

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**

REPLY OF THE REPUBLIC OF THE MARSHALL ISLANDS

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PART I

CHAPTER 1

INTRODUCTION

1. This is the Reply (“**Reply**”) of the Republic of the Marshall Islands (“**Marshall Islands**”) in the dispute between the Marshall Islands and the Republic of Equatorial Guinea (“**Equatorial Guinea**”) concerning the *M/T “Heroic Idun”* (“**Heroic Idun**” or “**the Vessel**”), which was submitted to a Special Chamber (“**the 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 Reply is submitted pursuant to Order 2024/2 of 25 July 2024 of the President of the Special Chamber and provides the response to the arguments raised in the Counter-Memorial that Equatorial Guinea submitted on 15 July 2024, pursuant to the President’s Order 2023/5 of 16 November 2023 (“**Counter-Memorial**”).

I. Equatorial Guinea’s defense in the Counter-Memorial

3. In its Memorial of 18 December 2023, the Marshall Islands articulated several claims against Equatorial Guinea. At its core, however, the case concerns the Marshall Islands’ freedom of navigation and exclusive flag-State jurisdiction that Equatorial Guinea breached by intercepting the “*Heroic Idun*” and her crew on 12 August 2022 in the exclusive economic zone (“**EEZ**”) of São Tomé and Príncipe, forcing them into Equatorial Guinea, and detaining them in Equatorial Guinea for 12 weeks (92 days), until their unlawful transfer to Nigeria on 11 November 2022.

4. The defenses that Equatorial Guinea has presented in its Counter-Memorial against the core of the Marshall Islands’ case are, for the most part, an exercise of attempting to “shift the blame” onto Nigeria. Equatorial Guinea claims that its actions were consequent upon a request by Nigeria to apprehend the Vessel on grounds of a “reasonable suspicion of piracy,”¹ and that Equatorial Guinea’s role was only “secondary.”² For Equatorial Guinea, Nigeria’s alleged request for cooperation on a suspicion that the “*Heroic Idun*” had committed a piracy attack means that:

a. The Chamber cannot decide the Marshall Islands’ claims because to do so would require adjudicating on the rights and obligations of Nigeria, which is not a party to the proceedings.

b. If the Chamber nonetheless proceeds to decide the Marshall Islands’ claims on the merits, then it must conclude that the “*Heroic Idun*”’s apprehension, and everything that ensued, was lawful because States are required to cooperate in the repression

¹ **Counter-Memorial**, para. 3

² **Counter-Memorial**, para. 126.

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of piracy, and piracy constitutes an exception to freedom of navigation and exclusive flag State jurisdiction.³

5. Both defenses are untenable.

6. As regards the first defense, despite Equatorial Guinea's attempts to shift the focus onto Nigeria to avoid its own responsibility, the Marshall Islands' claims in this case exclusively concern the conduct of Equatorial Guinea, and Equatorial Guinea's obligations under UNCLOS and international law, not those of Nigeria. Equatorial Guinea's position that its role was "secondary" seems to suggest that Equatorial Guinea believes it had no obligations to the Marshall Islands, and that only Nigeria did. This is not the case. Equatorial Guinea had obligations, and it is on these obligations that the Chamber is called upon to pronounce.⁴

7. As regards the second defense, allegations that the "*Heroic Idun*" may have committed an act of piracy are an *ex post facto* construct, by which Equatorial Guinea seeks to justify its conduct. Equatorial Guinea has not produced any contemporaneous evidence whatsoever that supports its case that it seized the Vessel because the Vessel had carried out or was suspected of carrying out piracy. To the contrary, Equatorial Guinea had overwhelming evidence that would have ruled out piracy. Indeed, Equatorial Guinea did not inform the Marshall Islands that piracy was the reason for its interception and detention of the Vessel and crew until the Counter-Memorial in these proceedings. It is simply not plausible that it would not have informed the Marshall Islands earlier than the Counter-Memorial if it was really the case that it had seized the Vessel on 12 August 2022 because the Vessel had carried out or was suspected of carrying out piracy, as it now claims.

8. The Marshall Islands fully acknowledges the importance of anti-piracy cooperation, both at the regional and international level. As a flag State which has one of the largest ship registries in the world, the Marshall Islands is at the forefront of these efforts and supports them fully and unreservedly. It is precisely to preserve genuine efforts against piracy, however, that piracy cannot become a pretext for conduct patently inconsistent with fundamental principles of UNCLOS.

9. Furthermore, Equatorial Guinea's conduct following its initial interception of the "*Heroic Idun*", including in the course of the extended detention thereafter, undermines both of Equatorial Guinea's defenses, as it manifestly illustrates that it is Equatorial Guinea's own actions that violated the Convention.

10. Equatorial Guinea's defenses also do not assist it in respect to the treatment of the crew of the "*Heroic Idun*." Equatorial Guinea's primary argument in response to the claim that it violated the crew's human rights is that the Chamber does not have jurisdiction to assess a State's conduct against its human rights obligations.

11. This is not the case. The law of the sea and human rights are closely linked, and UNCLOS tribunals have often looked at the human rights implications of a State's conduct in cases brought before them. It has long been established that considerations of humanity "must apply

³ Counter-Memorial, paras. 196–201, 221–231.

⁴ This is without prejudice to the Marshall Islands' rights to bring proceedings against Nigeria under UNCLOS, in respect of breaches by Nigeria of its own obligations under UNCLOS and international law in respect of the Marshall Islands.

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in the law of the sea, as they do in other areas of international law”⁵ and, more recently, it has been recognized that human rights inform the interpretation and application of the provisions of the Convention,⁶ and that “the law of the sea *requires States to consider* the human implications of regulatory measures, policies and *enforcement actions*.”⁷

12. The merchant shipping and global trade⁸ underpinned by the law of the sea and the fundamental principle of freedom of navigation simply would not exist without seafarers. Yet they are the first in harm’s way when vessels are seized and detained by States. It would be contrary to the object and purpose of the Convention – as well as wrong – not to take the treatment of crews and violations of their rights into account in disputes under the Convention concerning its interpretation and application.

II. Structure of the Reply

13. The structure of this Reply is as follows.

14. **Chapter 2** responds to Equatorial Guinea’s “Statement of Relevant Facts.”

15. **Chapter 3** addresses the Chamber’s jurisdiction, the admissibility of the Marshall Islands’ claims, and the law applicable to the present dispute. It responds, in particular, to Equatorial Guinea’s claims that the Chamber cannot adjudicate the merits of the Marshall Islands’ claims due to the *Monetary Gold* principle; that the Marshall Islands has failed to exhaust local remedies; that the Marshall Islands is improperly using “gateway” UNCLOS provisions; and that the Chamber should have regard to the Yaoundé Code in deciding the Marshall Islands’ claims under UNCLOS.

16. **Chapter 4** addresses Equatorial Guinea’s core defense that it apprehended the “*Heroic Idun*” on grounds that it was suspected of carrying out a piracy attack. It shows, in particular, that there is no evidence to support piracy allegations against the Vessel; that piracy appears to be an *ex post facto* defense; that, even if Equatorial Guinea had a reasonable suspicion of piracy in respect of the “*Heroic Idun*,” it would have been contrary to UNCLOS to seize the Vessel; and that neither Article 100 UNCLOS nor the Yaoundé Code can be relied upon to justify Equatorial Guinea’s conduct.

17. **Chapter 5** addresses Equatorial Guinea’s arguments that it exercised prescriptive jurisdiction lawfully under UNCLOS, in investigating the “*Heroic Idun*” and her crew, and in fining the Master, for allegedly entering the EEZ of Equatorial Guinea without obtaining Equatorial Guinea’s prior authorization, and for allegedly failing to display a flag in the EEZ of Equatorial Guinea.

⁵ *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999 (“*Saiga (No. 2)*”), at para. 155.

⁶ *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.

⁷ *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Declaration of Judge Infante Caffi of 21 May 2024*, at para. 4 (emphasis added).

⁸ According to UNCTAD figures, “over 80% of world trade volume is carried by sea”: see UNCTAD, “Review of Maritime Transport 2024”, at <https://unctad.org/publication/review-maritime-transport-2024>.

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18. **Chapter 6** addresses Equatorial Guinea's responses to the Marshall Islands' claims concerning its other breaches, which are set out in Chapter 7 of the Memorial, i.e., the failure to respect the principles of reasonableness and considerations of 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.

19. **Chapter 7** replies to Equatorial Guinea's arguments in response to Chapter 8 of the Memorial, including in particular those on liability, causation, and reparation, showing how the damages suffered by the Marshall Islands were caused by Equatorial Guinea's internationally wrongful acts. It also updates certain of the amounts claimed to reflect the figures as they have crystallized. For ease of reference, the Marshall Islands repeats each of the heads of damage set out in the Memorial, with the updated figures and supporting evidence.

20. The Reply concludes with the Marshall Islands' Submissions.

21. The Marshall Islands does not repeat its contentions in the Memorial but directs this Reply to the issues raised by Equatorial Guinea in its Counter-Memorial. The Marshall Islands maintains the submissions that it has already made in its Memorial, including on issues that it does not address in this Reply. The Marshall Islands should not be treated as having accepted the content or relevance of any of Equatorial Guinea's submissions or documents unless it expressly says so.

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PART II

CHAPTER 2

THE FACTS

I. Introduction

22. This Chapter responds to Equatorial Guinea’s “Statement of Relevant Facts” in Chapter 3 of its Counter-Memorial. The Marshall Islands has given a full account of events in Chapter 2 of the Memorial. It will not repeat that account here, but will address disputes of fact and points arising from Equatorial Guinea’s “Statement of Relevant Facts” and correct errors in Equatorial Guinea’s account of the Marshall Islands’ evidence. It invites the Chamber to read the Marshall Islands’ response below on specific points together with Chapter 2 of the Memorial. The response retains the section headings of the Statement of Facts in the Memorial.

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

23. As set out in the Memorial,⁹ events prior to the interception, diversion and detention of the “*Heroic Idun*” and her crew are part of the context and background, but are not relevant for the purpose of determining the Marshall Islands’ claims. The Marshall Islands addresses these events below as necessary to correct Equatorial Guinea’s account.

24. Vessel never attempted to load oil. Equatorial Guinea alleges that the Vessel “entered the EEZ of Nigeria intending to load oil at the Terminal” but “did not have proper legal authorisation to do so at the time.”¹⁰ If Equatorial Guinea is suggesting that the Vessel attempted to load oil without the requisite clearance, this is wrong (and it is equally wrong to suggest the Vessel required clearance to enter Nigeria’s EEZ). The Master explained in his First Statement that the Vessel was waiting at, and then near, Akpo to load oil, and clearance to do so arrived on 10 August 2022.¹¹

25. The Chief Officer could not identify the naval Vessel. Equatorial Guinea states that the Chief Officer “appears to have had no trouble at all identifying [the unidentified vessel] as belonging to the Nigerian Navy.”¹² In support of this, Equatorial Guinea quotes from the VDR transcript where the Chief Officer is recorded as saying: “A Nigerian boat is coming our way, man. Nigerian Navy.” This takes the statement out of context. As is plain from reading the transcript as a whole, the Chief Officer was only repeating the Terminal’s previous message. The Chief Officer then tried to verify the unidentified vessel with the Terminal, and – as recorded in the VDR transcript – the Terminal told him that it “cannot confirm.”¹³ The Chief Officer explained his train of thought very clearly in his First Statement: “[i]nitially, I thought

⁹ Memorial, paras. 27–36.

¹⁰ Counter-Memorial, para. 13.

¹¹ First Witness Statement of the Master, 15 December 2023 (“Master-1”), paras. 23, 35–36 (Annex RMI/-1); First Witness Statement of Stephen Askins, 14 December 2023 (“Askins-1”), paras. 8–10 (Annex RMI/-3).

¹² Counter-Memorial, para. 16(a).

¹³ MT/-26, at p. 272 (message at 20:37:10).

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the craft may be the Nigerian Navy but it was concerning to me that we couldn't identify them;"¹⁴ as events progressed, "I came to the conclusion that they must be pirates pretending to be the Nigerian Navy."¹⁵ He expands on why he formed this view in his second statement:

I could not see the vessel, nor could I identify her on the Vessel's Electronic Chart Display and Information System because the vessel was not using its automatic identification system ("AIS"). This meant I had no way of knowing whether it was in fact a Nigerian Navy vessel. I thought the situation was odd – we were not in Nigeria's territorial waters, and this had never happened to me before. As the vessel approached, we could not identify her. It was dark, and we couldn't see any features on the boat that identified her as a naval vessel. As the Master spoke with the unidentified vessel, it became increasingly aggressive and refused to turn on its AIS. Had the vessel turned on its AIS equipment, we would have been able to confirm its identity. All the while, we were in an area known for a very high risk of piracy. (...) I very much believed we were under attack from a pirate vessel, and this is obvious if you read the transcript of the VDR to the end – it records that I say things like, "*we cannot trust them*". I was also the one who made the mayday calls on VHF, and made the distress alerts via Digital Selective Calling (DSC), Inmarsat-C and Global Maritime Distress and Safety System on behalf of the "HEROIC IDUN".¹⁶

26. Vessel did not "cho[ose] to continue fleeing." Equatorial Guinea alleges that the Vessel "chose to continue fleeing"¹⁷ after it received confirmation from the IMB Piracy Reporting Centre on 9 August 2022 that the unidentified vessel was in fact a naval patrol vessel named "*Gongola*." This is wrong. The Vessel did not flee, but continued to proceed approximately 300 nautical miles from Nigeria given the risk of piracy incidents in that area (which Equatorial Guinea itself recognizes¹⁸).¹⁹ Even after the Terminal informed the "*Heroic Idun*" on 11 August 2022 that it had received the necessary clearance documents for the Vessel to load oil on 17 August and invited the "*Heroic Idun*" to enter the Terminal whenever she wished,²⁰ the Vessel continued to drift²¹ much farther offshore because it was safer to do so.²²

¹⁴ First Witness Statement of the Chief Officer, 9 June 2023 ("Chief Officer-1"), para. 21 (Annex RMI/-5).

¹⁵ Chief Officer-1, para. 27 (Annex RMI/-5).

¹⁶ Second Witness Statement of the Chief Officer, 23 November 2024 ("Chief Officer-2"), para. 4 (Annex RMI/-51).

¹⁷ Counter-Memorial, para. 16(d).

¹⁸ Equatorial Guinea explains the risks of piracy in the Gulf of Guinea at some length, at pp. 7–13 of its Counter-Memorial, affirming the high risk of piracy which informed the course the Master adopted in the Gulf of Guinea.

¹⁹ Chief Officer-2, para. 6 (Annex RMI/-51).

²⁰ Email: 11 August 2022 at 21:41 BST (Annex MT/-34).

²¹ The Master explains in his first statement that he uses the term 'drifting' "to mean that the vessel is not at anchor or tied alongside a jetty (the term does not have a defined meaning, but it is a common industry term). When a vessel is drifting, her main engines are often not running except to maneuver the vessel so as to maintain the drifting position. Drifting is common when vessels are waiting as it conserves fuel. However, even though the main engines are not running at all times, the vessels are still technically deemed to be 'underway with engines on', and this is the status reflected on the vessel's AIS. It follows that drifting in a HRA is particularly high risk because, if the vessel is approached by pirates, it will take time to start the main engines and gaining speed will be slow" (Master-1, para. 42 (Annex RMI/-1)).

²² Master-1, para. 85 (Annex RMI/-1).

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27. Misrepresentation of the Master's statement. Equatorial Guinea alleges that the Master does not explain in his statement that, after the Terminal told the Vessel on 11 August 2022 that it could return to the Terminal and wait, the Terminal cancelled this permission on 12 August. This is wrong: the Master did address this in his first statement. He explained that "on 12 August, the Terminal retracted the permission and advised the Vessel not to enter the Terminal field, but it did not specify" the reasons why.²³ He also annexed the relevant email.²⁴

III. The interception and diversion of the "*Heroic Idun*" and crew by the Equatoguinean Navy

28. Response to the approach of the "*Capitan David*." On 12 August 2022, while the "*Heroic Idun*" was drifting in the EEZ of São Tomé and Príncipe, it was approached by an Equatoguinean frigate, the "*Capitan David*." Equatorial Guinea says that the Vessel started its engine and increased its distance as the "*Capitan David*" approached. If Equatorial Guinea is seeking to suggest that this behaviour was unexpected or an attempt to flee, this is wrong. The Chief Officer explains:

When we were approached by "CAPITAN DAVID" in the EEZ of São Tomé and Príncipe, it is correct that we started our engines and increased our distance, but any suggestion that this is unusual is nonsense. It is very common for a vessel to start its engines and increase distance from a vessel which is approaching quickly to avoid a collision.²⁵

29. Equatorial Guinea wrongly states that the "*Capitan David*" "requested" the Vessel to "follow it to the port of Malabo."²⁶ No request was made: it was an order under threat of gunfire.²⁷ This is recorded in the VHF log and confirmed by Master and the crew in their witness statements.²⁸ Had the "*Capitan David*" fired on the Vessel, particularly with its cannons, it could have caused a series of explosions, causing the Vessel to catch fire and sink, potentially leading to a loss of life and ecological damage.²⁹

IV. Detention of the "*Heroic Idun*" and crew in Luba and Malabo

A. Detention

30. Division of the crew. As explained in the Memorial, in the early hours of 14 August 2022, 10 of the 26 crew members, including the Master, were disembarked onshore under

²³ Master-1, para. 84, fn. 3 (Annex RMI/-1).

²⁴ Email: 12 August 2022 at 13:09 UTC (Annex MT/-36).

²⁵ Chief Officer-2, para. 7 (Annex RMI/-51) (footnotes omitted).

²⁶ Counter-Memorial, para. 44.

²⁷ Second Witness Statement of the Master, 25 November 2024 ("Master-2"), para. 12 (Annex RMI/-50).

²⁸ See Master-1, para. 94 (Annex RMI/-1); Chief Officer-1, para. 44 (Annex RMI/-5).

²⁹ Master-2, para. 12 (Annex RMI/-50).

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armed naval guard. Captain Nchama states that this division “was agreed with the captain of the *Heroic Idun*.”³⁰ The Master vehemently denies this. He attests:

I would never agree to have certain crew brought ashore. I was never asked or consulted; the Equatoguinean authorities simply produced a crew list where they had marked names and said those who have been marked will be taken ashore for a few hours and the others will remain on board. This was obviously a lie though, as the crew who were taken ashore then remained there for months.³¹

31. Later that day, Equatorial Guinea ordered an additional five members of the crew to come ashore. Because the Master was already onshore, the Chief Officer was in charge on board (as the second in command after the Master). He was opposed to sending any additional crew because he knew it would leave the Vessel severely undermanned, but because he did not have a choice, he helped select the five additional members to leave the Vessel.³²

32. The Vessel was inspected and declared innocent. As explained in the Memorial, on the same day the crew were disembarked, inspections were carried out on the Vessel’s cargo tanks by the Ministry of Mines and Hydrocarbon.³³ The Chief Officer explains that the Equatoguinean authorities checked every part of the Vessel, including all of the crew’s bags.³⁴ The Equatoguinean authorities concluded that the tanks 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, and declared the vessel “innocent.”³⁵

33. Conditions of and in the Detention Facility. As explained in the Memorial, at around 23:00 LT on 14 August 2022, 15 crew members were transferred from the local police station to a government-owned facility on the edge of the city where they were detained (the “**Detention Facility**”).³⁶ Mr Hernández Martín’s evidence in support of Equatorial Guinea is that the Detention Facility was “brand new and, although unfurnished, comfortable” and had “suitable bathrooms.”³⁷ The Master, who was detained there, agrees that the building did appear new, but disagrees that it was comfortable or had suitable bathrooms. He attests that there was poor sanitation, dirty water which regularly ran out, common toilets, no beds and lots of mosquitoes, rats, and cockroaches.³⁸ Indeed, the crew detained in the Detention Facility contracted malaria and typhoid in contrast to the crew on the Vessel, who did not. The Master is confident that they contracted typhoid because the water tank which supplied them with water was filthy.

³⁰ First Witness Statement of Captain Juan Nsue Esono Nchama, 10 July 2024 (“**Nchama-1**”), para. 22 (**REG-WS-001**); **Counter-Memorial**, para. 69.

³¹ Master-2, para. 13 (**Annex RMI/-50**).

³² Chief Officer-2, para. 9 (**Annex RMI/-51**).

³³ **Memorial**, para. 46.

³⁴ Chief Officer-2, para. 18 (**Annex RMI/-51**); Video of the Equatoguinean guards searching the crew’s bags (**Annex PJ/-3**).

³⁵ First Witness Statement of Eivind Kulblik, 13 December 2023 (“**Kulblik-1**”), para. 9 (**Annex RMI/-2**); Askins-1, para. 12 (**Annex RMI/-3**); Master-1, para. 132 (**Annex RMI/-1**); Email: 14 August 2022; 16:16 (**Annex EK/-5**), p. 34.

³⁶ Master-1, para. 114 (**Annex RMI/-1**).

³⁷ First Witness Statement of Alberto Hernández Martín, 11 July 2024 (“**Hernández Martín-1**”), para. 10 (**REG-WS-003**).

³⁸ Master-2, para. 5 (**Annex RMI/-50**).

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Because the crew had communal facilities in the Detention Facility, this meant that typhoid swiftly spread amongst them.³⁹

34. Crew were not free to leave. Mr Hernández Martín also states that “there were some security watchmen outside but the crew were free to move and walk around as they wanted.”⁴⁰ If Mr Hernández Martín is suggesting that the crew were free to leave the Detention Facility, that is wrong. As the Master explained in his first statement:

[W]e were not able to leave, we did not have our passports ((...) they had been taken from us on our arrival in Equatorial Guinea), and armed guards patrolled the facility. There was never a moment when the detention facility was not under armed guard, and a head count was taken daily during the guard handovers. The guards were local police, and most of them were drinking alcohol in front of us and under the influence of alcohol.⁴¹

35. Conditions for crew detained on the Vessel. Equatorial Guinea extracts two sentences from two entries (out of a total of over 240 entries) from the log by OSM Ship Management AS (the “**Managers**”) between 12 August and 9 September 2022. Both entries were very early in the crew’s detention in Equatorial Guinea, on 22 and 23 August 2022. The sentence extracted from the 22 August entry states, “[g]ood atmosphere onboard, mixed team between guards and crew in daily basket game matches,” and the sentence extracted from the 23 August entry states, “[a]ll crew are quite comfortable.”⁴² The same entry goes on to say that “moral[e] is dropping.”⁴³ By cherry-picking these entries, Equatorial Guinea ignores the overarching context, which is that despite never formally arresting the crew or informing them of any legal charges against them, it detained and deprived the crew of their liberty for three months.⁴⁴ The suggestion that their unlawful detention was somehow comfortable or that the crew was not impacted by their detention is baseless and wrong. The contemporaneous evidence, almost all of which Equatorial Guinea has not contested, is that the mental and physical wellbeing of the crew became progressively worse as each day passed.⁴⁵

36. Food and water. Equatorial Guinea annexes receipts which show some of the food and water that the crew was provided with while detained.⁴⁶ Equatorial Guinea does not refute that at no stage in its almost three-month detention of the crew did it provide food, safe drinking water or any other provisions to the crew: all provisions were provided by Besora Maritima (“**Besora**”) (the local agents of Idun Maritime Limited (the “**Owners**”) and the Managers, and by the local representative of the protection and indemnity insurer (collectively, the “**local agents**”) and paid for by the Owners. In addition, the Equatoguinean guards on the Vessel had to be fed by the Cook with provisions that the Owners paid for and supplied to the Vessel.⁴⁷

³⁹ Master-2, para. 10 (**Annex RMI/-50**).

⁴⁰ Hernández Martín-1, para. 18 (**REG-WS-003**).

⁴¹ Master-1, para. 115 (**Annex RMI/-1**).

⁴² **Counter-Memorial**, paras. 74–76.

⁴³ Managers’ Log for the Emergency Centre, 12 August - 8 September (**Annex EK/-4**), p. 28.

⁴⁴ See, e.g., Master-1, paras. 115 and 120 (**Annex RMI/-1**); First Witness Statement of the 2nd Officer, 8 June 2023 (“**2nd Officer-1**”), para. 17 (**Annex RMI/-6**); Askins-1, para. 14 (**Annex RMI/-3**).

⁴⁵ See **Memorial**, paras. 61, 65.

⁴⁶ **REG-012**; **REG-013**.

⁴⁷ Chief Officer-2, para. 15 (**Annex RMI/-51**).

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37. Medical care. Equatorial Guinea states that the crew “were at all times” provided with “high-quality medical care.”⁴⁸ This is wrong. As the Master attests, initial medical attention was limited, and the attending military doctor was poor; he generally was not willing to perform tests on the crew to ensure that he reached a proper diagnosis;⁴⁹ he misdiagnosed one crew member multiple times;⁵⁰ and he only spoke Spanish, which made communicating difficult, even when the local agents were there to translate.⁵¹ It was only after a few weeks in Equatorial Guinea and repeated poor medical assistance from the military doctor that the crew obtained access to doctors at La Paz, a private hospital in Equatorial Guinea. For the avoidance of doubt, Doctor Irvin Simbarashe’s evidence is not first hand: he did not treat or see any of the crew at La Paz. His assertion that “most of the crew members who visited La Paz had (...) what are commonly referred to as sailors’ illnesses”⁵² is unsupported by any evidence and baseless. Neither the Master nor Chief Officer had contracted malaria or typhoid previously, despite a collective 39 years at sea.⁵³ None of the crew detained onboard the Vessel contracted malaria or typhoid; only the crew detained on land at the Detention Facility did.

38. Conditions for the Vessel in Luba. Equatorial Guinea’s submission that the Vessel was safe because Luba is “particularly suitable and used for oil vessels”⁵⁴ is not supported by any documentary evidence other than Mr McDowall’s witness statement, and the one example Mr McDowall gives of a vessel close to the size of the “*Heroic Idun*” in Luba Bay is not a VLCC, but a floating production unit. Publicly available information indicates that no VLCCs visited Luba in January 2020 to September 2024.⁵⁵ Mr McDowall also attests that there were “no security or other concerns relating to the vessel, and none were raised by the crew.”⁵⁶ This is not true. As explained in the Memorial, the Vessel was undermanned (which compromised the personal safety of the crew), and Equatorial Guinea refused to allow additional crew onboard, despite repeated requests;⁵⁷ the Vessel was swinging on its anchor unsafely too close to shore;⁵⁸ and there were significant safety events that occurred when the Vessel was at Luba: e.g., (i) a near collision with the “*Wele Nzas*” (that went unnoticed by the “*Wele Nzas*” until the Chief Officer alerted it via VHF radio while he was on watch),⁵⁹ (ii) a near collision on 27 October 2022 when a vessel passing through the port narrowly avoided colliding with the “*Heroic Idun*,”⁶⁰ and (iii) a fire on a supply boat alongside the Vessel which leaked oil into the

⁴⁸ Counter-Memorial, para. 4.

⁴⁹ Master-2, para. 8 (Annex RMI/-50).

⁵⁰ Kulblik-1, para. 26 (Annex RMI/-2).

⁵¹ Master-2, para. 8 (Annex RMI/-50).

⁵² First Witness Statement of Dr Irvin Simbarashe, 10 July 2024 (“Simbarashe-1”), para. 12 (REG-WS-004).

⁵³ Master-2, para. 10 (Annex RMI/-50); Chief-Officer-2, para. 16 (Annex RMI/-51).

⁵⁴ Counter-Memorial, para. 47. See also, First Witness Statement of Howard James McDowall, 2 July 2024 (“McDowall-1”), para. 9 (REG-WS-006).

⁵⁵ Master-2, para. 8 (Annex RMI/-50); Lloyd’s List Intelligence data for the Port of Luba from January 2020 to September 2024 (Annex MT/-47).

⁵⁶ McDowall-1, para. 10 (REG-WS-006).

⁵⁷ Memorial, paras. 308–311.

⁵⁸ Memorial, para. 66.

⁵⁹ First Expert Report of Voirrey Blount, 24 November 2023 (“Blount-1”), paras. 22–23 (Annex RMI/-37); Chief Officer-2, para. 30 (Annex RMI/-51); Kulblik-1, para. 77 (Annex RMI/-2).

⁶⁰ Blount-1, para. 28 (Annex RMI/-37).

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sea.⁶¹ If there was any damage to the Vessel, due to grounding or a collision with another vessel or a fire, it could have been a disaster. Because hydrocarbon vapors were present in the cargo tanks, and bunkers (i.e., fuel for the Vessel) was in the tanks, the Vessel could have caught fire, and explosions could have injured or killed the crew and caused damage to the marine environment.⁶²

B. Investigations

39. The Master signed his statement under duress. Mr Hernández Martín states that the Master signed his statement “freely.”⁶³ This is wrong. At the end of the interview, the Master was asked to sign a statement in Spanish.⁶⁴ It is correct that this statement was informally translated for him by Mr Hernández Martín orally on the spot, but the Equatoguinean authorities made it clear to the Master that he had to sign the Spanish statement that was presented or he would not be going anywhere. The Master did request a written English translation, but his request was denied – he was only given a written copy in Spanish. He also asked to sign the statement for receipt only, but this too was denied. Accordingly, after almost 12 hours of continuous, aggressive interrogation, the Master signed what was put in front of him under duress and did not make any amendments. After the interview he had suicidal thoughts, which he shared with his wife.⁶⁵

40. Other interviews. Equatorial Guinea says that Nigeria “effectively controlled the circumstances in which the *Heroic Idun* was apprehended and held” while in Equatorial Guinea.⁶⁶ This is wrong.⁶⁷ It was Equatorial Guinea, and Equatorial Guinea alone, which apprehended and detained the Vessel and crew for almost three months in Equatorial Guinea. The Equatoguinean authorities also (i) 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, all of which took place on Equatoguinean soil, and (ii) were present in those interviews. On each occasion, a request for attendance of a lawyer during questioning was made but refused by Equatorial Guinea.⁶⁸

⁶¹ Chief Officer-2, para. 14 (**Annex RMI/-51**); Chief Officer-1, para. 55 (**Annex RMI/-5**); First Witness Statement of the Electrician, 9 June 2023 (“**Electrician-1**”), para. 22 (**Annex RMI/-14**); Blount-1, paras. 32–33 (**Annex RMI/-37**) (and see the video at **Annex VB/-11**); Kulblik-1, para. 78 (**Annex RMI/-2**).

⁶² Chief Officer-2, para. 29 (**Annex RMI/-51**).

⁶³ Hernández Martín-1, para. 13 (**REG-WS-003**).

⁶⁴ Master-1, para. 127 (**Annex RMI/-1**).

⁶⁵ Master-2, para. 15 (**Annex RMI/-50**).

⁶⁶ **Counter-Memorial**, para. 137.

⁶⁷ The implication of Equatorial Guinea’s statement is that it is not fully sovereign over its own territory.

⁶⁸ 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**); First Witness Statement of the 3rd Officer, 9 June 2023 (“**3rd Officer-1**”), para. 14 (**Annex RMI/-10**); Chief Officer-1, para. 52 (**Annex RMI/-5**).

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C. The Fine⁶⁹

41. 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.⁷⁰ Captain Nchama says that he “never stated that the vessel or crew could leave once the fine had been paid.”⁷¹ However, there is clear evidence which indicates that Equatoguinean officials did inform the local agents and crew that the crew and Vessel would be released on the payment of the Fine.⁷² Notwithstanding, on payment of two million, one hundred and thirty-two Euros (€2,000,132), Equatorial Guinea kept the “Heroic Idun” and crew in detention and later handed them over to Nigeria.

42. The reason the Owners paid the Fine. Equatorial Guinea states that representatives for the Vessel paid the Fine “[b]ased on” the infractions allegedly committed by the Vessel and refer to three provisions of the CEMAC Code (only one of which is mentioned in the Fine).⁷³ If Equatorial Guinea is suggesting that the Owners paid the Fine because they accepted that the Vessel and crew had committed any wrongdoing, including under the CEMAC Code, this is wrong. As recounted in the Memorial, the Owners considered this demand for payment to be both unjustified and extortionate.⁷⁴ However, in the overriding interests of the safety and security of the Vessel and her crew, and the wellbeing of the crew, 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.⁷⁵ In any event, it would not have been possible to challenge the Fine in Equatorial Guinea because, as the Fine expressly states, it was made under the Equatorial Guinea’s “Military Jurisdiction.”⁷⁶ The International Commission of Jurists explains that under military jurisdiction in Equatorial Guinea, “[t]here are no standing courts and military justice operates by means of courts martial made up of military officials with no legal qualifications and *against whose verdicts there is no right of appeal.*”⁷⁷

43. Stay in hotel. Equatorial Guinea places much emphasis on the crew’s short stay at the Hotel Anda.⁷⁸ This must be viewed in context. 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.⁷⁹ The 15 crew onshore were

⁶⁹ Equatorial Guinea says, “it is notable that the Marshall Islands has filed multiple translations of this document” (para. 63(a)). The explanation for this is that Marshall Islands annexed both a certified translation of the Fine and the copy of the Google machine translation the witnesses relied on at the time. “The Fine” is defined at **Memorial**, para. 56.

⁷⁰ Askins-1, para. 24 (**Annex RMI/-3**); Kulblik-1, para. 42 (**Annex RMI/-2**); Master-1, para. 133 (**Annex RMI/-1**); Chief Officer-2, para. 19 (**Annex RMI/-51**); Master-2, para. 15 (**Annex RMI/-50**).

⁷¹ Nchama-1, para. 25 (**REG-WS-001**).

⁷² As referred to in the Letter from the Marshall Islands to the Equatoguinean Attorney General dated 18 October 2022 (**Annex SA/-15**); **Annex SA/-46**; **Annex SA/-47**; **Annex EK/-80**; **Annex EK/-81**; **Annex EK/-82**; **Annex EK/-49**; **Annex EK/-55**; **Annex EK/-57**; **Annex EK/-58**; **Annex EK/-56**.

⁷³ **Counter-Memorial**, paras. 63–64.

⁷⁴ **Memorial**, para. 59.

