, General Law of the Merchant Navy: violations for which he is criminally responsible as the author [redacted], Captain of the aforementioned tanker. (...).<sup>251</sup>

229. The legal provisions referred to by Equatorial Guinea in the Fine as the justification for the exercise of its criminal jurisdiction provide, in relevant parts, as follows:

- a. **Article 10 of Law No. 2/2020 dated 8 July:** "1. Every ship, vessel or naval craft of Equatoguinean nationality shall fly the flag of the Republic of Equatorial Guinea at the stern, if in port, and at the mast or mast mast-top during navigation."
- b. **Article 12 of Law No. 2/2020 dated 8 July:** "1. All ships, vessels and naval craft shall request authorization from the National Maritime Authority for entry, stay and dispatch in the jurisdictional waters and ports of the Republic of Equatorial Guinea."
- c. **Article 698(2)(b) and (c) of Law No. 2/2020 dated 8 July:** "The following misdemeanours, actions or omissions shall be considered very serious infractions: (...) 2. with respect to the management of maritime traffic (b) navigating without having obtained the navigation license, passport or document accrediting their nationality, or without carrying the name, IMO number and regulatory registration folio, when

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<sup>251</sup> The Fine and a certified translation are annexed at **Annexes RMI/-40** and **Annex RMI/-41**.

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applicable. (c) navigating without the ship or vessel or naval craft or artifact intended for transport, fishing or recreational use being duly registered, or with the regulatory certificates expired.”<sup>252</sup>

- d. **Article 581 of the Community Code of the Merchant Navy:** “The competent maritime authority has the discretionary power to establish the following offences concerning navigation police, namely: - not displaying the flag (...).” (in English translation from the Spanish original).<sup>253</sup>

230. On the face of these provisions, and on the facts of this case, there were no plausible grounds as a matter of Equatorial Guinea’s own domestic law to have applied these laws to the “*Heroic Idun*” and her crew:

- a. Article 10 of Law 2/2020 provides that “[e]very ship, vessel or naval craft of Equatoguinean nationality shall fly the flag of Equatorial Guinea (...)” The “*Heroic Idun*” is evidently not a vessel of Equatoguinean nationality, so Article 10 is therefore manifestly inapplicable.
- b. Article 12 of the same law provides that “all ships, vessels and naval craft shall request authorization from the National Maritime Authority for entry, stay and dispatch in the jurisdictional waters and ports of the Republic of Equatorial Guinea.” The Fine indicates that “*Heroic Idun*” was sanctioned because it sailed and remained in the EEZ of Equatorial Guinea’s Annobón Island from 9 August 2022 to 10 August 2022. The EEZ of Annobón Island is not the “jurisdictional waters and ports of the Republic of Equatorial Guinea.” Article 12 is therefore also manifestly inapplicable.
- c. It is patently not true that the “*Heroic Idun*” was not flying any flag at the time of its entry into the EEZ of Equatorial Guinea. The port of registration of the “*Heroic Idun*” – Majuro, the capital of the Marshall Islands – was printed in very visible letters at the stern of the vessel.<sup>254</sup>
- d. It is also patently not true that the “*Heroic Idun*” entered the EEZ of Annobón Islands between 9 and 10 August 2022. Whatever meaning is ascribed to the expression “Exclusive Economic Zone of Annobón Island,” between 9 and 10 August 2022 the “*Heroic Idun*” was nowhere near Annobón Island.

231. Without prejudice to the foregoing, and in any event, the Chamber can pronounce on the lawfulness of Equatorial Guinea’s laws.<sup>255</sup>

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<sup>252</sup> A copy of the relevant provisions of Law No. 2/2020 dated 8 July 2022 is at **Annex RMI/-43**. The English translation of the text is in **Annex RMI/-42**.

<sup>253</sup> **Annex RMI/-44**. The English translation of the text is in **Annex RMI/-42**.

<sup>254</sup> Master-1, para. 125.

<sup>255</sup> See *Saiga (No. 2), Judgment*, at para. 122: “The Tribunal notes that Guinea produces no evidence in support of its contention that the laws cited by it provide a basis for the action taken against the *Saiga* beyond the assertion that it reflects the consistent practice of its authorities, supported by its courts. Even if it is conceded that the laws of Guinea

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232. Equatorial Guinea's exercise of prescriptive jurisdiction breached UNCLOS in all of the three manners addressed in Section II(A-C) above, each of which is independently capable of giving rise to the responsibility of Equatorial Guinea.

233. First, the laws relied upon by Equatorial Guinea have no basis in the limited rights accorded to Equatorial Guinea as a coastal State by UNCLOS. They do not concern exploration, conservation or management of the living or non-living resources of the EEZ. Similarly, they do not concern artificial islands, installations and structures; they have no connection with marine scientific research or the protection and preservation of the marine environment; and they do not relate to any other right provided to the coastal State by the Convention. The fact that the laws enacted by Equatorial Guinea set out criminal sanctions in case of their breach reinforces that Equatorial Guinea's exercise of prescriptive jurisdiction purported to extend Equatorial Guinea's sovereignty over its EEZ.

234. Second, the laws usurped the prescriptive jurisdiction that UNCLOS reserves in an exclusive manner to the Marshall Islands in respect of activities of the "*Heroic Idun*" on the high seas and, *mutatis mutandis*, in the EEZ. Equatorial Guinea directly targeted navigation of the "*Heroic Idun*" by seeking to impose administrative conditions concerning navigation, such as the modalities of displaying the flag in the EEZ. Article 94(2)(b), read alongside Article 92, and applicable to the EEZ by virtue of Article 58(2), provides that it is the duty, in addition to the right, of the flag State alone to "assume jurisdiction *under its internal law* over each ship flying its flag and its master, (...) in respect of administrative, technical (...) matters concerning the ship."<sup>256</sup> Equatorial Guinea also sought to restrict the navigation of the "*Heroic Idun*" by imposing the requirement that the local authorities in Equatorial Guinea grant authorization for entry into "the Exclusive Economic Zone of Annobón Island," an area where the "*Heroic Idun*" has unrestricted access pursuant to the Convention.

235. Third, the laws relied upon by Equatorial Guinea, as interpreted and applied by Equatorial Guinea, are *prima facie* incompatible with UNCLOS, even if (which is not the case) they had been adopted pursuant to a valid legal basis under UNCLOS. Conditioning the ability of a foreign-flagged vessel to enter and sail in the EEZ of a coastal State to the coastal State's authorization is manifestly incompatible with freedom of the high seas under UNCLOS. To use the language of the ILC quoted in paragraph 225, this restriction "prima facie conflicts with what is required" by UNCLOS.

236. For these three reasons, by purporting to extend its criminal laws to lawful activities of the "*Heroic Idun*" in the EEZ of Equatorial Guinea – specifically navigation – without a lawful basis under UNCLOS, Equatorial Guinea breached Articles 56(1), 58, 87, 89 and 92 of the Convention.

237. It follows from Equatorial Guinea's unlawful exercise of prescriptive jurisdiction that all the measures adopted by the Equatoguinean authorities against the "*Heroic Idun*" and her crew

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which the Saiga is alleged to have violated are applicable in the manner that is claimed by Guinea, the question remains whether these laws, as interpreted and applied by Guinea, are compatible with the Convention."

<sup>256</sup> Emphasis added.

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based or consequent upon the exercise of such jurisdiction are, in turn, unlawful and in breach of the same provisions of UNCLOS.

238. Lastly, even if, *arguendo*, Equatorial Guinea could establish some title under UNCLOS for jurisdiction over the “*Heroic Idun*” and her crew in respect of their conduct in its EEZ, Equatorial Guinea’s exercise of any such jurisdiction would have been an abuse of right under Article 300 of UNCLOS, read alongside Part V of UNCLOS and in particular Article 56(1). This is because Equatorial Guinea only obtained custody of the “*Heroic Idun*,” and could only assert jurisdiction, as a result of an unlawful interception and diversion on the high seas.

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## CHAPTER 7

### OTHER BREACHES OF UNCLOS AND APPLICABLE LAW ARISING FROM THE DETENTION AND TREATMENT OF THE “*HEROIC IDUN*” AND HER CREW

#### I. Introduction

239. For the reasons given in Chapters 5 and 6, the interception and diversion of the “*Heroic Idun*” and her crew on 12 August 2022 in the EEZ of São Tomé and Príncipe and the subsequent exercise of enforcement measures by Equatorial Guinea interfered with the Marshall Islands’ freedom of navigation and exclusive flag State jurisdiction in breach of the Convention. All enforcement measures taken by Equatorial Guinea subsequent to its unlawful interception, diversion and detention of the Vessel and crew have no basis in international law, and Equatorial Guinea is responsible for the legal consequences which follow accordingly.

240. Without prejudice to this position, Equatorial Guinea’s treatment of the Vessel and crew also gave rise to a number of separate and discrete breaches of the Convention, which are the subject of this Chapter.

241. Specifically, Equatorial Guinea: failed to respect the principles of reasonableness and humanity (**Section II**); breached the obligation in Article 56(2) to have due regard for the rights and duties of the Marshall Islands (**Section III**); breached its obligations to observe the human rights of the crew (**Section IV**); failed to comply with its obligations under SOLAS, the COLREGS and the STCW (**Section V**); breached its obligation in Article 225 to avoid adverse consequences in the exercise of enforcement action (**Section VI**); breached its obligation to notify the flag State of enforcement action (**Section VII**); breached its obligation to release the Vessel promptly without undue delay (**Section VIII**); and breached its obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings (**Section IX**).

#### II. Equatorial Guinea’s enforcement measures failed to respect the principle of reasonableness and considerations of humanity

##### A. The principle of reasonableness (necessity and proportionality) and considerations of humanity

242. The exercise of enforcement jurisdiction is subject to the conditions set out by UNCLOS and other applicable rules of international law, whether or not the State undertaking that action possesses a valid jurisdictional title under the Convention for the enforcement measures.

243. In the *Duzgit Integrity*, the Annex VII tribunal stated that the exercise of enforcement powers is governed by the principle of reasonableness:

The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed

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by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality. These principles do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.<sup>257</sup>

244. The tribunal took into account the following ten elements: (a) whether the contested facts on which the exercise of enforcement jurisdiction was predicated actually occurred;<sup>258</sup> (b) whether the State undertaking the enforcement measures had abided by its own laws in the adoption of enforcement measures in general;<sup>259</sup> (c) whether the penalties adopted were those set out by law;<sup>260</sup> (d) whether the penalties and fines imposed were explained in their components;<sup>261</sup> (e) whether penalties and fines were justified having regard to the alleged wrong, or the interest that the archipelagic State intended to protect;<sup>262</sup> (f) whether penalties were justified having regard to prior criminal conduct of the vessel or the master;<sup>263</sup> (g) whether the owners were forced to cover expenses for the vessel during its detention by the archipelagic State;<sup>264</sup> (h) whether legitimate expectations created by the authorities were respected;<sup>265</sup> (i) whether any negotiation in respect of release of the vessel was affected by coercion;<sup>266</sup> and (j) whether the detaining State had notified the flag State of the alleged misconduct and measures taken.<sup>267</sup>

245. The tribunal held that:

When considered together, the prolonged detention of the Master and the vessel, the monetary sanctions, and the confiscation of the entire cargo, cannot be regarded as proportional to the original offence or the interest of ensuring respect for São Tomé's sovereignty (including São Tomé's interest in demonstrating that such conduct will not be tolerated in future cases).<sup>268</sup>

The disproportionality was such that it rendered "the cumulative effect of these sanctions incompatible with the responsibilities of a State exercising sovereignty."<sup>269</sup>

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<sup>257</sup> *Duzgit Integrity, Merits Award*, at para. 209.

<sup>258</sup> In the *Duzgit Integrity*, the conviction of the Master of serious offences that had never taken place, and sentencing him to three years in prison, was found to breach the requirements of reasonableness and humanity (see *Duzgit Integrity, Merits Award*, at para. 258).

<sup>259</sup> *Duzgit Integrity, Merits Award*, at para. 255.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> *Duzgit Integrity, Merits Award*, para. 256.

<sup>263</sup> *Duzgit Integrity, Merits Award*, at para. 258.

<sup>264</sup> *Duzgit Integrity, Merits Award*, at para. 259.

<sup>265</sup> *Duzgit Integrity, Merits Award*, at paras. 231 and 234.

<sup>266</sup> *Duzgit Integrity, Merits Award*, at para. 265.

<sup>267</sup> *Duzgit Integrity, Merits Award*, at para. 268.

<sup>268</sup> *Duzgit Integrity, Merits Award*, at para. 260.

<sup>269</sup> *Duzgit Integrity, Merits Award*, at para. 261.

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246. Considerations of humanity also weigh in the assessment of whether an exercise of enforcement jurisdiction has been exercised reasonably. The Tribunal in the *M/V “Saiga” (No.2)*, in the context of its discussion of the use of force in enforcement, explained that “[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law.”<sup>270</sup>

247. Considerations of humanity and reasonableness are connected. As explained by the Tribunal in the *“Juno Trader”*, in the context of its discussion of prompt release under Article 73 of the Convention, the “obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law.”<sup>271</sup>

248. Considerations of humanity apply beyond the use of force in enforcement action to all enforcement measures. Thus, in the *Enrica Lexie Incident*, the Tribunal in its provisional measures order took considerations of humanity into account when assessing restrictions on liberty<sup>272</sup> and the conditions of persons held on bail.<sup>273</sup> The grief and suffering of families affected by the events giving rise to the dispute were also relevant factors.<sup>274</sup>

### B. Breach

249. Equatorial Guinea breached its obligation to act in accordance with the principle of reasonableness and considerations of humanity when undertaking enforcement measures, including by:

- a. failing to notify the Marshall Islands of the exercise of enforcement action including the detention of the Vessel and crew;<sup>275</sup>
- b. imposing penalties in the Fine without providing any real explanation of its components and on the basis of laws which were on their face plainly not applicable to the alleged facts;<sup>276</sup>
- c. making payment of the Fine a necessary condition for the release of the Vessel.<sup>277</sup> Given the dire situation in which the crew were detained, and the trauma suffered

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<sup>270</sup> *Saiga (No. 2)*, Judgment, at para. 155.

<sup>271</sup> “*Juno Trader*” (*Saint Vincent and the Grenadines v. Guinea-Bissau*), Prompt Release, Judgment, ITLOS Reports 2004, p. 17 (“*Juno Trader, Prompt Release Judgment*”), at para. 77.

<sup>272</sup> “*Enrica Lexie*” (*Italy v. India*), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 182 (“*Enrica Lexie, Provisional Measures Order, ITLOS*”), at paras. 133 and 135 (the consequences entailed by the lengthy restrictions on liberty imposed by the Indian authorities on the Italian marines).

<sup>273</sup> *Enrica Lexie, Provisional Measures Order, ITLOS*, at paras. 104 and 106 (the residence requirements of the bail conditions imposed on the Italian marines by the Indian authorities).

<sup>274</sup> *Enrica Lexie, Provisional Measures Order, ITLOS*, at paras. 133–135 (the grief and suffering of the families of the Indian fishermen killed, and the consequences of the lengthy restrictions on the liberty of the Italian marines on their families).

<sup>275</sup> Gallagher-1, para. 26 (Annex RMI/-30).

<sup>276</sup> Master-1, para. 133 (Annex RMI/-1); Askins-1, paras. 24-25 (Annex RMI/-3); Kulblik-1, para. 36 (Annex RMI-2). See paragraph 230 above.

<sup>277</sup> Master-1, para. 133 (Annex RMI/-1); Askins-1, paras. 24-26 (Annex RMI/-3); Kulblik-1, paras. 36 and 65 (Annex RMI-2).

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them, Equatorial Guinea in effect extorted and coerced the Owners to pay the Fine to secure the release of the Vessel and her crew;

- d. imposing the Fine on the Master, which was not justified having regard to the offences the Master was charged with and considering any interest that Equatorial Guinea may have wished to protect;<sup>278</sup>
- e. depriving the crew of their liberty, as well as the detaining the Vessel, which was not justified having regard to the offences with which the Master was charged and considering any interest that Equatorial Guinea may have wished to protect;<sup>279</sup>
- f. forcing the Owners to cover expenses for the maintenance of the Vessel and crew during the entire time the Vessel was under the exclusive jurisdiction and control of Equatorial Guinea;<sup>280</sup>
- g. representing that the Vessel would be released upon payment of the Fine, but instead continuing to exercise its jurisdiction, including by transferring control and custody of the Vessel and crew to Nigeria;<sup>281</sup>
- h. transferring control and custody of the Vessel and crew to Nigeria in the face of the Prompt Release Proceedings;<sup>282</sup> and
- i. failing to show the most basic considerations of humanity in exercising its jurisdiction.<sup>283</sup>

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<sup>278</sup> Master-1, para. 133 (**Annex RMI/-1**); Askins-1, paras. 24-26 (**Annex RMI/-3**); Kulblik-1, paras. 36 and 65 (**Annex RMI-2**).

<sup>279</sup> Master-1, paras. 108-119, 141-145, 176-180 (**Annex RMI/-1**); Askins-1, para. 14 (**Annex RMI/-3**); Kulblik-1, para. 13 (**Annex RMI-2**). Additionally, see e.g., also: Chief Officer-1 (**Annex RMI/-5**), paras. 46-56; 2<sup>nd</sup> Officer-1, paras. 8-19 (**Annex RMI/-6**); 3<sup>rd</sup> Officer-1, paras. 9-17 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, paras. 23-33 (**Annex RMI/-8**); Able Seaman No 1-1, paras. 10-14 (**Annex RMI/-17**); Able Seaman No 2-1, paras. 13-19 (**Annex RMI/-18**); Able Seaman No 3-1, paras. 14-24 (**Annex RMI/-19**); Ordinary Seaman No 1-1, paras. 10-18 (**Annex RMI/-20**); Ordinary Seaman No 2-1, paras. 12-21 (**Annex RMI/-21**); Ordinary Seaman No 3-1, paras. 10-17 (**Annex RMI/-22**); Deck Cadet-1, paras. 14-21 (**Annex RMI/-9**); Chief Engineer-1, paras. 7-11 (**Annex RMI/-7**); 2<sup>nd</sup> Engineer-1, paras. 12-19 (**Annex RMI/-11**); 3<sup>rd</sup> Engineer-1, paras. 14-23 (**Annex RMI/-12**); 4<sup>th</sup> Engineer-1, paras. 12-21 (**Annex RMI/-13**); Electrician-1, paras. 10-23 (**Annex RMI/-14**); Pumpman-1, paras. 11-19 (**Annex RMI/-16**); Motorman No 1-1, paras. 11-15 (**Annex RMI/-24**); Motorman No 2-1, paras. 13-23 (**Annex RMI/-25**); Motorman No 3-1, paras. 11-13 (**Annex RMI/-26**); Fitter-1, paras. 12-21 (**Annex RMI/-23**); Engine Cadet-1, paras. 11-20 (**Annex RMI/-15**); Chief Cook-1, paras. 11-19 (**Annex RMI/-27**); Messman No 1-1, paras. 10-18 (**Annex RMI/-28**); Messman No 2-1, paras. 9-18 (**Annex RMI/-29**).

<sup>280</sup> Master-1, paras. 110-111, 116, 148, 173 (**Annex RMI/-1**); Kulblik-1, paras. 11, 13, 23-29, 50-54 (**Annex RMI-2**).

<sup>281</sup> Master-1, paras. 133-160 (**Annex RMI/-1**); Askins-1, paras. 24-44 (**Annex RMI/-3**); Kulblik-1, paras. 47-65 (**Annex RMI-2**).

<sup>282</sup> Askins-1, paras. 38-41 (**Annex RMI/-3**); Master-1, para. 144 (**Annex RMI/-1**).

<sup>283</sup> See e.g., Master-1, paras. 110 (stating that “[a]rmed police officers went in and out of that cell and beat people with sticks and large, rusty machetes”), 113 (stating that the place of detention “had no beds, were extremely dirty and full of cockroaches and rats. There were no toilets (...”), 117 (“[a]t times, there was no tap water for days, (...). The whole area was also heavily infested by mosquitos, so many of the crew caught malaria, including me”), 120 (“[n]o charges were ever presented to me by the Equatorial Guinea authorities, (...) The authorities also did not provide me

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### III. Equatorial Guinea violated its obligation of due regard under Article 56(2)

250. Insofar as Equatorial Guinea's enforcement measures purportedly concerned Equatorial Guinea's EEZ, Equatorial Guinea's obligation of due regard in Article 56(2) is also engaged.

251. As set out above in Chapter 5 at paragraphs 153-156, the object and purpose of the obligation of due regard is to ensure balance between concurrent, respective rights of States Parties to the Convention, having regard to their respective rights, as called for by the circumstances and by the nature of those rights.

252. In imposing the unjustified and excessive penalties that it did for alleged conduct in its EEZ, as reflected in the Fine dated 23 September (notified 28 September), Equatorial Guinea failed, in breach of Article 56(2), to have due regard for the rights that the Marshall Islands enjoyed in the EEZ of Equatorial Guinea under the Convention, including freedom of navigation and exclusive flag State jurisdiction.

### IV. Equatorial Guinea repeatedly violated the crews' human rights

253. As the account of events given in Chapter 2 demonstrates, Equatorial Guinea repeatedly and seriously violated the human rights of the crew. The Marshall Islands' addresses its claims under the Convention arising from these violations in this Section, under three headings. Subsection A addresses the relationship between human rights law and the Convention. Subsection B identifies and summarizes the human rights engaged on the facts of this case. Subsection C then sets out Equatorial Guinea's multiple violations of the human rights of the crew and consequent breaches of the Convention and applicable law.

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with legal assistance, and I was never presented before a judge"), and 126 ("[t]he interviewer was extremely aggressive and often screamed at me. No food or water was provided") (**Annex RMI/-1**). See also: Chief Officer-1, para. 54 (**Annex RMI/-5**) ("I did not see any charge sheet at any point during the detention"); 2<sup>nd</sup> Officer-1, para. 14 (**Annex RMI/-6**) ("I saw a policeman beating locals with big sticks in front of us. This was an awful sight"), 18 ("I was questioned by the EG authorities ... I was not allowed access to a lawyer"); 3<sup>rd</sup> Officer-1, para. 12 (**Annex RMI/-10**) ("The living conditions in the detention facility were bad ... there was no water, I was so thirsty that at one point I drank from the water used to flush the toilet even though there was no clean water in the toilets and showers"); 2<sup>nd</sup> Engineer-1, para. 17 (**Annex RMI/-11**) ("I did not have any exact information as to what I was being charged with. I was unsure if it was a money matter or something else, who was being charged, and what the charges were. There was no information at all"), 18 (stating that his lawyer "was not allowed on board the Vessel. He had no right to put forward arguments or request information"). See further: Junior 3<sup>rd</sup> Officer-1, paras. 28-29 (**Annex RMI/-8**); Able Seaman No 2-1, paras. 17-19 (**Annex RMI/-18**); Able Seaman No 3-1, paras. 20-22 (**Annex RMI/-19**); Ordinary Seaman No 1-1, paras. 17-18 (**Annex RMI/-20**); Ordinary Seaman No 2-1, paras. 19-21 (**Annex RMI/-21**); Ordinary Seaman No 3-1, paras. 15-17 (**Annex RMI/-22**); Deck Cadet-1, paras. 14-21 (**Annex RMI/-9**); Chief Engineer-1, paras. 7-11 (**Annex RMI/-7**); 3<sup>rd</sup> Engineer-1, paras. 17-19 (**Annex RMI/-12**); 4<sup>th</sup> Engineer-1, para. 19 (**Annex RMI/-13**); Electrician-1, paras. 16-19 (**Annex RMI/-14**); Pumpman-1, paras. 16-18 (**Annex RMI/-16**); Motorman No 1-1, paras. 14-15 (**Annex RMI/-24**); Motorman No 2-1, paras. 18-21 (**Annex RMI/-25**); Motorman No 3-1, paras. 15-18 (**Annex RMI/-26**); Fitter-1, paras. 19-21 (**Annex RMI/-23**); Engine Cadet-1, paras. 19-20 (**Annex RMI/-15**); Chief Cook-1, paras. 13-15 (**Annex RMI/-27**); Messman No 1-1, paras. 16-18 (**Annex RMI/-28**); Messman No 2-1, paras. 14-16 (**Annex RMI/-29**).

## MEMORIAL OF THE MARSHALL ISLANDS

### A. Human rights and the Convention

254. As set out in further detail below, Equatorial Guinea's detention and treatment of the crew violated their human rights under general or customary international law, as reflected in the Universal Declaration of Human Rights ("UDHR") and other human rights instruments, and was contrary to its obligations under the ICCPR, to which both the Marshall Islands and Equatorial Guinea are party,<sup>284</sup> and the African Charter, to which Equatorial Guinea is a party.

255. While the Convention concerns law of the sea, not human rights, human rights are nevertheless relevant to the Convention's interpretation and application in several respects.

256. First, the Tribunal has repeatedly affirmed the importance of human rights in Convention claims and there is an evident overlap between human rights and the considerations of humanity applicable in the law of the sea recognised by the Tribunal in the *M/V "Saiga" (No.2)*.<sup>285</sup> In the *M/V "Louisa"* the Tribunal stated that, although it had no jurisdiction because of a procedural defect, "it could not but take note" of the human rights issues raised:<sup>286</sup>

The Tribunal holds the view that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances (see "*Juno Trader*" (*Saint Vincent and the Grenadines v. Guinea-Bissau*), *Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77; "*Tomimaru*" (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at p. 96, para. 76).<sup>287</sup>

257. The Tribunal found in the "*Juno Trader*" that "the obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law."<sup>288</sup> In "*Tomimaru*," it held that shipowners should not be taken through proceedings inconsistent with international standards of due process of law.<sup>289</sup>

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<sup>284</sup> Equatorial Guinea acceded to the ICCPR on 25 September 1987, the Marshall Islands on 12 March 2018. As parties they undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant (Article 2(1)).

<sup>285</sup> *Saiga (No. 2), Judgment*, at para. 155.

<sup>286</sup> *Louisa, Judgment*, at para.154. The Tribunal held it had no jurisdiction over the human rights claims because they were new claims raised after the closure of the written pleadings and did not arise directly out of, or were not implicit in, the application (see paras. 141-149). The human rights violations raised (recorded in paras. 59-62 of the judgment) included: being detained in a prison cell with no chair, being denied a place to sleep and bathroom facility; being presented to a judge five days after the arrest; and being unable to leave the country and having passports retained for eight months. Furthermore, the record did not disclose that charges were ever brought. One of the persons so detained was not a crew member, but visiting her father on board. No charges were brought against two of the crew members concerned.

<sup>287</sup> *Louisa, Judgment*, at para.155.

<sup>288</sup> *Juno Trader, Prompt Release Judgment*, at para. 77.

<sup>289</sup> "*Tomimaru*" (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at para. 76.

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258. Second, human rights find direct expression in Article 230(3) of the Convention. This article provides that:

In the conduct of proceedings in respect of such violations [i.e. violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment] committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.

259. The relationship between Article 230(3) and international human rights law is well established. The authors of the *Virginia Commentary* observe that, in respect of the expression, “recognized rights of the accused” (which was introduced by the Informal Group of Juridical Experts in 1975):<sup>290</sup>

Guidance may be found in the Universal Declaration of Human Rights of 1948 and in the International Covenant for Civil and Political Rights of 1966, as well as in other global and regional instruments dealing with human rights, regarding the concept of “fair trial” and the rights of an accused person.<sup>291</sup>

260. Similarly, the authors of Proelß (ed.), *United Nations Law of the Sea: A Commentary*, observe that the requirement in Article 230(3) that “recognized rights of the accused shall be observed” should be construed by reference to the applicable legal instruments, including the IC-CPR.<sup>292</sup>

261. Third, the Tribunal may also have regard to human rights law when applying the gateway provisions in the Convention.

262. Finally, human rights obligations may form part of the applicable law under Article 293(1). A tribunal constituted under UNCLOS does not have jurisdiction to determine a breach of the ICCPR. However, insofar as the rights in the ICCPR are also reflective of customary international law or general principles of international law, they form part of the applicable law for the purpose of Article 293(1). The Annex VII tribunal in the *Arctic Sunrise* considered that in determining the Netherlands’ claims in relation to the interpretation and application of the Convention, it could, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards.<sup>293</sup> It could, accordingly, have regard to general international law in relation to human rights in order to determine whether the boarding, seizure, and detention of the “*Arctic Sunrise*” and the arrest and detention of those on board was reasonable and proportionate.<sup>294</sup>

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<sup>290</sup> *Virginia Commentary*, vol. IV, at paras. 230.2 and 230.9(c).

<sup>291</sup> *Virginia Commentary*, vol. IV, at p. 370, para. 230.9(c).

<sup>292</sup> *Proelß Commentary*, at p. 1557, para. 12.

<sup>293</sup> *Arctic Sunrise, Merits Award*, at para. 198. The tribunal did not consider that it had “jurisdiction to apply directly provisions (...) of the ICCPR or to determine breaches of such provisions” (para. 197).

<sup>294</sup> *Arctic Sunrise, Merits Award*, at para. 197. It considered this would be to interpret the relevant Convention provisions by reference to relevant context.

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### B. The human rights engaged in this case

263. The rights engaged on the facts of this case include: the right not to be tortured or subject to humiliating and degrading treatment; the right of detainees to be treated with humanity; the right to liberty and not to be subjected to arbitrary detention; the right to free movement and to leave the country; fair trial rights; and the prohibition on retroactive punishment. These rights are articulated in the texts of all the international and regional human rights treaties, including in particular in the text of the ICCPR, to which both Equatorial Guinea and the Marshall Islands are bound as contracting parties and which is, therefore, relevant law applicable in the relations between the parties for the purpose of the customary rule of treaty interpretation reflected in Article 31(3)(c) of the VCLT. They are also reflected in the text of the African Charter, to which Equatorial Guinea is also bound as a party and may also have the status of customary law or general principle.

264. The sources, content and (where relevant) the status of each of these rights are summarised in turn.

265. ***Prohibition on torture and cruel, inhuman or degrading treatment.*** Article 5 of the UDHR, Article 7 of the ICCPR, Article 3 of the European Convention on Human Rights (“ECHR”) and Article 5(2) of the American Convention on Human Rights (“ACHR”) provide that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This prohibition is also found in Article 5 of the African Charter and Article 8(1) of the Arab Charter on Human Rights (“Arab Charter”).

266. The ICCPR Human Rights Committee (“HRC”) has held that sending an individual to a country where there are substantial grounds for believing that the individual faces a real risk of severe violation of liberty or security of person, such as prolonged arbitrary detention, may amount to inhuman treatment prohibited by Article 7 of the ICCPR.<sup>295</sup>

267. The prohibition on torture is a peremptory norm.<sup>296</sup>

268. ***Right of detainees to be treated with humanity.*** Article 10(1) of the ICCPR, Article 5(2) of the ACHR and Article 20(1) of the Arab Charter provide that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The right is also reflected in Article 5 of the African Charter. Conditions of detention under the ICCPR are primarily addressed by the ICCPR Human Rights Committee under Article 10<sup>297</sup>

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<sup>295</sup> CCPR General Comment No. 35: Article 9 (Liberty and Security of Person) (16 December 2014) CCPR/C/GC/35 (“General Comment No. 35”), at para. 57; see also CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (29 March 2004) CCPR/C/21/Rev.1/Add. 13, at para. 12.

<sup>296</sup> Affirmed by the ICJ in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at para. 99; the European Court of Human Rights (“ECtHR”) in the *Advisory Opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture*, Request No. P16-2021-001, at para. 59, and by the Grand Chamber of the ECtHR in *Al-Adsani v. UK [GC]*, Application no. 35763/97, Judgment, 21 November 2001, at para. 61; and by the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 November 1998, at para. 144.

<sup>297</sup> General Comment No. 35, at para. 59.

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and are considered to complement the ban on torture or other cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR.<sup>298</sup>

269. Being held in detention without being informed of the reasons and without adequate sanitary facilities, provision of a bed or mattress, adequate medical treatment and provision of food or water have been found by the ICCPR Human Rights Committee to violate Articles 7 and 10(1).<sup>299</sup>

270. Conditions of detention are also addressed in *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, which were adopted by the UN General Assembly without a vote<sup>300</sup> in resolution 70/175 of 17 December 2015 (“**Standard Minimum Treatment Rules**”).<sup>301</sup> The Standard Minimum Treatment Rules build on earlier versions of the standards, General Assembly resolutions and human rights treaties, including the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 1984.<sup>302</sup> They are stated to be based on “the general consensus of contemporary thought and the essential elements of the most adequate systems of today”<sup>303</sup> and to set out “what is generally accepted as being good principles and practice in the treatment of prisoners.”<sup>304</sup>

271. The Standard Minimum Rules, which apply equally to persons arrested or imprisoned without charge,<sup>305</sup> include the following:

- a. “All prisoners shall be treated with the respect due to their inherent dignity and value as human beings” and shall not be subjected to, and shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment” (Rule 1).
- b. “All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health” (Rule 13).
- c. “The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner” (Rule 15).
- d. “Adequate bathing and shower installations shall be provided” (Rule 16).
- e. Prisoners “shall be provided with water and with such toilet articles as are necessary for health and cleanliness” (Rule 18.1) and “facilities shall be provided for the

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<sup>298</sup> CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty) (10 April 1992) (“**General Comment No. 21**”), at para. 3.

<sup>299</sup> See Sarah Joseph and Melissa Capstan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3<sup>rd</sup> ed., Oxford University Press 2015), at pp. 278–282 and the ICCPR Human Rights Committee decisions cited therein.

<sup>300</sup> Official Records of the 80<sup>th</sup> Plenary Meeting of the Seventieth Session of the General Assembly (Thursday, 17 December 2015, 10 a.m.) A/70/PV.80, at p. 25.

<sup>301</sup> Resolution adopted by the General Assembly on 17 December 2015, A/RES/70/175.

<sup>302</sup> Ibid. See the preamble to the resolution, in particular, paras. 4, 6-9 and 11.

<sup>303</sup> Ibid, Preliminary observation 1.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid, Preliminary observation 3 and Rule 122.

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proper care of the hair and beard, and men shall be able to shave regularly” (Rule 18.2).

- f. “Every prisoner shall, in accordance with local and national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness” (Rule 21).
- g. “Every person shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served” (Rule 22.1).
- h. “Drinking water shall be available to every prisoner whenever he or she needs it” (Rule 22.2).
- i. “The provision of health care for prisoners is a State responsibility” (Rule 24.1), and prisoners “should have access to necessary health-care services free of charge” (Rule 24.1). “The health-care service shall consist of an interdisciplinary team with sufficient qualified personnel” (Rule 25.2), and “[c]linical decisions may only be taken by the responsible healthcare professionals and may not be overruled or ignored by non-medical prison staff” (Rule 27.2).
- j. “Every untried prisoner has the right to be promptly informed about the reasons for his or her detention and about any charges against him or her” (Rule 119.1).
- k. “Denial of access to a legal adviser shall be subject to independent review without delay” (Rule 119.2).
- l. “Prisoners shall be provided with adequate opportunity, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice or a legal aid provider, without delay, interception or censorship and in full confidentiality, on any legal matter, in conformity with applicable domestic law. Consultations may be within sight, but not within hearing, of prison staff. In cases in which prisoners do not speak the local language, the prison administration shall facilitate access to the services of an independent competent interpreter” (Rule 120, read with Rule 61).

272. The ICCPR Human Rights Committee has held that the Standard Minimum Treatment Rules inform the content of the rights under ICCPR Articles 7 and 10.<sup>306</sup>

273. ***The right to liberty and not to be arbitrarily detained.*** Article 3 of the UDHR provides that “[e]veryone has the right to life, liberty and security of the person.” The corollary to the right to liberty and security is found in Article 9 of the ICCPR, Article 5 of the ECHR, Article 7 of the

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<sup>306</sup> General Comment No. 21, at para. 5; see also the recent ICCPR Human Rights Committee decision in *Likhovid v. Belarus* (Communication No. 2703/2015) (17 January 2023) CCPR/C/135/D/2703/2015, at para. 7.4.

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ACHR, Article 6 of the African Charter and Article 14 of the Arab Charter. While there are some differences between the texts, Article 9 of the ICCPR is representative. It provides that:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

274. According to the ICCPR Human Rights Committee, arrest or detention that lacks any legal basis is also arbitrary.<sup>307</sup> Arrest within the meaning of Article 9 need not involve a formal arrest as defined under domestic law.<sup>308</sup> Persons deprived of their liberty are to be informed at the time of their arrest of the reasons for their arrest.<sup>309</sup> Because “arrest” means the commencement of a deprivation of liberty, that requirement applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.”<sup>310</sup> The reasons must be given in a language that the arrested person understands.<sup>311</sup>

275. The prohibition on arbitrary detention is recognised as a peremptory norm of customary international law.<sup>312</sup>

276. ***Right to free movement and to leave any country.*** Article 13 of the UDHR provides that “[e]veryone has the right to freedom of movement (...) within the borders of each state” and that

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<sup>308</sup> General Comment No. 21, at para. 13. Any substantive grounds for arrest or detention must be prescribed by law; deprivation of liberty without such legal authorization is unlawful (at para. 22).

<sup>309</sup> General Comment No. 21, at para. 24.

<sup>310</sup> Ibid.

<sup>311</sup> General Comment No. 21, at para. 26.

<sup>312</sup> See the UN Human Rights Council’s Working Group on Arbitrary Detention Deliberation 9, Report of the Working Group on Arbitrary Detention (24 December 2012), A/HRC/22/44.

See also, Restatement (Third) of Foreign Relations Law of the United States, which reaches a similar conclusion. It states that the “prohibition against arbitrary detention has attained the status of jus cogens, a non-derogable norm that is binding on all states” (Restatement (Third) of Foreign Relations Law of the United States (The American Law Institute 1987), comment 702(n)). The ECtHR, whilst not expressly stating that the prevention of arbitrary detention is part of customary international law, states that Article 5 is of “the highest importance” (*Medvedyev v. France [GC]*, Application no. 3394/03, 29 March 2010, at para. 76) and has held that a deprivation of liberty through an arbitrary detention is a “complete negation and a most grave violation of Article 5” (*Belozorov v Russia and Ukraine*, Application no. 43611/02, 15 October 2015, at para. 113).

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“[e]verone has the right to leave any country.” This right is reflected in Article 12(1) and (2) of the ICCPR, which provides that:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

277. Materially identical provisions are found in Articles 26(1) and 27(1) of the Arab Charter, Article 2(1) and (2) of Protocol 4 of the ECHR, Article 22(1) and (2) of the ACHR, and Article 12(1) and (2) of the African Charter.

278. ***Right to a fair trial.*** Article 10 of the UDHR provides that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” The right to a fair trial is found in Article 6 of the ECHR, Article 8 of the ACHR, Article 13 of the Arab Charter, Article 7 of the African Charter, and Article 14 of the ICCPR. Article 14 of the ICCPR includes minimum guarantees in paragraph 3,<sup>313</sup> which include the entitlement to communicate with counsel of one’s own choosing, to have adequate time facilities for the preparation of one’s defence, to be tried in one’s presence, and to defend oneself in person or through legal assistance of one’s own choosing and not be compelled to confess guilt.

279. The right to a fair trial is a fundamental human right and there is strong evidence that the right and most of its components as expressed in Article 14 of the ICCPR have achieved customary status.<sup>314</sup>

280. ***Right not to be subjected to retroactive criminal penalties.*** Article 11(2) of the UDHR, Article 15 of the ICCPR, Article 7(2) of the African Charter, Article 9 of the ACHR and Article 7 of the ECHR prohibit, *inter alia* the imposition of retroactive penalties, including the imposition of a heavier penalty than was applicable at the time the offence was committed.<sup>315</sup> International human rights courts have considered the principle of non-retroactivity of criminal penalties is an “essential element of the rule of law” and accordingly occupies a “prominent place” in the system of international human rights protection.<sup>316</sup>

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<sup>313</sup> Also found in ECHR Article 6(3); ACHR Article 8(2).

<sup>314</sup> Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021), at pp. 13-14.

<sup>315</sup> For example, Article 15 of the ICCPR includes the proviso: “Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.” This wording is also found in Article 7 of the ECHR, Article 9 of the ACHR and Article 11 of the UDHR.

<sup>316</sup> See, e.g., the judgment of the Grand Chamber of the ECtHR in *Kononov v. Latvia [GC]*, Application no. 36376/04, Judgment, 17 May 2010, para. 185.