⁷⁵ Kulblik-1, para. 42 (**Annex RMI/-2**); Askins-1, para. 26 (**Annex RMI/-3**).

⁷⁶ **RMI/-41**. See also, Askins-2, para. 6 (**Annex RMI/-52**).

⁷⁷ Federico Andreu-Guzmán, “Military jurisdiction and international law: Military courts and gross human rights violations” (International Commission of Jurists, 2004), vol. 1, at p. 166 (emphasis added); see also pp. 99–101.

⁷⁸ **Counter-Memorial**, paras. 80–81, 310, 388; **REG-014**; **REG-016**; **REG-WS-005**.

⁷⁹ Kulblik-1, paras. 47–48 (**Annex RMI/-2**).

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moved to the Hotel Anda, under armed guard, to await formal release. They then spent 10 days (of the 92 days that they were detained in Equatorial Guinea) in the hotel. It is not disputed that it was an improvement on the Detention Facility, and the crew were particularly grateful to be transferred to the hotel because they understood (wrongly, as it turns out) that it meant they were about to be released.⁸⁰ Equatorial Guinea does not seek to explain why, after the crew was transferred to a hotel and granted additional privileges,⁸¹ they were subsequently detained in traumatic conditions at the quayside in Luba port, on the Vessel, and in the Detention Facility again, before being forcefully transferred to Nigeria.

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

44. In its Counter-Memorial, Equatorial Guinea glosses over and does not refute the events that transpired after the 15 crew held onshore left the hotel on 5 November before they were forcibly transferred to Nigeria.⁸² As explained in the Memorial, the crew was distraught when they heard they were being transferred to Nigeria: many of them described this day, and the days that followed prior to their transfer to Nigeria on 11 November 2022, as the worst days of their lives.⁸³

45. Equatorial Guinea states that, “even while in transit, Equatoguinean authorities made sure the crew was safe and well-treated.”⁸⁴ It gives one example: an interaction in which Captain Nazareth Nicul took a picture with the Chief Officer, exchanged telephone numbers with him, and spoke to the Chief Officer’s wife over a video call. Equatorial Guinea says that such actions “are incompatible with accusations now made against the Equatoguinean authorities of ill-treatment towards the crew.”⁸⁵

46. What Equatorial Guinea omits to mention is that these “actions” occurred while the Chief Officer was being forcibly transferred between the Vessel and the “*Wele Nzaz*.” As recounted in the Memorial, on 7 November 2022 the Chief Officer was ordered to disembark the Vessel to be taken onboard an Equatoguinean naval ship and he was to be handed over to the Nigerian Navy at Equatorial Guinea’s territorial sea boundary.⁸⁶ The Master objected, but the Chief Officer was forcibly removed from the Vessel and taken to the Equatoguinean naval vessel as a hostage.⁸⁷ The full context of this incident is provided by the Chief Officer in his second witness statement:

[W]hen I was being forced to go to the “WELE NZAS” on 7 November 2022, the Third Officer took a video of me being taken and sent it to the media in India. In that video I said, “*I am being taken away by the Nigerian Navy. This might be my last message. I am hopeful that all of you seeing me will help me*”

⁸⁰ Master-2, para. 17 (Annex RMI/-50).

⁸¹ Annex EK/-58.

⁸² Counter-Memorial, paras. 90–96.

⁸³ See, e.g., Master-1, para. 141 (Annex RMI/-1); 2nd Officer-1, para. 20 (Annex RMI/-6); First Witness Statement of the Deck Cadet, 8 June 2023 (“Deck Cadet- 1”), para. 22 (Annex RMI/-9); 3rd Officer-1, para. 19 (Annex RMI/-10).

⁸⁴ Counter-Memorial, para. 92.

⁸⁵ Counter-Memorial, para. 92.

⁸⁶ Memorial, para. 74.

⁸⁷ Chief Officer-1, para. 59 (Annex RMI/-5); Kulblik-1, para. 58 (Annex RMI/-2).

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and make this message reach everyone in the country". (...) The video was broadcast on national television in India and my wife watched it, so she became very scared and called me repeatedly on my phone. I answered her call while I was on the dingy being transferred between the Vessel and the "WELE NZAS". She was wailing and crying so loudly, so I put a smile on my face and tried to reassure her that I was going to be okay. I hung up with her and begged Captain Nazareth to speak to her and reassure her that nothing would happen to me. I did this because I am her husband. I have duties to her. I didn't want her to cry. So we then called my wife back, and Captain Nazareth reassured her that it was just a procedure, not to worry, and that I would be safe. This reassured her. I then took a picture with Captain Nazareth and sent it to her. This also reassured her, and the picture also allowed me to have a record of who was taking me. I exchanged numbers with Captain Nazareth because I wanted to be able to contact him to ask questions.

This in no way should be misconstrued to suggest that I considered Captain Nazareth as "trustworthy" or "helpful". I did not. I did what I had to do to reassure my wife. The reality was that he was one of the very few Equatorial Guinean naval officers that spoke English, and I wanted my wife to know that I was okay.⁸⁸

47. Rather than supporting Equatorial Guinea's case, this incident instead serves to underline the terrible and precarious situation the crew and their families were in at the hands of the Equatoguinean authorities.

VI. Events following the transfer to Nigeria

48. Equatorial Guinea says that "the Vessel appears – on the account even of the Marshall Islands – to have subsequently accepted liability under Nigerian anti-piracy legislation."⁸⁹ Equatorial Guinea's suggestion that Nigeria charged the Vessel with piracy, and that the Vessel, or anybody involved with it, accepted these allegations, is wrong. While the proceedings in Nigeria and their circumstances are beyond the scope of the present dispute, for the avoidance of doubt the Marshall Islands reiterates that the "*Heroic Idun*" was never at any point charged with piracy.⁹⁰ Section 16(5) of Nigeria's Suppression of Piracy and Other Maritime Offences Act 2019 under which the Vessel eventually accepted liability,⁹¹ and to which Equatorial Guinea is referring, concerns "incident reporting and evidence preservation," not commission of acts of piracy, which fall under section 10 of the Act.

⁸⁸ Chief Officer-2, paras. 22–23 (**Annex RMI/-51**).

⁸⁹ **Counter-Memorial**, para. 9.

⁹⁰ See the charge sheet, revised charge sheet and plea bargain annexed to the Memorial, at **Annex SA/-29**, **Annex SA/-32** and **Annex SA/-38**.

⁹¹ For the reasons explained by Mr Askins in his first statement, at paras. 55–57 (**Annex RMI/-3**). As he says there (at para. 57(h)), "[w]e were prepared to accept the plea bargain not because of any recognition of guilt on the part of the Vessel or her crew, but because it was clear to us all that [it was] the only real option." At para. 55 he explains that the Crisis Management Team decided to explore the option of a plea bargain "because the alternative was untenable: a trial which was likely to take 12–18 months, which the crew could not endure as they were already in severe mental and physical distress, and the very real risk that the crew would be wrongfully convicted of offences carrying sentences of life imprisonment" and the "very real risk that the Vessel would be subject to forfeiture."

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PART III

CHAPTER 3

JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

I. Introduction

49. Equatorial Guinea contends that: (i) the Chamber does not have jurisdiction over a number of the Marshall Islands' claims or that they are inadmissible, due to the application of the *Monetary Gold* principle⁹² (also, "**the principle**"), or the failure to exhaust local remedies,⁹³ or the improper use of "gateway" UNCLOS provisions;⁹⁴ and (ii) the Yaoundé Code is relevant applicable law for determining the Marshall Islands' claims under UNCLOS.⁹⁵

50. This Chapter addresses both of these arguments. **Section II** explains that none of the Marshall Islands' claims is barred by the *Monetary Gold* principle; **section III** explains that the Marshall Islands was not required to exhaust local remedies in respect of any of its claims; and **section IV** explains that Equatorial Guinea's arguments in respect of "gateway" provisions of UNCLOS are incorrect. **Section V** addresses Equatorial Guinea's arguments on applicable law.

II. The *Monetary Gold* principle does not apply

51. Equatorial Guinea contends that several of the Marshall Islands' claims fall outside the jurisdiction of the Chamber, or, in the alternative, that they are inadmissible, due to the *Monetary Gold* principle. The Marshall Islands recognizes that the principle (sometimes referred to as the "indispensable party principle"⁹⁶) is a well-established procedural rule of international law that may bar an international court or tribunal from adjudicating the merits of a claim. However, the *Monetary Gold* principle is not applicable in the circumstances of the present case, and therefore it does not preclude the Chamber from adjudicating the merits of any of the Marshall Islands' claims. Even if it were to be applicable *ex hypothesi* in the circumstances of the present case as regards acknowledged or alleged conduct by Nigeria, it would not avail Equatorial Guinea because the allegations advanced by the Marshall Islands are directed against the conduct of Equatorial Guinea alone, in respect of which Equatorial Guinea bears responsibility. Any obligations of Nigeria or rights that may avail it are not impugned in any way by the present proceedings.

52. The contours and scope of application of the *Monetary Gold* principle are addressed in sub-section A. Sub-section B then explains why the principle is not applicable to any of the Marshall Islands' claims.

⁹² Counter-Memorial, paras. 105–145.

⁹³ Counter-Memorial, paras. 146–155.

⁹⁴ Counter-Memorial, paras. 156–167.

⁹⁵ Counter-Memorial, paras. 177–178.

⁹⁶ *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, ITLOS Reports 2016 ("Norstar, Preliminary Objections Judgment"), at paras. 171–174; *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016 (2020) XXXIII R.I.A.A. 153 ("**South China Sea, Merits**"), at paras. 157, 1202.

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A. The contours of the *Monetary Gold* principle

53. ITLOS in the *M/V “Norstar”* explained the principle as follows:

[T]he notion of indispensable party is a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ. Pursuant to this notion, where “the vital issue to be settled concerns the international responsibility of a third State” or where the legal interests of a third State would form “the very subject-matter” of the dispute, a court or tribunal cannot, without the consent of that third State, exercise jurisdiction over the dispute (...).⁹⁷

54. As is evident from the language used, the application of the principle is subject to stringent conditions. The circumstances of the *Monetary Gold* case before the International Court of Justice (“ICJ”) elucidate these.⁹⁸ In that case, the ICJ was called upon to decide competing claims to gold bars, recovered from Germany but belonging to Albania, between Italy (the applicant) and the United Kingdom. Italy claimed that the gold should be delivered to Italy in partial satisfaction for the damage which Italy alleged it had suffered as a result of a law adopted by Albania in 1945. The United Kingdom’s position was that the gold should be delivered to the United Kingdom in partial satisfaction of the ICJ’s judgment in its favour in the 1949 *Corfu Channel* case. In order to decide on Italy’s claim for the gold, the Court would have had to decide first, as a matter of logical priority, the question of Albania’s international responsibility towards Italy. Since Albania was not a party to the proceedings, the Court could not do that and thus declined to adjudicate upon Italy’s claim.⁹⁹

55. While regularly invoked by respondent States in international proceedings, given its stringent requirements, the principle has only been applied very rarely (in only three cases).¹⁰⁰ The ICJ in *Military and Paramilitary Activities in and against Nicaragua* observed that “[t]he

⁹⁷ *Norstar*, *Preliminary Objections Judgment*, at para. 172; see also *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, *Preliminary Objections, Judgment of 28 January 2021*, ITLOS Reports 2021, at para. 97.

⁹⁸ *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, *Judgment of 15 June 1954*, I.C.J. Reports 1954 (“*Monetary Gold*”).

⁹⁹ The principle is intended to prevent a court or tribunal from adjudicating on the legal interests of States that are not party to proceedings. In *Monetary Gold*, the ICJ noted: “[w]here, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it” (p. 33). The rationale of the principle is that an international court or tribunal can only exercise jurisdiction over a State with its consent. In *Monetary Gold*, the ICJ explained that: “[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent” (p. 17). See also *Status of Eastern Carelia, Advisory Opinion of 23 July 1923*, P.C.I.J. Series B, No. 5, at p. 27.

¹⁰⁰ The ICJ has only found the Principle to be applicable in two cases, *Monetary Gold* and *Case Concerning East Timor (Portugal v. Australia)*, *Judgment of 30 June 1995*, I.C.J. Reports 1995 (“*East Timor*”). The only other instance in which an international tribunal applied the Principle was in *Larsen v. Hawaiian Kingdom, Award of 5 February 2001*, I.C.G.J. 378 (P.C.A. 2001).

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circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction.”¹⁰¹

56. The following points concerning the scope and application of the *Monetary Gold* can be drawn from the jurisprudence.

57. First, the principle is concerned with the “legal interests”¹⁰² of States that are not party to the proceedings (i.e., their legal rights and obligations¹⁰³), including the question of their international responsibility. The principle is not concerned with a State’s interests of a moral, political or reputational nature.¹⁰⁴

58. Second, it is not sufficient for the principle to be applicable that a third State may be “implicated in the Application.”¹⁰⁵ Nor is it relevant that the claimant may have elected to bring proceedings against one State only, when more than one State may be involved in the facts set out in the application.¹⁰⁶

59. Third, it is also not sufficient that the legal interests of a third State may be “affected,”¹⁰⁷ or that the decision of the claimant’s claim “might well have implications for the

¹⁰¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment of 26 November 1984, I.C.J. Reports 1984 (“**Nicaragua, Jurisdiction and Admissibility**”), at para. 88.

¹⁰² The ICJ in the *Monetary Gold* case noted: “[i]n the present case, Albania’s legal interests would not only be affected by a decision, but would form the very subject-matter of the decision” (p. 17). Similarly, in *Nicaragua v. United States, Jurisdiction and Admissibility*, it held: “[t]here is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings ‘would not only be affected by a decision, but would form the very subject-matter of the decision’” (para. 88).

¹⁰³ *South China Sea Arbitration (Philippines v. China)*, *Jurisdiction and Admissibility*, Award of 29 October 2015, (2020) XXXIII R.I.A.A. 3 (“**South China Sea, Jurisdiction and Admissibility**”), at para. 180.

¹⁰⁴ For example, the UK Supreme Court, discussing the *Monetary Gold* and *East Timor* cases in *Belhaj v Straw and others (United Nations Special Rapporteur on Torture and others intervening)* [2017] UKSC 3, [2017] AC 964, noted at [29] that: “[n]one of the (...) international cases carries the concept of ‘interests’ so far as to cover any reputational or like disadvantage that could result to foreign states (...) from findings as between the appellants and respondents.”

¹⁰⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, I.C.J. Reports 2005 (“**Armed Activities in the Congo**”), at paras. 200–204.

¹⁰⁶ In the *M/V “Norstar”*, for example, Spain was implicated in the facts set out in Panama’s Application. Despite this, Panama elected not to “institute[e] proceedings against Spain”: *M/V “Norstar”*, *Preliminary Objections, Observations and Submissions of the Republic of Panama dated 9 May 2016*, at para. 12. ITLOS rejected Italy’s invocation of the *Monetary Gold* principle. In the *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, Judgment of 26 June 1992, I.C.J. Reports 1992 (“**Phosphate Lands in Nauru**”), similarly, the ICJ rejected the invocation of the *Monetary Gold* principle and noted: “Australia has raised the question whether the liability of the three States would be ‘joint and several’ (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This (...) is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia” (para. 48).

¹⁰⁷ *Armed Activities in the Congo*, at para. 203: “the Court observed that it is not precluded from adjudicating upon the claims submitted to it in a case in which a third State ‘has an interest of a legal nature which may be affected

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legal situation”¹⁰⁸ of a third State. “An inference (...) as to the legal position of that third State is not enough” either.¹⁰⁹ Rather, in order for the principle to be applicable, the third party’s legal interests must “form the very subject-matter of the decision.”¹¹⁰ When the legal interests of the third State concern the question of its international responsibility, this must be “the vital issue to be settled.”¹¹¹

60. Fourth, the requirement that the legal interests of the third State must “form the very subject-matter of the decision” or that they have to be “the vital issue to be settled” has a specific meaning: that a “*finding* in respect of [the] legal situation” of a third State “will be needed as a *basis* for the (...) decision” on the claimant’s claim.¹¹²

61. Fifth, to be needed as a “*basis*,” the judicial determination of the legal rights and obligations of the third State must constitute a logical prerequisite to the determination of the claimant’s claim. In the words of the late Judge Crawford, “[t]he case law has (...) set firm limits to the *Monetary Gold* principle. It applies only where a determination of the legal position of a third State is a *necessary prerequisite* to the determination of the case before the Court.”¹¹³ This means that a prior judicial determination of the rights and obligations of the third State must be necessary and unavoidable for the determination of the claimant’s claim. The ICJ elucidated this as follows in *Certain Phosphate Lands in Nauru*:

In [the *Monetary Gold* case], the determination of Albania’s responsibility was a *prerequisite* for a decision to be taken on Italy’s claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is *not a prerequisite for the determination of the responsibility* of Australia (...). In the *Monetary Gold* case the link between, on the one hand, *the necessary findings regarding Albania’s alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical*; as the Court explained, “In order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against

by the decision in the case’, provided that ‘the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for’; *East Timor*, at para. 34: “The Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case.” See also *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, *Judgment of 22 December 1986*, I.C.J. Reports 1986, at para. 49.

¹⁰⁸ *Phosphate Lands in Nauru*, at para. 55: “[i]n the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.”

¹⁰⁹ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *Preliminary Objections, dissenting Opinion of Judge Crawford of 5 October 2016*, I.C.J. Reports 2016 (“*Nuclear Arms and Disarmament, Diss. Op. Crawford*”), at para. 32.

¹¹⁰ *Norstar*, *Preliminary Objections Judgment*, at para. 172.

¹¹¹ *Norstar*, *Preliminary Objections Judgment*, at para. 172.

¹¹² *Phosphate Lands in Nauru*, at para. 55 (emphasis added). A finding is to be intended as a formal judicial determination. See in this regard the Separate Opinion of Judge Shahabuddeen, at p. 296: the *Monetary Gold* test “is not merely one of sameness of subject-matter, but also one of whether, in relation to the same subject-matter, the Court is making a judicial determination of the responsibility of a non-party State.”

¹¹³ *Nuclear Arms and Disarmament, Diss. Op. Crawford*, at para. 32 (emphasis added).

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Italy, and whether she is under an obligation to pay compensation to her.”¹¹⁴
(emphasis added)

62. The ICJ’s approach of tying the application of the principle to the notion of logical priority has been affirmed and applied by ITLOS and Annex VII tribunals. In the *M/V “Norstar,”* ITLOS rejected Italy’s argument that the principle applied on the ground that “[t]he decision of the Tribunal (...) does not require the prior determination of Spain’s rights and obligations.”¹¹⁵ In the *South China Sea Arbitration*, the Annex VII tribunal excluded the application of the *Monetary Gold* principle on the grounds that “[t]he legal rights and obligations of Viet Nam (...) do not need to be determined as a *prerequisite* to the determination of the merits of the case.”¹¹⁶

63. Sixth, in order to decide whether a prior determination of the rights and obligations of an absent third State is required, the focus is on the specific claims submitted to the court or tribunal for adjudication,¹¹⁷ as articulated by the claimant in the submissions (i.e., prayer for relief).¹¹⁸ If deciding on the claimant’s submissions requires deciding on the rights and obligations of the third State, the principle applies. If it does not, the principle does not apply.¹¹⁹

64. Lastly, even when it is engaged, the principle may prevent adjudication of a specific head of claim if it requires a prior determination of the legal rights and obligations of a third

¹¹⁴ *Phosphate Lands in Nauru*, at para. 55. See also *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, I.C.J. Reports 2007: “[t]he Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined.” (para. 312); *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, I.C.J. Reports 2015: “it is not necessary for the Court to rule on the legal situation of those States as a prerequisite for the determination of the present claim. The principle discussed by the Court in the *Monetary Gold* case is therefore inapplicable.” (para. 116). The only other instance – in addition to the *Monetary Gold* case – in which the Principle was applied by the ICJ also concerned a question of the necessary prior determination of the legal rights and obligations of a third State. In the case of *East Timor*, the Court applied the principle because “in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent” (para. 35).

¹¹⁵ *Norstar, Preliminary Objections Judgment*, at para. 173.

¹¹⁶ *South China Sea, Jurisdiction and Admissibility*, at para. 180 (emphasis added).

¹¹⁷ In *Phosphate Lands in Nauru*, for example, the ICJ rejected the invocation of the Principle, noting that establishing the responsibility of Australia was “the only object of Nauru’s claim” (para. 55).

¹¹⁸ That the focus is on the claims and the submissions was made clear, *inter alia*, by the ICJ in *Nicaragua, Jurisdiction and Admissibility*. In rejecting the invocation of the principle, the Court noted: “Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions” (para. 88).

¹¹⁹ See Pierre d’Argent, “The *Monetary Gold* Principle: A Matter of Submissions” (2021) 115 AJIL Unbound 149: “[the Principle’s] application very much depends on the way grievances are articulated. For instance, in *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, had the DRC requested from the Court that it adjudge and declare that Uganda conspired with Rwanda to use force illegally, the principle could have been triggered. However, the principle was not engaged by the DRC’s carefully worded submissions, not even by the one relating to the fighting between the respondent and the alleged third absent state (i.e., Rwanda) that occurred in the city of Kisangani. The fact that the Court, instead of addressing the entire dispute through the lens of the *Monetary Gold* principle, limited its possible relevance to one of the Congolese submissions only highlights the true object of the principle. It relates to the subject-matter of the submissions, rather than to the subject-matter of the dispute as such” (p. 150).

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State, but does not oust the jurisdiction of a court or tribunal over the entirety of a dispute unless it applies to all the heads of claim.¹²⁰

B. The *Monetary Gold* principle is not applicable to any of the Marshall Islands' claims

65. In the present proceedings, it is Equatorial Guinea's responsibility, based on its own conduct in the light of its own international obligations, that is the subject-matter and the only object of all of the claims made by the Marshall Islands. None of the claims made by the Marshall Islands requires the logical prior determination of Nigeria's legal rights and obligations, including any question of Nigeria's responsibility for possible breaches of international law.¹²¹ Equatorial Guinea does not explain how, or why, "the Chamber would necessarily be required to examine Nigeria's legal rights and interests."¹²² It simply asserts without more that it does,¹²³ or mentions events in which Nigeria was implicated, but which are no more than background context to the Marshall Islands' claims¹²⁴ and not relevant to their determination.

66. In reality, Nigeria's actions or what happened in Nigeria are entirely irrelevant to most of the Marshall Islands' claims:¹²⁵ they are entirely irrelevant to the claim that Equatorial Guinea exercised prescriptive jurisdiction, and imposed sanctions on the "*Heroic Idun*," contrary to UNCLOS;¹²⁶ they are entirely irrelevant to the claim that Equatorial Guinea adopted measures contrary to the principles of reasonableness, considerations of humanity, and to the obligation to have due regards to the rights of the Marshall Islands;¹²⁷ they are entirely irrelevant to the claim that Equatorial Guinea breached gateway UNCLOS provisions by violating the human rights of the crew;¹²⁸ they are entirely irrelevant to the claim that Equatorial Guinea breached SOLAS, STCW and COLREGS, as well as various UNCLOS provisions, by preventing the vessel from being properly manned, by the unsafe maneuvering of its naval units and by causing a risk of collision;¹²⁹ they are entirely irrelevant to the claim that Equatorial Guinea breached international law by failing to notify the Marshall Islands of the measures it adopted

¹²⁰ In *Monetary Gold*, for example, the ICJ found that "although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate on the first claim submitted by Italy" (p. 33).

¹²¹ For example, the Marshall Islands could have decided to seek the determination of Equatorial Guinea's responsibility in aiding and abetting a possible wrongful act by Nigeria – which matter may have required the prior logical determination of Nigeria's rights and obligations. However, it did not do so. It calibrated its submissions so that the Chamber is only required to ascertain the legal position of Equatorial Guinea. See, in this regard, "General Commentary to the Articles on State Responsibility," in *Yearbook of the International Law Commission* (2001), vol. II (Part 2), p. 31 ("**Commentary to Articles on State Responsibility**"), at p. 67: "That principle [*Monetary Gold*] may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter".

¹²² **Counter-Memorial**, para. 107.

¹²³ **Counter-Memorial**, para. 107.

¹²⁴ **Counter-Memorial**, para. 128; para. 131.

¹²⁵ **Memorial**, paras. 438(c) – (i).

¹²⁶ **Memorial**, para. 438(d).

¹²⁷ **Memorial**, para. 438(e).

¹²⁸ **Memorial**, para. 438(f).

¹²⁹ **Memorial**, paras. 438(g)–(i).

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against the “*Heroic Idun*”;¹³⁰ and they are entirely irrelevant to the claim that Equatorial Guinea failed to release the Vessel promptly and in any case aggravated the dispute by disregarding the Marshall Islands’ application for prompt release of the Vessel before the ITLOS instituted under Article 292 of UNCLOS against Equatorial Guinea (the “**Prompt Release Application**” and “**Prompt Release Proceedings**”).¹³¹

67. Nigeria may appear, on first impression, to be relevant in respect of the Marshall Islands’ claims that the “*Heroic Idun*” was arrested on the high seas, and subsequently transferred to Nigeria contrary to UNCLOS, in so far as Equatorial Guinea’s case is that this occurred pursuant to a request by Nigeria.¹³²

68. The *Monetary Gold* principle is not, however, applicable to these claims, for the following reasons.

69. First, as regards these claims, it is Equatorial Guinea – not the Marshall Islands – that has sought to implicate Nigeria by raising an *ex post facto* defense on the merits that it acted pursuant to a request to cooperate in the repression of piracy.¹³³ It now seeks to rely on Nigeria’s claimed conduct to prevent the Chamber from adjudicating the claims that concern Equatorial Guinea. This attempt, however, cannot succeed.

70. The ICJ in *India v Pakistan* said, in respect of its competence *ratione materiae*, that a State cannot rely on a defense on the merits that it has chosen to raise to seek to control the jurisdiction of an international tribunal. If this were possible, a respondent State would be able to oust the jurisdiction of an international adjudicatory body by simply casting its defense on the merits in a certain manner. The ICJ observed that:

The fact that a defense on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned,—otherwise parties would be in a position themselves to control that competence, which would be inadmissible. As has already been seen in the case of the competence of the Court, so with that of the Council, its competence must depend on the character of the dispute submitted to it and on the issues thus raised—not on those defenses on the merits, or other considerations, which would become relevant only after the jurisdictional issues had been settled.¹³⁴

71. The same reasoning applies, *mutatis mutandis*, here. Whether *Monetary Gold* applies depends on how the Marshall Islands has presented its claims, not on the defenses that Equatorial Guinea has raised against these claims. Equatorial Guinea’s piracy defense would become relevant “only after the jurisdictional issues” have been settled. That is, at the merits stage.

¹³⁰ **Memorial**, para. 438(j).

¹³¹ **Memorial**, paras. 438(k)–(l), save as explained in the next paragraph.

¹³² **Memorial**, paras. 438(a), (b) and (l), in so far as the transfer of the “*Heroic Idun*” to Nigeria is concerned. See **Counter-Memorial**, para. 115.

¹³³ **Counter-Memorial**, paras. 179–231, especially para. 211ff.

¹³⁴ *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, I.C.J. Reports 1972, at para. 27. The ICJ confirmed this position in *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment of 14 July 2020, I.C.J. Reports 2020, at paras. 49–50.

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72. Second, the Chamber is not required to make any finding on the legal rights and obligations of Nigeria in order to decide the Marshall Islands' claim that the "*Heroic Idun*"'s interception and detention and subsequent transfer to Nigeria was contrary to international law.¹³⁵ The scope of these proceedings is limited. The question that the Chamber needs to answer is not whether Nigeria's conduct, including the request to Equatorial Guinea, was lawful; but rather only whether Equatorial Guinea's conduct, including its response to that request, was lawful. In this regard, on Equatorial Guinea's own pleaded case, the only circumstance that would have justified its apprehension and seizure of the "*Heroic Idun*" and its crew and their subsequent transfer to Nigeria is that Nigeria's request concerned the apprehension of a pirate vessel. As discussed in the next Chapter, there is absolutely no basis for this in the contemporaneous evidence that Equatorial Guinea relies on. Establishing this is sufficient for the Chamber to conclude that Equatorial Guinea's interception, detention and transfer of the "*Heroic Idun*" was unlawful, without any determination of the legal rights and obligations of Nigeria being required.¹³⁶

73. Further, even if Equatorial Guinea had had any reason to suspect piracy (which it did not), its rights and obligations under UNCLOS and general international law did not permit or allow Equatorial Guinea to seize the "*Heroic Idun*," or detain the Vessel and crew or transfer them to Nigeria.¹³⁷ Instead, Equatorial Guinea should have exercised its rights of visit pursuant to Article 110 of UNCLOS, to establish whether the Vessel actually was a pirate ship. It is upon these rights and obligations – which constitute the very subject matter of the dispute, and which relate exclusively to Equatorial Guinea's own conduct in response to Nigeria's request and more generally – that the Chamber would be called upon to adjudicate to decide the Marshall Islands' claims.

74. Equatorial Guinea also appears to rely on the circumstance that the Chamber would be "requested to examine (...) the subsequent treatment of the crew and Vessel" in Nigeria in support of its *Monetary Gold* argument.¹³⁸ However, no examination entailing a determination of the rights and obligations of Nigeria is required. The damages sought by the Marshall Islands in respect of events occurring after the Vessel was transferred to Nigeria are simply a consequence of Equatorial Guinea's wrongful conduct. As reflected in Article 31 of the Articles on State Responsibility, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act" and such "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act." In this case, absent Equatorial Guinea's wrongful conduct, the Marshall Islands would not have incurred any damage in Nigeria. In order to decide on whether those damages are recoverable in the present proceedings, the Chamber is not required to decide whether Nigeria's conduct was lawful, but only that those damages would not have been incurred but for Equatorial Guinea's wrongful acts. The issue, in other words, is not one of prior determination of rights or obligations of Nigeria engaging the *Monetary Gold* principle, but one of causation of the damage. For reasons

¹³⁵ **Memorial**, paras. 438(a) and (b).

¹³⁶ **Counter-Memorial**, para. 212.

¹³⁷ As discussed in detail at Chapter 4, seizure of a vessel on the high seas on grounds of piracy is only allowed when the conditions of Article 105 of UNCLOS are met (i.e., that the vessel is an established pirate ship in accordance with Article 103 of UNCLOS). If there are reasonable grounds to suspect piracy, yet it is not confirmed that the vessel is a pirate ship in accordance with Article 103 of UNCLOS, Article 110(1) of UNCLOS and the principle of proportionality require that the right of visit be exercised instead.

¹³⁸ **Counter-Memorial**, para. 128(h).

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explained in Chapter 7, such damage has been caused by Equatorial Guinea and is sufficiently direct to be recoverable.

75. Lastly, in the section of its Counter-Memorial concerning the *Monetary Gold* principle, Equatorial Guinea seeks to rely on the *M/V “Norstar”* to claim that its position is similar to that of Spain in those proceedings.¹³⁹ The Marshall Islands addresses this argument in the next Chapter.¹⁴⁰

76. For the purposes of the present Chapter, it is important to note that the *M/V “Norstar”* does not assist Equatorial Guinea in this context, for the following reasons:

a. ITLOS rejected Italy’s invocation of the *Monetary Gold* principle in the *M/V “Norstar”* in respect of Spain.

b. Panama elected to bring proceedings against Italy as the State requesting the seizure of the Panamanian-flagged vessel. It also accepted that Spain had its own independent responsibility, and that it remained open to Panama to bring a claim against Spain for breach of Spain’s own obligations.¹⁴¹ However, it chose not to do so. Given the manner in which Panama’s claim was structured, ITLOS held that “the dispute before the Tribunal concerns the rights and obligations of Italy” and that “it is the legal interests of Italy, not those of Spain, that form[ed] the subject-matter of the decision to be rendered by the Tribunal on the merits of Panama’s Application.”¹⁴² Unlike Panama, the Marshall Islands has elected, as it may, to bring the present proceedings against the State effecting the seizure, namely Equatorial Guinea. The Marshall Islands’ claims concern the wrongful nature of the seizure and other acts by Equatorial Guinea, with reference to Equatorial Guinea’s own obligations. Paraphrasing *M/V “Norstar,”* whether Nigeria committed a wrongful act is “of no relevance to the present case.”¹⁴³ The “subject-matter of the decision to be rendered” by the Chamber, therefore concerns the legal interests of Equatorial Guinea, not of Nigeria.

77. In conclusion, the *Monetary Gold* principle does not apply, does not exclude all or any of the Marshall Islands’ claims and it does not oust the Chamber’s jurisdiction over this dispute. In this case, the Marshall Islands is exclusively seeking to hold *Equatorial Guinea* accountable for *Equatorial Guinea’s* conduct and the breaches of *Equatorial Guinea’s* international obligations to the Marshall Islands.¹⁴⁴

III. The Marshall Islands was not required to exhaust local remedies

78. Equatorial Guinea contends that the Marshall Islands should have exhausted local remedies in respect of the claims that relate to the treatment of the crew. It does so mainly on

¹³⁹ Counter-Memorial, para. 115.

¹⁴⁰ At paras. 152–153 of the Reply.

¹⁴¹ *Norstar, Preliminary Objections Judgment*, at para. 152.

¹⁴² *Norstar, Preliminary Objections Judgment*, at para. 173 (emphasis added).

¹⁴³ *Norstar, Preliminary Objections Judgment*, at para. 152.

¹⁴⁴ This is without prejudice to the right of the Marshall Islands to pursue claims against Nigeria, in respect of conduct that is imputable to Nigeria, and by reference to Nigeria’s own international obligations.

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the ground that these claims “preponderantly relate”¹⁴⁵ to the rights of the crew, as opposed to rights of the Marshall Islands. According to Equatorial Guinea, this is so because, unlike in the *M/V “Saiga” (No. 2)*, *M/V “Virginia G”* and *M/V “Norstar,”* in which the human rights claims allegedly “flowed from the treatment of the vessel itself,” in the present proceedings “the Marshall Islands makes numerous standalone claims relating to alleged human rights breaches of crew members (...).”¹⁴⁶

79. Equatorial Guinea’s approach is incorrect, for the following reasons.

80. First, it is wrong to state that the current case is different from the *M/V “Saiga” (No. 2)*, *M/V “Virginia G”* and *M/V “Norstar.”* The critical issue, from the perspective of the preponderance test, is the nature of the rights invoked by the claimant State in the proceedings, and whether they are rights that belong to the State under UNCLOS. In the *M/V “Virginia G,”* the Tribunal looked at the “principal rights that Panama alleges have been violated” and at their “nature.”¹⁴⁷ It concluded that these rights “include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of the coastal State” and indicated that “[t]hose rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama.”¹⁴⁸ On this basis, it decided that “the claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged violations” of Panama’s rights under the Convention.¹⁴⁹ The rule on exhaustion of local remedies was found not to apply.¹⁵⁰

81. The present case is no different. The Marshall Islands has brought a case that, at its core, concerns freedom of navigation and exclusive flag State jurisdiction: the “principal rights” that the Marshall Islands alleges have been violated are quintessential State rights under UNCLOS. This excludes the application of the rule on exhaustion of local remedies.

82. Second, the Marshall Islands’ human rights-related claims are not disconnected from UNCLOS.¹⁵¹ The claim of the Marshall Islands is that, by its conduct, Equatorial Guinea has breached gateway provisions of UNCLOS that incorporate, by *renvoi*, other rules of international law, including fundamental human rights standards¹⁵² and general principles or rules of international law which are applicable by virtue of Article 293. There is no support for Equatorial Guinea’s proposition that the rule on exhaustion of local remedies, as articulated in the *M/V “Saiga” (No. 2)*, *M/V “Virginia G”* and *M/V “Norstar,”* should apply differently because the Marshall Islands has invoked human rights violations to find “independent alleged

¹⁴⁵ **Counter-Memorial**, para. 150 (emphasis in original omitted).

¹⁴⁶ **Counter-Memorial**, para. 152.

¹⁴⁷ *M/V “Virginia G” (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014 (“**Virginia G**”), at para. 157.

¹⁴⁸ *Virginia G*, at para. 157 (emphasis added).

¹⁴⁹ *Virginia G*, at para. 158.

¹⁵⁰ Similarly, ITLOS in the *M/V “Norstar”* highlighted that “the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to Panama under article 87 of the Convention, and (...) a violation of that right would amount to direct injury to Panama”: *Norstar*, Preliminary Objections Judgment, at para. 270. See also, less explicitly, *Saiga (No. 2)*, at para. 97. In these cases, too, the rule on exhaustion of local remedies was found not to be applicable.

¹⁵¹ **Counter-Memorial**, para. 152.

¹⁵² **Memorial**, paras. 438(e) and (f).

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breach[es] of UNCLOS.”¹⁵³ In fact, this serves to reinforce that it is the rights of the Marshall Islands as the flag State that are at stake and have been injured.

83. Equatorial Guinea also challenges the Marshall Islands’ contention that the rule on exhaustion of local remedies does not apply because there is no jurisdictional connection between Equatorial Guinea and those injured by its conduct.¹⁵⁴ It does so on the ground that “all claims related to alleged breaches of the crew’s human rights relate to conduct occurring on the territory of Equatorial Guinea.”¹⁵⁵ This does not create a relevant jurisdictional connection. As explained by Vice-President Wolfrum in his separate opinion elucidating the relevant passage of the Tribunal’s judgment in the *M/V “Saiga” (No. 2)*,¹⁵⁶ the rule on the exhaustion of local remedies:

is only applicable if a prior *voluntary* link exists between the individual and the Respondent State (...). In consequence it does not apply, as the [*M/V “Saiga” (No. 2)*] Judgment rightly points out (...), in cases where the State having taken measures *acted outside the scope of its jurisdiction*. In particular, when a State had no jurisdiction concerning the measures taken (...) the requirement to exhaust local remedies would amount to a recognition of the jurisdiction of that State. This is certainly not the objective of the concept on the exhaustion of local remedies.¹⁵⁷ (emphasis added)

84. The present case is on all fours with the “*M/V Saiga*” (No. 2). Equatorial Guinea took measures “outside the scope of its jurisdiction,” both prescriptive and enforcement. As explained in Chapter 4, the “*Heroic Idun*” was brought by Equatorial Guinea into Equatorial Guinea’s territory against its volition, under the threat of the use of force, in breach of the Marshall Islands’ freedom of navigation and exclusive flag State jurisdiction. Equatorial Guinea, in addition, investigated and adopted measures pursuant to an exorbitant exercise of prescriptive jurisdiction once the Vessel was in Luba, as explained in Chapter 5. In the circumstances, a jurisdictional link does not exist. In fact, the Marshall Islands wishes to emphasize that Equatorial Guinea’s conduct contrary to UNCLOS is exactly what enabled Equatorial Guinea to violate the rights of the crew in Equatorial Guinea.

85. Lastly, in its Counter-Memorial, Equatorial Guinea claims that no evidence is provided for the “bare assertion” that “there were no reasonably available and effective domestic

¹⁵³ **Counter-Memorial**, para. 152 (emphasis in original omitted).

¹⁵⁴ **Memorial**, paras. 118(d) and 119(c)–(d).

¹⁵⁵ **Counter-Memorial**, para. 153.

¹⁵⁶ See in particular *Saiga (No. 2)*, at para. 100: “In the opinion of the Tribunal, whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined in the light of the findings of the Tribunal on the question whether Guinea’s application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the “*Saiga*” could be deemed to have been within Guinea’s jurisdiction. If, on the other hand, Guinea’s application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed. The question whether Guinea was entitled to apply its customs laws is dealt with in paragraphs 110 to 136. For reasons set out in those paragraphs, the Tribunal concludes that there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case.”

¹⁵⁷ *Saiga (No. 2)*, Separate Opinion of Vice-President Wolfrum, at para. 55.

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remedies or any that provided a reasonable prospect of success.”¹⁵⁸ For the reasons given in the Memorial¹⁵⁹ and above, the requirement to exhaust local remedies does not apply and does not exclude admissibility in this case. Without prejudice to that position, and for the avoidance of doubt, the Marshall Islands considers its assertion on the lack of effective domestic remedies to be correct, and supported by the evidence.¹⁶⁰

IV. The Chamber has jurisdiction over the Marshall Islands’ claims under UNCLOS’s gateway provisions

86. Equatorial Guinea contends that the Marshall Islands, through the use of “gateway provisions,” is improperly seeking to extend the jurisdiction of the Chamber¹⁶¹ over breaches of treaties external to UNCLOS, namely the ICCPR, the African Charter on Human and Peoples’ Rights (“**African Charter**”), SOLAS, STCW and COLREGS. This is a mischaracterization of the Marshall Islands’ argument.¹⁶²

87. By recourse to the gateway provisions in Articles 2(3), 56(2), 58(2), 87(1) and 87(2), the Marshall Islands is not seeking in any way to extend the Chamber’s jurisdiction beyond UNCLOS. The Marshall Islands is not seeking a finding of breach by Equatorial Guinea of any legal obligation by which it is bound other than in and pursuant to UNCLOS. In the context of gateway provisions, instruments other than UNCLOS are relied upon solely to inform the interpretation and application of UNCLOS, the adjudication of which would fall within the jurisdiction of the Chamber. They are not relied upon as self-standing sources of rights and obligations.

88. Equatorial Guinea relies on the *Arctic Sunrise*.¹⁶³ However, the reason the claim invoking the ICCPR was rejected by the Annex VII Tribunal in that case was because the Netherlands requested the Tribunal to establish a breach of the ICCPR.¹⁶⁴ In this case the Marshall Islands is not seeking a determination of breach of the ICCPR or the African Charter, or that the Chamber act as an “enforcement regime”¹⁶⁵ for those treaties. Rather, the Marshall Islands has sought that the Chamber establish breaches of UNCLOS provisions (the gateway provisions) on grounds that Equatorial Guinea has failed to respect and has violated the human rights of the crew, including as set out in the ICCPR and the African Charter.¹⁶⁶

¹⁵⁸ **Counter-Memorial**, para. 154.

¹⁵⁹ **Memorial**, paras. 117–120.

¹⁶⁰ See *Askins-1 (Annex RMI/-3)*, at para. 15 and *Askins-2 (Annex RMI/-52)*, at para. 9.

¹⁶¹ Equatorial Guinea quotes a passage of the *M/V “Norstar”* in which ITLOS indicated that Article 293 of UNCLOS may not be used to extend the jurisdiction of the Tribunal (**Counter-Memorial**, para. 162). This point is not relevant to the gateway argument made by the Marshall Islands.

¹⁶² Equatorial Guinea has not refuted that customary rules or principles of international law may be relevant to the interpretation and application of UNCLOS gateway provisions.

¹⁶³ **Counter-Memorial**, paras. 163–164.

¹⁶⁴ *Arctic Sunrise*, Netherlands Memorial, at para. 397(1)(c): “The Kingdom of the Netherlands therefore requests the arbitral tribunal to adjudge and declare that: (1) the Russian Federation (...) (c) (...) breached its obligations to the Kingdom of the Netherlands (...) as a non-injured State with a legal interest, in regard to the right to liberty and security of the persons on board a ship and their right to leave the territory and maritime areas under the jurisdiction of a coastal State as provided by Articles 9 and 12.2 ICCPR, and customary international law”.

¹⁶⁵ *Arctic Sunrise*, *Merits Award*, at para. 197.

¹⁶⁶ **Memorial**, paras. 438(f)(ii)–(v). The Marshall Islands also relies on customary human rights and general principles of international law concerning minimum standards of treatment in prisons.

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89. The reliance on gateway provisions of UNCLOS is not novel, considering that the very terms of UNCLOS may call upon a court or tribunal having jurisdiction pursuant to it to consider external rules for the purpose of the exercise of that jurisdiction. By way of example, in the *Enrica Lexie Incident*, Italy claimed that India had breached Articles 2(3), 56(2) and 58(2) of UNCLOS because it arrested and exercised criminal jurisdiction over two Italian Marines contrary to the State immunity they were entitled to in international law.¹⁶⁷ Similar to the Marshall Islands' argument in the present proceedings, Italy's argument in the *Enrica Lexie Incident* was that State immunity constituted one of the "rules of international law" to which UNCLOS gateway provisions operate a *renvoi*. The Annex VII tribunal found the gateway provisions invoked by Italy to be inapplicable *ratione loci*.¹⁶⁸ In the present proceedings, the Marshall Islands has explained in its Memorial that the gateway provisions are "pertinent and applicable"¹⁶⁹ in respect of Equatorial Guinea's conduct contrary to the ICCPR, African Charter, and other human rights obligations,¹⁷⁰ as well as SOLAS, STCW and COLREGS.¹⁷¹

90. As regards SOLAS, STCW and COLREGS, the Marshall Islands' claims fall into two categories.¹⁷² The first is that the relevant rules are incorporated into UNCLOS through the gateway provisions and that, by acting inconsistently with these Conventions, Equatorial Guinea breached these UNCLOS gateways provisions. The same considerations apply as to the claims made under the gateway provisions which make a *renvoi* to the ICCPR and the African Charter, as well as custom and general principles. The second category of claims are claims of direct breaches of SOLAS, STCW and COLREGS. These claims are made on the different basis of Article 297(1)(c), as interpreted by tribunals constituted under UNCLOS.¹⁷³

V. Equatorial Guinea' arguments in respect of the law applicable to the present dispute

91. In the Chapter of its Reply concerning "Applicable law," Equatorial Guinea makes three main arguments: (i) that by referring to "other rules of international law not incompatible with the Convention" in the context of gateway UNCLOS provisions, the Marshall Islands is requesting the Chamber to exercise jurisdiction over alleged breaches of treaties external to UNCLOS;¹⁷⁴ (ii) that Article 293 permits the Chamber to have recourse, for deciding a claim under UNCLOS, to external agreements which give effect to UNCLOS obligations, and that

¹⁶⁷ See *The "Enrica Lexie" Incident (Italy v. India)*, Perm. Ct. Arb. Case No. 2015-28, Award of 21 May 2020 ("*Enrica Lexie, Merits Award*"), at para. 734.

¹⁶⁸ *Enrica Lexie, Merits Award* at para. 798: "(...) in the view of the Arbitral Tribunal, these Articles are not pertinent and applicable in the present case. Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention apply to the exercise of rights and duties in the territorial sea and the exclusive economic zone by coastal States, while the evidence in the present case demonstrates that India enforced its jurisdiction over the Marines only in its internal waters and on land, when the Marines were arrested and detained." (emphasis added).

¹⁶⁹ *Enrica Lexie, Merits Award* at para. 798.

¹⁷⁰ **Memorial**, para. 282.

¹⁷¹ **Memorial**, para. 312.

¹⁷² **Memorial**, paras. 285–293.

¹⁷³ **Memorial**, para. 292.

¹⁷⁴ **Counter-Memorial**, paras. 174–176.

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the Yaoundé Code constitutes one such agreement;¹⁷⁵ and (iii) that the Yaoundé Code is relevant State practice for the implementation of provisions of UNCLOS.¹⁷⁶ Each of these is addressed in turn.

92. As regards the first argument, the Marshall Islands has already addressed the gateway UNCLOS provisions in section IV of this Chapter, concerning the Chamber's jurisdiction.¹⁷⁷ As explained there, the Marshall Islands is not requesting, by invoking gateway provisions, that the Chamber exercise jurisdiction over alleged breaches of treaties external to UNCLOS. There is no need to repeat those arguments.

93. As to Equatorial Guinea's contention that Article 293 permits the Chamber to have recourse to the Yaoundé Code in assessing claims under UNCLOS, the Yaoundé Code is not among the "rules of international law not incompatible with this Convention" applicable to the Parties to this dispute pursuant to Article 293, for the following reasons:¹⁷⁸

- a. The Marshall Islands is not a party to Yaoundé Code. Further, the Yaoundé Code does not purport to codify customary international law and does not for the most part purport to be binding even among its signatories.¹⁷⁹ It is not, therefore, a "rule of international law" binding on or in any way opposable to the Marshall Islands;
- b. If interpreted as Equatorial Guinea contends, namely as allowing the seizure of a foreign-flagged vessel solely because a signatory to the Code requests it, the Yaoundé Code is "incompatible with the Convention."¹⁸⁰

94. Equatorial Guinea also asserts that "State practice pursuant to the Yaoundé Code must be seen as relevant State practice for the implementation of relevant provisions of UNCLOS," because it "represent[s] the agreement and commitments of West and Central African States regarding how they will operationalize and implement various UNCLOS obligations within the context of the regional maritime security architecture."¹⁸¹

95. If this submission is that the Yaoundé Code meets the requirements of relevant State practice for the purpose of the rules of treaty interpretation, it is not correct. The Yaoundé Code is not an agreement in the formal sense of the term, but a non-binding code of conduct,¹⁸² and, in any case, given its limited membership of 25 countries, cannot be a "subsequent agreement between the parties" of UNCLOS (170 parties) regarding its interpretation or the application of its provisions for the purposes of Article 31(3)(a) of the Vienna Convention on the Law of Treaties ("VCLT"). Nor, for the same reason, is it "subsequent practice" in the application of UNCLOS "which establishes the agreement of the parties" regarding its interpretation for the purpose of Article 31(3)(b) of the VCLT.

¹⁷⁵ **Counter-Memorial**, para 177.

¹⁷⁶ **Counter-Memorial**, para 178.

¹⁷⁷ At paras. 86–90 of the Reply.

¹⁷⁸ Equatorial Guinea's reliance on the Yaoundé Code is addressed further at paras. 159–163 of the Reply.

¹⁷⁹ See Article 19(a) of the Yaoundé Code, addressed further at para. 162 below.

¹⁸⁰ In fact, as explained at para. 163 below, the Yaoundé Code does not purport to depart from UNCLOS and does not contain any provisions which invite its parties to act inconsistently with UNCLOS.

¹⁸¹ **Counter-Memorial**, para. 178.

¹⁸² With the possible exception of one provision, addressed below at para. 162.

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Further, the Yaoundé Code also cannot be relied on for purposes of Article 31(3)(c) of the VCLT, often invoked alongside Article 293.¹⁸³

96. In the *South China Sea Arbitration*, the Annex VII tribunal noted that Article 293 alongside Article 31(3)(c) of the VCLT “enables it in principle to consider the relevant provisions of the [Convention on the Biological Diversity] for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention.”¹⁸⁴ Article 31(3)(c) provides that, in interpreting a treaty, there shall be taken into account “any relevant rules of international law applicable in the relations between the parties.” The tribunal in the *South China Sea Arbitration* could rely on this provision since both China and the Philippines were parties to the Convention on the Biological Diversity. The tribunal also relied on “Appendix I to the CITES Convention,” which it said “forms part of the general corpus of international law that informs the content of Article 192 and 194(5).” It did so noting that “CITES is the subject of nearly universal adherence, including by the Philippines and China.”¹⁸⁵

97. By contrast the Yaoundé Code, for reasons explained above, is not applicable in the relations between the Marshall Islands and Equatorial Guinea either as treaty law, or because it is the “subject of nearly universal adherence.” Therefore, it cannot be relied on for purposes of interpretation of UNCLOS under Articles 293 of UNCLOS and 31(3)(c) of the VCLT.

¹⁸³ **Memorial**, para 129.

¹⁸⁴ *South China Sea, Jurisdiction and Admissibility*, at para. 176.

¹⁸⁵ *South China Sea, Merits*, at para. 956.

CHAPTER 4

EQUATORIAL GUINEA HAS NO DEFENSE TO THE CLAIMS
OF BREACHES OF FREEDOM OF NAVIGATION AND EX-
CLUSIVE FLAG STATE JURISDICTION

I. Introduction: Equatorial Guinea's piracy defense

98. Equatorial Guinea relies on only one defense to the Marshall Islands' claims that it breached the Marshall Islands' freedom of navigation and exclusive flag State jurisdiction: that it acted in accordance with its obligations to cooperate in the repression of piracy under UNCLOS and the Yaoundé Code in response to a request by Nigeria ("**the piracy defense**").¹⁸⁶ Equatorial Guinea claims that it "did so on reasonable suspicion of piracy as communicated by Nigeria" in respect of the "*Heroic Idun*"¹⁸⁷ and that the "*Heroic Idun*"'s apprehension was therefore lawful, given that piracy constitutes an exception to freedom of navigation and exclusive flag State jurisdiction on the high seas.¹⁸⁸

99. Equatorial Guinea contends that the reasonable suspicion of piracy "was clearly present."¹⁸⁹ This is false. The burden to prove its assertion is on Equatorial Guinea. The evidence it relies on shows there was not, and could not have been, any "reasonable suspicion of piracy."

100. The contemporaneous evidence that Equatorial Guinea relies on for its seizure of the Vessel and crew in the EEZ of São Tomé and Príncipe simply does not say that the Vessel is suspected of or has carried out piracy. Equatorial Guinea relies on:

- a. A WhatsApp message from Nigeria that Equatorial Guinea claims was received on 10 August 2022 by Equatorial Guinea's Director General of Military Cooperation, time stamped 14:48 ("**the First WhatsApp message**"), which reads, in the official translation provided by Equatorial Guinea:

Current intelligence indicates that a large carrier of crude oil (VLCC), Heroic Idun (IMO: 9858058), a 336-meter super tanker, *came to load crude without approval and is suspected of being involved in an illegal fuel supply operation*. When NNS Gongola contacted them for interrogation, it raised *a false alarm of a piracy attack* and to avoid collateral damage, it *left Nigerian waters* and enter [sic] therefore it is necessary to stop the vessel so that it *explains its activities in waters of Nigeria*. It is kindly requested that, for example, the Navy tracks and stops the vessel. (...) ¹⁹⁰ (emphasis added)

- b. A second WhatsApp message from Nigeria that Equatorial Guinea claims it received on 10 August 2022, time stamped 14:48 ("**the Second WhatsApp message**"),

¹⁸⁶ Counter-Memorial, para. 3.

¹⁸⁷ Counter-Memorial, para. 3.

¹⁸⁸ Counter-Memorial, paras. 183, 196–201, 221–231.

¹⁸⁹ Counter-Memorial, para. 205.

¹⁹⁰ REG-002, pp. 2–3. The original message was in all capital letters.

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and also allegedly received by Equatorial Guinea's Director General of Military Cooperation, which reads, in the official translation provided by Equatorial Guinea:

The Nigerian CNS requests your help to stop the MV HEROIC IDUN involved in *theft of crude oil in Nigeria*.¹⁹¹ (emphasis added)

c. A Note Verbale from the Embassy of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of Equatorial Guinea dated 10 August 2022 (“**the Note Verbale**”) which reads, in the relevant passages:

The Embassy of the Federal Republic of Nigeria in Malabo, Equatorial Guinea, presents its compliments to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea and has the honour to kindly request the latter to intervene in the tracking, arrest and repatriation of an illegal large Crude Carrier (VLCC) Heroic IDUN No. (IMO9858058), a 336 meter super tanker which *was involved in the illegal entry into Nigerian's [sic] territorial waters to load crude oil without proper approval*. It is pertinent to indicate *the Heroic Idun was a Martial Island [sic] flagged ship* but escaped into Equatoguinean maritime domain by *raising a false piracy attack alarm to avoid collateral damage*.¹⁹² (emphasis added)

101. On Equatorial Guinea's pleaded case, to decide whether Equatorial Guinea acted lawfully, this Chamber only needs to address the following two questions:

- a. Whether Equatorial Guinea had any grounds at all to conclude, on the basis of the information available to it at the time, that the “*Heroic Idun*” was a vessel suspected of piracy;
- b. If the answer to (a) is in the affirmative, whether Equatorial Guinea acted consistently with UNCLOS and international law in seizing the “*Heroic Idun*,” diverting it into Equatorial Guinea, detaining it and its crew, and ultimately transferring them into the custody and control of Nigeria.

102. For the reasons explained in the following sections, the answer to both questions is in the negative. Indeed, it is plain from the WhatsApp messages that Equatorial Guinea relies on for its seizure of the Vessel set out above, as well as from the Note Verbale, that they do not say the “*Heroic Idun*” was engaged in, or suspected of, piracy.

103. This Chapter is organized as follows: **section II** provides an overview of UNCLOS's anti-piracy framework; **section III** demonstrates that Equatorial Guinea has no case that the “*Heroic Idun*” was either a vessel reasonably suspected of piracy, or a pirate vessel, and that there was no basis for Equatorial Guinea to exercise any of UNCLOS's enforcement powers against it; **section IV** explains that piracy appears to be a defense constructed *ex post facto* by Equatorial Guinea; **section V** shows that, had there been a suspicion of piracy in respect of the “*Heroic Idun*,” Equatorial Guinea should have exercised a right of visit, rather than seizing the

¹⁹¹ REG-002, p. 3.

¹⁹² Counter-Memorial, paras. 42–43; REG-019.

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Vessel; **section VI** elaborates on anti-piracy cooperation pursuant to UNCLOS and the Yaoundé Code, to demonstrate that neither authorized the seizure of the Vessel and crew; and **section VII** draws conclusions on Equatorial Guinea's piracy defense.

II. The UNCLOS anti-piracy framework

104. UNCLOS sets out the relevant legal framework in respect of countering piracy in Articles 100 to 107 and 110.

A. The definition of piracy

105. Article 101 defines piracy as follows:

Article 101 *Definition of piracy*

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

B. Enforcement powers in respect of piracy

106. UNCLOS's enforcement powers on the high seas in respect of piracy are set out at Articles 105 and 110 of the Convention.¹⁹³

¹⁹³ These enforcement powers are not available in respect of other conduct – such as armed robbery at sea – which, while factually similar to piracy, does not meet the legal test for piracy under UNCLOS (i.e., because the acts have not occurred on the high seas). See, in this regard, Yacouba Cissé (Special Rapporteur), First report on prevention and repression of piracy and armed robbery at sea (22 March 2023), 74th session of the UN ILC, A/CN.4/758, at p. 18, para. 46: “Indeed, piracy committed in the territorial waters or the internal waters of a State, even if it is characterized as armed robbery at sea, is still piracy once it has been defined as such by domestic law. *This piracy under domestic law would not however give rise to the application of universal jurisdiction, unlike piracy under the law of nations, which does involve the exercise of universal jurisdiction by all States.*” (emphasis added). See also Anna Petrig, “Piracy”, in Donald Rothwell et al (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) (“*Oxford Handbook of the Law of the Sea*”), at p. 850: “(...) a ship that directly engages in acts similar to those defined in Article 101(a) of [UNCLOS] in territorial waters cannot be seized by virtue of Article 105, which is limited to the high seas.”

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107. Article 105 indicates when a foreign flagged vessel may, exceptionally, be seized on the high seas on grounds of piracy. It provides:

Article 105
Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith. (emphasis added)

108. It is plain on the face of Article 105 that this is a permissive provision: it does not mandate the seizure of a pirate ship (“shall seize”), but merely authorizes it (“may seize”).¹⁹⁴ The same goes in respect of prosecution of pirates.¹⁹⁵ It is also plain on the face of Article 105 that UNCLOS authorizes the seizure of a foreign-flagged vessel on the high seas by any State only in two specific circumstances:

- a. if the vessel is a “pirate ship”; or
- b. if the vessel is a “ship taken by piracy and under the control of pirates.”

109. Allegations of falsely reporting a piracy attack are not among the grounds allowed for seizure under Article 105.

110. A “pirate ship” is defined by UNCLOS as follows:

Article 103
Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

111. Article 110 of UNCLOS provides for a warship’s right of visit of a foreign-flagged vessel on the high seas in the case of suspected piracy. In relevant part it provides:

¹⁹⁴ See Joseph W. Bingham, “Part IV—Piracy”, (1932) 26(1) A.J.I.L. Supplement: Research in International Law, p. 739 (“**Commentary to the Harvard Draft**”), pp. 755–756: “Many states do not undertake to punish a pirate who has not offended against its peculiar interests, and it would be difficult to obtain a general consent of all states to a treaty provision that they owe each other mutual duties to prosecute all pirates before their tribunals, or even to pursue and capture them on the high sea or in their own territory, for the imposition of such a duty would imply international liability if the duty were not fulfilled in a particular case.”

¹⁹⁵ Robin Churchill, “The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?” in Panos Koutrakos and Achilles Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014) (“**Churchill, Piracy Provisions**”), at p. 30: “The second question raised by Article 105 of UNCLOS and Article 19 of the High Seas Convention is whether a State having suspected pirates in its custody is obliged to prosecute them. The use of the word ‘may’ in Articles 105 and 19 suggests that there is no such obligation.”

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Article 110 *Right of visit*

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(...)

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

(...)

112. As noted by scholars commenting on Article 110(1)(a), "[t]he object and purpose of the right of visit is to verify whether a ship is indeed engaged in piracy."¹⁹⁶

113. The relationship between the enforcement powers in Articles 110 and 105, respectively, is one of progression. This is a matter of straightforward treaty interpretation, having regard to the ordinary meaning to be given to the articles in their context.¹⁹⁷ If there is no reasonable ground to suspect piracy, a foreign-flagged vessel may not be visited on the high seas. If there is a *suspicion on reasonable grounds* that a ship may be engaged in piracy, *it may be visited* under Article 110. If the vessel is *confirmed to be* a pirate ship within the meaning of Article 103, only then do Article 105 powers of *seizure* become available.

114. Guilfoyle notes, in this regard:

On the high seas, any government vessel may board a vessel *suspected of piracy* as an exception to the otherwise exclusive jurisdiction of the flag State. *Where evidence of piracy is discovered the State vessel may seize the*

¹⁹⁶ Petrig, "Piracy", in *Oxford Handbook of the Law of the Sea*, p. 852.

¹⁹⁷ Article 105 may be interpreted in light of Articles 106 and 110(3). The former provides that "Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure." The latter provides that "If the suspicions [on the basis of which a vessel was visited] prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained." The requirement in Article 106, is "adequate grounds", not "reasonable grounds." The requirement in Article 110(3) is that the "suspicion" be unfounded. The distinction between the grave act of seizing a vessel, to which Articles 105 and 106 refer, and the lesser interference of boarding and examining it under Article 110, to which Article 110(3) refer, suggests that what is "reasonable grounds for suspecting" for the purposes of boarding a vessel does not equate to and is not of itself "adequate grounds" for seizing it.

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suspect vessel, arrest persons on board, and subject them to the jurisdiction of the seizing State's courts.¹⁹⁸ (emphasis added)

115. Beckman similarly explains:

Article 110 on right of visit provides that a warship on the high seas (or in an EEZ) is justified in boarding a private foreign ship if there are reasonable grounds for suspecting that the ship is engaged in piracy. The warship may send a boat under the command of an officer to the suspect ship to verify the ship's right to fly its flag. If suspicion remains after the documents have been checked, the warship may proceed to a further examination on board the ship. *If upon examination it is determined that the ship is a pirate ship, the warship may exercise its right to seize the ship as provided in article 105.*¹⁹⁹ (emphasis added)

116. Geiß and Petrig provide further elaboration on the relationship between Article 105 and 110, as follows:

(...) The first sentence of Article 105 UNCLOS grants enforcement powers against pirate ships that go beyond the mere right of visit laid out in Article 110 UNCLOS. Article 105 UNCLOS, for example, authorizes the arrest of the crew of a pirate ship. However, unlike Article 110 UNCLOS, Article 105 UNCLOS only grants these enforcement powers vis-à-vis pirate ships as defined in Article 103 UNCLOS (i.e. an identified pirate ship). On the basis of the wording of Article 105 UNCLOS, *a mere suspicion that a ship might be engaged in piracy would not seem to suffice to trigger the enforcement powers provided by Article 105 UNCLOS*. These different standards in terms of suspicion in Articles 110 and 105 UNCLOS are in line with the graduation of enforcement competencies laid out in these provisions.

Article 110 UNCLOS grants a (mere) right of visit, in order to verify an initial suspicion. The logic of Article 110(2) UNCLOS is that as the initial suspicion is gradually substantiated, the range of enforcement powers against the suspicious ship is proportionally extended. (...)

*Ultimately, once the suspicion has been confirmed and the ship can be identified as a pirate ship in accordance with Article 103 UNCLOS, the enforcement measures granted by Article 105 UNCLOS become available. (...)*²⁰⁰

(emphasis added)

117. This is consistent with the consideration that:

¹⁹⁸ Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights" (2010) 59(1) I.C.L.Q., p. 141, at p. 144.

¹⁹⁹ Robert Beckman, "The piracy regime under UNCLOS: problems and prospects for cooperation", in Robert C. Beckman and J. Ashley Roach (eds.), *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, 2012) ("**Beckman, The piracy regime under UNCLOS**"), at pp. 25–26.

²⁰⁰ Anna Petrig and Robin Geiß, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press 2011) ("**Piracy and Armed Robbery at Sea**"), at p. 56.

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Article 105 of [UNCLOS] allows for the seizure of ships and the arrest of suspects aboard, that is, measures that are more intrusive and in greater conflict with the freedom of navigation as compared with those flowing from the right of visit.²⁰¹

118. Article 110, for its part:

(...) represents one attempt to address the tension between the principles of freedom of navigation and exclusive flag State jurisdiction, on the one hand, and the common interest in ensuring effective enforcement of laws against certain serious offenses on the other. (...) [T]he right of visit permits a minimal intrusion on a vessel's navigation rights in the name of effective law enforcement.²⁰²

119. When enforcement powers pursuant to Article 105 have been exercised without adequate grounds, UNCLOS provides for a duty of reparation of the damage caused in Article 106, which provides:

Article 106 *Liability for seizure without adequate grounds*

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, *the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.* (emphasis added)

120. The text of the provision makes clear that in the event of a seizure without adequate grounds, the responsibility lies with “the State making the seizure.” This is consistent with the fact that unjustified interference on the high seas with ships flying a foreign flag constitutes a breach of, *inter alia*, Articles 87 and 92 of UNCLOS. Such undue interference “entail[s] an obligation to provide reparation on the basis of the customary rules on internationally wrongful acts.”²⁰³

III. Equatorial Guinea has failed to establish that apprehension of the “*Heroic Idun*” was on grounds of piracy

121. Equatorial Guinea has failed to establish its case that the apprehension of the “*Heroic Idun*” was on grounds of piracy, as detailed below. Given this, Equatorial Guinea’s piracy defense fails to meet all the claims the Marshall Islands has made in Chapter 5 of its Memorial: the claim that Equatorial Guinea breached the Marshall Islands’ freedom of navigation and right to sail on the high seas, contrary to Articles 87 and 90 of UNCLOS; the claim that Equatorial Guinea did not have due regard to the rights of the Marshall Islands in exercising its own freedom of navigation in the EEZ of São Tomé and Príncipe, contrary to Article 87(2), or that, in any event, it abused its freedom of navigation contrary to Article 300 read with Article 87(1)

²⁰¹ Petrig, “Piracy” in *Oxford Handbook of the Law of the Sea*, at p. 852.

²⁰² Craig H. Allen, “The Peacetime Right of Approach and Visit and Effective Security Council Sanctions Enforcement at Sea” (2019) 95 Int’l L. Stud., p. 400, at p. 414. See also *Piracy and Armed Robbery at Sea*, at p. 56.

²⁰³ Report of the 11th Commission, “Piracy, Present Problems”, in *Yearbook of the Institute of International Law* (2023), vol. 83, p. 156 (“**Piracy, Present Problems**”), at p. 224.

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and 90; and the claim that Equatorial Guinea breached the Marshall Islands' exclusive flag State jurisdiction, contrary to Article 92 of UNCLOS.

122. Equatorial Guinea contends that it apprehended the “*Heroic Idun*” “on reasonable suspicion of piracy as communicated by Nigeria,”²⁰⁴ and that anti-piracy action “requires only reasonable suspicion, *made in the relevant context with the information available at the time*, that piracy may have occurred – as was clearly present in this case.”²⁰⁵

123. As set out in the introduction to this Chapter, the contemporaneous communications that Equatorial Guinea has produced to explain that the reasonable suspicion of piracy “was clearly present in this case” are:

- a. The First WhatsApp message and the Second WhatsApp message from Nigeria dated 10 August 2022.
- b. The Note Verbale from Nigeria dated 10 August 2022.