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### C. Breach

281. Equatorial Guinea failed to respect the human rights of the crew in multiple respects. Equatorial Guinea:

- a. unlawfully and arbitrarily detained the crew contrary to (i) the right not to be arbitrarily detained under customary international law, (ii) Equatorial Guinea's obligations under Article 9 of the ICCPR and Article 9 of the African Charter, and (iii) the requirements of Rules 119.1, read with Rule 122 of the Standard Minimum Treatment Rules;<sup>317</sup>
- b. prevented the crew from leaving the country, including by confiscating their passports, contrary to its obligations under Article 12 of the ICCPR and Article 12 of the African Charter;<sup>318</sup>
- c. denied the crew the right to legal representation, including when they were being aggressively questioned by Equatoguinean and Nigerian officials (sometimes for prolonged periods of time),<sup>319</sup> and forced crew members to sign statements they were not allowed to review, in a language they did not understand, contrary to (i) fair trial rights under customary international law, (ii) Equatorial Guinea's obligations under Article 14 of the ICCPR and Article 7 of the African Charter, and (iii) the requirements of Rules 119.1 and 120, read with Rules 61 and 122 of the Standard Minimum Rules;<sup>320</sup>
- d. subjected the crew to cruel, inhuman and degrading treatment and imprisonment and/or failed to treat the crew with humanity in detention, by, *inter alia*, holding the Chief Officer hostage aboard an Equatoguinean naval vessel,<sup>321</sup> detaining the crew in the Detention Facility, which was "extremely dirty and full of cockroaches and

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<sup>317</sup> Master-1, paras. 113 and 117 (**Annex RMI/-1**).

<sup>318</sup> Master-1, paras. 108 and 115 (**Annex RMI/-1**). See also: 2<sup>nd</sup> Officer-1, para. 13 (**Annex RMI/-6**); 3<sup>rd</sup> Officer-1, para. 10 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, para. 24 (**Annex RMI/-8**); Third Engineer-1, para. 12.

<sup>319</sup> Master-1, paras. 121-132, stating at 122 ("[a]s to lawyers, we were expressly told that no lawyers were allowed to be present during the interviews. (...) [W]e were unable to speak with the lawyers during the interviews and representation was denied to us when we asked"); as to the broader context and effects of the interviews, see 126 ("[t]he interview felt like it was primarily designed to harass. The interviewer was extremely aggressive and often screamed at me. No food or water was provided"); 128 ("[a]fter this initial interview, I had suicidal thoughts and felt very bad"); 132 ("[i]t all felt like a witch hunt, and it was clear to all of us that they had already decided the result of their investigation") (**Annex RMI/-1**); 2<sup>nd</sup> Officer-1, para. 18 (**Annex RMI/-6**) ("I was questioned by the EG authorities ... I believe we were questioned by prosecution lawyers ... I was questioned for around five hours in a small room surrounded by the police, Navy and other local officials. I was not allowed access to a lawyer"); Chief Engineer-1, para. 11 (**Annex RMI/-7**) ("I was questioned by E.G. Officials ... without any lawyer.").

<sup>320</sup> Master-1, para. 127 (**Annex RMI/-1**); Chief Engineer-1, para. 11 (**Annex RMI/-7**) ("I had to sign a testimony in Spanish.").

<sup>321</sup> Master-1, para. 146 (**Annex RMI/-1**) ("This resulted in the Equatorial Guinean Navy forcefully taking our Chief Officer to the Equatorial Guinean naval vessel as a hostage."); Chief Officer-1, para. 59 (**Annex RMI/-5**) ("On handing over to the Nigerian Navy, I was taken on-board the Naval Vessel Vele [sic] Nzaz, forcefully and against my will. The Navy had wanted to take the Master but as he was ill with Malaria, they decided to take me. I was detained in the Navy ship for 8 hours.").

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rats” and “heavily infested by [malaria-bearing] mosquitoes,”<sup>322</sup> failing to provide bedding and sanitary washing facilities to the crew in the Detention Facility, failing to provide food and access to drinking water (to the point where a crew member detained onshore had to drink “from the water used to flush the toilet”),<sup>323</sup> and failing to provide medical care of a sufficient standard, contrary to (i) Equatorial Guinea’s obligations under Articles 7 and 10 of the ICCPR and Article 5 of the African Charter, and (ii) the Standard Minimum Rules, which reflect customary international law or general principles of international law. As regards the Standard Minimum Rules, Equatorial Guinea failed to meet, *inter alia*, the requirements of Rules 1, 13, 15, 16, 18, 21, 22 and 24.1, 25.2 and 27.2;<sup>324</sup>

- e. imposed a Fine on the Master which was not justified on the face of the laws relied on or the facts, as set out above in paragraphs 228-230, contrary to (i) the prohibition in customary international law on retroactive penalties and (ii) Equatorial Guinea’s obligations under Article 15 of the ICCPR and Article 7(2) of the African Charter. By interpreting and applying its laws to apply to conduct which was not caught on the face of those laws or applying those laws to conduct which never occurred, and imposing such a heavy penalty, it must follow that Equatorial Guinea also acted incompatibly with its obligation not to impose a heavier penalty than was applicable at the time the offence was committed; and
- f. unlawfully transferred the crew into the custody and control of the Nigerian authorities to be taken to Nigeria, contrary to (i) the right not to be arbitrarily detained under customary international law, (ii) Equatorial Guinea’s obligations under Article 9 of the ICCPR and Article 9 of the African Charter, (iii) the requirements of Rules 119.1, read with Rule 122 of the Standard Minimum Treatment Rules, (iv) the prohibition on torture and cruel, inhuman or degrading treatment under customary law, and (v) Equatorial Guinea’s obligations under Article 7 of the ICCPR and Article 5 of the African Charter.<sup>325</sup>

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<sup>322</sup> Master-1, paras. 113 and 117 (**Annex RMI/-1**).

<sup>323</sup> 3<sup>rd</sup> Officer-1, para. 12 (**Annex RMI/-10**) (“The living conditions in the detention facility were bad ... there was no water, I was so thirsty that at one point I drank from the water used to flush the toilet even though there was no clean water in the toilets and showers”).

<sup>324</sup> Master-1, paras. 111 (“At no time did the Equatorial Guinean police or authorities provide food or water. All food and water was provided by the local agents (...”)”; 119 (deficient medical care) (**Annex RMI/-1**); Kulblik-1, paras. 11, 13 and 54 (**Annex RMI/-2**); 2<sup>nd</sup> Officer-1, para. 16 (**Annex RMI/-6**); Able Seaman No 1-1, paras. 13-14 (**Annex RMI/-17**) (“The facility was infested with rats and mosquitoes. This caused many of us to become sick with typhoid fever and malaria”); Able Seaman No 2-1, para. 16 (**Annex RMI/-18**) (“the facility was in very poor condition. I did not have access to clean water ... as a result of sharing these facilities, many of us caught typhoid. The facility also had lots of rats and mosquitos from which a lot of us caught malaria ... We received food and water from our company’s agents ... I was not provided with proper medical attention.”)

<sup>325</sup> Master-1, paras. 140-160 (**Annex RMI/-1**); Askins-1, paras. 32-44 (**Annex RMI/-3**); Kulblik-1, paras. 47-65 (**Annex RMI/-2**). See also: Chief Officer-1, paras. 57-60 (**Annex RMI/-5**); 2<sup>nd</sup> Officer-1, paras. 20-23 (**Annex RMI/-6**); 3<sup>rd</sup> Officer-1, paras. 18-21 (**Annex RMI/-10**); Junior 3<sup>rd</sup> Officer-1, paras. 34-38 (**Annex RMI/-8**); Able Seaman No 1-1, paras. 15-19 (**Annex RMI/-17**); Able Seaman No 2-1, paras. 20-24 (**Annex RMI/-18**); Able Seaman No 3-1, paras. 25-29 (**Annex RMI/-19**); Ordinary Seaman No 1-1, paras. 19-24 (**Annex RMI/-20**); Ordinary Seaman No 2-1, paras. 22-26 (**Annex RMI/-21**); Ordinary Seaman No 3-1, paras. 18-22 (**Annex RMI/-22**); Deck Cadet-1, paras.

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282. By so doing, Equatorial Guinea:

- a. acted contrary to rules and principles of international law not incompatible with the Convention to which the Chamber may have recourse under Article 293;
- b. breached its obligation under Article 87(1) of the Convention to exercise its freedom of the high seas under conditions laid down by “other rules of international law;”
- c. breached its obligation under Article 87(2) of the Convention to have due regard for the interests of the Marshall Islands in freedom of navigation, namely, (i) its interests as flag State of the “*Heroic Idun*” in the adherence by Equatorial Guinea, in respect of its treatment of crews on the Marshall Islands’ vessels exercising freedom of navigation to the principles of humanity and (ii) its human rights obligations under the customary rules or principles of international law reflected in the Standard Minimum Rules and the ICCPR and African Charter;
- d. if and insofar as the relevant conduct occurred on the Vessel while it was the territorial sea and outside its internal waters, breached its obligation under Article 2(3) to exercise sovereignty over the territorial sea subject to the Convention and other rules of international law; and/or
- e. insofar as the relevant conduct concerned alleged activities in its EEZ, breached its obligations under (i) Article 58(2) to comply with other pertinent rules of international law, and (ii) Article 56(2) to have due regard to the rights and duties of the Marshall Islands, to have crews onboard its flagged vessels treated in accordance with considerations of humanity, and Equatorial Guinea’s human rights obligations under customary international law, the ICCPR and African Charter, and the customary rules or principles of international law reflected in the Standard Minimum Rules.

### V. Equatorial Guinea breached its obligations under SOLAS, the STCW, and the COLREGS

283. Another issue in this case is Equatorial Guinea’s repeated disregard for, and rejection of requests to allow, safe manning of the “*Heroic Idun*” while it detained the Vessel in Luba Bay and when it handed the Vessel and crew over to the Nigerian authorities with the intention that it would be sailed to Nigeria. As a result of this conduct, Equatorial Guinea exposed the Vessel, those

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22-26 (Annex RMI/-9); Chief Engineer-1, para. 12 (Annex RMI/-7); 2<sup>nd</sup> Engineer-1, paras. 20-23 (Annex RMI/-11); 3<sup>rd</sup> Engineer-1, paras. 24-28 (Annex RMI/-12); 4<sup>th</sup> Engineer-1, paras. 22-25 (Annex RMI/-13); Electrician-1, paras. 24-28 (Annex RMI/-14); Pumpman-1, paras. 20-25 (Annex RMI/-16); Motorman No 1-1, paras. 16-19 (Annex RMI/-24); Motorman No 2-1, paras. 24-28 (Annex RMI/-25); Motorman No 3-1, paras. 21-27 (Annex RMI/-26); Fitter-1, paras. 22-24 (Annex RMI/-23); Engine Cadet-1, paras. 21-26 (Annex RMI/-15); Chief Cook-1, paras. 20-22 (Annex RMI/-27); Messman No 1-1, paras. 19-25 (Annex RMI/-28); Messman No 2-1, paras. 19-22 (Annex RMI/-29).

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onboard, and the marine environment to serious risks and breached its obligations under SOLAS, the STCW, the COLREGS, and the Convention.

284. This Section addresses the Marshall Islands' claims in respect of those breaches under four headings: subsection A addresses the applicability of SOLAS, the STCW, the COLREGS, and the Chamber's jurisdiction; subsection B sets out the provisions of SOLAS, the STCW and the COLREGS which are relevant to this claim; subsection C describes the safe manning requirements of the "*Heroic Idun*"; and subsection D then sets out how Equatorial Guinea's treatment of the Vessel and crew breached the relevant provisions of SOLAS, the STCW, the COLREGS, and the Convention.

### A. The applicability of SOLAS, the STCW, and the COLREGS, and the Chamber's jurisdiction

285. The Marshall Islands and Equatorial Guinea are both parties to SOLAS, the STCW, and the COLREGS. As noted in Chapter 4, SOLAS and STCW are two of the IMO's "four pillars," together with MARPOL and the MLC.

286. As set out in Chapter 4, SOLAS, the STCW, and the COLREGS are generally recognised as GAIRS incorporated by reference into various provisions of the Convention,<sup>326</sup> including Article 94 on the "Duties of the flag State", Article 217 on "Enforcement by flag States", and Article 297(1)(c) in Part XV.

287. Article 94(1) on the "Duties of the flag State" provides that "[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." According to Article 94(3):

Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

- (a) the construction, equipment and seaworthiness of ships;
- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

According to Article 94(4):

[s]uch measures shall include those necessary to ensure that: (...) , each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship.

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<sup>326</sup> *Proelß Commentary*, at p. 713; *South China Sea, Award*, at para. 1083.

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288. In taking the measures called for in Articles 94(3) and (4), “each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance” (Article 94(5)).

289. The account of the preparation of Article 94 given in the *Virginia Commentary* affirms the involvement of the IMO (or its predecessor, the IMCO) in the development of the text of Article 94 and that the term “applicable international instruments” in Article 94(3)(b) includes SOLAS and the COLREGS.<sup>327</sup> This has been confirmed subsequently. Commentators agree that SOLAS, the COLREGS, MARPOL, and the STCW are generally accepted international regulations for the purposes of Article 94.<sup>328</sup> Further, the Annex VII tribunal in the *South China Sea* held, in its award on the merits, that the COLREGS are within the category of “generally accepted international regulations, procedures and practices” for the purpose of Article 94(5).<sup>329</sup>

290. Article 217(1) of the Convention requires the flag State to:

ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels.

291. The applicable rules and standards include those concerning the manning of vessels, demonstrating the link between safe manning requirements and the protection of the marine environment.

292. Article 297(1)(c) affirms that “[d]isputes concerning the interpretation or application of the Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 of Part VX “when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.” The Annex VII tribunal in the *Chagos Marine Protected Area* arbitration accepted that Article 297(1)(c) is a source of jurisdiction over disputes relating to the contravention of rules and standards found in IMO treaties such as MARPOL, SOLAS, and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, as well as the provisions of the Convention (such as Articles 2(3), 56(2), 194 and 300) which may be relevant.<sup>330</sup>

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<sup>327</sup> See *Virginia Commentary*, vol. III, at pp. 137–152, in particular paras. 94.8(e)-(g) at pp. 147–149.

<sup>328</sup> *Proelß Commentary*, at p. 713.

<sup>329</sup> *South China Sea, Award*, at para. 1083. The Seabed Chamber in the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* held that a flag State also has an obligation to include enforcement mechanisms in the laws, regulations and measures it adopts pursuant to Article 94(5) (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at para. 138).

<sup>330</sup> *Chagos Marine Protected Area, Award*, at paras. 316, 321–323.

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293. Thus, the Chamber enjoys jurisdiction over disputes concerning breaches of SOLAS, the STCW, and the COLREGS directly, as well indirectly, through disputes concerning provisions of the Convention which incorporate international rules and regulations by reference, such as Article 94, or the gateway provisions.

### B. The relevant provisions of SOLAS, the STCW, and the COLREGS in this case

294. The regulations concerning safe manning of vessels to prevent collisions and other casualties and incidents, and to ensure the safety of the crew, the vessel and the marine environment are found in SOLAS, the STCW, and the COLREGS. Together the relevant provisions of these treaties form the international safe manning regime.

295. **SOLAS.** The purpose of SOLAS is to promote safety of life at sea by establishing uniform principles and rules, set out in its Annex.<sup>331</sup> The contracting parties undertake in Article 1(b) of SOLAS:

to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended.<sup>332</sup>

296. The SOLAS safe manning requirements are set out in Regulation 14, of Chapter V, “Safety of Navigation,” (“Regulation V/14”), “Ships’ manning.” Regulation V/14 provides, in relevant part, that:

1. Contracting Governments undertake, each for its national ships, to maintain, or, if it is necessary, to adopt, measures for the purpose of ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned.
2. Every ship to which chapter I applies shall be provided with an appropriate minimum safe manning document or equivalent issued by the Administration as evidence of the minimum safe manning considered necessary to comply with the provisions of paragraph 1.<sup>333</sup>

297. The “Administration” is defined in Regulation 2 of Chapter I of SOLAS (“Regulation I/2”) as the “Government of the State whose flag the ship is entitled to fly.” According to Chapter I, Regulation 1, unless provided otherwise, the regulations “apply only to ships engaged on international voyages,” defined in Regulation I/2 as “a voyage from a country to which the present

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<sup>331</sup> Preamble, stating: “Being desirous of promoting safety of life at sea by establishing in common agreement uniform principles and rules directed thereto” (**Annex RMI/-48**).

<sup>332</sup> **Annex RMI/-48.**

<sup>333</sup> **Annex RMI/-48.**

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Convention applies to a port outside such country, or conversely.” Regulation 3 of Chapter I contains exceptions (none of which apply here).<sup>334</sup>

298. Article 217(3) of the Convention requires flag State Parties to ensure that vessel certificates required by and issued pursuant to international rules and standards are carried on board the vessel. These include, *inter alia*, the safe manning document issued by the flag State administration under SOLAS.

299. The IMO Assembly in Resolution A.1047(27) has promulgated ‘Principles of Safe Manning’ which it recommends to governments and ‘Guidelines for the Application of the Principles of Safe Manning’ which should be used in applying the principles of safe manning to ensure the safe operation of ships to which Article III of the STCW and Regulation 2 of Chapter XI of SOLAS apply.<sup>335</sup> The Maritime Safety Committee has in addition published ‘Guidelines on Fatigue’. Flag Administrations should take the ‘Guidelines on Fatigue’ into account when making a determination on safe manning levels for ships flying the Administration’s flag.<sup>336</sup>

300. **STCW.** The purpose of the STCW is “to promote safety of life and property at sea and the protection of the marine environment by establishing in common agreement international standards of training, certification and watchkeeping for seafarers.”<sup>337</sup> It follows a similar format to SOLAS: the parties undertake in Article I(1) to give effect to the Convention and the annexes and, in Article I(2), to, *inter alia*, “take all other steps which may be necessary to give the Convention full and complete effect, so as to ensure that, from the point of view of safety of life and property at sea and the protection of the marine environment, seafarers on board ships are qualified and fit for their duties.”<sup>338</sup> According to Article III, the STCW applies “to seafarers serving on board seagoing ships entitled to fly the flag of a Party,” subject to the exceptions set out in that Article (none of which apply here).<sup>339</sup>

301. The “Administration” of the vessel, i.e., the Government of the flag State,<sup>340</sup> is required to specify in the certificate issued to each seafarer the capacity in which the holder is authorised to serve in terms identical to those used in the applicable safe manning requirements of the administration.<sup>341</sup> In other words, the Administration must specify, in addition to the number and positions of the crew required for safe manning of the vessel, the training requirements in accordance

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<sup>334</sup> **Annex RMI/-48.**

<sup>335</sup> Resolution A.1047(27), 20 December 2011, Annex 1, “Guidelines for the application of principles of safe manning” (“**Safe Manning Guidelines**”), para. 1.1 (available at [https://wwwcdn.imo.org/localresources/en/Knowledge-Centre/IndexofIMOResolutions/AssemblyDocuments/A.1047\(27\).pdf](https://wwwcdn.imo.org/localresources/en/Knowledge-Centre/IndexofIMOResolutions/AssemblyDocuments/A.1047(27).pdf)). Chapter XI of SOLAS concerns special measures to enhance maritime security and implements the International Code for the Security of Ships and Port Facilities (ISPS Code) (see the mandatory provisions at **Annex MT/-45**). As set out in para.1.1 of the Safe Manning Guidelines, the Safe Manning Guidelines should be used to “ensure the safe operation of ships”, the “security of ships” and “for the protection of the marine environment”.

<sup>336</sup> “Guidelines on Fatigue”, MSC.1/Circ.1598, 24 January 2019, Module 6, p. 54, available at <https://wwwcdn.imo.org/localresources/en/OurWork/HumanElement/Documents/MSC.1-Circ.1598.pdf>.

<sup>337</sup> Preamble to the STCW (**Annex RMI/-49**).

<sup>338</sup> **Annex RMI/-49.**

<sup>339</sup> **Annex RMI/-49.**

<sup>340</sup> Article II(b) (**Annex RMI/-49**).

<sup>341</sup> STCW Annex, Chapter I, Regulation I/2, para. 11 (**Annex RMI/-49**).

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with the STCW required for each of those crew members. Any certificate required by the STCW must be kept on board the ship.<sup>342</sup>

302. **COLREGS.** The parties to the COLREGS undertake in Article 1 to give effect to the Rules and other Annexes constituting the International Regulations for Preventing Collisions at Sea 1972” attached to the Convention.<sup>343</sup>

303. According to Rule 1(a), the “Rules shall apply to all vessels upon the high seas and in all waters navigable by seagoing vessels.”<sup>344</sup>

304. Rule 2(b), “Responsibility” provides that:<sup>345</sup>

In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

305. The relevant rules in this case are Rules 5, 6, 7 and 8:<sup>346</sup>

a. Rule 5, “Look-out,” provides that:

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

b. Rule 6, “Safe Speed,” provides that:

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

(a) By all vessels:

- (i) the state of visibility;
- (ii) the traffic density including concentrations of fishing vessels or any other vessels;

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<sup>342</sup> Ibid, Chapter I, Regulation I/2, para. 9.

<sup>343</sup> Annex RMI/-47.

<sup>344</sup> Annex RMI/-47.

<sup>345</sup> Annex RMI/-47.

<sup>346</sup> Annex RMI/-47.

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- (iii) the manoeuvrability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
  - (iv) at night the presence of background light such as from shore lights or from back scatter of her own lights;
  - (v) the state of wind, sea and current, and the proximity of navigational hazards;
  - (vi) the draught in relation to the available depth of water.
- (b) Additionally, by vessels with operational radar:
  - (i) the characteristics, efficiency and limitations of the radar equipment;
  - (ii) any constraints imposed by the radar range scale in use;
  - (iii) the effect on radar detection of the sea state, weather and other sources of interference;
  - (iv) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range;
  - (v) the number, location and movement of vessels detected by radar;
  - (vi) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.
- c. Rule 7(a), “Risk of Collision,” provides that:

Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.
- d. Rule 8, “Action to avoid Collision,” provides that:
  - (a) Any action to avoid collision shall be taken in accordance with the Rules of this Part and shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.
  - (b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.

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- (c) If there is sufficient sea-room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.
- (d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.
- (e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.
  - (i) A vessel which, by any of these Rules, is required not to impede the passage or safe passage of another vessel shall, when required by the circumstances of the case, take early action to allow sufficient sea-room for the safe passage of the other vessel.
  - (ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the Rules of this part.
  - (iii) A vessel the passage of which is not to be impeded remains fully obliged to comply with the Rules of this part when the two vessels are approaching one another so as to involve risk of collision.

### C. The safe manning requirements of the “*Heroic Idun*”

306. As a VLCC with a gross tonnage of 156,237 metric tons flagged to the Marshall Islands, which is a contracting party to SOLAS, the STCW, and the COLREGS, and to which Regulation 1 of Chapter I of SOLAS and Rule 1(a) of the COLREGS apply, the “*Heroic Idun*” is a ship to which SOLAS and the COLREGS apply, and it carries seafarers to which the STCW applies.

307. The Minimum Safe Manning Certificate for the “*Heroic Idun*” at the time of the relevant events was issued by the Marshall Islands on 21 July 2022 (“**Minimum Safe Manning Certificate**”).<sup>347</sup> It specifies that the Vessel is considered to be safely manned if it carries no less than 16 crew: 1 Master with “Certificate (STCW regulations)” (“**STCW certificate**”) II/2; 1 Chief Mate (also called a “Chief Officer”), with STCW certificate II/2; 2 OICNW (Officers in Charge of a Navigational Watch), with STCW certificate II/1; 3 Able Seafarers Deck, with STCW certificate II/5; 2 Ordinary Seafarers, with STCW certificate II/4; 1 Chief Engineer, with STCW certificate III/2; 1 First Assistant Engineer, with STCW Certificate III/2; 2 OICEW (Officers in Charge of an Engineering Watch), with STCW certificate III/1; and 3 Oiler/Motor of Able Seafarers Engine,

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<sup>347</sup> Annex VB/-2; Annex WG/-8.

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with STCW certificate III/4 or III/5. A Cook, with STCW certificate VI/I and trained and qualified in accordance with Regulation 3.2 of the MLC is also listed but not included in the 16.

### D. Breach

308. By taking 15 crew off the Vessel on 14 August 2022 (the Master, Second and 3<sup>rd</sup> Officer, the Chief Engineer, the Fourth Engineer, the Pumpman, two Able Seamen, an Ordinary Seaman, the Fitter, two Motormen, two Messmen, and the Engine Cadet), and detaining them onshore, Equatorial Guinea placed the Vessel below the minimum number of crew required (15) and without crew with the required STCW certifications, as set out in the Vessel's Minimum Safe Manning Certificate.

309. That the Vessel was below its safe manning requirements was raised with the Equatoguinean authorities multiple times, through different channels. For instance, on 19 September 2022, the Managers raised with local agents the need to have more crew onboard, as the crew onboard were "experiencing fatigue" due to their low number, and reiterated that the Vessel was below the "minimum safe manning requirements."<sup>348</sup> Similarly, on 6 November 2022, the Managers raised again that the Vessel was below safe manning levels.<sup>349</sup> In parallel, the Master constantly raised this issue with local agents, so they could convey it to the local authorities.<sup>350</sup>

310. Equatorial Guinea also refused repeated requests by the Marshall Islands to allow crew back onto the Vessel to meet the minimum safe manning requirements: on 16 August, the Marshall Islands Maritime Administrator wrote to the Governor of Luba and informed it that taking 15 crew, including the Master and Chief Engineer, off the Vessel was in contravention of SOLAS and seriously comprised the safe operation of the Vessel. On 26 August, 13 September, and 18 October, the Marshall Islands Maritime Administrator wrote to the Attorney-General and raised, among other things, concerns that the Vessel was below safe manning standards in breach of SOLAS.<sup>351</sup> On 31 October 2022, the Ministry of Foreign Affairs of the Marshall Islands sent a Note Verbale to the Ministry of Foreign Affairs, International Cooperation and Francophone Affairs raising, among other things, that the safe manning of the Vessel in accordance with SOLAS had been

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<sup>348</sup> Kulblik-1, para. 30 (**Annex RMI-2**).

<sup>349</sup> Kulblik-1, para. 50 (**Annex RMI-2**).

<sup>350</sup> Master-1, para. 173 (**Annex RMI-1**).

<sup>351</sup> Letter from the Marshall Islands Maritime Administrator to the Honorable Anatolio Nzang Nguema, Attorney-General, Republic of Equatorial Guinea, dated 26 August 2022 (**Annex SA/-9**); Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 13 September 2022 (**Annex SA/-11**); Letter from the Marshall Islands Maritime Administrator to the Attorney-General of Equatorial Guinea, dated 18 October 2022 (**Annex SA/-15**).

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compromised by Equatorial Guinea's actions.<sup>352</sup> Further, on 7 November 2022 the Marshall Islands issued a detention order to prevent the Vessel from sailing to Nigeria due to its non-compliance with safe manning standards.<sup>353</sup>

311. As well as breaching the minimum safe manning requirements for the Vessel, the short manning had an impact on the capabilities of the crew remaining onboard. They report suffering from fatigue,<sup>354</sup> which is consistent with studies on the impact of fatigue on safe manning.<sup>355</sup>

312. By this conduct, Equatorial Guinea:

- a. breached its obligation under (i) Article 1(b) of SOLAS to take all necessary steps to give SOLAS full and complete effect, (ii) Article 1(2) of the STCW to take all necessary steps to give the STCW full and complete effect, and (iii) Article 1 of the COLREGS to give effect to the Rules contained therein;
- b. breached its obligation under Article 87(1) to exercise its freedom of the high seas under conditions laid down by "other rules of international law," in this instance Article 1(b) of SOLAS, Article 1(2) of the STCW, and Article 1 of the COLREGS;
- c. breached its obligation under Article 87(2) to have due regard for the interests of the Marshall Islands, as flag State, to meet its duties under Articles 94 and 217 of the Convention; and/or
- d. breached its obligation under Article 2(3)<sup>356</sup> to exercise its sovereignty over the territorial sea subject to the Convention, including Article 87(1), and to other rules of international law, including Article 1(b) of SOLAS, Article 1(2) of the STCW and Article 1 of the COLREGS.

313. Furthermore, the unsafe manoeuvring of the Equatoguinean naval vessel the "*Wele Nzas*" on 26 September 2022 breached Rules 2, 6, 7 and 8 of the COLREGS.

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<sup>352</sup> Note Verbale EQ/01-22, from the Ministry of Foreign Affairs of the Republic of the Marshall Islands to the Ministry of Foreign Affairs, International Cooperation and Francophone Affairs, Republic of Equatorial Guinea, dated 28 October 2022, with a covering Note Verbale MI/22/EQ-1, from the Permanent Mission of the Republic of the Marshall Islands to the United Nations, New York, to the Permanent Mission of the Republic of Equatorial Guinea to the United Nations, New York, dated 31 October 2022 (**Annex SA/-16**).

<sup>353</sup> Flag State Detention Order (**Annex SA/-23**).

<sup>354</sup> See, e.g., Chief Officer-1, para. 51 (**Annex RMI/-5**); Junior 3<sup>rd</sup> Officer-1, para. 26 (**Annex RMI/-8**); 2<sup>nd</sup> Engineer-1, para. 16 (**Annex RMI/-11**); 3<sup>rd</sup> Engineer-1, para. 14 (**Annex RMI/-12**); Electrician-1, paras. 20-23 (**Annex RMI/-14**); Able Seaman No 3-1, paras. 17-18 (**Annex RMI/-19**).

<sup>355</sup> Blount-1 (**Annex RMI/-37**), paras. 19-20.

<sup>356</sup> The Marshall Islands notes in this regard that, despite research, it has been unable to establish whether the location where the Vessel was forced to anchor in Luba Bay and remained throughout its detention (over 1 NM from shore, at 03°29.3'N 008°33.7'E) was in Equatorial Guinea's territorial sea or internal waters, but appears to be in its territorial sea.

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314. The evidence of the crew detained onboard the Vessel and the Expert Report of the Master Mariner demonstrate that the breaches set out in paragraphs 308 to 313 led to real and serious risks to the Vessel, and, by extension, those onboard, and to the marine environment.<sup>357</sup>

315. By way of example, the Chief Officer, who was detained onboard the Vessel, refers in his statement to two potentially serious incidents, when the “*Wele Nzas*” passed by dangerously close to the Vessel<sup>358</sup> and a supply vessel alongside the Vessel caught fire.<sup>359</sup> Because the Equatoguinean authorities had refused repeated safe manning requests, the crew onboard was insufficient to move the Vessel out of the way of the “*Wele Nzas*” or to deal with a serious fire near the Vessel. Further, large vessels calling at the port of Luba were unnecessarily forced to pass between the “*Heroic Idun*” and the “*Wele Nzas*.” On 27 October 2022, one such vessel passing through narrowly avoided colliding with the “*Heroic Idun*.”<sup>360</sup>

316. The failure to allow safe manning of the Vessel also led to the damage suffered by the Vessel, because the Vessel was not sufficiently manned to carry out routine and necessary maintenance operations on the Vessel.<sup>361</sup>

### **VI. Breach of the obligation in Article 225 to avoid adverse consequences in the exercise of enforcement measures**

#### **A. The obligation to avoid adverse consequences in the exercise of enforcement measures**

317. Article 225 of the Convention, entitled “Duty to avoid adverse consequences in the exercise of the powers of enforcement,” provides that:

In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

318. The Tribunal in the *M/V “Virginia G”* observed that the obligation in Article 225 extends beyond Part XII:

[A]lthough article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application, as it states that “[i]n the exercise under this Convention of their powers of enforcement against foreign vessels”, States shall observe the requirement of this article, namely: not to endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or

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<sup>357</sup> Blount-1 (Annex RMI/-37), paras. 22-24; Chief Officer-1, para. 55 (Annex RMI/-5).

<sup>358</sup> Chief Officer-1, para. 55 (Annex RMI/-5).

<sup>359</sup> Chief Officer-1, para. 55 (Annex RMI/-5).

<sup>360</sup> Blount Statement, para.28 (Annex RMI/-37).

<sup>361</sup> Master-1, paras. 173-175 (Annex RMI/-1); Kublik-1, paras. 50-54 (Annex RMI/-2).

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expose the marine environment to an unreasonable risk. It follows from article 225 that all these requirements are applicable to enforcement activities undertaken pursuant to 73, paragraph 1, of the Convention...<sup>362</sup>

319. The Marshall Islands contends that the obligation on the parties in Article 225 to avoid adverse consequences to the safety of navigation and the marine environment in the exercise of enforcement measures further extends to all enforcement measures taken against a foreign vessel, whether or not undertaken under the Convention and whether or not lawful under the Convention.

320. Construing the obligation in Article 225 in this way is consistent with other provisions of the Convention, which form part of the relevant context for the purpose of the rule of treaty interpretation reflected in Article 31(2) of the VCLT, namely:<sup>363</sup> the general obligation on all States parties in Article 192 to protect and preserve the marine environment; the obligation in Article 194(1) to take “all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source;” the obligation to prevent, reduce and control pollution from vessels under Article 211; and the obligations of the flag State under Articles 94(1), (3)-(5) and 217 to ensure the safety of vessels flying its flag and their crews, safe navigation and prevention, reduction and control of pollution of the marine environment from vessels.

321. This interpretation of Article 225 is also consistent with the obligations of the parties under SOLAS, the COLREGS and the STCW, which include the Marshall Islands and Equatorial Guinea, to ensure the seaworthiness of ships and safe navigation. These rules and regulations are incorporated by reference into the Convention in, *inter alia*, Article 94 which in turn forms part of the relevant context for the interpretation of Article 225 for the purpose of the rules of treaty interpretation reflected in the *chapeau* to Article 31(3) of the VCLT and, following the *M/V “Norstar,”* Article 293.<sup>364</sup> More generally, these obligations are also relevant rules of international law applicable in relations between the parties for the purpose of the rule of treaty interpretation reflected in Article 31(3)(c) of the VCLT.

322. Any other interpretation of Article 225 would fail to realise the dual object and purpose of Article 225, fundamental to the Convention, which is to protect the marine environment and the safety of life at sea.<sup>365</sup>

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<sup>362</sup> *Virginia G, Judgment*, at para. 373. See also the *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019, Separate Opinion of Judge ad hoc Petrigh ITLOS Reports 2018–2019*, p. 447, at para. 4: “The obligation of the coastal State not to bring an arrested vessel to an unsafe anchorage is formulated in an absolute fashion.”

<sup>363</sup> The *chapeau* to Article 31(2) of the VCLT provides that “The context for the purpose of the interpretation of a treaty shall comprise, (...) the text, including its preamble and annexes.”

<sup>364</sup> *Norstar, Merits Judgment*, at paras. 137–138.

<sup>365</sup> As reflected in, *inter alia*, para. 4 of the preamble to the Convention: “Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote (...) the conservation of their living resources, and the study, protection and preservation of the marine environment.”

The role of the effectiveness (or the *effet utile*) in treaty interpretation has been recognised by the ICJ in, e.g. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment, I.C.J. Reports 1994*, p. 6, at para. 47, and *Fisheries*

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### B. Breach

323. Equatorial Guinea breached its obligation under Article 225 of the Convention to avoid adverse consequences when undertaking enforcement measures against the “*Heroic Idun*,” including by:

- a. repeatedly refusing to allow the Vessel to be safely and sufficiently manned so it could take basic safety precautions, as set out in detail at paragraphs 308-316 above,<sup>366</sup> including to avoid collisions with other vessels in the area (especially given the location in a busy port where Equatorial Guinea required the Vessel to be moored) and to fight any fires on or near the Vessel and address fire risks;<sup>367</sup> and
- b. the unsafe manoeuvres engaged in by “*Wele Nzaz*,” one of Equatorial Guinea’s naval vessels, dangerously close to the vessel on 26 September 2022, which risk was again exacerbated by the unsafe manning levels which meant the crew onboard could not move the Vessel out of the way.<sup>368</sup>

324. In so doing, Equatorial Guinea endangered the safety of navigation, created a hazard to the Vessel, rendered the anchorage unsafe and exposed the marine environment to unreasonable risks.

### VII. Equatorial Guinea breached its obligation to notify the flag State of enforcement measures

325. As set out above in Chapter 5, section II, at no point did Equatorial Guinea seek the Marshall Islands’ consent to intercept and divert the “*Heroic Idun*” and its crew in the EEZ of São Tomé and Príncipe. Nor at any point did it notify the Marshall Islands of the actions it had taken. The Marshall Islands Maritime Administrator only learned of Equatorial Guinea’s enforcement action and assertion of control over the Vessel on 12 August 2022 from the Managers. Nor did Equatorial Guinea respond to the Marshall Islands’ repeated efforts to engage with Equatorial Guinea to ensure the proper treatment of the Vessel and crew and to secure their release.<sup>369</sup>

326. The Marshall Islands contends that, in addition to violating the Marshall Islands freedom of navigation and exclusive flag State jurisdiction, Equatorial Guinea breached obligations under

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*Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, p. 432, at para. 52. See also *Norstar*, *Merits Judgment*, at para. 244 where the Tribunal made reference to the *effet utile* but saw no reason to depart from the general rule of treaty interpretation reflected in Article 31 of the VCLT.

<sup>366</sup> See also Kulblik-1, para. 50 (Annex RMI-2); Master-1, para. 173 (Annex RMI/-1).

<sup>367</sup> Chief Officer-1, para. 55 (Annex RMI/-5); Blount-1, paras. 16-21 (Annex RMI/-37). See also: Master-1, para. 112 (Annex RMI/-1) and Kulblik-1, para. 28.

<sup>368</sup> Blount-1, paras. 22-24 (Annex RMI/-37); Chief Officer-1, para.55 (Annex RMI/-5).

<sup>369</sup> As set out in Chapter 2, at paras. 44, 49, 50 53, 61, 64, 70, 96 and 97.

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the Convention and applicable law to notify the flag State of enforcement measures taken against their vessels and their crews.<sup>370</sup>

327. This claim is addressed in two parts in this Section. Subsection A addresses the existence of the general obligation to notify the flag State of enforcement action under the Convention and international law. Subsection B then sets out Equatorial Guinea's breaches of this obligation.

### A. The obligation to notify the flag State

328. Judge Kittichaisaree, in his declaration in the *M/V "Norstar,"* raised the question as to whether, besides the obligations specifically imposed by Articles 27 and 73(4), there is a general obligation of notification on States taking enforcement action against a foreign vessel to promptly notify the flag State.<sup>371</sup> The question was not, however, addressed by the Tribunal in that case because Panama had not specifically pleaded it. Judge Kittichaisaree raised the issue as he considered this an important issue going to safeguarding of the balance between the rights and obligations of States Parties to the Convention.<sup>372</sup> For the reasons set out below, the Marshall Islands contends that there is such an obligation.

329. There is no express provision in the Convention requiring notification where enforcement measures have been exercised over a foreign vessel in the high seas or the EEZ of a third State. It is not addressed in Articles 110 or 111. However, it is contended this obligation is a customary rule or a general principle of the international law of the sea to which the Chamber may have recourse under Article 293 and which, depending on the circumstances, will be relevant to the interpretation and application of one or more of gateway provisions. It is further contended that the obligation applies irrespective of the lawfulness under the Convention of the exercise of enforcement measures over the Vessel.

330. According to the recent work of the ILC, general principles of law formed within the international legal system may be identified through an inductive analysis of existing rules in the international legal system to find the principles reflected in those rules or underlying them, including international instruments reflecting the principle, and must be shown to be intrinsic to the system.<sup>373</sup>

331. The existing treaty rules and instruments governing the exercise of enforcement measures against foreign vessels consistently impose an obligation of notification of the flag State.

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<sup>370</sup> Various of the IMO treaties refer to enforcement measures against a vessel, including in particular its detention, as the exercise of "control" over a vessel. However, for the purpose of this Memorial the term "enforcement measures" will be used.

<sup>371</sup> *M/V "Norstar" (Panama v. Italy), Judgment, Declaration of Judge Kittichaisaree, ITLOS Reports 2018–2019*, p. 144 (**"Norstar, Merits Judgment, Declaration of Judge Kittichaisaree"**), at para. 19.

<sup>372</sup> *Norstar, Merits Judgment, Declaration of Judge Kittichaisaree*, at para. 24.

<sup>373</sup> Commentary to draft conclusion 7, para. 3–4 of the ILC's Draft conclusions on general principles of law (2022), in Report of the International Law Commission, Seventy-fourth Session A/78/10 (2023), p. 10, at p. 23.