124. Contrary to Equatorial Guinea's position, this contemporaneous correspondence does not contain the slightest suggestion that the “*Heroic Idun*” was suspected of piracy, let alone that there was a *reasonable* suspicion of piracy, or establish that it was a pirate ship.

125. There is simply nothing in the communications from Nigeria that suggests the “*Heroic Idun*” was being pursued on grounds of piracy. It would be extraordinary for Nigeria to have omitted reference to allegations of piracy against the “*Heroic Idun*” if that was the basis of its request.

126. In fact, it was clear from these communications that allegations that the “*Heroic Idun*” had carried out acts of piracy were not the basis of Nigeria's request:

- a. The First WhatsApp message and the Note Verbale said that the “*Heroic Idun*” had raised a false piracy attack alarm, i.e., not that the “*Heroic Idun*” had committed an act of piracy.
- b. The First and the Second WhatsApp messages said the “*Heroic Idun*” “came to load crude [oil] without approval,” was “involved in theft of crude oil,” and “is suspected of being involved in an illegal fuel supply operation.”²⁰⁶ The Note Verbale said the “*Heroic Idun*” entered Nigerian waters “to load crude oil without proper approval.” These acts do not integrate the *actus reus* of piracy under Article 101 of UNCLOS. They are not “violence or detention, or any act of depredation.” The notion of “depredation” presupposes the use of a degree of force.²⁰⁷
- c. Both the First and the Second WhatsApp messages and the Note Verbale said the conduct complained of had occurred “in Nigeria,” in the “waters of Nigeria,” and

²⁰⁴ Counter-Memorial, para. 3.

²⁰⁵ Counter-Memorial, para. 205 (emphasis added).

²⁰⁶ REG-01.

²⁰⁷ Churchill notes that “[d]epredation in the context of piracy appears to mean stealing goods from a ship by force, and possibly also merely attacking a ship. Since both involve some force, there is a substantial overlap with the alternative requirement of an act of violence.” (Churchill, Piracy Provisions, at p. 16).

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in the “territorial waters of Nigeria.”²⁰⁸ An act cannot constitute piracy unless it occurs on the high seas (or in an EEZ), or in a place outside the jurisdiction of any State.²⁰⁹ Acts understood to have occurred in areas where a State exercises sovereignty cannot constitute piracy. Acts understood to have occurred in the territorial waters of a State, in particular, cannot constitute piracy.²¹⁰

d. The First WhatsApp message and the Note Verbale also said that the “*Heroic Idun*” was a 336-meter Marshall Islands-flagged oil tanker. While there are several IMO reports of piracy attacks in West Africa against oil tankers,²¹¹ including Marshall Islands-flagged tankers,²¹² there has never been an occurrence in which it was established that a foreign-flagged tanker was itself a vessel engaged in piracy. Given how large, easy to identify, and relatively slow VLCCs are, it is evident why these types of vessels are not used to carry out piracy attacks. In consideration of this, it was unrealistic to believe the “*Heroic Idun*” was a vessel “intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101,” for purposes of Article 103 of UNCLOS.

127. For these reasons, Equatorial Guinea did not have any justification to exercise any of the UNCLOS anti-piracy enforcement powers. It had neither the right of visit pursuant to Article 110, since there were no reasonable grounds for suspecting piracy, nor – *a fortiori* – the right to seize the Vessel pursuant to Article 105, since the “*Heroic Idun*” was not a confirmed pirate vessel.

128. It bears emphasis that there was also nothing that could support piracy allegations against the “*Heroic Idun*” in the information received by Equatorial Guinea subsequent to the seizure of the Vessel and during its detention and investigation in Luba; to the contrary, this information provides further confirmation that the “*Heroic Idun*” was not, and could not have been, under any interpretation of UNCLOS, a pirate vessel:

²⁰⁸ This is confirmed by Nchama-1, para. 18 (REG-WS-001): “The Nigerian authorities requested assistance for the apprehension of the vessel *Heroic Idun*, which was suspected of *illegal activity in Nigeria*, had broadcast a false alarm of piracy and had fled Nigerian authorities.” (emphasis added).

²⁰⁹ The expression “a place outside the jurisdiction of any State” is intended to mean “terra nullius”: see Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017) (“**Proelß Commentary**”), at pp. 737, 742, 751; Prevention and Repression of piracy and armed robbery at sea, Memorandum by the Secretariat, 75th session of the UN ILC, A/CN.4/767 (“**Prevention and Repression of piracy, Secretariat Memorandum**”), at para. 120; and Piracy, Present Problems, at p. 205.

²¹⁰ Prevention and Repression of piracy, Secretariat Memorandum, at para. 120; James Crawford, *Brownlie’s Principles of Public International Law* (9th edn, Oxford University Press 2019), at p. 287; Myron H. Nordquist et al. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol. 3, Martinus Nijhoff 1995) (“**Virginia Commentary Vol III**”), at p. 201; *Proelß Commentary* at p. 737; Clive Schofield and Kamal-Deen Ali, “Combating Piracy and Armed Robbery at Sea: from Somalia to the Gulf of Guinea”, in Robin Warner and Stuart Kaye (eds.), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016), at p. 278; Beckman, The piracy regime under UNCLOS, at p. 21 (“Attacks on ships in areas under the territorial sovereignty of a state, including internal waters, archipelagic waters and territorial sea, cannot constitute piracy under international law.”).

²¹¹ See, for example, “Reports on acts of piracy and armed robbery against ships: Annual Report – 2022” (19 April 2023), IMO MSC.4/Circ.267 (“**IMO Reports on piracy 2022**”).

²¹² See, for example, attacks against Marshall Islands flagged vessels in West Africa reported in the IMO Reports on piracy 2022, at Annex 1, p. 4: “*Largo Evolution*” (9 January 2022); “*BW Thor*” (8 February 2022); “*Arch Gabriel*” (3 April 2022); “*B. Ocean*” (23 November 2022).

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- a. On 20 August 2022 the Nigerian Navy published a press release noting that:

[T]he suspected rogue vessel, MT Heroic Idun, which veered *into Nigerian waters* with the intention to load oil illegally, could not do so before it was accosted by Nigerian Navy Ship, Gongola at the *Akpo Oilfield Terminal*. (...) ²¹³ (emphasis added)

- i. The reference to the Akpo Oilfield Terminal is particularly relevant. The Annex VII tribunal in the *Arctic Sunrise* specified that acts directed against artificial installations do not constitute piracy. The tribunal noted:

An essential requirement of Article 101 is that the act of piracy be directed “against another ship”. The *Prirazlomnaya* is not a ship. It is an offshore ice-resistant fixed platform. (...) Having concluded that the *Prirazlomnaya* is not a ship, the Tribunal need not consider the other elements required to show piracy within the meaning of Article 101. ²¹⁴

- ii. Another sentence in the press release is highly relevant to the question of whether piracy was at issue: the one indicating that “clearly [the “*Heroic Idun*”] had not commenced taking products from the oilfield.” ²¹⁵ Failure to take property cannot constitute “depredation,” for purposes of Article 101. In fact, the Nigeria press release makes clear that it is not “a crime for vessels to come into Nigerian waters ahead of time without clearance pending same from authorities.” ²¹⁶

- iii. Lastly, it is remarkable that a public press release from the Nigerian Navy should not mention any allegations of piracy against the Vessel, if that was the basis of the request of cooperation addressed to Equatorial Guinea. Instead, the statement simply says that it was the “defiance to constituted authority by the Captain of the vessel [which] necessitated the Navy to invoke the collaboration of neighbouring Equatorial Guinea.” ²¹⁷

- b. On 24 August 2022, Equatorial Guinea received additional information from Nigeria indicating that the events concerned allegations of illegal loading of crude oil occurred in the territorial waters of Nigeria. The Note Verbale referred to the “*Heroic Idun*” as a “336-meter super tanker involved in illegal entry into Nigeria’s territorial waters for unauthorized loading of crude oil.” ²¹⁸

²¹³ **Annex SA/-5**, referred to in the **Counter-Memorial**, para. 56.

²¹⁴ *Arctic Sunrise, Merits Award*, at paras. 238, 240. See also Petrig, “Piracy”, in *Oxford Handbook of the Law of the Sea*, at p. 848: “However, submarine cables and pipelines or fixed platforms are not ships in the sense of Article 100 of [UNCLOS]. This excludes attacks against oil rigs, as witnessed in the Gulf of Guinea, from the ambit of piracy under international law.”

²¹⁵ **Annex SA/-5**, referred to in the **Counter-Memorial**, para. 56. Indeed, the day the Vessel arrived in Luba, Equatoguinean officials had inspected the Vessel and confirmed it was ballast (i.e., not carrying any cargo) and advised that the Vessel was “innocent” (**EK/-5**).

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ **Counter-Memorial**, para. 57; **REG-020**.

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c. On 12 September 2022, in a lengthy and detailed Note Verbale, Nigeria articulated the grounds on which the “*Heroic Idun*” was being investigated, indicating, *inter-alia*, that:²¹⁹

i. The “*Heroic Idun*” was being investigated for “infractions while within the jurisdiction of the Nigerian maritime space.”

ii. The alleged offence consisted in an attempt by the “*Heroic Idun*” to “load crude oil without the required authorisation,” allegedly contrary to provisions of Nigerian law and Articles 56 and 60 of UNCLOS. Notably, no provision of UNCLOS concerning piracy was mentioned, which would be expected if piracy was being relied on.

iii. Another alleged offence consisted in the “*Heroic Idun*” having falsely reported to be the victim of a piracy attack, i.e., Nigeria was not saying that a piracy attack had occurred.

d. On 12 October, Equatorial Guinea was informed of Nigeria’s “detailed assessment and conclusions”²²⁰ that the “*Heroic Idun*” had:

i. “escaped from Nigerian waters after it attempted to illegally load crude oil from the Akpo Oil Field”; and

ii. “communicated false information about piracy attack against her by a Nigerian Navy ship within the Nigerian maritime environment.”

129. Finally, as set out in the next section below, none of Equatorial Guinea’s own conduct at the time is consistent with the piracy defense it now relies on. It never said to the Marshall Islands, Owners, crew or their representatives, at any time throughout the Vessel and crew’s detention in Equatorial Guinea, that the Vessel and crew had been seized on suspicion of piracy.

IV. Equatorial Guinea’s piracy defense is an *ex post facto* construct

130. All the evidence produced by Equatorial Guinea in its Counter-Memorial supports the conclusion that Equatorial Guinea’s piracy defense is an *ex post facto* construct. In making this submission, the Marshall Islands invites the Chamber to follow the approach to evidence of the International Court of Justice (“ICJ”) articulated in the *Armed Activities on the Territory of the Congo* case, where it said that it:

(...) will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give par-

²¹⁹ Counter-Memorial, para. 60; REG-021.

²²⁰ Counter-Memorial, para. 65; REG-040.

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ticular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (...).²²¹ (emphasis added)

131. The Chamber should give prominent weight to the First and Second WhatsApp messages and the Note Verbale of 10 August 2022, and the additional communications received by Equatorial Guinea during its detention of the Vessel, and discard evidence prepared by Equatorial Guinea after the fact.

132. In this regard, the first piece of evidence produced by Equatorial Guinea in which the allegation appears that Equatorial Guinea's actions against the "*Heroic Idun*" were undertaken because the Vessel had carried out acts of piracy is a Note Verbale by the Minister of Foreign Affairs of Equatorial Guinea to his Nigerian counterpart dated 3 June 2023.²²² In the Note Verbale Equatorial Guinea indicated to Nigeria its understanding that the "*Heroic Idun*" "had been pursued by the maritime authorities of Nigeria *due to having carried out illicit acts of illegal purchase of fuel and piracy*, among others."²²³ This is nearly 10 months after Equatorial Guinea's seizure of the Vessel and crew on 12 August 2022; more than 6 months after the Marshall Islands commenced Prompt Release Proceedings on 9 November 2022 before the ITLOS; and more than five months after the Marshall Islands' submission of the present dispute to the compulsory dispute settlement mechanism of UNCLOS on 18 December 2022.²²⁴

133. Furthermore, Equatorial Guinea never informed the Marshall Islands that it had allegedly seized and detained the "*Heroic Idun*" and its crew on grounds that it was suspected of having carried out an act of piracy. The Marshall Islands learned this for the first time from Equatorial Guinea's Counter-Memorial, on 15 July 2024. This is despite the Marshall Islands' repeated attempts, set out in detail in the Memorial,²²⁵ to engage with Equatorial Guinea in the immediate aftermath of the apprehension of the Vessel and crew, and during the months of their detention in Equatorial Guinea which followed. Equatorial Guinea never communicated any allegations of piracy to the Owners, crew or others involved in the Vessel either.

134. The timing of events set out above and the contemporaneous documentation support the inference that Equatorial Guinea's defense that the "*Heroic Idun*" had committed acts of piracy is an *ex post facto* construct devised for the purpose of proceedings. There is absolutely no evidence which supports this claim.

²²¹ *Armed Activities in the Congo*, at para. 61.

²²² **Counter-Memorial**, para. 99; **REG-053**, p. 2. In that Note Verbale, Equatorial Guinea expressly refers to the Marshall Islands' "lawsuit against the Republic of Equatorial Guinea before the International Tribunal for the Law of the Sea, in Hamburg, Germany, in relation to the Vessel Heroic IDUN and its Crew."

²²³ **REG-053**, p. 2 (emphasis added).

²²⁴ See Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on which it is based, *The Republic of the Marshall Islands v. The Republic of Equatorial Guinea*, 18 December 2022.

²²⁵ **Memorial**, paras. 96–99.

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V. A suspicion of piracy on reasonable grounds would not warrant seizure of the “*Heroic Idun*” on the high seas as Equatorial Guinea contends

135. As set out above, Equatorial Guinea’s case is that the seizure was “on reasonable suspicion of piracy as communicated by Nigeria.”²²⁶ As also set out above, there was nothing in Nigeria’s communications to suggest the Vessel had been involved in piracy, and nor was Equatorial Guinea’s conduct at the time consistent with the alleged “reasonable suspicion.” While this is sufficient to dismiss Equatorial Guinea’s case, given the way Equatorial Guinea has framed its argument, the Marshall Islands considers it nevertheless important to address the law on this point, because it is fundamental to the principles of freedom of navigation and exclusive flag State jurisdiction and the balance between competing interests that States have agreed with respect to combatting piracy. In summary, even if Equatorial Guinea had had reasonable grounds to suspect piracy, which it did not, the seizure of the Vessel and crew, and their diversion into Equatorial Guinea, would still have been contrary to UNCLOS.

136. As discussed above, where there are reasonable grounds to suspect piracy, enforcement powers are, at first, limited to a right of visit pursuant to Article 110. It is only if, on the basis of the exercise of this right of visit, piracy suspicions are confirmed, that the broader enforcement powers under Article 105 can be exercised.

137. The right of visit “is generally exercised by sending a sea-boat with a boarding team (or in some situations by fast-roping down from a helicopter) to the suspect vessel so that maritime law enforcement agents can then board the vessel and carry out the necessary inquiries or inspections associated with the specific purpose under article 110.”²²⁷ The ILC has explained that:

[i]f the suspicion [of piracy] is not allayed [after checking a vessel’s flag] the vessel may proceed to check the ship’s papers. To this end it must send a boat to the suspect ship. As a general rule, the warship may not require the merchant ship to put out a boat to the warship. That would be asking too much of a merchant ship, and a ship’s papers must not be exposed unnecessarily to the risk of getting lost.²²⁸

138. The United States Navy’s Standard Organization and Regulations Manual provides an exemplification of the documents that may be examined in the context of a visit pursuant to Article 110, including to dispel allegations of piracy. It provides:

6.3.21 VISIT AND SEARCH, BOARDING AND SALVAGE, AND PRIZE CREW BILL

(...)

f. APPROACH AND VISIT.

(1) DUTIES OF THE EXAMINING OFFICER. Personnel in the boat sent by U.S. naval vessels may carry arms. The examining officer shall

²²⁶ **Counter-Memorial**, paras. 3, 9, 212.

²²⁷ UNODC, *Maritime Crime: A Manual for Criminal Justice Practitioners* (2017), at p. 55.

²²⁸ Report of the International Law Commission covering the work of its seventh session, 2 May - 8 July 1955, A/2934, *Yearbook of the International Law Commission* (1955), vol. II, at p. 27.

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inquire of the master and, if necessary, the crew, regarding the nature of the vessel and its activity, relative to the circumstances which gave rise to the approach and visit; i.e., piracy, slave trade, etc. The examining officer shall recommend to the commanding officer one of these actions:

(a) That the ship be released (if ownership of the ship has been recently transferred);

(b) That the ship be detained or seized and sent in for adjudication (if papers, questioning of personnel, search, and inspections do not result in satisfactory proof of ship's innocence).

(2) PAPERS TO BE EXAMINED. The ship's papers to be examined are:

(a) A certificate of registry or bill of sale (...).

(b) The crew list.

(c) The passenger list.

(d) The ship's log (...).

(e) The bill of health.

(f) The ship's clearance papers.

(g) The certificate of charter.

(h) The invoices or manifests of cargo.

(i) The bills of lading.

(j) A consular declaration certifying the innocence of the cargo may be included but it is not considered conclusive evidence of innocence.

(...)²²⁹

139. The suspected vessel and crew may also be searched and questioned to verify or dispel any piracy suspicion.²³⁰ Where the situation appears to present risks to the safety of the personnel exercising the right of visit, solutions exist in the practice of maritime enforcement operations to manage that risk. For example, a preliminary security sweep of the vessel is possible "to identify possible threats, including hidden persons and weapons."²³¹ Geiß and Petrig note that while:

[t]his practice is not explicitly mandated by UNCLOS and tends to somewhat blur the line between visit and search under Article 110(2) UNCLOS (...) *it responds to imminent security needs of the operating personnel* and it does not significantly prolong the visit. Therefore, it seems feasible to argue that

²²⁹ As reproduced in the "Annotated Supplement to the Commander's Handbook on the Law of Naval Operations" (2024) 102 Int'l L. Stud. 1, at 3-41 – 3-45.

²³⁰ *Virginia Commentary* Vol III, at p. 245. Article 8bis(5)(b) of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides additional insight into the purpose and modalities of a boarding operation in the context of the repression of maritime criminality. It provides that "the requesting Party shall ask the first Party (hereinafter referred to as 'the flag State') for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed."

²³¹ *Piracy and Armed Robbery at Sea*, at p. 58. *Proelß Commentary*, at p. 770.

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an initial security sweep is comprised already by the right of visit.²³² (emphasis added)

140. In the present case, Equatorial Guinea received the request to apprehend the Vessel on 10 August 2022 and the “*Capitan David*,” a warship, located the Vessel two days later, on 12 August 2022. When it approached the “*Heroic Idun*,” it requested it to stop its engines. The Master complied with this instruction promptly. Further, he engaged with the Equatoguinean naval unit over radio and answered the Navy’s few questions promptly. The Master asked whether the unit intended to board the vessel²³³ and even invited them to do so. He told the Equatoguinean Navy that “they were most welcome to come on board [the “*Heroic Idun*”] to undertake their investigation.”²³⁴

141. During the many hours that had elapsed from the request for apprehension of the vessel, Equatoguinean authorities could easily have carried out further enquiries such as contacting the Marshall Islands in respect of any piracy suspicion that they may have had in respect of the “*Heroic Idun*,”²³⁵ or asking for further information from Nigeria about the request. There is no evidence Equatorial Guinea did any of these things.

142. Further, there was nothing in the manner in which the Vessel or crew behaved when they were approached by the “*Capitan David*” that would have prevented the Equatoguinean authorities from complying with their UNCLOS obligations and visiting the Vessel, if they suspected piracy. Instead, the Equatoguinean authorities proceeded to seize the Vessel and crew at gunpoint, and to divert them to Equatorial Guinea, contrary to UNCLOS and to the principle of reasonableness in enforcement action.²³⁶

VI. Reliance on anti-piracy cooperation does not assist Equatorial Guinea’s case

143. Equatorial Guinea further seeks to justify its conduct by relying on its obligation to cooperate in the repression of piracy. Such arguments do not assist Equatorial Guinea, for the reasons explained below.

A. Anti-piracy cooperation pursuant to UNCLOS

144. The duty to cooperate in the repression of piracy is set out in Article 100 of UNCLOS, which provides:

Article 100

²³² *Ibid.*

²³³ **Memorial**, para. 38; First Witness Statement of the Master, 15 December 2023 (“**Master-1**”), para. 88 (**Annex RMI/-1**); transcript of two conversations between the “*Capitan David*” and the “*Heroic Idun*” on 12 August 2022 (**Annex MT/-35**).

²³⁴ **Master-1**, para. 98 (**Annex RMI/-1**); transcript of two conversations between the “*Capitan David*” and the “*Heroic Idun*” on 12 August 2022 (**Annex MT/-35**).

²³⁵ Article 104 of UNCLOS provides, in this regard, that “[a] ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.” See also Second Witness Statement of William Gallagher, 22 November 2024 (“**Gallagher-2**”), paras. 6–7 (**Annex RMI/-53**).

²³⁶ The principle of reasonableness in enforcement action is addressed further at Chapter 6/II below.

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Duty to cooperate in the repression of piracy

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

145. Equatorial Guinea claims that Article 100 UNCLOS permitted (or even mandated) that it apprehend the “*Heroic Idun*.”²³⁷ This is wrong.

146. First, Article 100 is simply not engaged by the facts. As explained in the preceding sections, there is no support whatsoever for Equatorial Guinea’s contention that the request for the seizure of the “*Heroic Idun*” and her crew was based on allegations of piracy.

147. Second, Article 100 cannot be interpreted as conferring on the requested State an autonomous basis to exercise enforcement jurisdiction that the requested State does not otherwise have under Articles 110 and 105 of UNCLOS. Relatedly, Article 100 cannot be interpreted as exempting the requested State from assessing the compatibility of the requested action with its own obligations under UNCLOS and international law, including the duty to respect freedom of navigation and exclusive flag State jurisdiction.

148. This is evident from a straightforward interpretation of Article 100 in accordance with the rules of treaty interpretation reflected in Article 31 of the VCLT, i.e., the ordinary meaning of the words of Article 100 in light of its object and purpose, a contextual reading of Article 100 against other provisions of UNCLOS, and relevant principles of international law applicable in the relations between the parties.

149. Article 100 is an obligation of conduct. The object and purpose of Article 100 is to ensure cooperation between States in repressing piracy. There is nothing in the wording of that provision which grants additional rights or powers in the repression of piracy that States do not already have under other provisions of UNCLOS or international law. Put another way, there is nothing in the provision which relieves or purports to relieve parties of their other obligations under UNCLOS. Otherwise it would be tantamount to saying that the requested party has less obligations towards flag States than the requesting party, or that where two States cooperate in repressing piracy, they have less obligations towards the flag State than if they had acted alone. That would not only defy common-sense, but also provide an avenue to circumvent obligations under UNCLOS.

150. Nor is there anything in the context of Article 100 that would support such a construction. To the contrary, the other UNCLOS provisions on piracy reinforce that cooperation does not relieve States of their other obligations:

- a. Article 106 provides that responsibility for a seizure made without adequate grounds lies with the State making the seizure. Nothing in Article 106 suggests that the mere fact of a request by another State for seizure would amount to “adequate grounds” to make the seizure, particularly when the request in question is plainly supported on inadequate grounds. Nor does the obligation to “cooperate to the fullest possible extent” under Article 100 justify reading down Article 106 in this way.

²³⁷ Counter-Memorial, para. 205.

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b. Article 92(1) of UNCLOS provides for exclusive flag State jurisdiction on the high seas “save in exceptional cases *expressly provided for* in international treaties or in [UNCLOS].”²³⁸ Articles 105 and 110 *expressly* provide for an exception in respect of piracy. Article 100 cannot *implicitly* confer on the requested State a broader jurisdiction in respect of piracy than is provided for in respect of Articles 105 and 110, solely on the basis of a request by another State.

151. As regards other relevant rules of international law applicable in the relations between the parties against which Article 100 must also be read:

a. Under the law of State responsibility, even when a wrongful act may be the consequence of some form of cooperation between States, the “State which commits the act in question” is not relieved of its responsibility solely because it acted pursuant to the request of another State.²³⁹ Exceptions to this principle are rare. Equatorial Guinea has invoked none, and in any event none apply in this case.²⁴⁰

b. A State requested to cooperate in the prevention or repression of a crime is under an obligation to assess whether the requested conduct is consistent with its international obligations, and must act within the parameters of these obligations. The ICJ addressed this in the *Bosnian Genocide* case, where it held, with regard to the obligation to prevent genocide, that:

In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. (...) The State’s capacity to influence [the action of persons likely to commit, or already committing, genocide] *must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law*; seen thus, a State’s capacity to influence may vary depending on *its particular legal position vis-a-vis the situations* and persons facing the danger, or the reality, of genocide.²⁴¹ (emphasis added)

²³⁸ (emphasis added).

²³⁹ Article 19 of the Articles on Responsibility of States for Internationally Wrongful Acts (“**Articles on State Responsibility**”). See Commentary to Articles on State Responsibility, at p. 70, which provides: “Article 19 serves three purposes. First, *it preserves the responsibility of the State which has committed the internationally wrongful act*, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State” (emphasis added).

²⁴⁰ The exceptions are: (i) cases of coercion of the requested State pursuant to Article 18 of the Articles on State Responsibility (see also, Commentary to Articles on State Responsibility, at pp. 69–70: “Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. (...) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State”); and (ii) situations where an organ of a State is placed at the disposal of another State pursuant to Article 6 thereof. In fact, the ILC’s Commentary to Article 6 supports the Marshall Islands’ case in respect of Article 100, explaining that “article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise”: Commentary to Articles on State Responsibility, at p. 44.

²⁴¹ *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, I.C.J. Reports 2007, at para. 430.

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152. In an attempt to avoid its responsibility, Equatorial Guinea claims that in the *M/V “Norstar,”* Panama argued that “Spain, as the State providing judicial assistance [to Italy], was neither obligated nor expected to investigate whether an offence existed or whether the seizure was justified,” and that “Spain was merely responsible for the manner and methods of the seizure.”²⁴²

153. Panama’s pleadings in the “*Norstar*” do not assist Equatorial Guinea. Rather, they assist the Marshall Islands. The quoted passages confirm Panama’s understanding that the requested State is not relieved of its international responsibility under UNCLOS or international law solely on the basis of a request for cooperation. In Spain’s case, according to Panama, this responsibility would have concerned the “manner and methods of the seizure,” since the vessel was in the internal waters of Spain, an area where Spain could exercise enforcement jurisdiction. On the other hand, Equatorial Guinea’s responsibility is engaged not only in respect of the manner and methods of the seizure, but also in respect of whether the seizure was permitted in the first place, having occurred on the high seas, where the Marshall Islands enjoyed freedom of navigation and exclusive flag State jurisdiction.

154. The Marshall Islands’ interpretation of Article 100 is supported by the ILC’s commentary to Article 38 of the ILC’s Draft Articles Concerning the Law of the Sea, the precursor to Article 100 of UNCLOS. This provides:

Any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. *Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.*²⁴³ (emphasis added)

155. Equatorial Guinea seeks to rely on this passage to support its case.²⁴⁴ However, this is not correct. The Annex VII Tribunal in the “*Enrica Lexie*” case relied on the ILC commentary on Article 38 to conclude that:

The duty to cooperate under Article 100 of the Convention does not necessarily imply a duty to capture and prosecute pirates.²⁴⁵

156. This interpretation, and the emphasis on the latitude that countries are allowed pursuant to Article 100 finds support in the scholarship. Beckman, for example, notes:

Article 100 is very vague, and the ILC commentary seems designed to give something to both sides of the issue. *At best, it could be argued that article 100 establishes a duty of due diligence on states to cooperate to repress piracy. However, it seems to give them considerable latitude in deciding how they will cooperate.* It would be difficult to argue that if a state refuses to exercise its right to arrest suspected pirates on the high seas or to exercise its right to prosecute suspected pirates it has arrested, then it would be in breach of its obligation to cooperate in article 100.

²⁴² **Counter-Memorial**, paras. 124, 140.

²⁴³ Report of the International Law Commission covering the work of its eight session, 23 April-4 July 1956, A/3159, “Commentary to the articles concerning the law of the sea”, in *Yearbook of the International Law Commission (1956)*, vol. II, p. 265 at p. 282.

²⁴⁴ **Counter-Memorial**, para. 203.

²⁴⁵ *Enrica Lexie, Merits Award*, at para. 723 (emphasis added).

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The piracy regime in UNCLOS is not intended to impose obligations on states to seize pirates on the high seas or to provide uniform measures for arresting and punishing pirates. ...²⁴⁶

(emphasis added)

157. The latitude that Article 100 provides confirms that it is for the requested State, under its own responsibility, to decide what measures may be adopted in each individual case when cooperation is requested, if any.

158. Even if it were true that “Article 100 cannot be read as conditional upon a State waiting for confirmation that an act of piracy has – in fact – occurred”²⁴⁷ (which is consistent with the fact that, as noted above, States have powers of visit where there is a reasonable suspicion of piracy), it also does not mean that a State can “hide” behind Article 100 when the prerequisites for engaging the provision are patently not met, e.g., because the request for cooperation does not, even *prima facie*, concern repression of piracy. It also does not mean they have license to seize a vessel because they are requested to do so, when UNCLOS authorizes, at most, a right of visit. If the request asks for action contrary to international law, the requested State must refuse the request, or implement the request in a manner that is consistent with its international obligations, unless it wants to incur international responsibility.

B. Anti-piracy cooperation and the Yaoundé Code

159. Equatorial Guinea also claims that the seizure of the “*Heroic Idun*” and its crew was necessitated by its “duty” to cooperate to repress piracy under the Yaoundé Code.²⁴⁸ For reasons explained in the previous sections, piracy is not engaged by the facts of the present case and relying on Article 100 does not advance Equatorial Guinea’s case. Nor does relying on the Yaoundé Code, for several reasons.

160. First, the Marshall Islands is not a signatory to the Yaoundé Code. Equatorial Guinea’s rights and obligations towards the Marshall Islands derive from treaties to which both the Marshall Islands and Equatorial Guinea are parties, as well as from customary and general principles of international law. Cooperation under the Yaoundé Code does not and cannot relieve Equatorial Guinea of its obligations to the Marshall Islands under UNCLOS.²⁴⁹

161. Second, a code of conduct between regional coastal States cannot render lawful as against a third State, not a party to such regional instrument, what would be unlawful under UNCLOS, i.e., the interception and detention of a foreign-flagged vessel by a coastal State on the high seas, without a lawful basis in international law. A regional code of conduct does not engage, for interpretative purposes, any of the principles reflected in Article 31(2) or 31(3) of the VCLT.

162. Even as between the signatories to a code of conduct, express wording conferring the consent of the flag State to board and apprehend its vessels would be needed to depart from the

²⁴⁶ Beckman, The piracy regime under UNCLOS, at pp. 27–28.

²⁴⁷ **Counter-Memorial**, para. 204.

²⁴⁸ **Counter-Memorial**, paras. 3, 6, 43, 125–126, 177, 184–185, 209–211, 216, 231.

²⁴⁹ See paras. 95–97 of the Reply.

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position under UNCLOS and customary international law.²⁵⁰ The Code, however, is expressly non-binding, “except as noted in Article [13],”²⁵¹ and Article 13 does not contain any provisions which are “noted” as being binding; is not framed in mandatory binding language; and does not in any event purport to require or permit signatories to seize foreign-flagged vessels on grounds not permitted by international law, but concerns only cooperating “in detecting” certain conduct.²⁵²

163. Third, the Yaoundé Code does not purport to authorize action inconsistent with international law. Rather, it is intended to be read consistently with international law:

a. Article 2(1) of the Yaoundé Code states that the signatories intend to cooperate, “[c]onsistent with (...) applicable rules of international law, (...) in the repression of transnational organized crime in the maritime domain (...) with a view towards: (...) interdicting ships (...) suspected of engaging in transnational organized crime.”²⁵³

b. In this regard, it is noted that not all instances of “transnational organized crime in the maritime domain”²⁵⁴ and “other illegal activities at sea”²⁵⁵ in the Yaoundé Code to which Equatorial Guinea makes reference²⁵⁶ constitute a lawful basis to interdict vessels on the high seas (which is an important derogation from the long-established principle of freedom of navigation). “Illegal oil bunkering”²⁵⁷ and “crude oil theft”²⁵⁸ do not. Piracy does.

c. The Yaoundé Code makes clear that it is fully cognizant of the existing body of international law when it comes to the exercise of jurisdiction outside territorial waters, and its provisions are drafted to be consistent with that body of law. For instance:

²⁵⁰ In this regard it is observed that even SUA (the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation), cited in the preamble to the Code and regarded as advancing enforcement operations at sea, does not authorize action against vessels flagged to other parties unless with the consent of the flag State. The UNSC resolutions cited by Equatorial Guinea also do not provide a legal basis for the action against the “*Heroic Idun*”; on the contrary, they reaffirm that UNCLOS governs anti-piracy activities: see fn. 253 below.

²⁵¹ Article 19 (“Nothing in this Code of Conduct is intended to: (a) create or establish a binding agreement, except as noted in Article [13]”), Yaoundé Code (**REG-001**).

²⁵² It seems likely that the reference to “Article [13]” was meant to refer to Article 17 (which states the signatories’ intention to conduct consultations to transform the Code into a binding agreement). As noted in its preambulatory clauses, the Yaoundé Code is “inspired by” the Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (or “**the Djibouti Code**”). Article 15(a) of the Djibouti Code, like Article 19(a) of the Yaoundé Code, provides that “Nothing in this Code of conduct is intended to: (a) create or establish a binding agreement, except as noted in Article 13 (...)”. Article 13 of the Djibouti Code is to a similar effect as Article 17 of the Yaoundé Code. However, nothing turns on this for the purpose of this case. Equatorial Guinea has not relied on Article 19(a) of the Code.