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332. UNCLOS contains express provisions which expressly require notification of the flag State of a vessel upon the adoption of measures of constraint against the vessel and its crew where the State is exercising enforcement jurisdiction under the Convention:

- a. Article 27(3), in respect of criminal jurisdiction exercised on board a foreign ship passing through the territorial sea or upon leaving internal waters, which requires that:

[T]he coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken;

- b. Paragraph (4) of Article 73, "Enforcement of laws and regulations of the coastal State" in Part V of the Convention, which provides that:

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; and

- c. Article 231, "Notification to the flag State and other States concerned," which provides that:

States shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 [of Part XII] against foreign vessels, and shall submit to the flag State all official reports concerning such measures. However, with respect to violations committed in the territorial sea, the foregoing obligations of the coastal State apply only to such measures as are taken in proceedings. The diplomatic agents or consular officers and where possible the maritime authority of the flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels.

333. IMO treaties which provide for port State control over vessels contain notification obligations. For example:

- a. Article 5(3) of MARPOL provides that:

[I]f a Party takes any action against... a ship for the reason that the ship does not comply with the provisions of the present Convention, the party shall immediately inform the consul or diplomatic representative of the

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Party whose flag the ship is entitled to fly, or if this is not possible, the Administration of the ship concerned.<sup>374</sup>

- b. Regulation 19(d) of Chapter I of SOLAS provides that:

In the event of this control giving rise to an intervention of any kind, the officer carrying out the control shall forthwith inform, in writing, the Consul or, in his absence, the nearest diplomatic representative of the State whose flag the ship is entitled to fly of all the circumstances in which intervention was deemed necessary. In addition, nominated surveyors or recognized organizations responsible for the issue of the certificates shall also be notified. The facts concerning the intervention shall be reported to the Organisation.<sup>375</sup>

- c. Article X(2) of the STCW provides that:

In the event that any deficiencies are found under paragraph (1) or under the procedures specified in Regulation 1/4, “Control procedures”, the officer carrying out the control shall forthwith inform, in writing, the master of the ship and the Consul or, in his absence, the nearest diplomatic representative or the maritime authority of the State whose flag the ship is entitled to fly, so that appropriate action may be taken. (...) <sup>376</sup>

- d. Article 11.2 of the International Convention for the Control and Management of Ship’ Ballast Water and Sediment 2004 (“**BWMC**”) is to the same effect.<sup>377</sup>

334. Procedures for Port State Control (“**PSC Procedures**”) have been adopted by the IMO Assembly in Resolution A.1155(32)<sup>378</sup> to provide basic guidance on the conduct of port State control inspections in support of the control provisions in the relevant conventions listed in section 1.2.1 of Chapter 1 of the PSC Procedures, and to provide consistency in the conduct of inspections and the application of control procedures. The mandatory notification requirements in the treaties are reflected in the PSC Procedures, including in Chapter 2, paragraphs 2.3.3 and 2.3.7.1, Chapter 3, paragraph 3.3.2, Chapter 4, paragraph 4.1.3, and in Appendix 11, paragraphs 6.2.18, 6.2.19 and 7.4.3, and the reference to MSC.1/Circ.1191 of 30 May 2006, entitled “Further reminder of the obligation to notify flag States when exercising control and compliance measures”.

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<sup>374</sup> Annex RMI/-46.

<sup>375</sup> Annex RMI/-48.

<sup>376</sup> Annex RMI/-49.

<sup>377</sup> Annex RMI/-45.

<sup>378</sup> IMO, Resolution A. 1155(32), adopted on 15 December 2021. The PSC Procedures are contained in the Annex to the Resolution (available at [https://www.wcdn.imo.org/localresources/en/OurWork/IIS/Documents/A%2032-Res.1155%20-%20PROCEDURES%20FOR%20PORT%20STATE%20CONTROL.%202021%20\(Secretariat\).pdf](https://www.wcdn.imo.org/localresources/en/OurWork/IIS/Documents/A%2032-Res.1155%20-%20PROCEDURES%20FOR%20PORT%20STATE%20CONTROL.%202021%20(Secretariat).pdf)).

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335. Port State control memoranda of understanding (“MOUs”) reflect the notification requirements in the IMO treaties and IMO PSC Procedures. Thus, for example, the Paris MOU on Port State Control 1982, section 3.7 provides that:

In the case of a detention, the Authority will immediately notify the flag Administration\*) in writing and include the report of inspection. Likewise the recognized organization that has issued the relevant certificates on behalf of the flag Administration will be notified, where appropriate. The parties above will also be notified in writing of the release of detention.<sup>379</sup>

336. Other regional Port State control MOUs contain equivalent provisions, including the MOU on Port State Control for the Indian Ocean Region 2013, section 3.7;<sup>380</sup> the MOU on Port State Control in the Black Sea Region 2010, section 3.7;<sup>381</sup> the MOU on Port State Control in the Mediterranean Region 2006, section 3.7;<sup>382</sup> the MOU on Port State Control in the Asia-Pacific Region 2013 (“Tokyo MOU”), section 3.6;<sup>383</sup> the Riyadh MOU on Port State Control 2004, section 3.16;<sup>384</sup> and EC Directive 2009/16/EC of 28 May 2009, Article 19(6).<sup>385</sup>

337. Functionally equivalent provisions are found in the fisheries treaties and instruments. For example, Article 21(5) of the Fish Stocks Agreement requires the flag State to be promptly notified of alleged violations of measures identified following a boarding and inspection of a vessel<sup>386</sup> and Article 18(1)(a) of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009 (“PSMA 2009”) requires prompt notification of the flag State if, following an inspection conducted under the agreement, there are clear grounds for believing the vessel has engaged in prohibited fishing.<sup>387</sup>

338. In addition, many bilateral consular treaties which contain provisions governing consular functions *vis-à-vis* shipping require that the consular officer of the flag State is notified by the coastal State when any enforcement action (excluding routine inspections in relation to customs or public health) is taken against flagged vessels, regardless of the legal basis of the enforcement

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<sup>379</sup> Available at <https://parismou.org/system/files/2023-06/Paris%20MoU%20including%2045th%20amendment.pdf>.

<sup>380</sup> Available at [https://www.iomou.nic.in/HOMEPAGE/pdf/IO\\_MOU\\_Revised.pdf](https://www.iomou.nic.in/HOMEPAGE/pdf/IO_MOU_Revised.pdf).

<sup>381</sup> Available at <http://www.bsmou.org/downloads/reference/Memorandum%20text%20including%2013th%20amendment.pdf>.

<sup>382</sup> Available at [http://www.medmou.org/MoU\\_Text.aspx](http://www.medmou.org/MoU_Text.aspx).

<sup>383</sup> Available at <https://www.tokyo-mou.org/doc/Memorandum%20rev18.pdf>.

<sup>384</sup> Available at <https://faolex.fao.org/docs/pdf/gcc183657E.pdf>.

<sup>385</sup> The current consolidated version of EC Directive 2009/16/EC is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0016-20191221>.

<sup>386</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (“Fish Stocks Agreement”) 2167 U.N.T.S. 3. The primacy of the jurisdiction of the flag State is reflected in, *inter alia*, paragraphs (6)-(7) of Article 21 and Article 19.

<sup>387</sup> U.N.T.S. Registration Number 54133, [2016] A.T.S. 21. See also Articles 11(3) and (5) (prompt notification of flag State required when entry to a port is denied and when such denial is withdrawn). The primacy of flag State jurisdiction is reflected in PSMA 2009 Article 20.

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action taken. For example, Article 39(1) of the USSR-United Kingdom Consular Convention (1965)<sup>388</sup> provides:

Where it is the intention of the courts or other competent authorities of the receiving State to take any coercive action or to institute any formal enquiry on board a vessel of the sending State they shall so inform the appropriate consular officer. Except where this is impossible on account of the urgency of the matter, such notification shall be made in time to enable the consular officer or his representative to be present. If the consular officer has not been present or represented he shall, upon request, be provided by the authorities concerned with full information with regard to what has taken place.

339. Other bilateral consular treaties contain identical or materially identical wording, including Article 27(3) of the Poland-East Germany Consular Convention (1957),<sup>389</sup> Article 39(1) of the USSR-Ethiopia Consular Convention (1977),<sup>390</sup> Article 40(1) of the USSR-Cyprus Consular Convention (1978),<sup>391</sup> Article 42(1) of the USSR-Sweden Consular Convention (1967),<sup>392</sup> Article 41 of the USSR-Ghana Consular Convention (1985),<sup>393</sup> Article 50(1) of the United Kingdom-East Germany Consular Convention (1976),<sup>394</sup> Article 56(1) of the United Kingdom-Hungary Consular Convention (1971),<sup>395</sup> and Article 51(1) of the Hungary-United States Consular Convention (1972).<sup>396</sup>

340. The evidence of the Senior Deputy Commissioner of Maritime Affairs of the Marshall Islands Maritime Administrator, which is responsible for the world's third largest registry, is that "[i]t is customary and expected that other States notify the flag State of a vessel which has been detained and subjected to any enforcement action immediately or as soon as possible, whatever the grounds for those actions."<sup>397</sup>

341. The obligation to notify the flag State is a corollary of exclusive flag State jurisdiction. The *Virginia Commentary* to Article 231 explains that "[t]he requirement of notification to the flag

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<sup>388</sup> 655 U.N.T.S. 259.

<sup>389</sup> 340 U.N.T.S. 99.

<sup>390</sup> 1141 U.N.T.S. 327.

<sup>391</sup> 1151 U.N.T.S. 217.

<sup>392</sup> 655 U.N.T.S. 317.

<sup>393</sup> 1498 U.N.T.S. 43.

<sup>394</sup> 1038 U.N.T.S. 53.

<sup>395</sup> 824 U.N.T.S. 3.

<sup>396</sup> 902 U.N.T.S. 177.

<sup>397</sup> Gallagher-I, para. 13 (**Annex RMI/-30**). The Senior Deputy Commissioner also attests that: "[t]he vast majority of the time, port States follow the requirements of the PSC Procedures and normal expectations when notifying the Administrator following detention of a Marshall Islands' vessel" (para. 19); and that "the Administrator would expect notification to be provided to the flag State prior to undertaking any boarding, investigation, or enforcement actions under Article 110 of UNCLOS against a vessel sailing on the high seas or the EEZ of a coastal State, even though it is not expressly required by Article 110, unless immediate actions are necessary to prevent further illicit activity (such as an active threat/event). In that case, notification as immediately as possible following initiation of actions would be expected." (para. 22)

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State of enforcement measures taken against a foreign vessel reflects the primacy of the enforcement jurisdiction, as well as the responsibility of the flag State for the actions of all ships and vessels of its registry or flying its flag, and their crews.”<sup>398</sup> Commentators regard the notification obligation in Article 231 of UNCLOS as enabling flag States to become aware of measures being enforced against their ships to give them the opportunity to demand the suspension of proceedings.<sup>399</sup> More generally the right to be notified of flag ship detentions is considered to be an important, related right to exclusive flag State jurisdiction and the principle of consent.<sup>400</sup>

342. It is, furthermore, well established in the Tribunal’s case law that the purpose of the notification requirement in Article 74 of the Convention is to ensure the flag State is able to exercise its rights and obligations under the Convention. The Tribunal observed in the *M/V “Camouco”* that:

[T]here is a connection between paragraphs 2 and 4 of Article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2 that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security, and article 292 on prompt release of vessels and crews in a timely and efficient manner.<sup>401</sup>

343. In the *M/V “Virginia G”* the Tribunal further held that, by failing to notify Panama as the flag State of the detention and arrest of the *M/V “Virginia G”* and subsequent actions taken against the vessel and its cargo, Guinea-Bissau violated the requirements of Article 73(4) and “thus deprived Panama of its right as a flag State to intervene at the initial stages of actions taken against the *M/V “Virginia G”* and during the subsequent proceedings.”<sup>402</sup>

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<sup>398</sup> *Virginia Commentary*, vol. IV, at p. 372, para. 231.1. See also p. 343, para. 226.11(d) which states, in respect of the obligation to notify in Article 226(1)(c) that “the obligation to promptly notify the flag State where release is refused or made conditional [because release would present an unreasonable threat of damage to the marine environment] reaffirms the general preeminence of the flag State, and is a further safeguard for the maintenance of the global navigation system.”

<sup>399</sup> *Proelß Commentary*, at p. 1558, para. 1.

<sup>400</sup> Richard A. Barnes, ‘Flag States’ in Donald R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), p. 304, at p. 313.

<sup>401</sup> “*Camouco*” (*Panama v. France*), *Prompt Release, Judgment, ITLOS Reports 2000*, p. 10 (“*Camouco, Prompt Release Judgment*”), at para. 59.

<sup>402</sup> *Virginia G, Judgment*, at para. 328.

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344. To similar effect, the ICJ has explained that the purpose of Article 36(1) of the Vienna Convention on Consular Relations 1963<sup>403</sup> is “to facilitate the implementation of the system of consular protection.”<sup>404</sup>

345. The sources referred to in paragraphs 332-344 above support the contention that the duty of notification is a general principle of international law.<sup>405</sup> There are at least three principles reflected in, or underlying, the existing rules of international law listed above which are intrinsic to the international system and, more specifically, the legal order of the seas and oceans.

346. First, the obligation to notify in the maritime context is to protect the principle of primacy of the flag State, which is intrinsic to the legal order of the seas and oceans and the international system more generally.

347. Second, both the rules specific to the maritime context and the rules of consular law share the purpose of implementing the system of protections provided by the rules, respectively the rights and duties of the flag State towards its vessels and their crews under the Convention and the applicable rights and duties under international law of the consular State to its nationals. These systems of protection, and the corresponding rights of flag and consular States, are also intrinsic to the international order.

348. For example, if the flag State is not informed, it cannot ensure the effectiveness of its rights reflected in Articles 58(2), 87 and 90 of the Convention to exercise freedom of navigation and to ensure that its vessels, their crew members and others involved<sup>406</sup> are not interfered with by the authorities of other States except with its consent,<sup>407</sup> and the effectiveness of its exclusive flag

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<sup>403</sup> 596 U.N.T.S. 261, which provides: “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State (...) if he so requests the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”

<sup>404</sup> *LaGrand (Germany v United States of America)*, Judgment, I.C.J. Reports 2001, p. 466 (“**LaGrand, Judgment**”), at para. 74; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12 (“**Avena, Judgment**”), at para. 50. Judge Wolfrum in his dissent in *M/V “Louisa,” Provisional Measures Order* noted the obligation is applicable also to the arrest of crew members of a ship (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010, Dissenting Opinion of Judge Wolfrum*, ITLOS Reports 2008-2010, p. 77, at para. 6).

<sup>405</sup> The Tribunal drew on, *inter alia*, Article 22(1)(f) of the Fish Stocks Agreement as a reflection of the basic principle concerning the use of force in law enforcement operations at sea in the *Saiga (No. 2)*, Judgment, at para. 156

<sup>406</sup> The Tribunal affirmed in the *M/V Saiga (No. 2)* that “the Convention considers the ship as a unit,” that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State” and each natural and juridical person involved is entitled to look for protection to the flag State” and that the flag State may present claims in respect of each of those persons even if they are not nationals of the flag State (*Saiga (No. 2)*, Judgment, at paras. 106–108).

<sup>407</sup> As expressed in UNCLOS (e.g., Articles 109, 110, 111) or other treaties to which both States are party (e.g., Article 17(3) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, 1582 U.N.T.S. 95, which provides that: “[a] Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed,

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State jurisdiction reflected in Article 92(1). Nor can it ensure its compliance, as flag State, with its duties under Articles 94 and 217 of the Convention, and the IMO and ILO treaties they incorporate by reference, to ensure the safety of the vessel, the crew and the protection of the marine environment.<sup>408</sup>

349. Third, and relatedly, the rules enable the flag or consular State to exercise the remedies available under international law. If the flag State is not informed, it compromises the flag State's right to raise a dispute under Part XV of the Convention in a timely manner and at an early stage, before it escalates. There is no principled reason for distinguishing the exercise of enforcement powers under Article 74, where the Tribunal has recognized this is the purpose of the notification requirement in Article 74(3), from enforcement action in other cases. As demonstrated by the evidence in this case, the damage suffered by crew members and their families, as well as those involved in their welfare, is irreparable.

350. There is also sufficient evidence to support the identification of the obligation to notify the flag State of enforcement measures against of Vessel as a rule of customary international law. The treaties referred to above, the Convention, MARPOL, SOLAS, and the STCW, among others, have near universal acceptance and represent nearly 100% of the world's tonnage.<sup>409</sup> The number of parties is an important factor in determining that the rules therein reflect customary international law.<sup>410</sup> The statement of the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator provides further evidence of general State practice and *opinio juris* supporting the identification of this obligation as a rule of customary international law. As the world's third largest flag State, with over 5,500 registered vessels totalling over 198 million gross tons and representing about 12% of the global fleet, the Marshall Islands' interests are specially affected by flag State notification.<sup>411</sup> Furthermore, as an administrator with extensive experience of over 25 years in the maritime industry, the inner workings of flag States and State practice concerning vessel detentions, the Senior Deputy Commissioner's evidence that the overwhelming majority of States notify the flag State of detentions is authoritative and weighty.

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request authorization from the flag State to take appropriate measures in regard to that vessel," or some other agreement or arrangement with the flag State.

<sup>408</sup> This is affirmed by the evidence of the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator, William Gallagher, at Gallagher-1, para. 25 (**Annex RMI/-30**). The *Proelß Commentary* notes that the obligation to inform the flag State in Article 231 is "consistent with similar obligations included in other provisions of the Convention," citing Articles 27(3), 28, 73(4) and 94(1) (at p. 1559, para. 6).

<sup>409</sup> According to the United Nations Treaty Collection, UNCLOS has 169 parties. According to the IMO's, 'Status of Treaties', last issued 20 November 2023 (available at [https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties%20\(10\).pdf](https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties%20(10).pdf)), MARPOL has 161 parties, representing 98.67% of the world's tonnage; SOLAS 1974 has 168 parties, representing 98.69% of the world's tonnage, the 1978 and 1988 Protocols, have, respectively 124 and 130 parties, representing 97.34% and 97.91% of world tonnage; the STCW has 167 parties, representing 98.69% of the world's tonnage; and the BWMC has 95 parties, representing 92.50% of the world's tonnage.

<sup>410</sup> See, e.g. para. 3 of the commentary to Conclusion 11 of the ILC's Draft conclusions on identification of customary international law (2018), in Report of the ILC, Seventieth Session A/73/10 (2018), p. 117, at p. 143.

<sup>411</sup> See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at paras. 73–74, and para. 7 of the commentary to Conclusion 11 of the ILC's Draft conclusions on identification of customary international law (2018), in Report of the ILC, Seventieth Session A/73/10 (2018), p. 117, at p. 146.

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351. In accordance with the jurisprudence set out in paragraph 128 above, general principles of international law and rules of customary law are part of the applicable law which the Chamber may apply under Article 293.

352. Furthermore, in addition to forming part of the applicable law under Article 293, the general duty to notify the flag State of enforcement measures taken against its vessels and their crews may also apply, as relevant, through or be incorporated by reference to or more of the gateway provisions listed in paragraph 127 above.

### B. Breach

353. Equatorial Guinea repeatedly and consistently breached its duty to notify the Marshall Islands of enforcement measures taken or contemplated in respect of the “*Heroic Idun*” and her crew, including by:

- a. failing to notify the Marshall Islands immediately or forthwith upon its interception, diversion and detention of the “*Heroic Idun*” and her crew on 12 August 2022;<sup>412</sup>
- b. failing to notify the Marshall Islands of its intention to impose, and the imposition of, a penalty and the Fine on the Master;<sup>413</sup>
- c. failing to notify the Marshall Islands of its intention to transfer, and the actual transfer of, the Vessel and the crew into the custody and control of Nigeria for transportation to Nigeria.<sup>414</sup>

354. Insofar as the Marshall Islands relies on a gateway provision of the Convention, as a further alternative to the application of the duty of notification as a customary rule or general principle of international law pursuant to Article 293, the relevant gateway provision in respect of the interception, forcible diversion and detention and subsequent transfer to the Nigerian authorities is Article 87, read with Article 58(2). This is because the interception and diversion of the “*Heroic Idun*” by Equatorial Guinea was in the EEZ of São Tomé and Príncipe, assimilated to the high seas for the purpose of the relations between Equatorial Guinea and the Marshall Islands in respect of the “*Heroic Idun*,” and all the enforcement actions Equatorial Guinea subsequently undertook stemmed from that initial exercise of enforcement action. That is, Equatorial Guinea did not exercise its right to freedom of navigation under “the conditions laid down by ... other rules of international law,” nor did it have “due regard” for the interests of the Marshall Islands. As regards the Fine, the relevant gateway provision is Article 56(2), given the penalty and the Fine concerned alleged conduct in Equatorial Guinea’s EEZ.