²⁵³ (emphasis added). This has also been consistently recognized by the UN Security Council. In UNSC Resolution 2634 (31 May 2022) (**REG-031**), the Security Council reaffirmed that “international law, as reflected in [UNCLOS], sets out the legal framework within which all activities in the oceans and seas must be carried out, including countering piracy and armed robbery at sea” (emphasis added); the same point is also reaffirmed in the preambulatory paragraphs of UNSC Resolution 1816 (2 June 2008) (**REG-025**) and UNSC Resolution 2018 (31 October 2011) (**REG-054**).

²⁵⁴ Article 1(5), Yaoundé Code (**REG-001**).

²⁵⁵ Article 2(b)–(d), Yaoundé Code (**REG-001**).

²⁵⁶ **Counter-Memorial**, paras. 26, 125, 184, 210.

²⁵⁷ **Counter-Memorial**, paras. 26, 184.

²⁵⁸ **Counter-Memorial**, para. 184.

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- i. Article 6(2) provides that “[a]ny Signatory may seize a pirate ship beyond the outer limit of any State’s territorial sea (...).”²⁵⁹ In contrast, no provision suggests that a similar right of seizure exists in relation to other forms of transnational organized crime.
- ii. Article 19(b) provides that “[n]othing in this Code is intended to (...) affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.”
- iii. Article 19(d) provides that “[n]othing in this Code is intended to (...) apply to or limit boarding of ships conducted by any Signatory in accordance with international law, beyond the outer limit of any State’s territorial sea, including boardings based upon the right of visit (...).”²⁶⁰
- d. Article 2(1) provides that cooperation as envisaged in the Yaoundé Code will be “[c]onsistent with (...) applicable rules of international law”, i.e., that any “effective measures in response to reported transnational organized crime (...) or other illegal activities at sea”²⁶¹ must be consistent with international law.

VII. Conclusions

164. Despite its belated reliance on its piracy defense, Equatorial Guinea in reality apprehended the “*Heroic Idun*” and crew, detained them, and transferred them to Nigeria on the basis of allegations that the Vessel may have been involved in an illegal fuel supply operation in waters understood to be subject to Nigerian jurisdiction and that it may have falsely reported a piracy attack.²⁶² The latter was regarded as “an act that portrays exaggerated insecurity in the general area,”²⁶³ in the light of Nigeria’s position that “there was no piracy attack on [sic] Nigeria waters in the last one year”²⁶⁴ (i.e., the “*Heroic Idun*” appears to have been seized for an alleged act of defamation). This is clearly contrary to UNCLOS because there is no exception to the principles of freedom of navigation under Article 87 and exclusive flag State jurisdiction under Article 92 for these scenarios.

165. Equatorial Guinea, as the “State making the seizure” without adequate grounds, is liable to the Marshall Islands, pursuant to Article 106 UNCLOS and the law of State responsibility, for the loss and damage caused by the seizure, and all the consequences thereof.

²⁵⁹ (emphasis added).

²⁶⁰ (emphasis added).

²⁶¹ Article 13(2), Yaoundé Code (REG-001).

²⁶² For the avoidance of doubt, it is reiterated that all allegations and charges were denied (Askins-1, paras. 52-57 (Annex RMI/-3)), the Vessel had received the necessary clearance documents on 10 August 2022 (Memorial, para. 36 and supporting annexes) and the Nigerian Navy issued a press release on 20 August 2022 stating the Vessel “had not taken any products from the oilfield as being falsely alleged in some quarters” (Askins-1, para. 12 and Annex SA/-5).

²⁶³ Request from the Ministry of Defense of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, REG-040.

²⁶⁴ Annex SA/-5, referred to in the Counter-Memorial, para. 56.

CHAPTER 5

EQUATORIAL GUINEA EXERCISED PRESCRIPTIVE JURIS-
DICTION CONTRARY TO UNCLOS

I. Introduction

166. This Chapter addresses Equatorial Guinea’s contention that it “acted pursuant to lawful prescriptive jurisdiction.”²⁶⁵

167. Equatorial Guinea relies on two main arguments:

a. That Article 12 of Equatorial Guinea’s Law No. 2/2020 dated July 8, General Law of the Merchant Navy (“**Law No. 2/2020 dated 8 July**” or the “**Merchant Marine Law**”) requires that all vessels must obtain authorization to enter the “jurisdictional waters” of Equatorial Guinea,²⁶⁶ consistent with what Equatorial Guinea considers a “new norm of customary international law that allows coastal States to regulate navigation through their EEZ based on the nature of the ship and its cargo.”²⁶⁷

b. That Article 581 of the Community Code of the Merchant Navy (attached to regulations 03/01UEAC088-CM06, adopted by the Council of Ministers of the CEMAC in a meeting held in Bangui on August 3, 2001) (“**2001 CEMAC Code**”)²⁶⁸ establishes an offence under Equatoguinean law for failing to fly a physical flag, and accordingly permits the imposition of fines.²⁶⁹

168. Both of these arguments are wrong. **Section II** addresses why Equatorial Guinea cannot rely on its domestic legislation to claim that it exercised prescriptive jurisdiction lawfully. **Section III** addresses why, even on Equatorial Guinea’s own case, its legislation is contrary to UNCLOS and international law.

II. Equatorial Guinea cannot rely on its domestic legislation
to claim that it exercised prescriptive jurisdiction lawfully under
UNCLOS

169. Domestic legislation does not and cannot confer prescriptive jurisdiction for the purpose of UNCLOS. What is a lawful exercise of prescriptive jurisdiction is a question of international law, not domestic law. Accordingly, the 2001 CEMAC Code and Merchant Marine Law cannot be relied upon by Equatorial Guinea as the basis of its prescriptive jurisdiction for

²⁶⁵ Counter-Memorial, paras. 271–281.

²⁶⁶ Counter-Memorial, paras. 276–278.

²⁶⁷ Counter-Memorial, para. 278.

²⁶⁸ The 2001 CEMAC Code was repealed and replaced on 22 July 2012 by Regulation 08/12-UEAC-088-CM-23. This means that the part of the Fine predicated on the 2001 CEMAC Code had no basis in domestic law. For the sake of argument, this Chapter proceeds on the basis that Equatorial Guinea referred to the wrong version of the CEMAC Code in the Fine and should have referred to the version attached to Regulation 08/12-UEAC-088-CM-23 (“**2012 CEMAC Code**”), not the 2001 CEMAC Code. For completeness, Article 581 of the 2011 CEMAC Code is repeated almost verbatim in Article 772 of the 2012 CEMAC Code.

²⁶⁹ Counter-Memorial, para. 279.

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the purpose of the Convention. Rather, they are the way in which Equatorial Guinea purported to exercise its prescriptive jurisdiction, which is what the Marshall Islands claims is contrary to UNCLOS. It is the adoption of that legislation, the creation of offences and the imposition of fines pursuant to that legislation, in respect of the conduct of foreign-flagged vessels that falls within the regime of freedom of the high seas (applicable, *mutatis mutandis*, in the EEZ), that constitutes breach of UNCLOS's rules on prescriptive jurisdiction.

170. Further, and in any case, it is a well-established rule of international law that domestic legislation cannot be relied upon to justify a violation of international law.²⁷⁰

III. On Equatorial Guinea's own case its legislation is contrary to UNCLOS

171. On Equatorial Guinea's own case, Article 12 of the Merchant Marine Law and Article 581 of the 2001 CEMAC Code, and/or the manner in which Equatorial Guinea interprets them, are contrary to UNCLOS.

172. **Article 12 of the Merchant Marine Law.**²⁷¹ Equatorial Guinea maintains that Article 12 of the Merchant Marine Law requires, in unqualified terms, that "all vessels" must seek authorization for "entry" into and "stay" in Equatorial Guinea's "jurisdictional waters";²⁷² that Article 12, interpreted in the light of the CEMAC Code,²⁷³ means that the fine was not imposed for illegal entry into "territorial waters" but for entry into "jurisdictional waters"; that the term "*jurisdictional waters*" includes the EEZ of Equatorial Guinea;²⁷⁴ and that Article 12 seeks to provide for "the navigational safety of vessels traversing the EEZ."²⁷⁵

173. Article 12 exceeds the limits on the prescriptive jurisdiction allowed by the Convention, hampering rights of freedom of navigation and exclusive flag-State jurisdiction in the EEZ. Coastal States are not entitled to subject a foreign-flagged vessel's entry into their EEZ to their authorization, even for reasons of navigational safety:

- a. UNCLOS does not provide for this limitation even in respect of the territorial sea. In fact, Article 22 of UNCLOS indicates that "[t]he coastal State may, where necessary having regard to the safety of navigation, require foreign ships *exercising the right of innocent passage* through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe" and that "tankers (...) may be required to confine their passage to such lanes."²⁷⁶ At most, this allows coastal States

²⁷⁰ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion of 4 February 1932, P.C.I.J. Series A/B, No. 44*, at p. 24; see also Article 27 of the 1969 Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. (...)"

²⁷¹ This provides, in the relevant part: "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." See **Annex RMI/-42** (original at **Annex RMI/-43**).

²⁷² **Counter-Memorial**, para. 276.

²⁷³ **Counter-Memorial**, para. 275.

²⁷⁴ **Counter-Memorial**, paras. 274–275.

²⁷⁵ **Counter-Memorial**, para. 278.

²⁷⁶ The Marshall Islands is aware that a minority of coastal States require prior authorization for foreign warships and/or nuclear-powered ships or ships carrying hazardous substances intending to exercise the right of innocent

to regulate *where* foreign ships may transit, not *whether* they may transit. The legal regime of the EEZ does not permit the coastal State to adopt measures concerning safety of navigation that are more restrictive than those allowed in the territorial sea.

b. The few instances in which States have sought to restrict access of foreign-flagged vessels to their EEZ are exceptional, and the examples concern the regulation of vessel-source pollution in old, single-hulled oil tankers²⁷⁷ or vessels carrying extremely dangerous substances, such as highly radioactive or radiotoxic nuclear materials.²⁷⁸ The relevant regulations do not concern safety of navigation; in addition, they do not apply indiscriminately to “all vessels,”²⁷⁹ including state-of-the-art oil tankers like the “*Heroic Idun*.” Their legality is, in any event, highly contested.²⁸⁰ Certainly, in any case, these rare instances do not reflect either widespread and consistent practice, or *opinio juris*.²⁸¹ As such, they cannot constitute a “new norm of customary international law,” as Equatorial Guinea alleges,²⁸² that displaces long-established rules²⁸³ on freedom of navigation and exclusive flag State jurisdiction in the EEZ,²⁸⁴ as codified in UNCLOS.

passage in their territorial sea: see J. Ashley Roach, *Excessive Maritime Claims* (4th edn, Brill 2021), at pp. 269–277 and Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edn, Manchester University Press 2022) (“**Churchill, Lowe and Sander**”), at p. 154, fn. 68. The lawfulness of this practice is highly contested: Yoshifumi Tanaka, “Navigational Rights and Freedoms” in Donald Rothwell et al (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015), at pp. 546–549. Critically, in any case, it only concerns areas of the sea where the coastal State exercises full sovereignty (i.e., the territorial sea), and only specific categories of vessels or cargoes.

²⁷⁷ Oceans and the law of the sea: Report of the Secretary General (3 March 2003), UN Doc. A/58/65, at p. 21: “Some European coastal States have already taken unilateral action against *single-hull tankers 15 years old or older carrying heavy fuel oils*. Spain, France and Portugal have banned such vessels from their exclusive economic zones and have taken measures to enforce the ban. *Regrettably, this measure is not in conformity with UNCLOS, article 58.*” (emphasis added).

²⁷⁸ See e.g., Chile’s Law on Nuclear Safety, Law No. 18.302, art. 4, originally promulgated on 16 April 1984, and amended pursuant to Law No. 19.825 on 1 October 2002. See also Jon M. Van Dyke, “Ocean Transport of Radioactive Fuel and Waste” in David D. Caron and Harry. N. Scheiber (eds.), *The Oceans in the Nuclear Age: Legacies and Risks* (Brill 2014) at pp. 150–159.

²⁷⁹ **Annex RMI/-42** (original at **Annex RMI/-43**).

²⁸⁰ The prohibition to enter the EEZ that some Pacific countries reportedly adopted in respect of ships transporting spent nuclear fuel was justified as a “countermeasure” in response to the alleged failure of some nuclear States to comply with their obligation under UNCLOS in respect of the protection of the marine environment. Presenting the ban to enter a coastal State’s EEZ as a “countermeasure” underlines the understanding by coastal States that this measure is contrary to international law. In any case, this practice “appears incompatible with UNCLOS”: see Churchill, Lowe and Sander, at p. 279.

²⁸¹ See *North Sea Continental Shelf, Judgment of 20 February 1969, I.C.J. Reports 1969* (“**North Sea Continental Shelf**”), at para. 77.

²⁸² **Counter-Memorial**, para. 278.

²⁸³ Albert J. Hoffmann, ‘Freedom of Navigation’ (2011) Max Planck Encyclopedia of International Law, at para. 2.

²⁸⁴ In response to the scholarly article referred to by Equatorial Guinea at **Counter-Memorial**, fn. 437, Churchill, Lowe and Sander note at p. 279 that: “It has been argued that as a result of the practice just described, ‘a new norm of customary international law appears to have emerged that allows coastal States to regulate navigation through their EEZs based on the nature of the ship and its cargo’. It must be doubted, however, whether the relevant practice is sufficiently widespread and uniform to have given rise to a new rule of customary law, especially one that would have modified UNCLOS.”

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174. In fact, UNCLOS rules on vessel-source pollution are clear.²⁸⁵ Article 211 of UNCLOS stipulates that “States, acting through the competent international organization or general diplomatic conference,” i.e., not exercising regulatory powers autonomously, shall adopt “international rules and standards” to prevent, reduce and control vessel-source pollution in the marine environment, and “promote the adoption (...) whenever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment.”²⁸⁶ Even in the territorial sea, where the coastal State enjoys sovereignty, the regulations that the coastal State may adopt in respect of pollution from vessels cannot go as far as prohibiting entry, or requiring authorization for entry. Rather, they “shall (...) not hamper innocent passage of foreign vessels.”²⁸⁷ Freedom of access must apply, *a fortiori*, in the EEZ, where the coastal State does not possess sovereignty and associated regulatory powers, but only sovereign rights for the limited purposes set out by UNCLOS.

175. **Article 581 of the 2001 CEMAC CODE.**²⁸⁸ Equatorial Guinea claims that, on the basis of Article 581 of the 2001 CEMAC Code, it had the right to impose an offence in respect of the “*Heroic Idun*”’s failure to fly a physical flag in the EEZ of Equatorial Guinea and to impose fines on the Master accordingly.²⁸⁹

176. As indicated in the Memorial,²⁹⁰ the Marshall Islands disputes that the “*Heroic Idun*” was not displaying or flying the Marshall Islands’ flag.²⁹¹ The port of registration of the “*Heroic Idun*” – Majuro, the capital of the Marshall Islands – was printed very clearly at the stern of the Vessel, in accordance with Marshall Islands’ legislation. This constitutes a physical display of the Marshall Islands’ flag. For the avoidance of doubt, the Vessel also properly displayed the IMO number for purposes of identification in accordance with SOLAS.²⁹²

²⁸⁵ **Counter-Memorial**, para. 277. Equatorial Guinea makes a passing reference to vessel-source pollution by quoting a passage of a statement by Judge Wolfrum. It does not appear to argue, however, that Article 12 is intended to prevent vessel-source pollution.

²⁸⁶ Article 211(1) UNCLOS.

²⁸⁷ Article 211(4) UNCLOS. The same goes, under Article 23 UNCLOS, in respect of foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances.

²⁸⁸ This provides, in the relevant part: “The competent maritime authority has the discretionary power to establish the following offences concerning the navigation police, namely: - not displaying the flag; (...)”. See **Annex RMI/-42** (original at **Annex RMI/-44**).

²⁸⁹ **Counter-Memorial**, para. 279.

²⁹⁰ **Memorial**, para. 230(c).

²⁹¹ The interpretation of the relevant provision in Article 581 of the 2001 CEMAC Code relied on by the Marshall Islands (at **RMI Annex 42**, Vol. II, p. 671) is “*not displaying the flag*”, whereas Equatorial Guinea’s translation (in Reg. 029, Vol. III, Bates p. 441) is “*failure to fly the flag*.”

²⁹² The Vessel was marked in accordance with the requirements of Marshall Islands’ domestic legislation and SOLAS:

(i) Section 230, Chapter 2 of The Republic of the Marshall Islands Maritime Act 1990 (P.L. 1990-92, § 45; P.L. 2001-27 (available at <https://www.register-iri.com/wp-content/uploads/MI-107.pdf>)) provides:

§ 230. Names, numbers and marks on vessels.

(1) Every documented vessel shall have her name marked upon each bow and upon the stern. The home port of the vessel shall also be marked upon the stern. These names shall be painted or gilded upon beaded or cast Roman letters in light color on a dark background, or in a dark color on a light background, permanently affixed and distinctly visible. The smallest letters used shall not be less than six inches in height.

(2) Each vessel of the Republic, in addition to having her name painted on her stern, shall have the same conspicuously placed in distinct, plain letters of not less than six inches in height, on each outer side of the pilot house.

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177. International law, furthermore, neither provides for any duty for a vessel to fly or display a physical flag of its nationality on the high seas or in the EEZ of a coastal State, nor requires a picture of its flag to be painted on the vessel.²⁹³

a. Article 91(1) of UNCLOS, which is applicable to the EEZ by virtue of Article 58(2), only indicates that vessels have the nationality of the flag that they have the “right to fly” and “are entitled to fly.” It does not require that a vessel *must* “fly the flag” on the high seas, let alone that a foreign-flagged vessel on the high seas must “fly the flag” in accordance with the law of a coastal State.

b. The Annex VII tribunal in the *Enrica Lexie Incident* noted that “[a] flag may thus be regarded as ‘visual evidence’ or ‘a symbol’ of nationality, but is not determinative for that vessel’s nationality.”²⁹⁴ It is the nationality of the vessel that is crucial, not whether a flag is flown at all times, since “the entitlement to enjoy freedom of navigation is ‘intimately linked to the question of the granting of nationality to ships’.”²⁹⁵

c. That international law does not prescribe a duty to fly the flag on the high seas or in the EEZ was recently confirmed by the United States Court of Appeals for the First Circuit. The Court of Appeals held that:

Although the nationality of a vessel is often referred to as its “flag,” there is no requirement that a vessel fly a physical flag to maintain its nationality. See Matos-Luchi, 627 F.3d at 5. Rather, “[s]hips have the nationality of the State whose flag they are entitled to fly.” UNCLOS art. 91, § 1 (...).²⁹⁶ (emphasis in original)

(3) The Maritime Administrator may prescribe a system of numbering and marking documented vessels. The designated number(s) of each vessel shall be marked permanently on her main beam.

(4) The draft of every registered vessel shall be marked upon the stem and stern post, in English feet or in decimeters, in Arabic numerals. The bottom of each numeral shall indicate the draft to that line.

(ii) SOLAS Chapter XI-1 Regulation 3 requires the ship’s identification number (IMO number) to be permanently marked, that the permanent marking shall be plainly visible, clear of any other markings on the hull and painted in a contrasting colour and prescribes the minimum size, and that the method of marking must be such that it cannot be easily expunged (**Annex RMI/-55a**).

²⁹³ SOLAS, by contrast, does require cargo ships above 300 gross tonnage to be marked with their IMO number, as set out in the preceding footnote.

²⁹⁴ *Enrica Lexie, Merits Award*, at para. 1029, quoting from Nigel Ready, “Nationality, Registration, and Ownership of Ships” in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea* (Oxford University Press 2014), at p. 24.

²⁹⁵ *Enrica Lexie, Merits Award*, at para. 1033, quoting from David Attard and Patricia Mallia, “The High Seas” in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea* (Oxford University Press 2014), at p. 247.

²⁹⁶ *United States v. Dávila-Reyes*, 23 F.4th 153 (1st Cir. 2022), at p. 60, fn. 44. The case concerned an appeal against the convictions of certain individuals for drug trafficking on the high seas pursuant to the United States Maritime Drug Law Enforcement Act, 46 U.S.C. 705 (“MDLEA”). The main argument of the defendants was that the vessel on which the contested acts were committed was a foreign vessel, and hence not subject to the jurisdiction of the United States. The defendants argued that even if the vessel was “without nationality” for purposes of the MDLEA, it was not “stateless” for purposes of international law. Their convictions were quashed, and the underlying charged dismissed, on grounds that Congress had no power under the Felonies Clause of the United States Constitution to criminalise conduct of foreign nationals who were aboard a foreign vessel on the high seas at the time of that conduct. That decision was reversed by the First Circuit sitting *en banc* in *United*

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d. Maritime practice is consistent with this, and has been for a long time. In the context of the 1955 ILC discussion on the question of “Policing of the high seas,” the Special Rapporteur said:

It was generally accepted that warships had the right to demand that merchant vessels at sea should show their flag upon request. Such a request for identification was perfectly natural, *because it was not the usual practice for merchant vessels continually to fly their flags at sea.*²⁹⁷ (emphasis added)

e. Scholars, similarly, have held that it is not possible to:

(...) point to any historical fact indicating that at any point in time sea-faring nations and others decided to institute a requirement that a ship fly a flag. There is no requirement regarding painting emblems of flags on the side of ships. (...) We learned that basically *there is no international law requiring that a ship fly a flag on the high seas* (...) ²⁹⁸ (emphasis added)

178. For Equatorial Guinea to require that foreign-flagged vessels in its EEZ must fly a flag, and to detain them for related investigations, and to impose fines for alleged failures to fly the flag, constitutes a hindrance to navigation contrary to freedom of navigation, as well as to the exclusive regulatory power of the flag State in respect of vessels in the EEZ.

179. For completeness, the Marshall Islands notes that Equatorial Guinea also claims, in support of its proposition that it exercised prescriptive jurisdiction lawfully, that the fine imposed on the Master of the “*Heroic Idun*” was reasonable.²⁹⁹ Without prejudice to the arguments set out in the preceding paragraphs, the Marshall Islands does not consider that laws allowing for the imposition of fines of over two million Euros for conduct that – even if it could be considered an offence – would be a minor offence, can be considered a reasonable exercise of prescriptive jurisdiction.

180. Lastly, even if, *arguendo*, Equatorial Guinea were right about the basis and scope of its prescriptive jurisdiction over the “*Heroic Idun*” and her crew in respect of their conduct in its EEZ (which it is not), 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, including as regards the detention of the crew and the imposition of the fine for alleged breaches of its domestic legislation, as a result of an unlawful interception and diversion on the high seas.

States v. Dávila-Reyes, 84 F.4th 400 (1st Cir. 2023), but not on the question of the interpretation of Article 91. In fact, the Court at pp. 47–48 confirmed that “according to Matos-Luchi, under (...) international law, ‘[t]he controlling question is whether at the point at which the authorities confront the vessel, it bears the insignia or papers of a national vessel or its master is prepared to make an affirmative and sustainable claim of nationality.’” (emphasis in original omitted). There is no reference to any alleged duty to fly a physical flag under international law.

²⁹⁷ *Yearbook of the International Law Commission (1955)*, vol. I, summary of the 288th meeting, at p. 26, para. 12.

²⁹⁸ Barry Hart Dubner and Mary Carmen Arias, “Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?” (2017) 29 U.S.F. Mar. L. J. 99, at p. 141.

²⁹⁹ **Counter-Memorial**, para. 273.

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CHAPTER 6

EQUATORIAL GUINEA'S OTHER BREACHES

I. Introduction

181. This Chapter replies to Equatorial Guinea's responses to the Marshall Islands' claims concerning Equatorial Guinea's other breaches set out in Chapter 7 of the Memorial.

182. The organization of this Chapter follows Chapter 7 of the Memorial. Equatorial Guinea's failures to respect the principle of reasonableness and considerations of humanity are addressed in **section II**; breach of the obligation in Article 56(2) to have due regard for the rights and duties of the Marshall Islands is addressed in **section III**; the failure to respect the human rights of the crew is addressed in **section IV**; the failure to comply with its obligations under SOLAS, the COLREGS and the STCW is addressed in **section V**; breach of its obligation in Article 225 to avoid adverse consequences in the exercise of enforcement action is addressed in **section VI**; breach of its obligation to notify the flag State of enforcement action is addressed in **section VII**; breach its obligation to release the Vessel promptly without undue delay is addressed in **section VIII**; and breach of its obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings is addressed in **section IX**.

II. Equatorial Guinea's enforcement measures failed to respect the principle of reasonableness and considerations of humanity³⁰⁰

A. Introduction to this section

183. Equatorial Guinea, without explanation, addresses the Marshall Islands' claim that its enforcement measures failed to respect the principle of reasonableness and considerations of humanity as part of its responses to, respectively, the Marshalls Islands' Article 225 claim³⁰¹ and its human rights-related claims.³⁰² As explained further below, the basis of the Marshall Islands' claim under this heading is distinct from both of these claims. Following the approach in the Memorial, the Marshall Islands will continue to treat them separately.

184. Equatorial Guinea also contends that "[a] degree of deference and sovereign margin of appreciation apply,"³⁰³ to all enforcement action generally, including in assessing the reasonableness of measures.³⁰⁴

185. This section addresses: (i) why the principle of reasonableness in enforcement measures is a distinct head of claim and its relationship to considerations of humanity (**sub-section B**); (ii) why there is no support for the adoption and application of Equatorial Guinea's "margin of appreciation" argument (**sub-section C**); and (iii) why Equatorial Guinea has failed

³⁰⁰ Memorial, paras. 242–249.

³⁰¹ Counter-Memorial, paras. 232–256.

³⁰² Counter-Memorial, paras. 301–319.

³⁰³ Counter-Memorial, para. 240; see paras. 241–244.

³⁰⁴ See Counter-Memorial, para. 245.

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to establish that it did not breach the requirements of the principle of reasonableness (**subsection D**).

B. The principle of reasonableness as a head of claim and its relationship to considerations of humanity

186. It is unclear from Equatorial Guinea's treatment of this claim in the Counter-Memorial whether it has taken the approach that it has because it contests the treatment of the principle of reasonableness in enforcement action as a separate head of claim, capable of giving rise to a separate prayer for relief and finding of breach.

187. The principle of reasonableness in the exercise of enforcement action has been deployed in different ways in proceedings under the Convention. It might, depending on the case, be pleaded, and treated by ITLOS and other tribunals, as (i) giving rise to a separate head of claim and breach (albeit arising out of the exercise of rights and powers under UNCLOS),³⁰⁵ (ii) relevant to the interpretation and application of a Convention provision requiring a State to exercise sovereignty in accordance with the Convention,³⁰⁶ or (iii) as informing the interpretation of a Convention provision which specifically concerns enforcement.³⁰⁷

³⁰⁵ See the *Saiga* (No. 2), in which ITLOS found that Guinea had exercised its prescriptive jurisdiction (at para. 136) and right of hot pursuit (at para. 150) in breach of UNCLOS, before going on to find that when Guinea purported to exercise these powers to stop and arrest the vessel, it had also breached the rules of international law applicable by virtue of Article 293 concerning the use of force in the arrest of ships. Guinea was found to be in breach of the applicable international law which requires "that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply (...)" (see para. 155 and para. 183(9)). See, in a similar vein, the *Virginia G*, at paras. 360–362 and para. 452(13) (although ITLOS found no unreasonable use of force in that case). The Annex VII tribunal in the *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**"), citing the *Saiga* (No. 2), stated that "[t]hese principles do not only apply in cases where States resort to force, but to all measures of law enforcement" (para. 209) (emphasis added); see also para. 254. The Annex VII tribunal in *Guyana v Suriname* cites the *Saiga* (No. 2), para. 155, as authority for its jurisdiction over norms of international law including those related to the use of force (at paras. 405–406; see also para. 445 and para. 488(2)), and added that its jurisdiction to consider violations of other norms of international law was further supported by its findings of breaches of UNCLOS obligations (at para. 406). The Annex VII tribunal in the *Arctic Sunrise, Merits Award* considered that law enforcement measures taken under the Convention had to meet the requirements of reasonableness, necessity and proportionality, but considered it did not need to address this given its finding that the interception and detention of the vessel did not comply with the Convention (para. 222; see also paras. 326 and 333). See also the treatment of the claim in the *Virginia G* of excessive use of force in boarding and inspection of the vessel (at paras. 360–362, 452(13)).

³⁰⁶ The Annex VII tribunal in the *Duzgit Integrity, Merits* citing the *Saiga* (No. 2), refers to the norm as the "principle of reasonableness", which "encompasses the principles of necessity and proportionality", and states that "[t]hese principles do not only apply in cases where States resort to force, but to all measures of law enforcement" (at para. 209; see also para. 254). The disproportionality of the sanctions imposed in that case rendered them incompatible with the responsibilities of a State exercising sovereignty on the basis of Article 49 of the Convention (at para. 261), which went to a finding of breach of Article 49(3) (see para. 342(c)).

³⁰⁷ ITLOS in the *Virginia G* applied the requirement of reasonableness developed in the "*Hoshinmaru*" (*Japan v. Russian Federation*), Prompt Release, Judgment of 6 August 2007, ITLOS Reports 2007 in relation to the bond "generally to enforcement measures under article 73 of the Convention," and took the position that "in applying enforcement measures due regard has to be paid to the particular circumstances of the case and the gravity of the violation" (para. 270; see also para. 452(8)); see also the *Juno Trader*, at para. 77 ("The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes

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188. Thus, the Marshall Islands' treatment of the principle of reasonableness in the exercise of enforcement action as the basis of a separate head of claim is grounded in the jurisprudence under the Convention.³⁰⁸

189. Considerations of humanity are invoked by ITLOS and other tribunals under the Convention as variously informing what can be considered reasonable and necessary in enforcement action,³⁰⁹ the interpretation of provisions concerning enforcement,³¹⁰ and what provisional measures in a case concerning detention of a vessel and crew would be considered appropriate.³¹¹ Drawing on this jurisprudence, the Marshall Islands' position (as reflected in the formulation of its submissions in the Memorial³¹²) is that considerations of humanity may be taken into account in determining whether a particular enforcement measure was reasonable, necessary and proportionate.

190. The Marshall Islands adopts the formulation of the principle of reasonableness in enforcement action of the Annex VII tribunal in the *"Duzgit Integrity,"* i.e., that "the exercise of enforcement powers" under UNCLOS is governed by "the principle of reasonableness," which "encompasses the principles of necessity and proportionality."³¹³

191. For the avoidance of doubt, the question of what is "necessary" or "proportionate" in the context of the principle of reasonableness in enforcement action is distinct from the question of whether the State had jurisdiction under the Convention or any other applicable rule of international law to take that enforcement action. The question asked by the principle of reasonableness is whether, judged against the justification or objective given by the State undertaking the enforcement measure, that measure was reasonable (necessary and proportionate), including whether it was humane. In other words, whether or not the State had jurisdiction to intercept and detain a vessel and crew does not determine whether there has been a breach of the principle of reasonableness. Having determined that a State had no enforcement jurisdiction to intercept and detain a vessel and crew, a tribunal may decide to leave its enquiry there.³¹⁴ That does not, however, mean that States are thereby relieved of the continuing obligation to

of this provision."). And see the statement by ITLOS in *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment of 28 May 2013, ITLOS Reports 2013 ("**Louisa**"), at para. 154, 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".

The principle of reasonableness in enforcement action may also be relevant to the interpretation and application of a gateway provision, for the reasons set out in paras. 126–127 of Chapter 4 of the **Memorial**, "Applicable Law". See also paras. 87–90 of this Reply.

³⁰⁸ The response to Equatorial Guinea's arguments specific to the human rights-related claims are addressed later in this chapter at section IV below and the arguments in respect of the Article 225 claim are addressed at section VI below.

³⁰⁹ E.g., *Saiga* (No. 2), para. 155.

³¹⁰ E.g., *Juno Trader*, para. 77.

³¹¹ E.g., "*Enrica Lexie*" Incident (*Italy v. India*), Perm. Ct. Arb. Case No. 2015-28, Order on the Request for the Prescription of Provisional Measures of 29 April 2016, at paras. 102, 104, 106.

³¹² **Memorial**, paras. 246–248.

³¹³ *Duzgit Integrity*, at para. 209.

³¹⁴ See the *Arctic Sunrise*, Merits Award at para. 333, where the tribunal concluded that there was no legal basis under UNCLOS for the seizure of the vessel, and then said: "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. Having reached this conclusion, the Tribunal does not need to consider the reasonableness, necessity, and proportionality of those measures."

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carry out enforcement action in accordance with the principle of reasonableness and considerations of humanity, even if there is no basis for such action under UNCLOS.³¹⁵

C. Equatorial Guinea's "margin of appreciation" argument

192. Equatorial Guinea contends that "a tribunal should not stand as a *de novo* review authority of a sovereign State's authorities" and that "[a] degree of deference and sovereign margin of appreciation apply"³¹⁶ to "the exercise of a coastal State's enforcement jurisdiction generally."³¹⁷ In support of this argument it relies on the joint dissenting opinion in the "*Virginia G*" case³¹⁸ and the dissenting opinion of Judge Wolfrum in the "*Camouco*" prompt release application.³¹⁹

193. For the reasons which follow, the Marshall Islands' position is that there is no support for the adoption and application of a "margin of appreciation" to the assessment of the lawfulness of a coastal State's exercise of "enforcement jurisdiction generally," and in any case the adoption of a "margin of appreciation" is unnecessary as the question of whether a State enjoys any discretion can be (and is) addressed through the application of the rules of treaty interpretation.