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<sup>412</sup> See para. 44 above. See Askins-1, paras. 14 and 16 (**Annex RMI/-3**); Gallagher-1, paras. 26 and 36 (**Annex RMI/-30**).

<sup>413</sup> Gallagher-1, para. 26 and 36 (**Annex RMI/-30**).

<sup>414</sup> See para. 68 above and Gallagher-1, paras. 26, 34 and 36 (**Annex RMI/-30**).

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355. Accordingly, in addition to breaching its duty to notify the Marshall Islands which applies by virtue of Article 293, Equatorial Guinea also breached Articles 87(1) and (2) read with Article 58(2), and Article 56(2) of the Convention.

### **VIII. Breach of the obligation to release the “*Heroic Idun*” and crew promptly without undue delay**

356. For the reasons set out in this Section, the question of whether there is an obligation to release detained foreign-flagged vessels and their crew promptly and without undue delay naturally follows from the related question of whether there is a general obligation to notify the flag State of enforcement action, considered in the previous Section. The Marshall Islands contends that there is a general obligation under the Convention and international law to release detained foreign-flagged vessels and their crews promptly without undue delay. This is addressed in subsection A. Equatorial Guinea’s breaches of this obligation are then set out in subsection B.

#### **A. The obligation to release detained vessels and their crew promptly without undue delay**

357. The sources supporting the existence of this obligation (set out below) are broadly the same as those supporting the existence of the obligation to notify the flag State of enforcement measures. Likewise, the reasoning of Judge Kittichaisaree in his declaration in the *M/V “Norstar”* concerning a general notification obligation applies equally to the question of an obligation to release detained vessels and their crew promptly and without delay. It is an important issue going to safeguarding the balance between the rights and obligations of States Parties to the Convention.

358. The reasoning set out above in paragraphs 332-344 applies *mutatis mutandis* accordingly. There is no express provision in the Convention requiring release promptly and without undue delay where enforcement action and control have been exercised over a foreign vessel in the high seas or the EEZ of a third State, or elsewhere, otherwise than in accordance with the provisions of the Convention. The Convention assumes lawful enforcement action. However, as with the obligation to notify the flag State of the exercise of enforcement action or control over a vessel, it is contended this obligation is a general principle of the international law of the sea applicable by virtue of Article 293 or through a relevant gateway provision, which applies irrespective of the lawfulness under the Convention of the exercise of enforcement action over a vessel and its crew.

359. The existing treaty rules and instruments governing the exercise of enforcement action against or control over foreign vessels consistently impose an obligation to release promptly without undue delay.

360. UNCLOS contains the following provisions which expressly require prompt release of a vessel where the State is exercising enforcement jurisdiction under the Convention:

- a. Paragraph 2 of Article 73, on the enforcement of laws and regulations of the coastal State concerning living resources in the EEZ, provides that “[a]rrested vessels and their crews shall be promptly released upon the posting of a reasonable bond or other security.”

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- b. Paragraph 7 of Article 220, provides that, in respect of a vessel detained pursuant to paragraph 6,<sup>415</sup> “whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.”
- c. Paragraph 1(b) of Article 226, “Investigation of foreign vessels,” which concerns investigations provided for in Article 216 (pollution by dumping) and Articles 218 and 220 (pollution from vessels by, respectively, port and coastal States), provides that, “[i]f the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.”

361. These provisions are intrinsic to the legal order of the law of the sea and fundamental principles of the freedom of navigation and the exclusive jurisdiction of the flag State. The primacy of the exclusive jurisdiction of the flag State in relation to the institution of proceedings against a vessel and its crew is affirmed by the provisions of Article 228(1).

362. IMO treaties which provide for port State control over vessels contain obligations to release vessels which have been detained without undue delay. For example,

- a. MARPOL, Article 7, provides that:
  - (1) All possible efforts shall be made to avoid a ship being unduly detained or delayed under Articles 4, 5 or 6 of the present Convention [i.e., the provisions concerning enforcement of the rules and regulations therein].
  - (2) When a ship is unduly detained or delayed under Articles 4, 5 or 6 of the present Convention, it shall be entitled to compensation for any loss or damage suffered.<sup>416</sup>
- b. SOLAS, Regulation 19(f) of Chapter I provides that:

When exercising control under this regulation all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered.<sup>417</sup>

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<sup>415</sup> Which permits, *inter alia*, detention of a vessel navigating in the EEZ by the coastal State where there is clear objective evidence it violated applicable international rules and standards for the prevention, reduction and control of pollution from vessels resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone. Article 220(8) provides that the provisions of paragraph 7 also apply to action taken pursuant to the other paragraphs of Article 220.

<sup>416</sup> Annex RMI/-46.

<sup>417</sup> Annex RMI/-48.

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- c. STCW, Article X(4), provides that:

When exercising control under this article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.<sup>418</sup>

- d. BWMC, Article 12, provides that:

1. All possible efforts shall be made to avoid a ship being unduly detained or delayed under Article 7.2, 8, 9 or 10 [i.e., the provisions concerning enforcement of the rules and regulations therein].

2. When a ship is unduly detained or delayed under Article 7.2, 8, 9 or 10, it shall be entitled to compensation for any loss or damage suffered.<sup>419</sup>

363. Port State MOUs contain materially identical provisions. For example, Article 3.13 of the Tokyo MOU provides that:<sup>420</sup>

When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship. Nothing in the Memorandum affects rights created by provisions of relevant instruments relating to compensation for undue detention or delay.

364. The same provision is found in paragraph 3.13 of the Paris MOU on Port State Control;<sup>421</sup> the MOU on Port State Control for the Indian Ocean Region 2013, section 3.10;<sup>422</sup> the MOU on Port State Control in the Black Sea Region 2010, section 3.12;<sup>423</sup> the MOU on Port State Control in the Mediterranean Region 2006, section 3.10;<sup>424</sup> the Riyadh MOU on Port State Control 2004, section 3.21;<sup>425</sup> and EC Directive 2009/16/EC of 28 May 2009, Article 19(8).<sup>426</sup>

365. The IMO PSC Procedure provides in Chapter 2, paragraph 2.1.4 that:

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<sup>418</sup> Annex RMI/-49.

<sup>419</sup> Annex RMI/-45.

<sup>420</sup> Available at <https://www.tokyo-mou.org/doc/Memorandum%20rev18.pdf>.

<sup>421</sup> Available at <https://parismou.org/system/files/2023-06/Paris%20MoU%20including%2045th%20amendment.pdf>.

<sup>422</sup> Available at [https://www.iomou.nic.in/HOMEPAGE/pdf/IO\\_MOU\\_Revised.pdf](https://www.iomou.nic.in/HOMEPAGE/pdf/IO_MOU_Revised.pdf).

<sup>423</sup> Available at <http://www.bsmou.org/downloads/reference/Memorandum%20text%20including%2013th%20amendment.pdf>.

<sup>424</sup> Available at [http://www.medmou.org/MoU\\_Text.aspx](http://www.medmou.org/MoU_Text.aspx).

<sup>425</sup> Available at <https://faolex.fao.org/docs/pdf/gcc183657E.pdf>.

<sup>426</sup> The current consolidated version of EC Directive 2009/16/EC is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0016-20191221>.

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All possible efforts should be made to avoid a ship being unduly detained or delayed. If a ship is unduly detained or delayed, it should be entitled to compensation for any loss or damage suffered.<sup>427</sup>

366. Functionally equivalent provisions are found in the fisheries treaties and instruments. Article 21(18) of the Fish Stocks Agreement provides that “States shall be liable for loss attributable to them arising from action taken pursuant to this article when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this article.”<sup>428</sup> Article 13(2)(f) of PSMA 2009 requires that each party carrying out inspections should “make all possible efforts to avoid unduly delaying the vessel to minimize interference and inconvenience.”<sup>429</sup>

367. The evidence of the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator is that “[i]t is expected that States do not delay a foreign vessel for longer than is necessary to investigate the alleged issue or incident which was reported as the cause for intervention”<sup>430</sup> and that “States normally are very expeditious when handling detentions and make efforts to not delay the ship longer than necessary (which causes undue burden on the owners, managers, charterers, crew, etc.).”<sup>431</sup>

368. The account of the preparatory materials for Article 292 in the *Virginia Commentary* demonstrates that the concern to include a procedural mechanism in the Convention to bring prompt release proceedings before ITLOS was “a problem of special concern to a number of delegations; that is, if a vessel is detained because it violates the regulations of a coastal State (for instance, those relating to fishing or marine pollution, it should be promptly released upon posting of a bond.”<sup>432</sup> As the “for instance” in this passage demonstrates, the concern was not limited to cases concerning fishing or marine pollution. The 1975 informal working ground on the settlement of disputes “accepted the idea that a special international procedure would be necessary to ensure prompt release of vessels” and “it was suggested that the Convention should protect against prolonged detention of not only the detained vessel, but also any detained members of its crew or any detained passengers.”<sup>433</sup> In the discussion at the fourth session of the conference in 1976, concerning whether individuals should be granted a general right of access to ITLOS, it was claimed (rightly) that “to allow a State to detain a tanker for an extensive period of time would be extremely costly and would result in additional increases in prices of petroleum products, and (...) a fisherman would suffer great losses if his boat were detained for a large portion of the fishing season.”<sup>434</sup>

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<sup>427</sup> IMO, Resolution A. 1155(32), adopted on 15 December 2021. The PSC Procedures are contained in the Annex to the Resolution (available at [https://wwwcdn.imo.org/localresources/en/OurWork/IIIS/Documents/A%2032-Res.1155%20-%20PROCEDURES%20FOR%20PORT%20STATE%20CONTROL,%202021%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/OurWork/IIIS/Documents/A%2032-Res.1155%20-%20PROCEDURES%20FOR%20PORT%20STATE%20CONTROL,%202021%20(Secretariat).pdf)).

<sup>428</sup> Above, n. 386.

<sup>429</sup> Above, n. 387.<sup>430</sup> Gallagher-1, para. 18 (**Annex RMI/-30**).

<sup>430</sup> Gallagher-1, para. 18 (**Annex RMI/-30**).

<sup>431</sup> Gallagher-1, para. 19; see also paras. 25 and 36 (**Annex RMI/-30**).

<sup>432</sup> *Virginia Commentary*, vol. V, at p. 67, para. 292.1.

<sup>433</sup> *Virginia Commentary*, vol. V, at p. 67, para. 292.2.

<sup>434</sup> *Virginia Commentary*, vol. V, at p. 68, para. 292.4.

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369. It is not recorded in the account of the discussions, but detaining the crew for an extensive period of time also has a humanitarian impact, as demonstrated by the facts of this case and recognised by the Tribunal in the “*Juno Trader*,”<sup>435</sup> the *M/V “Louisa*,”<sup>436</sup> and the *Enrica Lexie Incident*,<sup>437</sup> and Judge Laing in his declaration in the “*Camouco*,” where he observed:

It seems to me, too, that there cannot be any gainsaying that prompt release is also reinforced by its significant humanitarian underpinnings, ranging from the economic rights or concerns of ship owners to the civil rights or concerns of detained crews.<sup>438</sup>

370. It should be emphasised that argument here is not directed to the scope and interpretation of Article 292 of the Convention.<sup>439</sup> Rather, it is that the presence of Article 292 in the Convention and its preparatory materials are further sources which support the existence of the general rule and its importance in the law of the sea and the balancing of rights and interests between parties to the Convention.<sup>440</sup>

371. A general principle of law requiring the release of foreign-flagged vessels promptly without undue delay can be identified in the existing rules in the international legal system set out above. The principle underlying those rules, which has been affirmed by the Tribunal and individual judges, is to find a balance between the rights and obligations of the States parties to the Convention, between flag States and port and coastal States, and to take into account the costs entailed by detention of vessels to international trade, individual livelihoods and the welfare and rights of the crew on those vessels. These values are without doubt intrinsic to the legal order of the seas and oceans and the international legal order more generally.<sup>441</sup>

372. For the reasons set out in paragraphs 358-369 above, there is also sufficient evidence of State practice and *opinio juris* in the treaty practice set out above and the statement of the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator to support the identification of this obligation as a rule of customary international law.

373. In accordance with the jurisprudence set out in paragraphs 128 above, general principles of international law and rules of customary law are part of the applicable law which the Chamber may apply under Article 293.

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<sup>435</sup> *Juno Trader*, *Prompt Release Judgment*, at para. 77.

<sup>436</sup> *Louisa*, *Judgment*, at paras. 154-155.

<sup>437</sup> *Enrica Lexie*, *Provisional Measures Order*, *ITLOS*, at para. 135.

<sup>438</sup> “*Camouco*” (*Panama v. France*), *Prompt Release, Judgment, Declaration of Judge Laing*, *ITLOS Reports 2000*, p. 41, at p. 42.

<sup>439</sup> Addressed by the Marshall Islands in its prompt release application dated 9 November 2022, at paras. 60-64 and 81.

<sup>440</sup> That Article 292 is intended to strike a balance between the interests of the flag State and other States parties was recognised by the Tribunal in “*Monte Confurco*” (*Seychelles v. France*), *Prompt Release, Judgment*, *ITLOS Reports 2000*, p. 86, at para. 71.

<sup>441</sup> Commentary to draft conclusion 7, paras. 3–4 of the ILC’s Draft conclusions on general principles of law (2022), in Report of the ILC, Seventy-fourth Session A/78/10 (2023), p. 10, at p. 23.

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374. Furthermore, in addition to forming part of the applicable law under Article 293, the obligation to release vessels promptly without undue delay may also inform the interpretation and application of one or more of the Convention's gateway provisions listed in paragraph 127 above.

### B. Breach

#### 1. *Breach of the general obligation of prompt release*

375. Equatorial Guinea's obligation to promptly release the Vessel and its crew without undue delay was engaged from the time it detained the Vessel, on 12 August 2022.

376. For the reasons set out above, Equatorial Guinea's detention of the Vessel and its crew was unlawful and it follows accordingly that its breach of the obligation to release promptly without delay arose immediately upon the detention. Instead, the Vessel and crew were detained by Equatorial Guinea on 12 August 2022, for a period of 3 months or 92 days. Throughout that period the Marshall Islands made repeated requests for the immediate release of the Vessel and crew, which were ignored by Equatorial Guinea. On 11 November 2022, Equatorial Guinea did not release the Vessel and crew, but transferred control and custody over them to Nigeria, without justification and without any legal process.<sup>442</sup> In these circumstances, there can be no question but that Equatorial Guinea breached its obligation to release the Vessel and crew promptly without undue delay, and that this was a continuing breach.

377. Even if, which is denied, Equatorial Guinea had, or considered that it had, a lawful justification for its detention of the Vessel and crew in the EEZ of São Tomé and Príncipe, the evidence suggests that its investigations into the conduct of the Vessel and crew in its EEZ were complete with the interview of the Master and other crew members on 17/18 August 2022.<sup>443</sup> There is no explanation for the delays between, respectively, that interview, and the issue of the Fine on 23 September and its notification on 28 September 2022, and none was given by Equatorial Guinea to the Marshall Islands. In any event, and without prejudice to foregoing, there can be absolutely no reason for failing to release the Vessel and crew on 5 October 2022 upon receipt of the payment of two million, one hundred and thirty-two Euros (€2,000,132), which was demanded by Equatorial Guinea and the payment of which was made a condition of release of the Vessel and crew.

378. Accordingly, Equatorial Guinea breached its obligation to release the Vessel promptly without undue delay which applies by virtue of Article 293 and, in the further or alternative, for the reasons given in paragraph 332-344 above which apply *mutatis mutandis*, breached Articles 87(1) and (2) read with Article 58(2), and Article 56(2).

#### 2. *Breach of Article 292(4)*

379. In addition, or in the alternative, the Marshall Islands contends that by failing to release the Vessel and crew promptly upon receipt of the payment of two million, one hundred and thirty-

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<sup>442</sup> As detailed in Chapter 2 above.

<sup>443</sup> Chapter 2, paras. 51-52.

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two Euros (€2,000,132) on 5 October 2022 in fulfilment of the agreement to release the Vessel and its crew upon payment of the sums levied in in the Fine,<sup>444</sup> Equatorial Guinea breached Article 292(4) of the Convention.

380. Article 292(4) provides that:

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.

381. The sum in question was paid, notwithstanding the appreciation that this penalty was both unwarranted and extortionate. Notwithstanding receipt of the funds, Equatorial Guinea refused to release the Vessel and crew.

382. However the amount paid might be described, there is no doubt that it would readily meet the criterion of “a reasonable bond or other financial security” addressed in Article 292. In the Marshall Islands’ contention, the Chamber should deem the payment made to have constituted “the posting of [a] bond or other financial security” as determined by Equatorial Guinea for purposes of the obligation of prompt release under Article 292(4).

383. This appreciation is supported by the underlying purpose of the requirement to pay a bond or other financial security, namely, to ensure the payment in due course of any lawful penalty that may be imposed or to secure the presence of the Master or crew before the local court in criminal proceedings. In this case, the penalty imposed by Equatorial Guinea has already been paid, and there are no pending criminal proceedings against the Master (and there were never any against the crew).

384. As to the reasonableness of the amount already paid for purposes of a “deemed bond,” this must follow from the fact that this is the amount that was required by Equatorial Guinea itself. In any event, as the Tribunal observed in the “*Hoshinmaru*” and other cases:

[A] number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.<sup>445</sup>

385. The Tribunal stated further, in the same case, that “the amount of a bond should be proportionate to the gravity of the alleged offences.”<sup>446</sup>

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<sup>444</sup> Detailed at Chapter 2, at paragraphs 56 and following.

<sup>445</sup> “*Hoshinmaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment*, ITLOS Reports 2005-2007, p. 18 (“*Hoshinmaru, Prompt Release Judgment*”), at para. 82, quoting *Camouco, Prompt Release Judgment*, at para. 67.

<sup>446</sup> *Hoshinmaru, Prompt Release Judgment*, at para. 88.

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386. In the circumstances of the present case, the penalty having been imposed by Equatorial Guinea, there can be no doubt about the adequacy of the sum paid for purposes of constituting the deemed posting of a bond or other financial security.

387. Equatorial Guinea's failure to release the Vessel and the crew despite the payment of this sum demanded by Equatorial Guinea, accordingly, breached Article 292(4).

### **IX. Breach of the obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings**

#### **A. Obligation to preserve the rights of the parties and not aggravate the dispute pending proceedings**

388. Equatorial Guinea is obliged to abstain from any measure capable of exercising a prejudicial effect in relation to the execution of any decision to be given and, in general, not to take or allow any step of any kind which might aggravate or extend the dispute.

389. This principle is well-established. The Permanent Court of International Justice in *Electricity Company of Sofia and Bulgaria* acknowledged "the principle universally accepted by international tribunals and likewise laid down in many conventions (. . .) to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."<sup>447</sup>

390. This passage was cited with approval by the ICJ in *LaGrand*, and given as one of the additional reasons which pointed to the binding character of Article 41 of the ICJ Statute on provisional measures.<sup>448</sup>

391. The obligation to refrain from any action that might aggravate the dispute has likewise been recognised by the Special Chamber of the Tribunal in the provisional measures order in *Ghana and Cote D'Ivoire*<sup>449</sup> and by the Tribunal in the provisional measures order in the *Land Reclamation*.<sup>450</sup> The Tribunal in *Land Reclamation* considered that, "having regard to the obligation of the parties not to aggravate the dispute pending its settlement, the parties have the obligation not to create an irremediable situation."<sup>451</sup>

392. The Annex VII tribunal in *South China Sea* further explained that:

[T]he proper understanding of this extensive jurisprudence on provisional measures is that there exists a duty on parties engaged in a dispute settlement

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<sup>447</sup> *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Order 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 194, at p. 199.

<sup>448</sup> *LaGrand, Judgment*, at para. 103.

<sup>449</sup> *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146, at para. 108.

<sup>450</sup> *Land Reclamation in and around the Straits of Johor*, Provisional Measures Order, at para. 90.

<sup>451</sup> *Ibid* (in that case, an alleged acceleration of land reclamation and infilling works).