194. The majorities in the "*Virginia G*" and the "*Camouco*" did not adopt the terminology of "margin of appreciation," nor has it been adopted in other judgments or awards under UNCLOS.³²⁰ Further, the majorities in these cases did not engage in a discussion of the standard of review. The Tribunal in the "*Camouco*" simply determined whether the bond imposed by the French courts was "reasonable" for the purpose of Article 73(2), applying the criteria set out in the *M/V "Saiga" (No. 1)* and "keeping in view the overall circumstances of the case."³²¹ The Tribunal in the "*Virginia G*," having emphasized that the coastal State may take such

³¹⁵ Following the decision in the *Arctic Sunrise, Merits Award*, the tribunal considered the compensation payable by Russia for the detention of the crew at *Arbitration regarding the Arctic Sunrise (Netherlands v. Russia), Award on Compensation of 10 July 2017* (2019) R.I.A.A. XXXII 317 ("*Arctic Sunrise, Compensation Award*"), at paras. 71–86. In determining the amount of compensation to award, the tribunal considered the severity of the treatment of the crew while in detention compared to the circumstances of precedent cases (see paras. 76–77). Therefore, even though the tribunal did not consider the reasonableness, necessity and proportionality of the enforcement measures taken against the crew in its award on the merits, it effectively took those factors into account in its award on compensation.

³¹⁶ **Counter-Memorial**, para. 240.

³¹⁷ **Counter-Memorial**, para. 245.

³¹⁸ *Virginia G, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia* ("*Virginia G, Joint Dissent*"), at para. 52.

³¹⁹ "*Camouco*" (*Panama v. France*), *Prompt Release, Judgment of 7 February 2000, ITLOS Reports 2000* ("*Camouco*"), *Dissenting Opinion of Judge Wolfrum*, at paras. 6, 11.

³²⁰ The Marshall Islands' position is that it is unnecessary and unhelpful to import a term adopted in 1976 by the European Court of Human Rights ("**ECtHR**") and developed since in the context of that treaty into UNCLOS. Even in the context of the European Convention on Human Rights ("**ECHR**"), the nature, scope and application of the margin of appreciation are contested (see, e.g. "Whither the Margin of Appreciation", Lecture by Dean Spielmann, President of the ECtHR, 14 March 2014, (2014) 67 *Current Legal Problems* 49 ("**Whither the Margin of Appreciation**"), especially at pp. 4–5). It is also noted that in respect of the ICCPR, the Human Rights Committee held in *Ilmari Lämsä et al v. Finland (Communication No. 511/1992)*, UN Doc CCPR/C/52/D/511/1992 (26 October 1994), that the State's freedom to encourage development and allow economic activity was not to be assessed by reference to a "margin of appreciation," but by the obligations it had undertaken, in that case under Article 27 of the ICCPR (para. 9.4), a position which has remained unaltered.

³²¹ *Camouco*, at para. 70; see paras. 66–70.

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measures “as may be necessary” under Article 73(1), observed that “[i]t is within the competence of the Tribunal to establish whether the legislation promulgated by Guinea-Bissau for the exclusive economic zone is in conformity with the Convention and whether the measures taken in implementing this legislation are necessary,”³²² and determined that the confiscation of the vessel and cargo were not “necessary” in the “circumstances of the present case.”³²³

195. In any event, it is plain from the dissenting opinions relied on by Equatorial Guinea that: (i) use of the term “margin of appreciation” (or “discretion,” which is used synonymously³²⁴) does not mean there is no competence to review the actions of national authorities; and (ii) any “margin of appreciation” is subject to “limitations” imposed “upon coastal States in respect of enforcement” by the Convention.³²⁵ The “coastal State does not enjoy unlimited freedom,”³²⁶ and deference may be “denied by the Convention itself.”³²⁷

196. These are questions of interpretation,³²⁸ as affirmed by Judge Paik in his separate opinion in the “*Virginia G*” in which he addressed the standard of review in some detail (he did not use the term “margin of appreciation”). He noted that the question of the standard of review does not arise frequently in law of the sea disputes, but needed to be addressed in the “*Virginia G*” “because the key issue *relates to the interpretation and application of the term ‘necessary’* [in Article 73(1)], which is by nature fact-intensive and circumstance-dependent.”³²⁹ The term “necessary” “has to be interpreted in its specific context and in the light of its object and purpose,”³³⁰ and “the allowable degree of discretion or the appropriate level of scrutiny may vary from case to case, and from issue to issue.”³³¹

³²² *Virginia G*, at para. 256; see also para. 270: “In the view of the Tribunal the principle of reasonableness applies generally to enforcement measures under article 73 of the Convention. It takes the position that in applying enforcement measures due regard has to be paid to the particular circumstances of the case and the gravity of the violation.” It determined that the enforcement measure of confiscation was “not reasonable in light of the particular circumstances of this case.”

³²³ *Camouco*, at para. 269.

³²⁴ See *Camouco*, Dissenting Opinion of Judge Anderson, at p. 50; Dissenting Opinion of Judge Wolfrum, at paras. 11, 12, 14; *Virginia G*, *Joint Dissent*, at para. 53.

³²⁵ *Camouco*, Dissenting Opinion of Wolfrum, at paras. 6, 11.

³²⁶ *Virginia G*, *Joint Dissent*, at para. 48.

³²⁷ *Virginia G*, *Joint Dissent*, at para. 49. Judge Cot, whose views were cited in the Joint Dissent and quoted by Equatorial Guinea at **Counter-Memorial**, para. 243, explained in the “*Volga*” (*Russian Federation v. Australia*), *Separate opinion of Judge Cot of 23 December 2002*, *ITLOS Reports 2002*, at para. 18: “[t]he concept of ‘margin of appreciation’ is closely related to that of ‘reasonableness’. The concept of ‘reasonableness’ implies the existence of a discretionary power that must be curbed.” Similarly, in the ECHR context President Spielmann observed in *Whither the Margin of Appreciation* that the margin of appreciation does not mean subsidiary to State authorities in a broad or general way on traditional sovereignty grounds or a vehicle of “unprincipled deferentialism.”

³²⁸ *Camouco*, Dissenting Opinion of Judge Anderson, at pp. 53, 59 (what is “reasonable” “has to be approached in its factual and legal context, including not only article 292 itself but also the scheme of the Convention as a whole.”); *Camouco*, Dissenting Opinion of Judge Wolfrum, at paras. 2–8; *Virginia G*, *Joint Dissent*, at paras. 44–46.

³²⁹ *Virginia G*, Separate Opinion of Judge Paik, at para. 17 (emphasis added); see also paras. 16, 18–20.

³³⁰ *Virginia G*, Separate Opinion of Judge Paik, at para. 14; see also para. 27.

³³¹ *Virginia G*, Separate Opinion of Judge Paik, at para. 20 (emphasis added). See paras. 21–25 for the interpretation of the term “necessary” in Article 73(1) and para. 26 (“there is no provision in the Convention for the standard the Tribunal should apply in reviewing the conformity of national actions with the Convention”) and para. 27. In applying the term as interpreted to the case before him, he considered that the standard “should certainly be much higher than that of deferential review” (para. 27) and that the Tribunal “should apply a fairly high standard in reviewing the consistency of the confiscation measure (...) with article 73, paragraph 1 of the Convention” (para. 28; see also para. 29).

197. Drawing these threads together:

- a. The jurisprudence of the Tribunal and other tribunals under the Convention does not provide a precedent (or *jurisprudence constante*) for the application of a “margin of appreciation” to scrutiny of the exercise of a coastal State’s enforcement jurisdiction, either in respect of specific measures or “enforcement jurisdiction generally.”³³²
- b. They have instead approached such issues as orthodox questions of interpretation, by identifying the “discretion” (if any) conferred on States by a specific article or applicable rule, and the limits on that discretion.³³³ Not all provisions or applicable rules confer on national authorities a degree of discretion.³³⁴
- c. Even where a “margin of appreciation” approach is articulated in the two dissenting opinions relied on by Equatorial Guinea, whether it is appropriate to (i) consider the application of a standard of review at all, and, if so, (ii) the appropriate level (or intensity) of review, is to be assessed on a case-by-case, issue-by-issue basis, depend on the content and interpretation of the relevant Convention provision or applicable rule, taking into account the Convention and other relevant factors.³³⁵ The dissenting opinions do not provide any support for the application of a “margin of appreciation” to “enforcement jurisdiction generally.”

198. Turning to the applicable rule in this head of claim, and applying the Tribunal’s approach based on the interpretation of the rule in issue, the principle of reasonableness (as articulated in the *“Duzgit Integrity”*) encompasses the principles of “necessity” and “proportionality.” Although such terms may be construed as containing an element of discretion for the State

³³² Counter-Memorial, para. 245.

³³³ For instance: The “right or discretion” enjoyed by the coastal State under Article 246 (*Arbitration regarding the Arctic Sunrise (Netherlands v. Russia)*, Award on Jurisdiction of 26 November 2014 (2019) R.I.A.A. XXXII 185, at para. 75); the obligation of assistance under Article 202 allows an “element of discretion on the part of States” (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024 (“ITLOS Climate Change Advisory Opinion”)*, at paras. 331, 335); “States retain discretion in determining the particular measures to achieve the stated objectives” in Article 61 (*ITLOS Climate Change Advisory Opinion*, at para. 413); concerning the term “reasonable grounds for believing” in Article 206, and the tribunal in the *South China Sea* Arbitration’s observation that the “terms ‘reasonable’ and ‘as far as practicable’ contain an element of discretion for the State concerned”, the Tribunal has held that “the discretion of such a State is limited by the fact that it is required to determine whether an activity under its jurisdiction or control ‘may cause substantial pollution of or significant and harmful changes to the marine environment’. It is a matter of objective determination based on facts and scientific knowledge.” (*ITLOS Climate Change Advisory Opinion*, at para. 361); on the obligation in Article 194(5), which may call for specific measures, the Tribunal has said that “[t]heir implementation depends on the relevant domestic legal system and allows for the exercise of discretion. However, States do not have absolute discretion with respect to the action that is required. As stated by the Seabed Disputes Chamber in the *Area Advisory Opinion*, a ‘State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.’” (*ITLOS Climate Change Advisory Opinion*, at para. 405; see also para. 230 and the dispositive of the *Area Advisory Opinion* (“The sponsoring State does not have an absolute discretion with respect to the action it is required to take under Annex III, article 4, paragraph 4, of the Convention.”: *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Reports 2011*, at para. 230).

³³⁴ See, e.g. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, I.C.J. Reports 2003, at para. 73, discussed in the *Virginia G*, Separate Opinion of Judge Paik, at para. 19. See also the treatment of State’s “discretion” under specific provisions of UNCLOS by the Tribunal and Annex VII tribunals in the various cases set out in the preceding footnote (fn. 333 above).

³³⁵ See *Virginia G*, Separate Opinion of Judge Paik, at paras. 28–29.

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concerned, such discretion is limited by the fact that the necessity or proportionality of an enforcement measure is to be assessed against its stated or apparent objective. This is a matter of objective determination based on the facts.³³⁶

- D. Equatorial Guinea has failed to establish that it did not breach the requirements of the principle of reasonableness

199. The Marshall Islands particularized Equatorial Guinea's breaches of the principle of reasonableness in paragraph 249 of the Memorial. It now addresses each of these in turn in response to Equatorial Guinea's submissions in the Counter-Memorial.

a. Failing to notify the Marshall Islands of the exercise of enforcement action including the detention of the Vessel and crew.³³⁷ Equatorial Guinea provides no explanation as to why it failed to notify the Marshall Islands of the exercise of enforcement action, including the detention of the Vessel and crew, nor why it ignored and failed to respond to, or engage with, the Marshall Islands' communications of 16 August 2022, 26 August 2022, 8 September 2022, 13 September 2022, 18 October 2022, 28 October 2022, and 4 November 2022, which included representations concerning treatment of the crew.³³⁸ The failure to engage was wholly unreasonable and had implications for the rights of the flag State and humane treatment of the crew.³³⁹ Furthermore, if, as Equatorial Guinea now belatedly contends, its enforcement measures against the Vessel and crew were undertaken to repress piracy, it was all the more unreasonable and indeed, inexplicable and inhumane that this was never communicated to the Marshall Islands, the Owners and the crew.

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.³⁴⁰ As to this, Equatorial Guinea has not sought to defend the manifest inapplicability of Article 10 of Law No. 2/2020 dated 8 July and Article 698(2)(b) and (c) of Law No. 2/2020 dated 8 July as grounds for the Fine,³⁴¹ or why it failed to include an explanation of its components. Article 581 of the CEMAC Code was not applicable because the Vessel was displaying its flag.³⁴² The 2001 CEMAC Code relied on in the Fine was in fact not even in force at the relevant time. Equatorial Guinea

³³⁶ See, *mutatis mutandis*, the approach of the Tribunal in the *ITLOS Climate Change Advisory Opinion*, in para. 361.

³³⁷ First Witness Statement of William Gallagher, 17 December 2023 ("**Gallagher-1**"), para. 26 (**Annex RMI/-30**).

³³⁸ See the summary of the communications in para. 97 of the **Memorial**, and, in particular, the letter of 18 October 2022 (**Annex SA/-15**) and the Note Verbale of 28 October 2022 (**Annex SA/-16**).

³³⁹ As set out at paras. 261–262 of the Reply.

³⁴⁰ Master-1, para. 133 (**Annex RMI/-1**); Askins-1, paras. 24–25 (**Annex RMI/-3**); Kulblik-1, para. 36 (**Annex RMI-2**).

³⁴¹ See **Memorial**, para. 230.

³⁴² **Memorial**, para. 230(c), and para 176 of the Reply. The Marshall Islands addresses Equatorial Guinea's unlawful exercise of prescriptive jurisdiction above in respect of the laws relied on by Equatorial Guinea in its Counter-Memorial, i.e., Article 12 of the Merchant Marine law and Article 581 of the CEMAC Code above, at paras. 172–178.

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now contends the Fine included a claim for “maintenance,”³⁴³ but there is no reference to this on the face of the Fine.

c. Making payment of the Fine a necessary condition for the release of the Vessel and in effect extorting and coercing the Owners to pay the Fine to secure the release of the Vessel and her crew.³⁴⁴ Equatorial Guinea disputes that it made the payment of the Fine a condition of release of the Vessel, relying on the evidence of Captain Nchama.³⁴⁵ The evidence does not support this contention. As Mr Askins, the Master and the Chief Officer attest, it was repeatedly made clear to them that the Vessel and crew would be released on the payment of the Fine.³⁴⁶ The contemporaneous record supports this.³⁴⁷ It is simply not plausible that all the witnesses would have formed this belief, that it would be recorded in the contemporaneous documentation at the time, and that Owners would have paid an enormous fine of €2,000,132, if they had not been told and assured by or on behalf of Equatoguinean officials that payment would secure release of the Vessel and crew. As set out in the Memorial, given the dire situation in which the crew were detained, and the trauma suffered by 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.³⁴⁸ Equatorial Guinea contends that the Fine of €2,000,132 “was reasonable in relation to the offences charged and maintenance claimed,” that it “included expenses for the investigation of the Vessel and its crew while in Equatorial Guinea,”³⁴⁹ and that the Tribunal “has previously accepted that similar expenses imposed on a vessel were not unreasonable and disproportionate,”³⁵⁰ citing the Maritime and Port Institute (“**IMAP**”) fine imposed by São Tomé and Príncipe addressed in the “*Duzgit Integrity*.” No such comparison can be drawn. The IMAP fine was the “normal legal penalty for the type of infringement committed by “*Duzgit Integrity*,” was increased for “operational and administrative expenses” incurred as a result of the intervention of the coastguard (with the overall sum being €28,875), and was imposed under the same law which was the basis for the arrest (i.e., it had a basis in law and that law was connected with, and was the basis of, the arrest).³⁵¹ By contrast, in this case the legal bases for the Fine recorded on its face bear

³⁴³ Counter-Memorial, para. 273.

³⁴⁴ Master-1, para. 133 (Annex RMI/-1); Askins-1, paras. 24-26 (Annex RMI/-3); Kulblik-1, paras. 36 and 65 (Annex RMI-2); Kulblik-2, paras. 5, 8 (Annex RMI/-54).

³⁴⁵ Nchama-1, para. 25 (REG-WS-001).

³⁴⁶ See fn. 70, at para. 41 of the Reply.

³⁴⁷ See fn. 72, at para. 41 of the Reply.

³⁴⁸ Master-1, para. 133 (Annex RMI/-1); Askins-1, paras. 24-26 (Annex RMI/-3); Kulblik-1, paras. 36 and 65 (Annex RMI-2).

³⁴⁹ Counter-Memorial, para. 273.

³⁵⁰ Counter-Memorial, para. 273.

³⁵¹ *Duzgit Integrity, Merits*, at paras. 255, 81.

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no relationship to the reason now given for the Vessel's interception and detention.³⁵² In other words, at least some if not of all of the expenses Equatorial Guinea claims that it incurred for investigation and maintenance of the Vessel appear to have been incurred for reasons which had nothing to do with the stated legal bases for the Fine and were not disclosed on the face of the Fine. Furthermore, the amount was over 73 times the amount found reasonable in the "*Duzgit Integrity*." The tribunal's finding that the IMAF fine was not disproportionate must also be considered against its finding that all the other penalties taken together, including a customs fine of €1,080,000, were disproportionate when considering the original wrong committed by the vessel (an attempt to make an unauthorized STS transfer in archipelagic waters).³⁵³ In the present case, the Fine of €2,000,132 was allegedly for not flying a flag and not seeking prior authorization to sail through the EEZ.

e. Depriving the crew of their liberty, as well as 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.³⁵⁴ The explanation Equatorial Guinea now gives in its Counter-Memorial for its detention of the crew (for the first time) is the repression of piracy. For the reasons given elsewhere, there was simply no basis for this and, as set out above, failure to inform the crew that was the reason for their continued detention in itself violated the principle of reasonableness in enforcement action. Equatorial Guinea has not even attempted to explain how deprivation of liberty of the crew and the Vessel for failing to fly the flag or seek prior authorization to sail through its EEZ could have been necessary in relation to those alleged offences.

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

³⁵² According to para. 272 of the **Counter-Memorial**, "the Vessel's apprehension occurred in response to the request by Nigeria under the Yaoundé Code."

³⁵³ *Duzgit Integrity, Merits*, at para. 256.

³⁵⁴ 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; 2nd Officer-1, paras. 8–19 (**Annex RMI/-6**); 3rd Officer-1, paras. 9–17 (**Annex RMI/-10**); First Witness Statement of the Junior 3rd Officer, 8 June 2023, paras. 23–33 (**Annex RMI/-8**); First Witness Statement of Able Seaman No 1, 8 June 2023 ("**Able Seaman No 1-1**"), paras. 10–14 (**Annex RMI/-17**); First Witness Statement of Able Seaman No 2, 9 June 2023 ("**Able Seaman No 2-1**"), paras. 13–19 (**Annex RMI/-18**); First Witness Statement of Able Seaman No 3, 8 June 2023 ("**Able Seaman No 3-1**"), paras. 14–24 (**Annex RMI/-19**); Ordinary Seaman No 1-1, paras. 10–18 (**Annex RMI/-20**); First Witness Statement of Ordinary Seaman No 2, 8 June 2023 ("**Ordinary Seaman No 2-1**"), paras. 12–21 (**Annex RMI/-21**); First Witness Statement of Ordinary Seaman No 3, 8 June 2023, paras. 10–17 (**Annex RMI/-22**); Deck Cadet-1, paras. 14–21 (**Annex RMI/-9**); First Witness Statement of the Chief Engineer, 8 June 2023, paras. 7–11 (**Annex RMI/-7**); First Witness Statement of the 2nd Engineer, 9 June 2023 ("**2nd Engineer-1**"), paras. 12–19 (**Annex RMI/-11**); First Witness Statement of the 3rd Engineer, 8 June 2023, paras. 14–23 (**Annex RMI/-12**); First Witness Statement of the 4th Engineer, 9 June 2023, paras. 12–21 (**Annex RMI/-13**); Electrician-1, paras. 10–23 (**Annex RMI/-14**); First Witness Statement of the Pumpman, 8 June 2023, paras. 11–19 (**Annex RMI/-16**); First Witness Statement of Motorman No 1, 9 June 2023, paras. 11–15 (**Annex RMI/-24**); First Witness Statement of Motorman No 2, 9 June 2023, paras. 13–23 (**Annex RMI/-25**); First Witness Statement of Motorman No 3, June 2023, paras. 11–13 (**Annex RMI/-26**); First Witness Statement of the Fitter, 8 June 2023, paras. 12–21 (**Annex RMI/-23**); First Witness Statement of the Engine Cadet, 8 June 2023, paras. 11–20 (**Annex RMI/-15**); First Witness Statement of the Chief Cook, 8 June 2023 ("**Chief Cook-1**"), paras. 11–19 (**Annex RMI/-27**); First Witness Statement of Messman No 1, 8 June 2023, paras. 10–18 (**Annex RMI/-28**); First Witness Statement of Messman No 2, 8 June 2023, paras. 9–18 (**Annex RMI/-29**).

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of Equatorial Guinea.³⁵⁵ Equatorial Guinea provides no explanation as to why it forced the Owners to cover expenses for the maintenance of the Vessel and crew. Owners were also forced to provide food for the Equatoguinean guards guarding the crew onboard the Vessel.³⁵⁶

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.³⁵⁷ As noted above, Equatorial Guinea maintains that it did not represent that the Vessel would be released upon payment of the Fine, but this is not supported by the evidence. The evidence is that its officials did make this representation to representatives of the Owners, but, contrary to that representation, instead continued to exercise jurisdiction, including by transferring control and custody of the Vessel and crew to Nigeria. Not only was this conduct plainly unreasonable, but also inhumane. The crew and their families were led to believe they would finally be released but were instead handed over to Nigeria, where their ordeal continued for another six months.

h. Transferring control and custody of the Vessel and crew to Nigeria in the face of the Prompt Release Proceedings.³⁵⁸ It was plainly not reasonable, necessary, or proportionate to transfer control and custody of the Vessel and crew to Nigeria before the Prompt Release Proceedings brought by the Marshall Islands had been heard and determined. It showed no consideration of humanity towards the crew and their families, especially given the length of time and conditions in which they had already been detained and the lack of legal process or any explanation for the grounds of the transfer. Nothing suggests it was necessary, even for purposes of purported cooperation under Article 100 of UNCLOS and the Yaoundé Code on which Equatorial Guinea now relies, to effect the transfer on 11 November 2022, in circumstances in which it had already detained the vessel for three months and a hearing at the ITLOS had been set for 24 November 2022. There is no justification for Equatorial Guinea's failure to await the outcome of the Prompt Release Proceedings before the Tribunal. Indeed, Equatorial Guinea does not even attempt to provide one.

i. Failing to show the most basic considerations of humanity in exercising its jurisdiction.³⁵⁹ Equatorial Guinea contends that the crew were at all times treated in accordance with the principle of humanity by the Equatoguinean authorities.³⁶⁰ In support of this contention, it relies on various witness statements. The statements contain

³⁵⁵ Master-1, paras. 110–111, 116, 148, 173 (**Annex RMI/-1**); Kulblik-1, paras. 11, 13, 23–29, 50–54 (**Annex RMI-2**).

³⁵⁶ See para. 36 of the Reply.

³⁵⁷ Master-1, paras. 133–160 (**Annex RMI/-1**); Askins-1, paras. 24–44 (**Annex RMI/-3**); Kulblik-1, paras. 47–65 (**Annex RMI-2**); Kulblik-2, paras. 5–8 (**Annex RMI/-54**).

³⁵⁸ Askins-1, paras. 38–41 (**Annex RMI/-3**); Master-1, para. 144 (**Annex RMI/-1**).

³⁵⁹ As set out in detail at **Memorial**, para. 249(i), fn. 283. See also Master-1, paras. 110, 113, 117, 120, and 126 (**Annex RMI/-1**); Chief Officer-1, para. 54 (**Annex RMI/-5**); 2nd Officer-1, para. 14 (**Annex RMI/-6**); 3rd Officer-1, para. 12 (**Annex RMI/-10**); 2nd Engineer-1, paras. 17–18 (**Annex RMI/-11**); Master-2, paras. 5, 8–15, 19–21 (**Annex RMI/-50**); Chief Officer-2, paras. 8–10, 12, 14–26 (**Annex RMI/-51**).

³⁶⁰ **Counter-Memorial**, paras. 302–303, 318.

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gaps in the detail³⁶¹ and gaps in the timeline,³⁶² and are in large part second hand.³⁶³ By contrast, the evidence of the Master, the Chief Officer and the other members of the crew of what happened to them is first-hand, detailed, and corroborated, not only by each other but by the contemporaneous documentary record and the expert report of Dr Perman-Kerr. Their evidence is compelling and must be accorded greater weight and preferred over that relied on by Equatorial Guinea accordingly.

200. For the reasons set out above, even if Equatorial Guinea had had jurisdiction to intercept and detain the Vessel and the crew in the EEZ of São Tomé and Príncipe, which it did not, and even if it had had prescriptive jurisdiction to adopt the measures that it adopted in respect of conduct of the Vessel in its EEZ, which it did not, each of the subsequent measures it undertook in the purported exercise of its enforcement powers, whether considered separately or in combination, fell far short of the requirements of the principle of reasonableness, including considerations of humanity.

III. Equatorial Guinea's violation of its obligation of due regard under Article 56(2)³⁶⁴

A. Equatorial Guinea has not responded to this claim

201. Equatorial Guinea did not respond to the Marshall Islands' Article 56(2) claim in the Memorial,³⁶⁵ which was that, even if Equatorial Guinea had jurisdiction to regulate and sanction certain conduct of the "*Heroic Idun*" in its EEZ, Equatorial Guinea breached its obligation in Article 56(2) to have due regard to the rights enjoyed by the Marshall Islands in the EEZ of Equatorial Guinea. It did so by restricting the conduct of the "*Heroic Idun*" in its EEZ and by imposing penalties for failure to comply with its laws, as reflected in the Fine.³⁶⁶

202. As Equatorial Guinea notes, the Annex VII tribunal in the *Chagos Marine Protected Area* arbitration explained the meaning of "due regard" in the context of Article 56(2) as follows:

³⁶¹ For example, Mr Hernández does not mention the Fine; no statements address how long the onshore crew were in Hotel La Paz or address their removal back to the Detention Facility. Similarly, Captain Nazareth completely omits to mention the mechanics and the manner in which the crew were transferred over at gunpoint to the Nigerian authorities and forced—also at gunpoint—to sail to Nigeria, see: Chief Officer-2, paras. 19-20 (**Annex RMI/-51**). Overall Equatorial Guinea's witnesses omit relevant facts, such as that "lawyers were not allowed to be present in any of the interviews", see: Master-2, para. 14 (**Annex RMI/-50**). Nor does Mr McDowall mention the incidents where the "*Wele Nzaz*" was dragging anchor due to bad weather and was drifting towards the Vessel, nor the incident where a supply boat caught fire next to the Vessel, see: Chief Officer-1, para. 55 (**Annex RMI/-5**).

³⁶² For example, Mr Hernández was not present in Equatorial Guinea throughout the detention and did not attend all the interviews with the crew members (Master-2, para. 14 (**Annex RMI/-50**); Hernández Martin-1, paras. 17 and 14 (**REG-WS-003**), and Equatorial Guinea has not adduced any evidence from anyone that was on the Vessel whilst it was detained at Luba.

³⁶³ For example, the evidence of both Dr Simbarashe and Mr Reina is second-hand and is not based on their direct dealings with the crew (Simbarashe-1, para. 9 (**REG-WS-004**) and First Witness Statement of Jorge Gaona Reina, 1 July 2024, para. 11 (**REG-WS-005**)).

³⁶⁴ **Memorial**, paras. 250–252.

³⁶⁵ **Memorial**, paras. 250–252.

³⁶⁶ **Memorial**, para. 252.

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In the Tribunal's view, the ordinary meaning of "due regard" calls for [the coastal State] to have such regard for the rights of [other States] 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 [other States'] rights; nor does it uniformly permit [the coastal State] 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 [the other State in question], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [coastal State], and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.³⁶⁷

203. Applying the foregoing, even if Equatorial Guinea had jurisdiction to regulate and sanction certain conduct of the "*Heroic Idun*" in its EEZ, it clearly did so without due regard to the rights of the Marshall Islands, including freedom of navigation, exclusive flag State jurisdiction, and the right to be treated reasonably by the coastal State:

- a. The rights of freedom of navigation and exclusive flag State jurisdiction of the Marshall Islands as the flag State (and the duties that accompany those rights, including to the crew of its flagged vessels) are fundamental to the law of the sea and international law.
- b. Equatorial Guinea imposed a huge fine and detained the "*Heroic Idun*" for months, in circumstances in which UNCLOS provides alternative solutions that would have also ensured Equatorial Guinea had due regard to the rights of the Marshall Islands. For instance, if a coastal State has doubts about the flag of a vessel, UNCLOS provides, in certain circumstances, a right of visit. Equatorial Guinea has also failed to explain why it is necessary for a vessel to fly an actual flag in its EEZ, in addition to displaying the port of registration of the flag State on its stern, and the IMO number as required by SOLAS.
- c. As regards the asserted need to provide for "the navigational safety of vessels traversing through the EEZ"³⁶⁸ pursuant to Article 12 of the Merchant Marine Law, no explanation is given as to why requiring authorization for all vessels, including near-new VLCCs, to enter the EEZ would be necessary to further this objective.

B. Equatorial Guinea's "due regard" argument in relation to its piracy defense

204. While Equatorial Guinea did not address the due regard claim set out in the Memorial, it has addressed the obligations of due regard under Articles 56(2) and 87(2) in the context of its piracy defense.

³⁶⁷ *Arbitration regarding the Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015 (2018) R.I.A.A. XXXI 359 ("**Chagos Marine Protected Area**"), at para. 519, applied in *South China Sea, Merits* in respect of Article 58(3): see paras. 742–744, 753–757.

³⁶⁸ **Counter-Memorial**, para. 278.

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205. It is unclear whether Equatorial Guinea's submission is that "responding lawfully to piracy (...) cannot amount to a failure to exercise 'due regard',"³⁶⁹ i.e., can *never be a breach* of the obligation of "due regard" under Article 56(2) or 87(2), or that its conduct *in this case* did not breach the obligation.

206. If the former, it is incorrect as a matter of law, for the following reasons:

a. Whether or not there has been a failure of "due regard" does not turn on the legal basis, or alleged legal basis, of the conduct in issue. It is to be determined on a case-by-case basis, applying the test formulated in the *Enrica Lexie Incident* and *Chagos Marine Protected Area* arbitration to the facts.

b. An interpretation which excepts actions against, or alleged to be taken against, piracy under UNCLOS Articles 100 and 105 from the due regard obligations in Articles 56(2) and 87(2) would be contrary to the due regard test formulated in the *Enrica Lexie Incident* and *Chagos Marine Protected Area* arbitration, because it would impose a "universal rule of conduct"³⁷⁰ and "priority for one activity over another,"³⁷¹ namely an asserted "right and duty" to respond to a suspicion of piracy over the rights and duties of the flag State.³⁷²

c. Furthermore, this interpretation is not supported by the other provisions of the Convention concerning piracy. For example, the inclusion of Article 106, "Liability for seizure without adequate grounds" (which provides that "[w]here the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure"), recognizes that flag State rights can be engaged by action taken under Article 105.³⁷³ It is also perfectly possible for a response to piracy to be carried out in a way which breaches the obligation of due regard for the rights of other States in other ways. For example, carrying out the seizure of a ship on suspicion of piracy with no regard to the potential for a serious oil spill (which eventuates) would be without due regard for coastal States' rights in respect of living resources and the marine environment, even if (which is not the case here) the requirement of adequate grounds for the seizure of the ship on suspicion of piracy had been satisfied.

d. Nor is Equatorial Guinea's interpretation supported by the passages from the *Enrica Lexie Incident* award which it quotes at paragraph 225 of the Counter-Memorial. These passages record the Annex VII tribunal's finding based on the application

³⁶⁹ **Counter-Memorial**, para. 217; see also para. 226 ("when responding lawfully to piracy – both a right and a duty under UNCLOS – a State's conduct cannot amount to a failure to exercise 'due regard' to the rights of other States"); cf. para. 231 ("Lawful measures pursuant to UNCLOS' anti-piracy provisions (...) are recognised exceptions to these two principles, and acting under them, where exercising reasonableness and due regard, cannot breach these principles.").

³⁷⁰ *Chagos Marine Protected Area*, at para. 519, set out at **Memorial**, para. 154.

³⁷¹ *Enrica Lexie, Merits Award*, at para. 973, set out at **Memorial**, para. 153. The parties rely on these same cases: Equatorial Guinea cites the same jurisprudence, at **Counter-Memorial**, paras. 221–224.

³⁷² Cf. *Enrica Lexie, Merits Award*, at para. 975.

³⁷³ See also Article 104, which also affirms the continuing interest of the flag State in cases concerning piracy: "A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived."

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of the due regard test to the facts: the actions taken by the Italian marines to protect the “*Enrica Lexie*” against an alleged pirate attack did not, as India had alleged, result in a breach of Italy’s obligation of “due regard” for the sovereign rights of India over natural resources in its EEZ under Article 58(3).³⁷⁴ It was not a finding that all action concerning piracy is excluded from the due regard obligation, or (which amounts to the same thing) that where piracy is involved it will automatically trump other rights and obligations under the due regard test. Indeed, an analogous argument by India was rejected.³⁷⁵ The tribunal held that “the object and purpose of the obligation of ‘due regard’ is to ensure balance between concurrent rights belonging to coastal and other States.”³⁷⁶ This reasoning applies *mutatis mutandis* when the balance in issue is between the concurrent rights and obligations of two flag States.

207. If Equatorial Guinea’s contention is that, applying the due regard test in the *Enrica Lexie Incident* and the *Chagos Marine Protected Area* arbitration, it has not breached Articles 56(2) and 87(2) in this case as a matter of fact, this is also wrong:

- a. Equatorial Guinea appears to suggest that it cannot have violated the obligation of due regard because it was undertaking “measures to suppress a suspected act of piracy on reasonable grounds pursuant to obligations of international cooperation in a reasonable manner,” “responding lawfully to piracy” and “acting reasonably at the behest of another State to arrest a vessel.”³⁷⁷
- b. For the reasons set out in paragraphs 123–128 above, Equatorial Guinea did not have “reasonable grounds” based on the request from Nigeria on which it relies on for treating the “*Heroic Idun*” as a pirate vessel and seizing it.
- c. Even if it had had reasonable grounds (which it did not), the actions that Equatorial Guinea took did not meet the requirements of due regard. As explained above, the factors to be taken into account are: (i) the nature of the rights held by State A and their importance; (ii) the extent of the anticipated impairment of those rights by State B; (iii) the nature and importance of the activities contemplated by State B; and (iv) the availability of alternative approaches. Applying each of these in turn:
 - i. The rights of freedom of navigation and exclusive flag State jurisdiction of the Marshall Islands as the flag State (and the duties that accompany those rights, including to the crew of its flagged vessels) are fundamental to the law of the sea and international law.
 - ii. Intercepting and detaining a vessel and its crew for almost three months and handing it over into the custody and control of the authorities of a third State, in the face of proceedings before ITLOS, are the antithesis of the freedom of navigation and exclusive flag State jurisdiction.

³⁷⁴ *Enrica Lexie, Merits Award*, at para. 981.

³⁷⁵ The tribunal rejected India’s argument that in respect of the due regard obligation in Article 58(3), the determination must always be in favor of the coastal State if another State’s activity clashes with the coastal State’s competence in respect of the economic utilization of its EEZ (see *Enrica Lexie, Merits Award*, at paras. 971–975).

³⁷⁶ *Enrica Lexie, Merits Award*, at para. 975 (emphasis added).

³⁷⁷ **Counter-Memorial**, paras. 225, 226, 229.

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iii. The Marshall Islands accepts that action against piracy is of the utmost importance.

iv. However, as explained in Chapter 4, in the event that there is a reasonable suspicion of piracy, UNCLOS does not allow seizure of a vessel. Instead, it allows measures that cause less interference with a foreign-State's right to navigation and exclusive flag State jurisdiction in respect of its vessels on the high seas.³⁷⁸ Equatorial Guinea could have exercised a right of visit under Article 110(1)(a) and it could have communicated with the Marshall Islands, as the flag State clearly named on the vessel, in its AIS identification and in the documents on the Vessel, at any time before³⁷⁹ or during its visit.³⁸⁰ These actions were available to Equatorial Guinea and would have cleared up any misapprehension that it had as to whether the "*Heroic Idun*" had been engaged in piracy, without requiring the detention of the Vessel and crew and the much greater interference with the rights of the Marshall Islands which followed. The actions of Equatorial Guinea were not those of a State giving any due regard at all to the rights of a flag State.

IV. Equatorial Guinea repeatedly violated the crews' human rights³⁸¹

A. Introduction to this section

208. Equatorial Guinea appears to combine its response to the Marshall Islands' claim that it violated the crews' human rights with its response to the Marshall Islands' claim that Equatorial Guinea failed to act in accordance with considerations of humanity.³⁸² However, while there is some overlap between human rights and considerations of humanity in the law of the sea and between the Marshall Islands' claims in section II and section IV of Chapter 7 of the Memorial,³⁸³ the heads of claim are distinct and not coextensive.³⁸⁴

209. Equatorial Guinea contends that the Chamber's jurisdiction does not extend to external human rights treaties³⁸⁵ and that, in any event, as a matter of fact, the crew "were given the best possible treatment that could reasonably be expected given the resources and facilities

³⁷⁸ *The Enrica Lexie, Merits Award*, at para. 973, cited by Equatorial Guinea in its **Counter-Memorial**, para. 223.

³⁷⁹ There is nothing in the timeline that suggests Equatorial Guinea did not have time to contact the Marshall Islands before approaching the "*Heroic Idun*". On its own evidence, it took the warship the "*Capitan David*" approximately 2.5 days to reach the "*Heroic Idun*" after receiving the communications from Nigeria: Nchama-1, para. 19 (**REG-WS-001**).

³⁸⁰ See further para. 141 of the Reply above and Gallagher-2, paras. 6–7 (**Annex RMI/-53**).

³⁸¹ **Memorial**, paras. 253–282.

³⁸² **Counter-Memorial**, paras. 301–319. At para. 67 Equatorial Guinea says that "the crew of the *Heroic Idun* was treated in accordance with applicable standards, including with due regard for their human rights."

³⁸³ As recognized by the Marshall Islands in the **Memorial**, para. 256. General international law in relation to human rights may also inform the application of the principle of reasonableness (necessity and proportionality): see the discussion in the *Arctic Sunrise, Merits Award* referred to at **Memorial**, para. 262.

³⁸⁴ This can be demonstrated by comparing para. 249 with paras. 281–282 of the **Memorial**. See also paras. 187–188 of the Reply above, addressing the basis for the separate claim of breach of the principle of reasonableness.

³⁸⁵ **Counter-Memorial**, para. 301.

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available” and “were at all times treated in accordance with the principle of humanity.”³⁸⁶ It also submits that “since the conduct in respect of the crew did not occur on the high seas, Equatorial Guinea could not have breached Article 87.”³⁸⁷

210. The Marshall Islands has addressed the Chamber’s jurisdiction in respect of human rights-related claims in its Memorial³⁸⁸ and above at paragraphs 86–90. The Chamber has jurisdiction over these claims for the reasons given there, as reflected in the formulation of its claims at paragraphs 281–282 of the Memorial. Equatorial Guinea itself recognizes that gateway provisions may “allow a tribunal to have reference to other rules of international law to interpret or apply them, to the extent that such rules are not incompatible with UNCLOS under Article 293.”³⁸⁹ Equatorial Guinea’s defense on the facts is addressed below **in sub-section B**, and the relevance of Article 87 is addressed in **sub-section C**.

B. Equatorial Guinea has not rebutted these claims

211. At paragraphs 265 to 280 of the Memorial, the Marshall Islands sets out the human rights which it contends are engaged by Equatorial Guinea’s conduct in this case,³⁹⁰ summarizing the sources, content and (where relevant) the status of each of these rights (i.e., whether custom or a general principle of international law). At paragraph 281(a)–(f), the Marshall Islands sets out, with references to the evidence, the multiple respects in which Equatorial Guinea had failed to respect these human rights and, at paragraph 282(b)–(e), it sets out which UNCLOS provisions were breached by these failures.

212. Of the failures identified in paragraph 281(a)–(f) of the Memorial, Equatorial Guinea only addresses those corresponding to paragraph 281(d), concerning the rights of detainees to be treated with humanity and not subjected to cruel, inhuman and degrading treatment in its section entitled, “Equatorial Guinea acted in accordance with the principle of humanity and did not violate the human rights of crew members.”³⁹¹ In addition, Equatorial Guinea’s “Statement of Relevant Facts” in Chapter 3 addresses facts relevant to paragraph 281(c), concerning the denial of the crew’s right to legal representation and their forced signing of statements that they did not understand.³⁹² The Marshall Islands addresses each of Equatorial Guinea’s points in turn.

1. *Right of detainees to be treated with humanity and not subjected to cruel, inhuman and degrading treatment*

³⁸⁶ **Counter-Memorial**, paras. 318, 302.

³⁸⁷ **Counter-Memorial**, para. 319, fn. 479.

³⁸⁸ **Memorial**, paras. 126-129; see also paras. 254-263.

³⁸⁹ **Counter-Memorial**, para. 174 and the references cited at fn. 314.

³⁹⁰ The prohibition on torture and cruel, inhuman or degrading treatment; the right of detainees to be treated with humanity; the right to liberty and not to be arbitrarily detained; the right to free movement and to leave any country; the right to a fair trial; and the right not to be subjected to retroactive criminal penalties.

³⁹¹ **Counter-Memorial**, paras. 301–319.

³⁹² **Counter-Memorial**, paras. 52–54.

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213. Equatorial Guinea contends that it met the requirements of humanity with respect to the crews' housing, food and water and provided high-quality medical care.³⁹³ However, the evidence relied on by Equatorial Guinea does not support this, as set out below.

214. Housing, food and water. Equatorial Guinea says that the Detention Facility was new, had running water, air conditioning and adequate space to house the crew members comfortably, that suitable bedding was provided by Mr Hernández Martín (of Besora), that crew members were free to walk around at all times, that they were well looked after and comfortable, that the facilities were cleaned on a regular basis, and that the crew's subsequent stay at a luxury hotel at Luba is "entirely inconsistent with the allegations of mistreatment alleged by the Marshall Islands."³⁹⁴

215. However, as to the conditions at the Detention Facility, this is contradicted by the evidence of the Master who was detained in the Detention Facility for nearly three months. He says that, while it appeared new, it was not comfortable and did not have suitable bathrooms. He attests that there was poor sanitation, dirty water which regularly ran out, common toilets, no beds, and lots of mosquitoes, rats and cockroaches. The water tank which supplied the detained crew with water was filthy.³⁹⁵ While crew could walk around the Detention Facility, they were not free to leave: armed guards patrolled the facility at all times.³⁹⁶

216. Equatorial Guinea says that the crew onboard the Vessel were able to seek the necessary supplies and provisions from Besora, and that receipts show the crew was provided with a wide range of provisions.³⁹⁷ It also suggests the atmosphere on board was good. As to this, the contemporaneous evidence, almost all of which Equatorial Guinea has not contested, is that the mental and physical wellbeing of the crew became progressively worse as each day passed.³⁹⁸

217. Furthermore, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),³⁹⁹ set out at paragraph 271 of the Memorial, specify that the provision of proper accommodation, adequate bathing and shower installations, water and toiletries necessary for cleanliness, sufficient bedding, food, and drinking water are the responsibility of the State, not private actors, such as the Owners in this case, acting through their local agent, Besora.

218. Medical care. Equatorial Guinea contends that the crew at all times had access to high quality medical care, that (relying on the statement of Dr Simbarashe) most of the illnesses the crew members presented with were "illnesses common in sailors, which are common and easily

³⁹³ **Counter-Memorial**, para. 303.

³⁹⁴ **Counter-Memorial**, paras. 304–306, 310.

³⁹⁵ Master-2, para. 10 (**Annex RMI/-50**). See also para. 31 above and the references to the crew's statements annexed to the Memorial, given at **Memorial**, para. 281, fns. 323–324.

³⁹⁶ Master-1, para. 115 (**Annex RMI/-1**), quoted at para. 34 above.

³⁹⁷ **Counter-Memorial**, paras. 303, 306

³⁹⁸ See **Memorial**, paras. 61, 65, and para. 35 of the Reply above.

³⁹⁹ Adopted by the UN General Assembly without a vote in Resolution 70/175 of 17 December 2015 (available at <https://documents.un.org/doc/undoc/gen/n15/443/41/pdf/n1544341.pdf>).

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treatable,”⁴⁰⁰ and that Dr Perman-Kerr’s expert report does not demonstrate that the detention of the crew in Equatorial Guinea caused the mental health issues suffered by the crew.⁴⁰¹

219. The evidence of the crew contradicts this:⁴⁰²

a. The Master attests:

i. “The initial medical attention was limited and the attending military doctor appeared to be extremely badly trained. For example, he failed three times to diagnose the Pumpman with malaria.”⁴⁰³

ii. The military doctor “was not willing to perform tests on us to get proper diagnoses and instead would just check our blood pressure and temperature.”⁴⁰⁴

iii. “I have been at sea for over 23 years, and I have never encountered any sailors with typhoid or malaria, or experienced these illnesses myself.”⁴⁰⁵

b. The Chief Officer, who was detained onboard the Vessel, attests that he often had to beg for a boat and make continuous requests over multiple days to get permission to take the crew to hospital.⁴⁰⁶

220. As to Dr Simbarashe’s evidence, he never saw or treated the crew members who attended La Paz hospital. The crew were never assessed for mental trauma.⁴⁰⁷ The weight of his evidence must be treated accordingly. Furthermore, he does not provide any support for his assertion that typhoid fever, diarrhea, malaria and gastritis are illnesses common in sailors, and his evidence is contradicted by that of the Master and Chief Officer.⁴⁰⁸ Nor does Dr Simbarashe refer to the crew members who had to go to hospital with severe stomach and abdominal pain,⁴⁰⁹ or breathing problems.⁴¹⁰

221. As regards the Expert Report of Dr Lesley Perman-Kerr, Equatorial Guinea asserts that “the report makes no specific assessment regarding the treatment or mental health of the crew members in October 2022 while in Equatorial Guinea,” with the implication that it cannot be established that the detention of the crew in Equatorial Guinea “caused the crew members to suffer from the various mental conditions alleged.”⁴¹¹ This misrepresents the Report and is incorrect. Dr Permann-Kerr clearly states in her Report that her expert professional opinion is

⁴⁰⁰ **Counter-Memorial**, para. 309.

⁴⁰¹ **Counter-Memorial**, paras. 312–317.

⁴⁰² See also Able Seaman No 1-1, paras. 13-14 (**Annex RMI/-17**) and Able Seaman No 2-1, para. 16 (**Annex RMI/-18**).

⁴⁰³ Master-2, para. 8 (**Annex RMI/-50**).

⁴⁰⁴ Master-2, para. 8 (**Annex RMI/-50**).

⁴⁰⁵ Master-2, para. 10 (**Annex RMI/-50**).

⁴⁰⁶ Chief Officer-2, para. 17 (**Annex RMI/-51**).

⁴⁰⁷ Master-2, para. 11 (**Annex RMI/-50**).

⁴⁰⁸ See para. 37 of the Reply above.

⁴⁰⁹ Ordinary Seaman No 2-1, paras. 16–18 (**Annex RMI/-21**).

⁴¹⁰ Able Seaman No 1-1, para. 16 (**Annex RMI/-17**).

⁴¹¹ **Counter-Memorial**, paras. 313, 317.

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that the experiences in Equatorial Guinea triggered and contributed to the crew's post-trauma mental health condition and likely post-traumatic stress disorder (“PTSD”). She attests:

28. Swift transition from ‘a normal routine trip’ to hostile detention in EG was a shocking experience for the crew. They described their period of detention in EG, where 15 were held for a period in an on-shore detention facility with 11 remaining on board the vessel, as being extremely traumatic. They described being in constant fear regarding their physical safety at the hands of aggressive guards who, as the crew reported, were regularly intoxicated while in charge of weapons. Those of the crew on-shore in EG suffered further anxieties being in close proximity to the authorities with the threat of interrogation or worse and were forced to witness the torture of another detainee at the Malabo police station with the threat that they could be next. Additional traumatising was caused by the insanitary conditions, harassment during the night and the negligent delay in attending to some significant health needs.

29. For the men taken on-shore in EG, the reported poor and dangerous conditions and the intentional infliction of mental anguish, in my professional opinion meets the criteria for psychological torture defined by Hong et al (2023) as “the intentional infliction of suffering without resorting to direct physical violence, in what is known as ‘no touch’ torture.” (4) The crew still on-board the vessel reported aggressive intimidation from the EG guards and were fearful regarding the fate of their fellow crew and whether they may too be taken to the on-shore detention facility.

(...)

36. Once it was possible to speak to the crew, they reported the events experienced in EG and their symptoms, which clearly met APA defining criteria for a post-trauma mental health condition. In my professional opinion, it is likely that most, if not all, of the crew could receive a formal diagnosis of PTSD. Furthermore, *if it was triggered by events they experienced in EG as I believe to be the case*, by the time their detention ended at the end of May 2023 their PTSD would be a chronic condition which is a longer lasting form of the disorder diagnosed when symptoms continue in excess of 3 months. The difference between the chronic and the acute condition is that sufferers are likely to have more severe ingrained core symptoms and experience depressive states and interpersonal difficulties.

37. *The overall length of time in detention (EG and Nigeria), the levels of fear and uncertainty when EG decided to hand over the vessel to Nigeria, the fear of a long prison sentence should the court decide to convict them, the lack of information regarding actions of OSM and their lawyers and their families’ wellbeing due to the severe restrictions on communication and the lack of psychological and pastoral care, all compounded the initial traumatic experience in EG* and resulted from the vessel being handed over to Nigeria. In my professional opinion, these experiences have had extremely damaging psychological consequences for the men, and by implication for their families, the ramifications of which are likely to impact them in varying degrees for the rest of their lives in terms of personality changes and depression

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linked to loss of status, stigma, employment and relationship difficulties. In support, as concluded by Brooks and Greenberg (2021) (2), “The psychological impact on those wrongfully accused appears to be vast, severe and long-lasting.”⁴¹²

(emphasis added)

222. Equatorial Guinea also seeks to rely on an undertaking it sought from Nigeria seeking to ensure the crews’ human rights would be respected there “as well.”⁴¹³ Whether Nigeria acted consistently with its human rights obligations is beyond the scope of the present proceedings. The Marshall Islands’ human rights-related claims solely concern Equatorial Guinea’s conduct and its breach of its obligations.⁴¹⁴ From this perspective, the undertaking is evidence that Equatorial Guinea recognized that the crew had fundamental human rights and that it had obligations to the crew under the ICCPR.⁴¹⁵

2. *Right to legal representation and forcing crew members to sign statements*

223. As noted at paragraph 212 above, in Chapter 6 of its Counter-Memorial on the merits Equatorial Guinea does not address the submission at paragraph 281(c) of the Memorial concerning its failure to respect the crew’s rights to legal representation and not to be forced to sign statements they did not understand. However, Mr Hernández Martín states that the Master signed his statement “freely.” The Master attests that this was not the case. As he explains in his second witness statement:

After 12 hours of continuous aggressive interrogation, I was mentally and physically exhausted. I had been awake for hours, I was being detained without charge in terrible conditions at a police station with armed, aggressive guards, and I was desperate to be released. I was made pretty clear to us that we had to sign the Spanish statements that were presented to us at the end of the interrogation or we would not be going anywhere.⁴¹⁶

224. Equatorial Guinea does not contest that crew members’ requests for the attendance of lawyers during questioning were refused⁴¹⁷ or that the crew were never informed by Equatoguinean authorities of the grounds on which they were being detained.

⁴¹² First Psychological Report of Dr Lesley Perman-Kerr, 20 November 2023 (“**Perman-Kerr-1**”), paras. 28–37 (**Annex RMI/-38**).

⁴¹³ **Counter-Memorial**, para. 318 and **REG-011**, p. 1. The undertaking refers to the ICCPR (para. I), the fundamental human rights of the crew members (para. II.) and “International, Regional and National Agreement [sic] on Laws that guarantee Human Rights” (final paragraph).

⁴¹⁴ As set out at **Memorial**, para. 281.

⁴¹⁵ As set out in **Memorial**, paras. 262–280. For the avoidance of doubt, the Marshall Islands does not accept the adequacy or lawfulness of the undertaking. It is unnecessary to address this for the reasons given in the present paragraph.

⁴¹⁶ Master-2, para. 15 (**Annex RMI/-50**).

⁴¹⁷ See para. 40 of the Reply above and the references to the evidence in fn. 68.

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C. Article 87 is a relevant gateway provision

225. Finally, Equatorial Guinea submits that “since the conduct in respect of the crew did not occur on the high seas, Equatorial Guinea could not have breached Article 87 UNCLOS.”⁴¹⁸ Article 87 is a relevant gateway provision for the Marshall Islands’ human rights-related claims because the conduct which gives rise to the claim – the interception and detention of the “*Heroic Idun*” and its crew – was consequent upon Equatorial Guinea’s exercise of its freedom of the high seas in the EEZ of a third State, São Tomé and Príncipe, under Article 87 read with Article 58(2).⁴¹⁹ Pursuant to Article 87, Equatorial Guinea is obliged to exercise its freedom of the high seas “under the conditions laid down by this Convention and by other rules of international law” and with “due regard for the interests of other States in their exercise of the freedom of the high seas.”

226. Equatorial Guinea’s reliance on the Tribunal’s judgment in *M/V “Louisa”* in support of its argument is inapposite.⁴²⁰ The *M/V “Louisa”* was detained while it was voluntarily docked in a Spanish port, not involuntarily detained while it was exercising freedom of navigation on the high seas and EEZs in accordance with Article 87(1) and 58(1).⁴²¹ It was for this reason that the Tribunal concluded that Article 87 could not constitute a basis for the claims submitted by Saint Vincent and the Grenadines in respect of the detention of the *M/V “Louisa.”*⁴²²

V. Equatorial Guinea’s breaches of its obligations under SOLAS, the STCW, and the COLREGS⁴²³

227. Equatorial Guinea addresses the Marshall Islands’ claim in Section V of Chapter 7 of the Memorial that Equatorial Guinea breached Article 1(b) of SOLAS, Article 1(2) of the STCW, Article 1 of the COLREGS, Articles 87(1), 87(2) and 2(3) of UNCLOS and Rules 2, 6, 7 and 8 of the COLREGS at paragraphs 282–300 of its Counter-Memorial.

228. Equatorial Guinea’s response to these claims is that: (i) the Chamber does not have jurisdiction over SOLAS, the STCW and the COLREGS as these treaties are external to UNCLOS;⁴²⁴ (ii) the STCW does not contain any relevant provisions on manning requirements,

⁴¹⁸ **Counter-Memorial**, para. 319, fn. 479; see also para. 228. The Marshall Islands relies on Article 87 at **Memorial**, paras. 282(b) and (c).

⁴¹⁹ That Article 87 may be applicable and breached by conduct not only on the high seas but in respect of the high seas is affirmed by the Tribunal in the *M/V “Norstar” (Panama v. Italy)*, *Merits Judgment of 10 April 2019*, *ITLOS Reports 2018–2019 (“Norstar, Merits Judgment”)*, at para. 226: “Contrary to Italy’s argument, even 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.” The point here is that Equatorial Guinea, in seizing and detaining the Vessel and its crew, relies on Part VII of UNCLOS as the basis for the exercise of its jurisdiction. It follows that that jurisdiction is subject to the provisions of Part VII, in particular in this instance Article 87, and the limits therein on the exercise of that jurisdiction.

⁴²⁰ At **Counter-Memorial**, para. 228, where Equatorial Guinea contends that “[i]t is not the case (...) that a vessel lawfully detained in a State’s port can be subject to an ongoing violation of Article 87”.

⁴²¹ *Louisa*, at paras. 48, 107 and 109.

⁴²² See *Louisa*, at para. 109.

⁴²³ **Memorial**, paras. 283–316.

⁴²⁴ **Counter-Memorial**, para. 282.

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and Article 1(2) does not impose a substantive obligation;⁴²⁵ (iii) SOLAS does not impose obligations on parties other than the flag State and the Marshall Islands has not substantiated how Equatorial Guinea breached Article 1(b) of SOLAS in any event;⁴²⁶ (iv) safe manning requirements are inapplicable when a vessel is anchored in harbor;⁴²⁷ (v) Equatorial Guinea did not violate Article 1 and Rules 2, 6, 7 and 8 of the COLREGS because the Vessel was not damaged and there was allegedly no concern for the safety of the Vessel;⁴²⁸ (vi) Article 87(1) does not apply because the breaches complained of did not take place on the high seas;⁴²⁹ and (vii) Equatorial Guinea's conduct did not breach its obligation in Article 2(3) of UNCLOS.⁴³⁰

229. For the reasons set out below, these contentions are either incorrect in law or do not apply on, or are unsupported by, the facts.

230. (i) The Chamber has jurisdiction. The Chamber has jurisdiction over SOLAS, the STCW and the COLREGS for the reasons set out in paragraphs 285–293 of the Memorial and in paragraphs 86–90 of this Reply.

231. (ii) The STCW contains provisions relevant to manning requirements. It is clear that the STCW does contain provisions on manning requirements, e.g., the safe manning requirements of a vessel specify the STCW qualifications for each member of crew required to be onboard,⁴³¹ and the STCW regulates the relationship between safe manning and watchkeeping.⁴³² Indeed, the relationship between the STCW and SOLAS in respect of safe manning and watchkeeping is well recognized in the relevant literature⁴³³ and IMO instruments.⁴³⁴

232. Equatorial Guinea's contention that Article 1(2) of the STCW does not impose a "substantive obligation" is wrong. Applying the general rule of interpretation reflected in Article

⁴²⁵ Counter-Memorial, paras. 283–287.

⁴²⁶ Counter-Memorial, paras. 288–291.

⁴²⁷ Counter-Memorial, paras. 292–295.

⁴²⁸ Counter-Memorial, paras. 296–298.

⁴²⁹ Counter-Memorial, para. 299.

⁴³⁰ Counter-Memorial, para. 300.

⁴³¹ As set out in the Memorial, para. 301.

⁴³² Regulation VIII/1 para. 1.2 of the STCW Convention (**Annex VB/-1**, p. 274) provides that watch systems shall be such that the efficiency of watchkeeping is not impaired by fatigue. See also, IMO Assembly Resolution A.772(18), adopted on 4 November 1993, "Fatigue factors in manning and safety" ("**IMO Res A.772(18)**"), at recital para. 4 (**Annex RMI/-55**).

⁴³³ Filippo Lorenzon, "Safety and Compliance" in Yvonne Baatz (ed), *Maritime Law* (5th edn, Routledge 2021) notes at pp. 376–377 that SOLAS Chapter IX contains the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code), and explains at p. 387 that "[i]t is important to understand that both the ISM Code and the STCW Convention relate to the human element and are closely related and complementary to each other. The ISM Code states that: 'The company must ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.' *It is the [STCW], which defines these international requirements and it may be said that it is in some respects an amplification of the ISM Code.* Any failure by a shipowner to comply with the requirements of the [STCW] could be construed as a breach of the ISM Code (...)" (emphasis added).

⁴³⁴ IMO Res A.772(18), at recital paras. 3–5 and para. 4.3.1 (**Annex RMI/-55**); IMO Assembly Resolution A.1047(27), adopted on 30 November 2011, "Principles of minimum safe manning" ("**IMO Res A.1047(27)**"), Annex 1, at paras. 1.1, 3.1.1.1 and Annex 2, at paras. 1.2, 1.2.1.2, 1.2.4.2, and the minimum safe manning document in Annex 4 (**Annex RMI/-56**). SOLAS Chapter V, Regulation 14(1) (**Annex RMI/-48**, p. 709) in turn provides: "Contracting Governments undertake (...) to maintain (...) 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.†", where note † refers to IMO Res A.1047(27).

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31 of the VCLT,⁴³⁵ Article 1(2) plainly does impose a treaty obligation and imposes it on all parties to the Convention without distinction:

- a. Its title is “General *obligations* under the Convention;”⁴³⁶
- b. The ordinary meaning of the words used are those of mandatory treaty obligations which apply to all, not some of the parties (“[t]he **Parties** undertake to promulgate all laws, decrees, orders and regulations and to 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”⁴³⁷); and
- c. Article 1(2) does not purport to prescribe the steps which parties must take. They are required to take “all (...) steps,” which by definition must include (i) the steps necessary to ensure that, on vessels within that party’s custody and control, crew on board possess the qualifications specified by the flag State under the STCW, and (ii) the party with custody and control does not take any steps that render the vessel non-compliant with those requirements or prevent the flag State from meeting its obligations under the STCW.

233. This interpretation is consistent with the object and purpose of the STCW, which is expressly stated in Article 1(2) to be ensuring “safety of life (...) at sea” and “the protection of the marine environment.” That parties other than the party which is the “Administration,” i.e., flag State, of the vessel also have obligations under Article 1(2) is consistent with Article X of the STCW, which requires port States to verify the certification status of all seafarers serving on board and take appropriate action if there are any deficiencies.

234. (iii) SOLAS does impose obligations on Equatorial Guinea. Equatorial Guinea misconstrues the Marshall Islands’ submission on SOLAS.⁴³⁸ The simple point is that Article 1(b) requires Equatorial Guinea to take “all (...) 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, a ship is fit for the service for which it is intended.”⁴³⁹ The arguments concerning the interpretation of Article 1(2) of the STCW above apply *mutatis mutandis* to Article 1(b) of SOLAS: (a) Article 1(b) is entitled “General *obligations*”; (b) it applies to “[t]he Contracting Governments,” i.e., all parties; and (c) those parties “undertake” to “take all (...) steps which may be necessary to give the present Convention full and complete effect.” This must include ensuring, in respect of vessels which a party has detained and are within its control, that the safe manning requirements established by the flag State under regulation 14 of Chapter V of SOLAS and IMO Resolution A.1047(27) are adhered to in order to ensure safety of life and protection of the marine environment.⁴⁴⁰ This interpretation is consistent with the conferral of control powers

⁴³⁵ Which provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁴³⁶ **Annex RMI/-49**, p. 725 (emphasis added).

⁴³⁷ **Annex RMI/-49**, p. 725 (emphasis added).

⁴³⁸ **Counter-Memorial**, paras. 288–291.

⁴³⁹ Article 1(b), SOLAS (**Annex RMI/-48**).

⁴⁴⁰ Protection of the marine environment is not expressly mentioned in Article 1(b) of SOLAS but it is accepted that the objectives of safe manning include the avoidance of damage to the marine environment: see IMO Res A.1047(27), Annex 1, Guidelines for the application of principles of minimum safe manning, para. 2 (**Annex**

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on port States under Chapter I, Regulation 19(a)–(c) of SOLAS. As set out in the Memorial, the Expert Report of the Master Mariner, and the First and Second Witness Statements of the Chief Officer, Equatorial Guinea’s actions in removing 15 crew from the Vessel and refusing to allow it to be safely manned did in fact endanger, *inter alia*, the safety of the crew and the marine environment.⁴⁴¹ It plainly did not take “all (...) steps which may be necessary” to give the Conventions “full and complete effect,” as required by Article 1(b) of SOLAS and Article 1(2) of the STCW.

235. As to Equatorial Guinea’s assertion that the Marshall Islands has not substantiated how it breached Article 1(b) of SOLAS, the Marshall Islands refers to paragraphs 308–312 of the Memorial where this is set out.

236. (iv) Safe manning requirements are applicable when a vessel is anchored and were applicable in Luba. Equatorial Guinea’s reliance on the statement in the Vessel’s safe manning certificate that “[t]he vessel named in this document is considered to be safely manned, if when it proceeds to sea, it carries not less than the number and grades/capacities of personnel specified (...)”⁴⁴² to suggest that minimum safe manning levels apply in law only when the vessel is sailing at sea⁴⁴³ is wrong. Depending on the location and type of the anchorage and the size of the vessel (in this case a VLCC), it can be considered to be “at sea” while at anchor. The STCW Code at Section B-VIII/2 provides that:

The master of every ship at an unsheltered anchorage, at an open roadstead or any other virtually “at sea” conditions in accordance with chapter VIII, section A-VIII/2, part 4-1, paragraph 51, of the STCW Code should ensure that watchkeeping arrangements are adequate for maintaining a safe watch at all times. A deck officer should at all times maintain responsibility for a safe anchor watch.⁴⁴⁴

237. The place where the Vessel was forced by the Equatoguinean authorities to anchor in Luba was an unsheltered anchorage or open roadstead within the meaning of the STCW Code.⁴⁴⁵ The Vessel was anchored 1.3 nautical miles off the shore of Bioko Island (and not in the port itself, which is not in any event designed for VLCCs⁴⁴⁶). The geography and conditions of Luba where the Vessel was anchored are not suitable for VLCCs: it was anchored close to grounding depths for the Vessel, close to shore and exposed to wind and waves – in particular,

RMI/-56). The relationship between safe manning and protection of the marine environment is also reflected in UNCLOS Articles 194(3)(b), 211(5)(c) and 217(2).

⁴⁴¹ See **Memorial**, paras. 311 and 314–316 and the evidence referred to therein, at fns. 354, 355 and 357–361; and Chief Officer-2, paras. 11, 27 (**Annex RMI/-51**). See also, Master-2, paras. 21–22 (**Annex RMI/-50**).

⁴⁴² **Annex VB/-2**.

⁴⁴³ **Counter-Memorial**, para. 292.

⁴⁴⁴ STCW Code, Section B-VIII/2, Part 4.1, para. 4 (**Annex RMI/-57**).

⁴⁴⁵ Chief Officer-2, para. 27 (**Annex RMI/-51**).

⁴⁴⁶ See Master-1, para. 106 (**Annex RMI/-1**) where he addresses the change of the port of arrival from Malabo to Luba: “This was concerning to us because Luba is not a port in the traditional, shipping sense. It is an extremely small port that is primarily used by support vessels, small vessels and survey vessels which go to oil rigs. A ship as big as a VLCC is not designed to go into small ports like Luba. If anything went wrong, we could be thrust aground.”; see also Blount-1, paras. 26–30 and 37 (**Annex RMI/-37**).

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there was a variable and relatively strong current.⁴⁴⁷ The area was also busy with marine traffic going in and out of the port of Luba.⁴⁴⁸

238. The relevance of the STCW requirements is affirmed on the face of the Safe Manning Certificate itself, which at the bottom lists “Special requirements or conditions.” These state that “[w]atchkeeping arrangements shall be at the discretion of the Master *but shall never be of lesser standards than those proscribed by the STCW Convention and IMO Resolution A.1047(27)*” and that “[t]he grades and numbers of personnel listed above reflect the minimum levels of safe manning necessary for the safety of navigation and operation.”⁴⁴⁹

239. The relevant instruments (which must in any event prevail over wording on a safe manning certificate) establish that watchkeeping arrangements and operations still apply to a vessel when at anchor.⁴⁵⁰ In particular, and in addition to the provisions of Section B-VIII/2 of the STCW Code referred to above:

a. STCW Code, Section A-VIII/2, mandatory “Standards regarding watchkeeping: Watchkeeping arrangements and principles to be observed,” at paragraphs 51, 82 and 83 in Part 4, “Watchkeeping at sea,” make specific provision for watchkeeping for a “Ship at anchor.”⁴⁵¹

b. STCW Convention, Regulation VIII/2, “Watchkeeping arrangements and principles to be observed,” provides in para. 2.4 that:

2 Administrations shall require the master of every ship to ensure that watchkeeping arrangements are adequate for maintaining a safe watch or watches, taking into account the prevailing circumstances and conditions and that, under the master’s general direction:

(...)