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procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process. *This duty exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding.* Indeed, when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings.<sup>452</sup> (emphasis added)

393. The tribunal considered that such a duty is “inherent in the central role of good faith in the international legal relations between States” recognised in Article 26 of the VCLT, which is “no less applicable to provisions of a treaty relating to dispute settlement.”

Where a treaty provides for the compulsory settlement of disputes, the good faith performance of the treaty requires the cooperation of the parties with the applicable procedure. Compulsory settlement is also premised on the notion that the final result will be binding on the parties and implemented by them as a resolution of their dispute. The very purpose of dispute settlement procedures would be frustrated by actions by any party that had the effect of aggravating or extending the dispute, thereby rendering it less amenable to settlement.<sup>453</sup>

394. It concluded that these principles find their expression in Articles 279 and 300 of the Convention and that the final and binding nature of decisions under Article 296 has an impact on the permissible conduct of the parties.<sup>454</sup> Actions by either party to aggravate or extend the dispute are incompatible with the recognition and performance in good faith of these obligations.<sup>455</sup>

395. The *South China Sea* tribunal did not consider there was any need to reach beyond the text of the Convention to identify the source of law applicable to the conduct of parties in the course of dispute settlement proceedings under Part XV beyond these provisions, but, to the extent it were necessary to do so, considered that the non-aggravation principle constitutes a principle of international law applicable to States engaged in dispute settlement, to which a tribunal may have recourse under Article 293(1).<sup>456</sup>

### B. Breach

396. Equatorial Guinea:

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<sup>452</sup> *South China Sea, Award*, at para. 1169 (emphasis added).

<sup>453</sup> *South China Sea, Award*, at para. 1171.

<sup>454</sup> *South China Sea, Award*, at para. 1172.

<sup>455</sup> *South China Sea, Award*, at para. 1172.

<sup>456</sup> *South China Sea, Award*, at para. 1173.

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- a. repeatedly failed to engage with the Marshall Islands' communications raising a dispute under the Convention, inviting discussion and requesting the immediate release of the Vessel and crew as set out in paragraphs 96-99 above;
- b. handed control and custody over the Vessel and crew over to Nigeria on 11 November 2022, after the Marshall Islands had made an application to ITLOS under Article 292 for prompt release of the Vessel and crew and, furthermore, after the application had been communicated to it. Instead of attempting to resolve the dispute in accordance with its obligations under Part XV of the Convention, and awaiting the outcome of the Prompt Release Proceedings, Equatorial Guinea put it out of its power to free the Vessel and the crew. Not only did this aggravate and extend the dispute under the Convention between the two parties, but it caused further and substantial damage, loss and injury to the Marshall Islands, the Vessel, the crew, and others involved the Vessel.

397. In so doing, Equatorial Guinea:

- a. acted contrary to its obligation under general international law not to extend or aggravate the dispute, to which the Chamber may have recourse by virtue of Article 293;
- b. breached its obligation under Article 283 to proceed expeditiously to exchange views regarding the settlement of the dispute;
- c. breached its obligations under Part XV of the Convention and/or, in particular, Articles 286, 288, 292, 296 and/or 297(1) of the Convention to submit to the jurisdiction of courts and tribunals under the Convention in accordance with the terms of those provisions; and/or
- d. failed to fulfil in good faith the obligations assumed under Part XV of the Convention and/or, in particular, Articles 286, 288, 292, 296 and/or 297(1) of the Convention in breach of Article 300 of the Convention.

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## CHAPTER 8

### REMEDIES

#### I. Introduction

398. This Chapter examines the legal consequences arising from Equatorial Guinea's responsibility for the breaches of UNCLOS and applicable rules of international law detailed in Chapters 5 to 7.

399. As set out by the Tribunal in the *M/V "Saiga" (No 2)*:

It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish [sic] the situation which would, in all probability, have existed if that act had not been committed' (*Factory at Chorzów, Merits, Judgment No.13, 1928, P.C.J.I., Series A, No. 17, p.47*).<sup>457</sup>

400. The customary international law obligation to make reparation for internationally wrongful acts is reflected in Article 31 of the Articles on State Responsibility.<sup>458</sup> Article 31 provides:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

401. Article 31 has been cited with approval by ITLOS in *Activities in the Area*,<sup>459</sup> *M/V "Virginia G."*,<sup>460</sup> and *M/V "Norstar."*<sup>461</sup> It is well-established that Article 304 of the Convention requires the Tribunal to take account of the Articles on State Responsibility when considering the obligation to make full reparation.<sup>462</sup>

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<sup>457</sup> *Saiga (No. 2), Judgment*, at para. 170, cited in *Virginia G, Judgment*, at para. 428 and *Norstar, Merits Judgment*, at para. 316. See also, in this regard, Article 1 of the Articles on State Responsibility: "Every internationally wrongful act of a State entails the international responsibility of that State." The tribunals in *Virginia G, Judgment*, at para. 430 and in *Norstar, Merits Judgment*, at para. 317 accepted that Article 1 of the Articles on State Responsibility reflects customary international law.

<sup>458</sup> Articles on State Responsibility, at p. 91.

<sup>459</sup> *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 ("*Activities in the Area*"), para. 194.

<sup>460</sup> *Virginia G, Judgment*, para. 429.

<sup>461</sup> *Norstar, Merits Judgment*, para. 318.

<sup>462</sup> See, e.g., *Activities in the Area*, at para. 171 ("Since article 304 of the Convention refer[s] (...) to 'the application of existing rules and the development of further rules regarding responsibility and liability under international law', account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility").

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402. The Marshall Islands also notes that the first consequence that would follow from findings of breach is that the Chamber should make declarations of those breaches. This is important to ensure that there can be no doubt about the rights and duties of the Parties.

403. This Chapter is organised as follows. **Section II** addresses the principles of reparation applicable in this case. **Section III** addresses the Marshall Islands' claims for restitution and compensation for material and non-material damage, **Section IV** its claim for interest on the principal sums due, and **Section V**, its claim for costs in these proceedings. **Section VI** addresses the Marshall Islands' requests for an assurance and guarantee of non-repetition, and an acknowledgment of wrongdoing from Equatorial Guinea.

### II. Applicable principles of reparation

404. It is well-established in the Tribunal's jurisprudence that a State which is responsible for breaches of the Convention must provide reparation not only in respect of the damage suffered by the injured State but also for damage or other loss suffered by the Vessel, including all persons involved or interested in its operation.<sup>463</sup>

405. In the *M/V "Saiga" (No.2)*, in its first judgment concerning reparations, the Tribunal explained that:

Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. Damage or other loss suffered by the *Saiga* and all persons involved or interested in its operation comprises injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.<sup>464</sup>

406. This has been followed by the Tribunal in all relevant cases where it has considered reparation (*M/V "Virginia G"* and *M/V "Norstar"*) and by Annex VII tribunals (*Arctic Sunrise* and *Duzgit Integrity*).<sup>465</sup>

407. The appropriate forms of reparation in this case are restitution, compensation (including interest and costs) and satisfaction in the form of an acknowledgement of wrongdoing, together with an assurance and guarantee of non-repetition.

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<sup>463</sup> Any potential issue of double recovery arising from other arbitral proceedings involving the Vessel will be addressed in due course, if and when they arise.

<sup>464</sup> *Saiga (No. 2)*, *Judgment*, at para. 172.

<sup>465</sup> *Virginia G*, *Judgment*, at paras. 432–434; *Norstar*, *Merits Judgment*, at paras. 322–323; *Arctic Sunrise*, *Merits Award*, at paras. 393–394; *Duzgit Integrity*, *Merits Award*, at paras. 315(c) and 333.

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### III. Restitution and compensation

408. Restitution is the obligation to re-establish the *status quo ante* – that is, “the situation which existed before the wrongful act was committed”<sup>466</sup> – by wiping out all the consequences of the unlawful act.

409. The obligation to pay compensation arises “insofar as such damage is not made good by restitution.”<sup>467</sup> Compensation must cover any financially assessable damage,<sup>468</sup> including both material and non-material damage.<sup>469</sup> As explained by the tribunal in the *Arctic Sunrise*:

[T]he Netherlands is entitled to compensation for damage to the *Arctic Sunrise*, including physical damage and costs incurred to prepare it for its return voyage, as well as lost profits (...) Having regard to the circumstances of the present case and the case-law of both the International Court of Justice and ITLOS, the Tribunal considers that the Netherlands is entitled to the award of non-material damages in relation to the arrest, detention, and prosecution of those on board the *Arctic Sunrise*.

#### 1. *Restitution and compensation in respect of material damage*

410. As set out above, the cardinal rule governing reparation under international law is that it must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

411. The non-compliance of Equatorial Guinea with its obligations under the Convention directly owed to the Marshall Islands, and owed to the Marshall Islands as a member of the international community, caused injury to the Marshall Islands. The Marshall Islands accordingly seeks the following restitution and compensation for material damage.

412. First, in order to re-establish the situation which existed before the wrongful acts were committed, Equatorial Guinea must revoke the Fine and return the two million, one hundred and thirty-two Euros (€2,000,132) paid by the Owners to Equatorial Guinea pursuant to the Fine.

413. Second, in order to compensate the Marshall Islands and the Vessel (including all persons involved or interested in its operation) for the damage caused by its internationally wrongful acts, Equatorial Guinea must provide compensation for the following:<sup>470</sup>

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<sup>466</sup> Articles on State Responsibility, Article 35.

<sup>467</sup> Articles on State Responsibility, Article 36(1).

<sup>468</sup> Articles on State Responsibility, Article 36(2), cited in *Norstar, Merits Judgment*, at para. 431.

<sup>469</sup> General Commentary to the Articles on responsibility of States for internationally wrongful acts, in *Yearbook of the International Law Commission (2001)*, vol. II (Part 2), p. 31, at p. 101 (“No less than material injury ... non-material damage is financially assessable and may be the subject of a claim of compensation...”).

<sup>470</sup> As regards compensation, all sums in currencies other than US dollars have been converted to US dollars at the exchange rate at the date each sum was imposed or invoiced.

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- a. costs and expenses to assist the crew during their wrongful detention (including wages and costs for medical (including psychological) assistance), in the sum of approximately one million, seven thousand dollars (USD\$1,007,000);
- b. costs and expenses relating to the crew and the Vessel while it was unlawfully detained (including bunkers (fuel), agency and port charges, and provisions), in the sum of approximately one million, two hundred and twenty-seven thousand dollars (USD\$1,227,000);
- c. payments made to secure the release of the Vessel and her crew, in the sum of fifteen million dollars (USD\$15,000,000), and five million Nigerian Naira (5,000,000) equivalent to eleven thousand and nine hundred and fifty seven dollars (US\$11,957) (assuming the Fine is returned as restitution – if it is not, the Marshall Islands should also be compensated for the payment made pursuant to the Fine – i.e., two million, one hundred and thirty-two Euros (€2,000,132), which is equivalent to one million, nine hundred and sixty, eight hundred and twenty-one dollars (USD\$1,960,821)), for a total sum equivalent to sixteen million nine hundred and seventy-two thousand, seven hundred and seventy-eight dollars (USD\$16,972,778);
- d. costs and expenses to repatriate the crew following their release and put in place replacement crew, in the sum of approximately one million, one hundred and thirty-eight thousand, five hundred dollars (USD\$1,138,500);
- e. costs and expenses to repair the Vessel after its unlawful detention and resume the operation of the Vessel, in the sum of approximately four hundred and eighty thousand dollars (USD\$480,000);
- f. loss of hire, in the sum of approximately nineteen million, three hundred and forty-eight thousand, five hundred and sixty dollars (USD\$19,948,560);<sup>471</sup>
- g. increased war risk premium levied by the Vessel's insurers, in the sum of approximately two hundred and twenty thousand British pounds (£220,000) (equivalent to three hundred and four thousand, nine hundred and sixty-two dollars (USD\$304,962); and
- h. wasted costs incurred in pursuing the Prompt Release Proceedings, in the sum of approximately six hundred and fifty thousand dollars (USD\$650,000).

414. For the avoidance of doubt, to the extent that the Marshall Islands is seeking compensation in respect of the detention of the Vessel and crew in Nigeria and the payments made to Nigeria, it is not necessary for this Chamber to assess the lawfulness of Nigeria's conduct under the Convention or international law. As explained above, Equatorial Guinea is under an obligation to make full reparation for the injury caused by its internationally wrongful acts,<sup>472</sup> and that reparation

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<sup>471</sup> See First Expert Report of Tim Horne, 14 December 2023 ("**Horne-1**") (**Annex RMI/-39**).

<sup>472</sup> Articles on State Responsibility, Article 31(1).

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must, as far as possible, wipe out all the consequences of its illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>473</sup> In this case, none of the damage, including that which occurred in Nigeria, would have been suffered or incurred if Equatorial Guinea had not breached its obligations to the Marshall Islands and had not unlawfully detained the Vessel and crew on 12 August 2022. Further, the damage would have been less extensive if Equatorial Guinea, having unlawfully detained the Vessel and crew, had released them as it was obliged to do, rather than handing them over into the control and custody of Nigeria in breach of its obligations under the Convention.

415. Finally, the sums set out in paragraph 413 above reflect the available information at the present date. The Marshall Islands reserves its right to address the Tribunal further on the issue of quantum, and to revise the sums set in paragraph 413 above, in the event that the Tribunal determines that Equatorial Guinea is obliged to make full reparation to the Marshall Islands.

### 2. *Non-material damage*

416. The award of damages for non-material injury for unlawful detention of a vessel's crew is well-established in international practice<sup>474</sup> and in the jurisprudence of the Tribunal and Annex VII tribunals and of the International Court of Justice: see the *M/V "Saiga" (No. 2)*;<sup>475</sup> *M/V "Virginia G"*;<sup>476</sup> *M/V "Norstar"*;<sup>477</sup> *Arctic Sunrise*;<sup>478</sup> *Duzgit Integrity*;<sup>479</sup> and *Diallo*.<sup>480</sup>

417. In assessing the amount of non-material damages, the context and the conditions of an individual's detention are to be taken into account.<sup>481</sup>

418. In the *Arctic Sunrise*, the tribunal (quoting Judge Greenwood in *Diallo*) observed:

a tribunal seized of the task of assessing non-material damages ought not merely select an arbitrary figure but apply principles that are "capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of [the] case, but by comparison with other cases".<sup>482</sup>

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<sup>473</sup> *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, at p. 47.

<sup>474</sup> See, e.g., *Nautilus Submarine Pearl Fishing Co., Owner of the Bark v. Mexico*, in Moore's Digest of International Arbitration (1898) vol. IV, at p. 3251; *Topaze Case (interlocutory)* (1903) IX R.I.A.A. 387.

<sup>475</sup> *Saiga (No. 2), Judgment*.

<sup>476</sup> *Virginia G, Judgment*.

<sup>477</sup> *Norstar, Merits Judgment*.

<sup>478</sup> *Arbitration regarding the Arctic Sunrise* (Netherlands v. Russia), Award on Compensation of 10 July 2017 (2019) R.I.A.A. XXXII 315 ("*Arctic Sunrise, Award on Compensation*").

<sup>479</sup> *Arbitration regarding the Duzgit Integrity* (Malta v. São Tomé and Príncipe), Award on Reparation of 18 December 2019 (2020) 190 I.L.R. 324 ("*Duzgit Integrity, Award on Reparation*").

<sup>480</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324 ("*Diallo, Compensation Judgment*").

<sup>481</sup> *Saiga (No. 2), Judgment*, at paras. 172–173; *Diallo, Compensation Judgment*, at paras. 23–24; *Arctic Sunrise, Award on Compensation*, at para. 76; *Duzgit Integrity, Award on Reparation*, at paras. 183–185.

<sup>482</sup> *Arctic Sunrise, Award on Compensation*, at para. 74.

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419. In *Diallo* the ICJ awarded a sum equivalent to eighty-five thousand dollars (USD\$85,000) (which, adjusted for inflation, is equivalent to a daily rate of one thousand, five hundred and eighty-two dollars and eighty-two cents (USD\$1,582.82)<sup>483</sup>) for Mr Diallo’s “significant psychological suffering and loss of reputation.”<sup>484</sup> Relevant facts included that Mr Diallo was:

- a. “arrested without being informed of the reasons for his arrest and without being given the possibility of a remedy;”
- b. “detained for an unjustifiably long period pending expulsion” (i.e., 72 days);
- c. “made the object of accusations that were unsubstantiated;” and
- d. “wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities.”<sup>485</sup>

420. In the *Arctic Sunrise*, the tribunal awarded less than the ICJ awarded in *Diallo* (which, adjusted for inflation, is equivalent to a daily rate of four hundred and nineteen Euros and eighty-eight cents (EUR 419.88)<sup>486</sup>), but on the express basis that the circumstances were less extreme than in *Diallo*. In that case, the tribunal noted that the members of the “Arctic 30” were detained for two months (less than Mr Diallo) and later granted amnesty by Russia, they did not suffer a loss of reputation, and their conditions were “not optimal.”<sup>487</sup>

421. In this case, a higher daily rate than in *Diallo* or the *Arctic Sunrise* is appropriate on the facts of this case. Not only are the first three of the four factors present in *Diallo* present in this case, but there are in addition the following exacerbating features:

- a. the Master and crew were detained for 289 days (92 days in Equatorial Guinea and 198 days in Nigeria);<sup>488</sup>
- b. the Master and crew faced personal threats to their safety during their detention in Equatorial Guinea (e.g., at the police station in Malabo and when being forced to board the Nigerian naval vessel in Luba port);<sup>489</sup>
- c. the 15 members of the crew detained at the Detention Facility in Equatorial Guinea were held in unsanitary and degrading conditions;<sup>490</sup>

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<sup>483</sup> According to the Consumer Price Index Inflation Calculator published by the US Bureau of Labor Statistics as of October 2023: [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)

<sup>484</sup> *Diallo, Compensation Judgment*, at para. 21.

<sup>485</sup> *Ibid.*

<sup>486</sup> According to the Consumer Price Index Inflation Calculator published by the Ireland Central Statistics Office as of October 2023: <https://visual.cso.ie/?body=entity/cpiccalculator>

<sup>487</sup> *Arctic Sunrise, Award on Compensation*, at para. 76.

<sup>488</sup> See: Chapter 2, Sections IV and VIII above.

<sup>489</sup> See: Chapter 2, Sections IV and V above.

<sup>490</sup> See: Chapter 2, Section IV(A), particularly paras. 47-48.

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- d. the 11 members of the crew who remained on the Vessel during their detention in Equatorial Guinea were forced to work in dangerous conditions for long hours;<sup>491</sup>
- e. the Master and crew were never formally arrested or given reasons for their detention in Equatorial Guinea, but their liberty was severely curtailed;<sup>492</sup>
- f. the Master and crew were repeatedly denied access to lawyers while in detention and during questioning by authorities, and they were forced to sign statements in a language they did could not speak, read or understand;<sup>493</sup>
- g. the Master and crew suffered physical injury while in detention, including by contracting malaria and typhoid, and neither Equatorial Guinea nor Nigeria provided them with adequate treatment;<sup>494</sup>
- h. the Master and crew suffered psychiatric injury while in detention (e.g., some had suicidal thoughts, others will never be able to sail again);<sup>495</sup>
- i. the Master and crew missed important life events (e.g., the births of children and deaths of family members);<sup>496</sup>
- j. the family members of the Master and crew endured psychological injury while the Master and crew were in detention;<sup>497</sup>
- k. the reputation of the Master and crew were tarnished due to false statements made by Equatorial Guinea (e.g., one family had to pull their daughter out of school for bullying, and another could not leave their house);<sup>498</sup> and
- l. Some crew members have lost their livelihood as they are no longer able to return to sea.<sup>499</sup>

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<sup>491</sup> See: Chapter 2, Section IV(A), particularly para. 49.

<sup>492</sup> See: Chapter 2, Section IV(A), particularly para. 47 and Chapter 2, Section IV(B), para. 52.

<sup>493</sup> See: Chapter 2, Section IV(B), para. 54.

<sup>494</sup> See: Chapter 2, Section IV(D), in particular para. 65.

<sup>495</sup> See: Chapter 2, Section IV(D), in particular para. 65; First Psychological Report of Dr Lesley Perman-Kerr, 20 November 2023 (“**Perman-Kerr-1**”), para. 18 (**Annex RMI/-38**).

<sup>496</sup> Perman-Kerr-1, paras. 21-22 (**Annex RMI/-38**); Chief Officer-1, para. 69; 3<sup>rd</sup> Officer-1, paras. 22, 26-27; Junior 3<sup>rd</sup> Officer-1, para. 48; 2<sup>nd</sup> Engineer-1, para. 29; 3<sup>rd</sup> Engineer-1, para. 34; 4<sup>th</sup> Engineer-1, paras. 33-34; Electrician-1, paras. 31, 36 (birth of his first child); Pumpman-1, para. 28 (birth of his child); Able Seaman No 1-1, para. 24; Ordinary Seaman No 1-1, para. 30; Ordinary Seaman No 3-1, para. 31; Motorman No 3-1, para. 36.

<sup>497</sup> See e.g., Master-1, para. 178 (**Annex RMI/-1**).

<sup>498</sup> See e.g., 2<sup>nd</sup> Engineer-1, para. 29 (**Annex RMI/-11**); 3<sup>rd</sup> Officer-1, para. 28 (**Annex RMI/-8**); Able Seaman No 1-1, para. 25 (**Annex RMI/-17**).

<sup>499</sup> See e.g., Perman-Kerr-1, para. 27 (**Annex RMI/-38**); 2<sup>nd</sup> Engineer-1, para. 28 (**Annex RMI/-11**); Electrician-1, paras. 37-38 (**Annex RMI/-14**); Master-1, para. 178 (**Annex RMI/-1**).

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422. Furthermore, in contrast with *Diallo* – where no evidence was provided of Mr Diallo’s moral and mental harm, suffering, shock and loss of reputation<sup>500</sup> – there is in this case overwhelming evidence of the significant harm suffered by the crew.

423. In light of the foregoing, the Marshall Islands submits that the unlawful acts of Equatorial Guinea have caused the Master and crew to suffer significant non-material injuries. In light of the factors set out in paragraph 421 above, the Marshall Islands seeks compensation for non-material injury calculated on the basis of two thousand dollars (USD\$2,000) per day per crew member for each day that the Master and crew were detained by Equatorial Guinea and Nigeria. The total figure for compensation for non-material is therefore calculated as fifteen million and twenty-eight thousand dollars (USD\$15,028,000).

### IV. Interest

424. The payment of interest on damages due is well-established as an element of full reparation, as reflected in Article 38 of the Articles on State Responsibility. In UNCLOS jurisprudence, interest has been awarded on numerous occasions by both ITLOS and by Annex VII tribunals.<sup>501</sup>

425. In order to ascertain how full reparation should be achieved when awarding interest, the Annex VII tribunal in the *Duzgit Integrity* arbitration determined that regard must be had to three elements: (a) the rate or rates of interest applicable to the award of damages, (b) whether simple or compound interest will be awarded, and (c) the date or dates from which interest will run.<sup>502</sup> The tribunal also stated:<sup>503</sup>

[T]he award of interest serves to achieve full reparation in two respects. First, it serves to compensate for the decrease in economic value of the sums awarded between the point when the losses were incurred and the time when payment is made. Second, interest serves to provide compensation for the loss of use of the amounts in question, insofar as these funds could not be productively employed or as borrowing of alternative capital may have been required.

426. The three elements identified in *Duzgit Integrity* give rise to the following principles:

- a. To ascertain the appropriate rate of interest, account must be taken, *inter alia*, of commercial conditions prevailing in the countries where the expenses were incurred,<sup>504</sup> and/or the cost of borrowing at commercial rates.<sup>505</sup>

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<sup>500</sup> *Diallo, Compensation Judgment*, at para 19. At para. 21, the ICJ stated that, “non-material injury can be established without specific evidence.”

<sup>501</sup> *Saiga (No. 2), Judgment*, at para. 173; *Virginia G, Judgment*, at paras. 444-445; *Norstar, Merits Judgment*, at paras. 459-462; *Arctic Sunrise, Award on Compensation*, at paras. 118-119; *Duzgit Integrity, Award on Reparation*, at para. 204.

<sup>502</sup> *Duzgit Integrity, Award on Reparation*, at para. 205.

<sup>503</sup> *Duzgit Integrity, Award on Reparation*, at para. 207.

<sup>504</sup> *Saiga (No. 2), Judgment*, at para. 173, followed in *Virginia G, Judgment*, at para. 443; *Arctic Sunrise, Award on Compensation*, at para. 122.

<sup>505</sup> *Arctic Sunrise, Award on Compensation*, at para. 122; *Duzgit Integrity, Award on Reparation*, at para. 208.

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- b. Because nearly all financial transactions take place on the basis of compound interest, most international courts and tribunals now award compound interest to achieve full reparation.<sup>506</sup>
- c. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.<sup>507</sup>

427. In this case, the appropriate rate of interest for all material and non-material damages claimed in US dollars is the US prime rate plus 1%,<sup>508</sup> compounded at quarterly intervals, and running (as relevant) from the date of the commission of the wrongful acts or the date the costs/expenses were incurred, until compensation is paid. As to the Fine, the appropriate rate of interest, based on the currency of the payment of the Fine and the corresponding currency of the sum claimed under this head, is the EURIBOR six month rate plus 5%, compounded at six monthly intervals, and running from the date of payment of the Fine until the date of restitution or (if awarded as compensation) the date of payment of compensation. These rates reflect the cost of borrowing at commercial rates in those currencies.

### V. Costs

428. Article 21 of the Tribunal's Rules of Procedure provide:

Unless decided otherwise by the Tribunal, each Party shall bear its own costs. The Arbitral Tribunal may make an award in respect of the costs incurred by the Parties in presenting their cases, as appropriate.

429. Article 21 clearly contemplates that the Tribunal has a discretion to award costs. Indeed, the first sentence of Article 21 of the Rules is the same as Article 64 of the ICJ Statute, and the ICJ stated in *Diallo* that "Article 64 implies that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties."<sup>509</sup> Although the Tribunal has not awarded costs to date, it has similarly recognized that an award of costs may be appropriate in other cases (see *M/V "Saiga" (No. 2)*, *M/V "Virginia G."*, *M/V "Louisa"*, *M/V "Norstar"*).<sup>510</sup>

430. There is increasing support for international courts and tribunals awarding costs.<sup>511</sup> The arbitral tribunal in *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, an arbitration under the

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<sup>506</sup> See the discussion in the *Integrity, Award on Reparation*, at para. 212. Compound interest was also awarded in *Virginia G, Judgment*, at paras. 444–446 and in *Norstar, Merits Judgment*, at paras. 460–462. It was not awarded in the *Arctic Sunrise* but only because the Netherlands did not claim compound interest.

<sup>507</sup> Articles on State Responsibility, Article 38(2).

<sup>508</sup> This is similar to the approach adopted in *Arctic Sunrise*, where the Tribunal applied an interest rate of Euro LIBOR annual rate plus six percent in respect of all material damages. It reasoned that "[t]his rate is appropriate in light of the commercial conditions prevailing in the countries where the expenses were incurred and given that the expenses were for the most part incurred by Greenpeace International, a private foundation that borrows money at ordinary commercial rates." (*Arctic Sunrise, Award on Compensation*, at para. 122).

<sup>509</sup> *Diallo, Compensation Judgment*, at para. 60.

<sup>510</sup> *Saiga (No. 2), Judgment*, at para. 182; *Louisa, Judgment*, at para. 159; *Norstar, Merits Judgment*, at paras. 467–468; *Virginia G, Judgment*, at para. 451.

<sup>511</sup> It is now more common for arbitral tribunals to award costs than to not in investor State disputes: see, British Institute of International and Comparative Law, '2021 Empirical Study: Costs, Damages and Duration in Investor-

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ICSID Facility Rules, commented on the increasing number of tribunals that award costs. It observed that “while the traditional position in investment arbitration has been that the Parties bear their own legal costs and share equally the costs of the arbitration, there have been a number of cases which have departed from this principle and have awarded costs on a ‘loser pays’ basis.”<sup>512</sup> It considered an award of costs was appropriate in that case because compensating the claimant for the cost of bringing the proceeding was required to wipe out the consequences of respondent’s breach of the bilateral investment treaty and was “particularly appropriate in the current case given the serious and egregious nature of the breach.”<sup>513</sup> Costs are also awarded by the Inter-American Court of Human Rights on the basis that “costs are part of the concept of reparation, since the actions carried out by the victims with the aim to obtain justice, both nationally and internationally, involves expenditure that must be compensated.”<sup>514</sup>

431. In this case, compensating the Marshall Islands for the costs of bringing these proceedings is necessary to ensure full reparation, and there are circumstances which make it appropriate for the Court to allocate costs to the Marshall Islands. In particular:

- a. Equatorial Guinea completely disregarded its obligations under the Convention and international law to engage with the flag State and attempt to resolve the dispute in good faith.
- b. Equatorial Guinea ignored the appropriate attempts by the Marshall Islands’ Commissioner for Maritime Affairs to engage with it at an early stage, and it did not respond to *any* of the Marshall Islands’ letters and Notes Verbales.
- c. Equatorial Guinea acted in bad faith and displayed complete disregard to ITLOS, the Marshall Islands and the dispute settlement procedures it has agreed to under the Convention when it handed the Vessel and crew over to Nigeria in the face of Prompt Release Proceedings.

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State Arbitration’, pp. 16-21 (at p. 16, “[f]rom June 2017 to May 2020, less than 23% of tribunals ordered parties to bear their own costs. ... That shows a clear trend of tribunals shifting towards costs adjustment.”). See, e.g., *PJSC DTEK Krymenergo v. The Russian Federation*, Perm. Ct. Arb. Case No. 2018-41, Award of 1 November 2023, at paras. 1023–1029. Costs are also awarded by the Inter-American Court of Human Rights. See, e.g., *Myrna Mack Chang v Guatemala*, Inter-American Court of Human Rights, Series C No. 101, Merits, Reparations and Costs (25 November 2003), paras. 290-291; *Guzmán Medina y otros vs. Colombia*, Inter-American Court of Human Rights, Series C No. 495, Merits, Reparation and Costs Judgment (23 August 2023), at paras. 146–147.

<sup>512</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, at para. 860.

<sup>513</sup> *Ibid.*

<sup>514</sup> *Guzmán Medina y otros vs. Colombia*, Inter-American Court of Human Rights, Series C No. 495, Merits, Reparation and Costs Judgment (23 August 2023), at para. 146 (unofficial translation from the Spanish original).

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### VI. Assurances and guarantees of non-repetition and an acknowledgement by Equatorial Guinea of its breaches of UNCLOS

432. In addition to the reparations sought above, the Marshall Islands also requests assurances and guarantees of non-repetition from Equatorial Guinea, and an acknowledgement by Equatorial Guinea of its breaches of UNCLOS.

433. As to each, the Articles on States Responsibility are again instructive. Article 30 provides:

The State responsible for the internationally wrongful act is under an obligation: (...) (b) to offer appropriate assurances and guarantees of non-repetition, if the circumstances so require.<sup>515</sup>

434. Article 37(2) provides:

Satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.<sup>516</sup>

435. In the *M/V “Virginia G,”* the Tribunal decided to provide satisfaction in the form of a judicial declaration that Guinea-Bissau had acted wrongfully and violated Panama’s rights under UNCLOS.<sup>517</sup> In this case, the Marshall Islands contends that a judicial declaration is not sufficient due to the seriousness of the breach and the character of the obligations breached, as described in Chapters 5-8 above.

436. In making this submission, the Marshall Islands is especially mindful of its role as the world’s third largest registry and its attendant responsibilities and leading role in the shipping industry. The Marshall Islands is in this sense specially affected by the treatment of its flagged vessels and their crew by the authorities of other States, such as those of Equatorial Guinea. The Marshall Islands is responsible for over 5,500 flagged vessels – approximately 12% of the global fleet – and approximately 550 of its vessels operated in West Africa in 2022. The nature and gravity of Equatorial Guinea’s unlawful treatment of the “*Heroic Idun*” and her crew in this case present serious and wider implications, not only for the Vessel and those concerned in her operations in this case, but for the Marshall Islands’ fleet and those of other flag States operating off West Africa and elsewhere. It is imperative that neither Equatorial Guinea, nor any other State, engage in the unlawful treatment inflicted on the “*Heroic Idun*,” its crew, and flag State in this case.

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<sup>515</sup> See also *LaGrand, Judgment*, at para. 124; *Avena, Judgment*, at para. 153; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, p. 168, at para. 257. In each case, the ICJ awarded (or in the case of *Armed Activities in the Congo*, declared satisfied) assurances of non-repetition.

<sup>516</sup> See, *S. S. “I’m Alone” (Canada v. United States of America)*, Award of 5 January 1935, III R.I.A.A. 1609, at p. 1618, where an Anglo-American claims commission ordered that the United States “ought finally to acknowledge its illegality.”

<sup>517</sup> *Virginia G, Judgment*, at para. 448.

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437. Accordingly, in all the circumstances of this case, it is appropriate that Equatorial Guinea be ordered to provide an assurance and guarantee of non-repetition, and to expressly acknowledge its breaches of UNCLOS.

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### SUBMISSIONS

438. The Marshall Islands requests the Chamber to adjudge and declare that:
- a. By intercepting the “*Heroic Idun*” and her crew in the EEZ of São Tomé and Príncipe, forcing them to divert course, including under the threat of the use of force, and placing them under military escort, Equatorial Guinea breached Articles 87(1), 90 and 92 of UNCLOS.
  - b. By the same conduct, Equatorial Guinea breached Article 87(2) of UNCLOS and / or Article 300, read alongside Articles 87(1) and 90, having failed to exercise its own freedom of navigation in the EEZ of São Tomé and Príncipe with due regard to the rights of the Marshall Islands to freedom of navigation and / or abused its right to freedom of navigation and right to sail in the EEZ of São Tomé and Príncipe.
  - c. All measures adopted by Equatorial Guinea subsequent to the unlawful interception and diversion of the “*Heroic Idun*” and her crew in the EEZ of São Tomé and Príncipe are without basis in UNCLOS and international law.
  - d. By enacting and implementing its criminal laws in respect of activities of the “*Heroic Idun*” and her crew in the EEZ of Equatorial Guinea without any basis in UNCLOS, and by usurping the Marshall Islands’ exclusive prescriptive jurisdiction in respect of those activities, Equatorial Guinea breached Articles 56(1), 58, 87, 89 and 92 of the Convention or Article 300 read with Part V of UNCLOS.
  - e. Equatorial Guinea in any case adopted measures in respect of the “*Heroic Idun*” and her crew that were contrary to principle of reasonableness and considerations humanity and, in so far as those measures purportedly concerned the EEZ of Equatorial Guinea, it also failed to have due regard to the rights of the Marshall Islands in that maritime zone, in breach of Article 56(2) of UNCLOS.
  - f. By failing to respect and violating the human rights of the crew, including as set out in the ICCPR and the African Charter and in customary international law, and failing to observe the United Nations Standard Minimum Rules for the Treatment of Prisoners, Equatorial Guinea breached:
    - i. rules and principles of international law not incompatible with the Convention to which the Chamber may have recourse under Article 293;
    - ii. Article 87(1) of UNCLOS, in respect of its obligation to exercise its freedom of the high seas under conditions laid down by “other rules of international law;”
    - iii. Article 87(2) of UNCLOS, in respect of its obligation to have due regard for the interests of the Marshall Islands;

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- iv. Article 2(3) of UNCLOS, in respect of its obligation to exercise sovereignty in the territorial sea subject to other rules of international law;
  - v. Article 58(2), in respect of its obligation to comply with other pertinent rules of international law and its obligation under Article 56(2) to have due regard to the rights and duties of the Marshall Islands, insofar as the relevant conduct concerned alleged activities in its EEZ.
- g. By preventing the “*Heroic Idun*” from being properly manned, and by refusing the Marshall Islands’ repeated requests in this regard, Equatorial Guinea breached:
- i. Article 1(b) of SOLAS, in respect of its obligation to take all necessary steps to give SOLAS full and complete effect;
  - ii. Article 1(2) of the STCW, in respect of its obligation to take all necessary steps to give the STCW full and complete effect;
  - iii. Article 1 of the COLREGS, in respect of its obligation to give effect to the Rules contained therein;
  - iv. Article 87(1) of UNCLOS, in respect of its obligation to exercise its freedom of the high seas under conditions laid down by “other rules of international law,” in this instance Article 1(b) of SOLAS, Article 1(2) of the STCW, and Article 1 of the COLREGS;
  - v. Article 87(2), in respect of its obligation to have due regard for the interests of the Marshall Islands, as flag State, to meet its duties under Articles 94 and 217 of the Convention;
  - vi. Article 2(3) to exercise its sovereignty over the territorial sea subject to the Convention, including Article 87(1), and to other rules of international law, including Article 1(b) of SOLAS, Article 1(2) of the STCW, and Article 1 of the COLREGS.
- h. By the unsafe manoeuvring of the naval vessel the “*Wele Nzas*” on 26 September 2022, Equatorial Guinea breached Rules 2, 6, 7 and 8 of the COLREGS.
- i. By preventing the “*Heroic Idun*” from being properly manned, requesting the vessel to be moored in a location where it was at a significant risk of collision, and by the unsafe manoeuvring of its naval vessel “*Wele Nzas*” on 26 September 2022 in respect of the “*Heroic Idun*,” Equatorial Guinea breached Article 225 of UNCLOS.
- j. By failing to notify the Marshall Islands of, *inter alia*, (i) the interception, diversion and detention of the “*Heroic Idun*” and her crew, (ii) the imposition of a penalty on the Master of the Vessel, and (iii) the transfer of the Vessel to Nigeria, Equatorial Guinea breached its duty to notify the Marshall Islands as the flag State of enforcement measures adopted in respect of its Vessel, which duty has general application

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in law of the sea and/or Articles 87(1) and 87(2), read with Article 58(2), and Article 56(2) of the Convention.

- k. By detaining the “*Heroic Idun*” and its crew for a period of 92 days, and by continuing the detention despite the payment of a penalty amounting to two million, one hundred and thirty-two Euros (€2,000,132), Equatorial Guinea breached its obligation to release vessels promptly, which has general application in law of the sea and/or Articles 87(1) and 87(2), read with Article 58(2), and Article 56(2), and/or Article 294(2) of the Convention.
- l. By repeatedly failing to engage with the Marshall Islands in respect of the “*Heroic Idun*” and her crew, and by handing over control of the Vessel and crew to Nigeria on 11 November 2022, after having been notified of the Marshall Islands’ prompt release application, Equatorial Guinea breached:
  - i. Articles 283 of UNCLOS;
  - ii. Articles 286, 288, 292, 296 and/or 297(1) of the Convention, and Article 300 of the Convention read alongside these provisions; and
  - iii. the general obligation not to aggravate the dispute with the Marshall Islands.

439. These breaches engage the international responsibility of Equatorial Guinea vis-à-vis the Marshall Islands and trigger the obligations of Equatorial Guinea in respect of the Marshall Islands under international law stemming from its wrongful conduct. Having regard to this, the Marshall Islands further requests the Chamber to:

- a. Order that Equatorial Guinea:
  - i. pay compensation to the Marshall Islands:
    - 1. for material damage in the amount of thirty-nine million, seven hundred and sixty seven thousand, nine hundred and seventy-nine dollars (USD \$39,767,979);
    - 2. for non-material damage of fifteen million and twenty-eight hundred dollars (USD \$15,028,000);
  - ii. pay two million, one hundred and thirty-two Euros (€2,000,132) in restitution (or, alternatively, in compensation);
- b. Order that Equatorial Guinea pay interest in respect of the sums specified above calculated:
  - i. on sums awarded in US dollars, the US prime rate plus 1% (one per cent), compounded at quarterly intervals;

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- ii. on sums awarded in Euros, the EURIBOR six month rate plus 5% (five per cent), compounded at six monthly intervals;

to run (as relevant) from the date of the commission of the wrongful act or the date the date the costs/expenses were incurred (in respect of the sums awarded in compensation) and from the date of payment of the Fine until the date of restitution or (if awarded as compensation) the date of payment of compensation.

- c. Award costs of the present proceedings to the Marshall Islands;
- d. Order that Equatorial Guinea:
  - i. revoke the Fine imposed on the Master;
  - ii. acknowledge its wrongful conduct in respect of the Marshall Islands; and
  - iii. provide an assurance and guarantee of non-repetition.

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The Republic of the Marshall Islands reserves the right to supplement and/or amend its claim and the relief sought as necessary (including in relation to damages, costs and interest), and to make such other requests from the Special Chamber of the Tribunal as may be necessary to preserve its rights under the Convention.

18 December 2023



**Ms. Meredith Kirby**

**Agent of the Republic of the Marshall Islands**

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