.4 *an appropriate and effective watch or watches are maintained for the purpose of safety at all times, while the ship is at anchor or moored* and, if the ship is carrying hazardous cargo, the organization of such watch or watches takes full ac-

⁴⁴⁷ See Master-1, para. 106 (**Annex RMI/-1**) where after the passage quoted in the preceding footnote, the Master notes that “Luba is also open to the weather and in the middle of the HRA, so it was extremely dangerous”. Mr Kulblik says that “[t]he location where the Vessel was anchored at Luba (throughout the entire period of detention) was relatively close to the shore, not particularly deep and not well-suited for ships as large as the Vessel” (Kulblik-1, para. 74 (**Annex RMI/-2**)); the Chief Officer, who was detained on board, attests that “[w]e suffered frequent bad weather including strong wind speeds. This necessitated me to prepare the engines requiring the help of two engineers and two crew who were sent forward for anchor stations. These crew were exposed to high risk as the ship was anchored 1 mile off the land. During the three month detention, the frequent bad weather kept me awake a lot (...)” (Chief Officer-1, paras. 50–51) (**Annex RMI/-5**). See also: Master-2, paras. 21-27 (**Annex RMI/-50**); Chief Officer-2, para. 11 (**Annex RMI/-51**).

⁴⁴⁸ Blount-1, paras. 26–30 and 37 (**Annex RMI/-37**).

⁴⁴⁹ **Annex VB/-2** (emphasis added).

⁴⁵⁰ See also the discussion at para. 240 of the Reply below.

⁴⁵¹ **Annex VB/-1**, pp. 288–289, 293.

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count of the nature, quantity, packing and stowage of the hazardous cargo and of any special conditions prevailing on board, afloat or ashore (...)⁴⁵²

(emphasis added)

c. IMO Assembly Resolution A.772(18), adopted on 4 November 1993, “Fatigue factors in manning and safety,” does not suggest that safe manning does not apply when a vessel is at anchor. Rather, “port conditions” and “density of vessel traffic” are listed as external environmental factors to be taken into account.⁴⁵³ STCW Code Regulation A-VIII/1, mandatory “Standards regarding watchkeeping: Fitness for duty,” makes no distinction for when a vessel is at anchor.⁴⁵⁴

240. Further:

a. Section 1.1.4 of MN 7-038-2, the “Minimum Safe Manning Requirements for Vessels” notice published by the Marshall Islands Maritime Administrator, and relied on by Equatorial Guinea,⁴⁵⁵ is irrelevant on the facts. The “*Heroic Idun*” was not “moored or anchored in an unmanned condition” because leaving it in an unmanned condition was “appropriate for safety reasons.”⁴⁵⁶ On the contrary, it was anchored in Luba 1.3 nautical miles from the shore with insufficient crew in breach of its safe manning requirements because Equatorial Guinea, *inter alia*, forcibly removed 15 of the 26 crew from the Vessel and repeatedly refused requests to safely man the Vessel.⁴⁵⁷

b. IMO Resolution A.890(21), relied on by Equatorial Guinea to support its argument that principles of safe manning do not apply when a ship is moored,⁴⁵⁸ was revoked by Resolution A.1047(27) adopted on 30 November 2011.⁴⁵⁹ In any event, both Resolution A.890(21), and Resolution A.1047(27) which replaced it, do not “require only that minimum safe manning of a ship must ensure its ‘capability’ to ‘moor and unmoor the ship safely’.”⁴⁶⁰ The capability to “moor and unmoor the ship safely” is only one of nine listed capabilities in Resolution A.1047(27), which include, *inter alia*, the capability to “maintain safe navigational, port, engineering and radio watches in accordance with regulation VIII/2 of the 1978 STCW Convention, as amended, and also maintain general surveillance of the ship,” “perform operations, as appropriate,

⁴⁵² Annex VB/-1, p. 279.

⁴⁵³ IMO Res A.772(18), at para. 3.1.4 (Annex RMI/-55).

⁴⁵⁴ Annex VB/-1, p. 276.

⁴⁵⁵ Counter-Memorial, para. 293.

⁴⁵⁶ Section 1.1.4, at REG-055, p. 5. Section 1.1.4 goes on to state that “In all cases, the principles of §1.1.2 apply”, and section 1.1.2 in turn provides that “Vessel operators must ensure there are enough qualified personnel on board the vessel to safely handle all expected operations in addition to watch standing duties.”

⁴⁵⁷ As set out in the Memorial, paras. 309–310, and the evidence referred to therein, at fns. 348–351.

⁴⁵⁸ Counter-Memorial, para. 295.

⁴⁵⁹ IMO Res A.1047(27), at para. 6 (Annex RMI/-56).

⁴⁶⁰ Counter-Memorial, para. 295.

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for the prevention of damage to the marine environment,” and “maintain, as appropriate, the structural integrity of the ship.”⁴⁶¹ These capabilities are plainly as important when a vessel is anchored as when it is under sail. This is affirmed by paragraph 1.3 of Annex 2 to Resolution A.1047(27), which states that “the determination of the minimum safe manning should also take into account (...) the management of the safety, security and protection of the environment functions of a ship at sea *when not under way*.”⁴⁶²

241. Removing the crew off the Vessel and refusing repeated safe manning requests also meant the mandatory requirements of the ISPS Code were not complied with.⁴⁶³

242. In short, Equatorial Guinea’s assertion that leaving 11 crew onboard fulfilled safe manning requirements⁴⁶⁴ is wrong as a matter of law and not supported by any evidence. To the contrary, the evidence is that the crew onboard could not in fact “moor and unmoor” the Vessel in Luba to carry out routine and necessary maintenance operations on the Vessel, including heaving and re-anchoring operations,⁴⁶⁵ or move the Vessel out of the way of the “*Wele Nzas*” and other vessels which threatened to collide with it.⁴⁶⁶

243. (v) Equatorial Guinea breached the COLREGS. It is clear from the text of Article 1 and Rules 2, 6, 7 and 8 of the COLREGS that they do not require damage to establish breach.⁴⁶⁷ It is accordingly irrelevant that the “*Wele Nzas*” or any other vessel passing close by caused no damage to the “*Heroic Idun*.”⁴⁶⁸

⁴⁶¹ The nine capabilities listed in IMO Res A.1047(27), Annex 1, at para. 3.1 are “the capability to: .1 maintain safe navigational, port, engineering and radio watches in accordance with regulation VIII/2 of the 1978 STCW Convention, as amended, and also maintain general surveillance of the ship; .2 moor and unmoor the ship safely; .3 manage the safety functions of the ship when employed in a stationary or near-stationary mode at sea; .4 perform operations, as appropriate, for the prevention of damage to the marine environment; .5 maintain the safety arrangements and the cleanliness of all accessible spaces to minimize the risk of fire; .6 provide for medical care on board ship; .7 ensure safe carriage of cargo during transit; .8 inspect and maintain, as appropriate, the structural integrity of the ship; and .9 operate in accordance with the approved Ship’s Security Plan” (**Annex RMI/-56**).

⁴⁶² Emphasis added. The safe manning principles are also reflected in the Maritime Labour Convention 2006, in Regulation 2.7 and Standard A2.7 (manning levels) and Regulation 2.1 and Standard A2.3 (hours of work and hours of rest) (available at <https://www.ilo.org/node/562386>).

⁴⁶³ The International Ship & Port Facility Security Code, Part B, at para. 4.28 provides that: “In establishing the minimum safe manning of a ship the Administration should take into account that the minimum safe manning provisions established by regulation V/14 only address the safe navigation of the ship. The Administration should also take into account any additional workload which may result from the implementation of the ship’s security plan and ensure that the ship is sufficiently and effectively manned. In doing so the Administration should verify that ships are able to implement the hours of rest and other measures to address fatigue which have been promulgated by national law, in the context of all shipboard duties assigned to the various shipboard personnel.” (**Annex RMI/-58**).

⁴⁶⁴ **Counter-Memorial**, para. 295.

⁴⁶⁵ Kulblik-1, paras. 73–75 (**Annex RMI/-2**). See also **Memorial**, para. 316 and the evidence referred to therein, at fn. 361.

⁴⁶⁶ See **Memorial**, para. 315 and the evidence referred to therein, at fns. 358–360.

⁴⁶⁷ The elements of an internationally wrongful act of a State are set out in Article 2 of the Articles on State Responsibility: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.” As set out in para. (9) of the commentary to Article 2, there is no general rule that damage is required for an internationally wrongful act; whether damage is required depends on the primary rule (Commentary to Articles on State Responsibility, p. 36).

⁴⁶⁸ Cf. **Counter-Memorial**, para. 297.

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244. Nor, contrary to what Equatorial Guinea appears to suggest,⁴⁶⁹ are the distances between the “*Wele Nzas*” and the “*Heroic Idun*,” when the former dragged anchor and then engaged in a dangerous maneuver on 26 September 2022, indicative of no risk being posed to the “*Heroic Idun*.” Distance is just one factor among others, including the characteristics and length of the “*Wele Nzas*,” the characteristics and length of the “*Heroic Idun*,” and the insufficient crew levels onboard the “*Heroic Idun*.”⁴⁷⁰ The “*Wele Nzas*” dragged anchor and came within 463 metres of the “*Heroic Idun*.” The “*Heroic Idun*” is 336 metres in length.⁴⁷¹ Therefore the “*Wele Nzas*” was just over a ship’s length from the “*Heroic Idun*” when she managed to arrest her movement. This is very close for a ship to pass a vessel of the “*Heroic Idun*”’s size.⁴⁷²

245. Nor, contrary to Equatorial Guinea’s contention, was there no concern for the safety of the “*Heroic Idun*” at the time. The Chief Officer, who was onboard at the time of the “*Wele Nzas*” incident, attests that when the “*Wele Nzas*” dragged anchor nearby it “almost caused a collision.”⁴⁷³ He also refers to his concerns for the safety of the Vessel when a supply boat alongside the Vessel caught fire, which he says “could have caused a major accident as [the] *Heroic Idun* is a tanker.”⁴⁷⁴ As the Master and Chief Officer explain, the Vessel had flammable gases within her holds, so the risk of explosion was still present even without a cargo.⁴⁷⁵ The lack of crew further meant that the firefighting response would have been severely compromised.⁴⁷⁶

246. (vi) Article 87(1) is engaged. The obligation under Article 87(1) is relevant and engaged by Equatorial Guinea’s violations of the STCW, SOLAS and the COLREGS for the reasons set out in paragraphs 225–236 above.

247. (vii) Equatorial Guinea has breached Article 2(3). Equatorial Guinea has provided no explanation for its statement that its conduct did not breach the obligation in Article 2(3) of UNCLOS to exercise sovereignty over the territorial sea subject to UNCLOS and other rules of international law. For the reasons given above, Equatorial Guinea has failed to establish that the Chamber does not have jurisdiction over SOLAS and the STCW or that they were not applicable and breached on the facts, or that the COLREGS were not breached.⁴⁷⁷ It follows that Equatorial Guinea has failed to meet its obligation under Article 2(3).

⁴⁶⁹ Counter-Memorial, para. 297.

⁴⁷⁰ Blount-1, para. 23 (Annex RMI/-37).

⁴⁷¹ See Annex TH/-3, p. 637.

⁴⁷² Blount-1, paras. 22, 36–37 (Annex RMI/-37).

⁴⁷³ Chief Officer-1, para. 55 (Annex RMI/-5). See also Kulblik-1, para. 77 (Annex RMI/-2), referring to Annex EK-66, p. 207.

⁴⁷⁴ Chief Officer-1, para. 55 (Annex RMI/-5); see also Blount-1, paras. 32–33 and 36 (Annex RMI/-37).

⁴⁷⁵ Master-2, para. 12 (Annex RMI/-50); Chief Officer-2, paras. 11, 29–30 (Annex RMI/-51).

⁴⁷⁶ Blount-1, paras. 33, 36 (Annex RMI/-37).

⁴⁷⁷ Equatorial Guinea does not suggest that the Chamber does not have jurisdiction over the COLREGS.

VI. Breach of the obligation in Article 225 to avoid adverse consequences in the exercise of enforcement measures⁴⁷⁸

248. Equatorial Guinea addresses the Marshall Islands' claim that it breached Article 225 of the Convention at paragraphs 232–256 of Chapter 6 of the Counter-Memorial. It (i) treats Article 225 as synonymous with the principle of reasonableness and treats the Marshall Islands' claims under that head of claim together with its claim of breach of Article 225;⁴⁷⁹ (ii) contends that the Marshall Islands' interpretation of Article 225 is wrong;⁴⁸⁰ (iii) maintains the Chamber should accord it a "margin of appreciation" in its application of Article 225;⁴⁸¹ and (iv) claims that it did not breach Article 225 on the facts.⁴⁸² Each of these contentions is addressed in turn. For the reasons set out below, points (i)–(iii) are misconceived and, on point (iv), Equatorial Guinea has failed to rebut the evidence that it breached Article 225.

249. (i) Article 225 of the Convention is not synonymous with the principle of reasonableness. First, a general principle of international law is not a treaty article: they are distinct sources of international law.⁴⁸³ They are both forms of primary rules, the breach of which can provide independent bases for State responsibility.⁴⁸⁴ As set out above, the principle of reasonableness in the exercise of enforcement measures may provide the basis for a separate claim under the Convention.⁴⁸⁵ Secondly, Article 225 on its face is of narrower scope than the principle of reasonableness in the exercise of enforcement action. Article 225 specifically concerns enforcement action which "endanger[s] the safety of navigation or otherwise creates[s] any hazard to a vessel, or bring[s] it to an unsafe port or anchorage, or expose[s] the marine environment to an unreasonable risk," whereas, as set out above, the principle of reasonableness in the exercise of enforcement action is of broader application, and applies to, *inter alia*, the imposition of penalties and fines and the treatment of the crew.⁴⁸⁶

250. (ii) The Marshall Islands' interpretation of Article 225 is correct. Equatorial Guinea says it is incorrect to interpret Article 225 by reference to SOLAS, the STCW, COLREGS and Article 94 of the Convention,⁴⁸⁷ and that "it is not clear on what legal or logical basis the Marshall Islands asserts that Article 94 'forms part of the relevant context' for interpreting Article 225."⁴⁸⁸

251. The Marshall Islands' interpretation is a straightforward application of the rules of treaty interpretation reflected in Article 31 of the VCLT:

- a. The chapeau to Article 31(2) of the VCLT provides that "[t]he context for the purpose of the interpretation of a treaty shall comprise (...) the text (...)." Article 94

⁴⁷⁸ **Memorial**, paras. 317–324.

⁴⁷⁹ See, e.g., **Counter-Memorial**, paras. 239, 248, 256.

⁴⁸⁰ **Counter-Memorial**, paras. 235–238.

⁴⁸¹ **Counter-Memorial**, paras. 240–245.

⁴⁸² **Counter-Memorial**, paras. 247–256.

⁴⁸³ As reflected in Article 38(1) of the ICJ Statute.

⁴⁸⁴ See Commentary to Articles on State Responsibility, p. 36, at para. (13).

⁴⁸⁵ At paras. 186–191 above.

⁴⁸⁶ As set out in the **Memorial**, paras. 242–248 and at paras. 189–190 of above.

⁴⁸⁷ **Counter-Memorial**, para. 235.

⁴⁸⁸ **Counter-Memorial**, para. 236.

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is part of the text of the Convention. It is generally accepted⁴⁸⁹ that Article 94(5) requires the flag State to conform to the IMO treaties concerning the measures “as are necessary to ensure the safety at sea with regard, *inter alia*, to,”⁴⁹⁰ “the manning of ships”⁴⁹¹ and “the prevention of collisions;”⁴⁹² “that each ship is in the charge of a master and officers who possess appropriate qualifications,” and “that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship.”⁴⁹³ It is evident from the text of Article 94 that compliance with the relevant IMO conventions, i.e., the STCW, SOLAS and COLREGS, is considered necessary to ensure safety of life at sea, prevent collisions and control marine pollution. It follows that these conventions must also inform the content of the obligations under Article 225, which also concerns safety of navigation, hazards to vessels and protection of the marine environment. The connection between Article 94 and Article 225 is affirmed by commentators.⁴⁹⁴

b. In this connection it is also noted that Equatorial Guinea does not contest that Article 225 must be construed consistently with Articles 192, 194(1), 211 and 217 of the Convention which concern protection of the marine environment.⁴⁹⁵ Articles 211 and 217 make express reference to the applicable international rules and standards to prevent, reduce and control pollution of the marine environment⁴⁹⁶ and these are understood to include SOLAS, the STCW and the COLREGS.⁴⁹⁷

c. SOLAS, the STCW and COLREGS may also be relevant context by virtue of Article 31(3)(c), which provides that “[t]here shall be taken into account, together with context: (...) any relevant rules of international law applicable in the relations between

⁴⁸⁹ As set out in the **Memorial**, para. 289 and references therein.

⁴⁹⁰ Article 94(3) chapeau.

⁴⁹¹ Article 94(3)(b).

⁴⁹² Article 94(3)(c); see also Article 94(4)(c).

⁴⁹³ Article 94(4)(b).

⁴⁹⁴ The authors of Proelß observe in the commentary on Article 225 at *Proelß Commentary*, at p. 1536, that the safety of navigation “may be attained by coastal States adopting and giving due publicity to rules and regulations (...), without foregoing the compliance with flag States’ laws and regulations relating to the seaworthiness of vessels (→ Art. 94(3)(a), (4)(a) and other applicable international rules).”

⁴⁹⁵ **Memorial**, para. 320.

⁴⁹⁶ In Articles 211(1), (2), (3), (5), (7) and 217(1), (2), (3) and (4). While Article 217 specifically concerns enforcement by the flag State of such international rules and standards, for the reasons elaborated above, at paras. 232 and 234 of the Reply, States Parties other than the flag State have obligations to take all necessary steps to ensure the conventions are complied with, which must include ensuring the flag State is able to comply with its obligations under Article 217 and applicable international rules and standards, or is not prevented by that other Party from complying Article 217 and its obligations under the applicable international rules and standards.

⁴⁹⁷ For the reasons set out at **Memorial**, paras. 285–293. The connection between safe manning and prevention, reduction and control of pollution from ships is express in Article 217(2) (“States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of (...) manning of vessels”) and Article 194(3)(b) (“The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent: (...) (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the (...) manning of vessels”).

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the parties.” SOLAS, the STCW and COLREGS are “applicable between the parties.”⁴⁹⁸ They are “relevant rules of international law,”⁴⁹⁹ including because their provisions address “the safety of navigation,” “the creation of any hazards” to the Vessel, and the protection of the marine environment.

252. (iii) Breach of Article 225 is to be objectively determined. The Marshall Islands has addressed Equatorial Guinea’s margin of appreciation argument above.⁵⁰⁰ Applying the approach set out there, the language of Article 225 does not contain any basis for interpreting it to contain an element of discretion for the State concerned. The passages from the joint dissent in “*Virginia G*” and dissent in “*Camouco*” relied on in the Counter-Memorial⁵⁰¹ addressed the meaning of the terms “as may be necessary” and “reasonable” in Article 73(1) and (2).⁵⁰² Article 225 by contrast is framed as a mandatory obligation: “States *shall not endanger* 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.”⁵⁰³

253. As such, Article 225 imposes limits on States’ exercise of enforcement powers under the Convention and does not confer any discretion on the State concerned to determine whether it has endangered the safety of navigation, created a hazard to a vessel or brought the vessel to an unsafe port or anchorage, or exposed the marine environment to an unreasonable risk. Whether it has done so can and must be objectively assessed by reference to the facts and other relevant factors, including the international rules standards which represent States’ understanding of and agreement on what is necessary to protect safety of navigation and the marine environment,⁵⁰⁴ relevant industry knowledge and practice (e.g., as to what are the features of a suitable port for VLCCs), and scientific understanding. The inclusion of the term “unreasonable” in the text of Article 225 does not alter this analysis, as the question of what is an “unreasonable risk” is to be assessed by reference to the risks to the marine environment posed by,

⁴⁹⁸ **Memorial**, paras. 285–286; 124–125.

⁴⁹⁹ See Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd edn, 2015), at p. 299 (“relevant” rules of international law are “those touching on the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation (...) ‘a treaty must be deemed “to refer to such principles for all questions which it does not itself resolve expressly and in a different way.”’”).

⁵⁰⁰ See paras. 192–197 above.

⁵⁰¹ **Counter-Memorial**, paras. 242–244.

⁵⁰² The dissenting judges in the “*Virginia G*” were concerned with the proper interpretation of the words “as may be necessary” in Article 73(1), in the context of the question of whether the confiscation of a vessel for failing to obtain prior written authorization for bunkering in the EEZ in accordance with Guinea-Bissau law was “necessary” (*Virginia G*, *Joint Dissent*, paras. 45–46, 48). They reasoned that what was “necessary” was to be interpreted by reference to other elements of Article 73(1), namely the conferral of “sovereign rights” to “manage” living resources (para. 49). The term “sovereign” was considered to import a degree of deference, “unless such deference is denied by the Convention itself” (*ibid*), and the coastal State was to enjoy considerable discretionary powers in laying down the content of laws concerning conservation and management of living resources (para. 52, citing Judge Wolfrum) and concerning enforcement measures under Article 73(1) (para. 50), but not unlimited powers of appreciation (para. 53).

⁵⁰³ Emphasis added. This submission is without prejudice to the fact that, as set out in the Memorial, Chapters 5 and 6, and at Chapter 4 above, Equatorial Guinea did not enjoy any discretionary enforcement powers under the Convention or international law to intercept and detain the Vessel and crew.

⁵⁰⁴ See International Convention for the Prevention of Pollution from Ships 1973 (“**MARPOL**”), Annex 1 (“Regulations for the Prevention of Pollution by Oil”), Chapter 2, reg. 6, para. 4.1 (ship to be fit to proceed to sea without “presenting an *unreasonable threat of harm to the marine environment*” (emphasis added)) (**Annex RMI/-59**); MARPOL Article 5 (where ship has no certificate or does not comply with its certificate, a state party inspecting the ship must not allow it to sail until it can proceed to sea without “presenting an *unreasonable threat of harm to the marine environment*” (emphasis added)) (**Annex RMI/-46**, p. 687).

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inter alia, vessels and collisions to the marine environment and what can or should be done to address known risks and to identify and address potential risks.⁵⁰⁵ Again, this is a matter of objective determination.⁵⁰⁶

254. (iv) Equatorial Guinea breached Article 225. The evidence establishes that Equatorial Guinea's exercise of enforcement measures against the Vessel by removing 15 of its 26 crew from the Vessel, leaving it seriously undermanned for the entire period of its detention,⁵⁰⁷ forcing it to anchor in Luba bay, where conditions were not suitable for a VLCC like the "*Heroic Idun*,"⁵⁰⁸ and allowing the naval vessel stationed to guard the Vessel, the "*Wele Nzas*" to unsafely maneuver,⁵⁰⁹ endangered the safety of navigation, created a hazard for the Vessel, the crew and others onboard the Vessel, and exposed the marine environment to an unreasonable risk in breach of Article 225.

⁵⁰⁵ In this regard it is noted that the Tribunal in the *ITLOS Climate Change Advisory Opinion* considered, in the context of its consideration of the duty under Article 206, that the precautionary approach may restrict the margin of discretion on the part of the State concerned (para. 361). It is also noted that, insofar as a provision of the Convention imposes an obligation or standard of due diligence, "the standard of due diligence is variable, depending upon relevant factors, including risks of harm involved in activities" (para. 256) and this "should not be understood as an obligation which depends largely on the discretion of a State (...) The content of an obligation of due diligence should be determined objectively under the circumstances, taking into account relevant factors" (para. 257).

⁵⁰⁶ *Ibid.*

⁵⁰⁷ **Memorial**, paras. 308–311.

See Master-1, para. 173 (**Annex RMI/-1**): "The Vessel was severely undermanned during its period of detention in Equatorial Guinea. This was a concern I raised with the local agents at the time for the attention of the Equatorial Guinea authorities on various occasions. *The authorities did not seem to care about by this, so the Vessel remained undermanned for the three months and completely unable to handle any emergencies.*" (emphasis added); First Witness Statement of the Junior Third Officer, 8 June 2023, para. 26 (**Annex RMI/-8**): "I could not rest properly because I was under extreme stress. *I had to keep 12 hours of bridge watches every single day for 3 months which was exhausting.*" (emphasis added); First Witness Statement of the Second Engineer, 9 June 2023, para. 16 (**Annex RMI/-11**): "Only 4 people from the engine side were available during the detention including myself. *With only a limited crew, it was very tough to keep the Vessel alive and it suffered breakdowns/ steam and seawater leaks. In trying to prevent the Vessel sitting in dead ship without power supply or water, personal safety was compromised, but we had no other option.*" (emphasis added); First Witness Statement of the Third Engineer, 8 June 2023, paras. 14, 16 (**Annex RMI/-12**): "(...) it was difficult to do my duties in the engine room as we had less manpower (...) I was fatigued due to the lack of manpower on board."; Electrician-1, paras. 20, 22 (**Annex RMI/-14**): "The situation in relation to the day-to-day management of the Vessel was very tough. Four crew members (including myself) had to take care of all maintenance works in the engine room. There are usually 10 of us. (...) All of these conditions, coupled with the work we were doing on board were *unsafe and could potentially lead to deadly results*, particularly my job (...) During my detention in EG, I was saved twice from death due to electrocution by 440 volts, while I was working on an electrical issue that had arisen on board the Vessel." (emphasis added); Able Seaman No 3-1, para. 17 (**Annex RMI/-19**): "The conditions on-board the Vessel while we were detained were abnormal. We were shorthanded."; Ordinary Seaman No 2-1, para. 15 (**Annex RMI/-21**): "(...) there were only 11 of us on board which made the work very difficult to do. Everyone had extra jobs to do because of the lack of crew."; First Witness Statement of Motor Man No. 1, 9 June 2023, para. 13 (**Annex RMI/-24**): "(...) as I was the only motor man on-board, my duties drastically increased. I had a lot of work to do and could not rest for long periods of time."; Chief Cook-1, para. 18 (**Annex RMI/-27**): "(...) I could not rest properly because I was doing all galley work for 20 people, entirely by myself, for more than 3 months."

⁵⁰⁸ **Memorial**, para. 315. See Master-1, para. 106 (**Annex RMI/-1**): "[T]he port of arrival changed from Malabo to Luba. This was concerning to us because Luba is not a port in the traditional, shipping sense. It is an extremely small port that is primarily used by support vessels, small vessels and survey vessels which go to oil rigs. A ship as big as a VLCC is not designed to go into small ports like Luba. If anything went wrong, we could be thrust aground. Luba is also open to the weather and in the middle of the HRA, so it was extremely dangerous."

⁵⁰⁹ **Memorial**, paras. 315, 323(b); see Chief Officer-1, para. 55 (**Annex RMI/-5**).

VII. Equatorial Guinea's breach of its obligations to notify the flag State of enforcement measures⁵¹⁰

255. Equatorial Guinea addresses the Marshall Islands' claim that it breached its obligation to notify the flag State of enforcement measures at paragraphs 257 to 270 of its Counter-Memorial. Equatorial Guinea's main contention is that there is no obligation to notify the flag State of enforcement actions under UNCLOS and therefore it cannot be understood to have breached it.⁵¹¹ Its secondary argument is that, as the Marshall Islands had knowledge of the events at all relevant points in time, it was caused no prejudice.⁵¹²

256. The Marshall Islands addressed in detail in its Memorial the existence of a general principle of international law imposing a general duty to notify the flag State of enforcement action, which forms part of the applicable law for the purpose of Article 293 and may apply by virtue of a gateway provision.⁵¹³

257. Equatorial Guinea's response focusses on the Marshall Islands' submission that there is also sufficient evidence to support the identification of the obligation to notify the flag State of enforcement measures against the Vessel as a rule of customary international law.⁵¹⁴ It says the Marshall Islands provides no evidence of State practice and *opinio juris*.⁵¹⁵ This is incorrect.⁵¹⁶

258. Insofar as Equatorial Guinea contends that specific notification requirements found in specific treaty regimes and IMO resolutions cannot suggest the formation of a customary rule applicable to all enforcement measures by the flag State, this is wrong as a matter of principle. As set out in the ILC's Conclusions on the Identification of Customary International Law, "the existence of similar provisions in a number of bilateral or other treaties" *may* attest to the existence of a corresponding rule of customary international law.⁵¹⁷ Applying that principle here:

- a. The wording of the provisions in the Convention and a large number of IMO treaties and other instruments identified in paragraphs 332–336 of the Memorial are

⁵¹⁰ **Memorial**, paras. 323–324.

⁵¹¹ **Counter-Memorial**, para. 258. At **Counter-Memorial**, para. 262, fn. 417, Equatorial Guinea refers to Article 73(4) of UNCLOS and states that "the Tribunal has repeatedly confirmed that claims of non-compliance with Articles 73(3) and 73(4) are inadmissible in prompt release proceedings." That is beside the point, since it is an observation purely about the limited scope of prompt release proceedings, and not any other proceedings under UNCLOS. In any event, ITLOS has in fact found, in prompt release proceedings, that a failure to notify under Article 73(4) (amongst other things) *gave rise to a breach of Article 73(2)*: see the *Juno Trader* at paras. 76, 77, 80. In other words, breaches of Article 73(3) and 73(4) of UNCLOS are relevant even in prompt release proceedings, because they can give rise to or contribute towards a breach of the prompt release obligation under Article 73(2) (see also *Camouco*, at para. 59, and *Juno Trader*, *Separate Opinion of Judge Treves*, at paras. 3–5).

⁵¹² **Counter-Memorial**, paras. 267–270.

⁵¹³ **Memorial**, paras. 328–350.

⁵¹⁴ **Memorial**, para. 350.

⁵¹⁵ **Counter-Memorial**, paras. 263–264.

⁵¹⁶ The State practice and *opinio juris* relied on by the Marshall Islands are set out in the **Memorial**, para. 350.

⁵¹⁷ See "Identification of Customary International Law," in Report of the International Law Commission on the work of its seventieth session, A/73/10, *Yearbook of the International Law Commission (2018)*, vol. II (Part 2), p. 89 ("Draft Conclusions on Identification of Customary International Law"), at p. 107, commentary para. (8); p. 105, Conclusion 11(2).

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self-evidently “similar” and speak to the same obligation of conduct: all require notification or informing representatives of the flag State “immediately,” or “forthwith,” or “promptly,” “of any measures,” or upon “invention,” “control,” or “detention.” They are framed in terms of “a fundamentally norm-creating character.”⁵¹⁸

b. Whether such repetition attests to the existence of a corresponding rule requires “an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule.”⁵¹⁹ Such evidence is provided by the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator.⁵²⁰

259. In any event, even if it is not accepted that the evidence supports the identification of a customary rule, the requirements for the identification of a general principle of international law are satisfied. Equatorial Guinea has not contested this.

260. In this regard it is further noted that the Yaoundé Code, which Equatorial Guinea relies for its piracy defense, recognizes in its “Guiding Principles” that the flag State may have legitimate interests in cases arising under the Code and affirms that the signatories “intend to liaise and cooperate with,” *inter alia*, the flag State.⁵²¹

261. As to Equatorial Guinea’s other argument (that the Marshall Islands had knowledge of the events at all relevant points in time because it was informed by the Managers of the “*Heroic Idun*”’s detention and therefore was caused no prejudice), even if it were true (which it is not) that no prejudice was caused to the Marshall Islands, this would not relieve Equatorial Guinea of responsibility for breach of its notification obligation. This is for two reasons:

a. First, the notification obligation does not require damage to establish breach. Nor has Equatorial Guinea said otherwise.

b. Second, the notification obligation is placed on the State undertaking the enforcement measure, and it is well-established that such notification obligations cannot be discharged by reference to the fact that private actors, such as the Managers, had already conveyed the information in question.⁵²²

262. Furthermore, treating the notification requirement as satisfied by the fact of notification by private actors, as Equatorial Guinea suggests, would undermine the object and purpose of the rule, in at least two ways:

a. First, relying on an assumption that private actors will inform the flag State would not ensure that the flag State is notified of enforcement measures against its vessels so that it can assert its rights and obligations.

⁵¹⁸ See *North Sea Continental Shelf*, at para. 72.

⁵¹⁹ Draft Conclusions on Identification of Customary International Law, at p. 107, commentary para. (8).

⁵²⁰ Gallagher-1, paras. 13, 19, 22, 25 (**Annex RMI/-30**).

⁵²¹ Article 3(2) of the Yaoundé Code (**REG-001**).

⁵²² *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, I.C.J. Reports 2010 (“**Pulp Mills**”), at para. 110 (“the information (...) via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform (...) which is borne by the [state] party”), citing *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, I.C.J. Reports 2008, at para. 150.

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b. Second, even if the flag State is informed of events by private actors, it does not follow that it can therefore exercise its rights and obligations. Requiring the State taking the enforcement measure against a foreign vessel to notify the flag State necessarily involves a *direct communication with* the flag State. This effectively opens a channel of communication by the State taking the enforcement measure, as there is an expectation that the State so notified may respond to the author of the notification. It is well-recognized that States' procedural obligations to engage with each other, in good faith, enable and facilitate dialogue, diplomacy and dispute settlement.⁵²³ In this case, the Marshall Islands may have been able to – and did – make representations to Equatorial Guinea concerning the “*Heroic Idun*” after its detention on 12 August 2022, on 16 August and 22 August,⁵²⁴ because the Mangers had informed it of the Vessel and crew's detention. However, this is plainly not the same as responding to a notification opening up a channel of communication.⁵²⁵ Equatorial Guinea's complete absence of replies to the Marshall Islands' repeated letters demonstrates there was no such channel between the two States, despite the Marshall Islands' attempts. The events demonstrate that this was undoubtedly to the prejudice and detriment of the Marshall Islands' rights and obligations and the circumstances of the crew, the Vessel, and others involved with the Vessel.⁵²⁶

VIII. Equatorial Guinea's breach of the obligation to release the “*Heroic Idun*” and crew promptly without undue delay⁵²⁷

263. Equatorial Guinea addresses the Marshall Islands' claim that it breached the obligation to release the “*Heroic Idun*” and its crew promptly without delay at paragraphs 320 to 336 of the Counter-Memorial.

264. Equatorial Guinea maintains that there is no general obligation to release vessels and their crew without undue delay under international law,⁵²⁸ because the provisions in treaties and other instruments the Marshall Islands invokes in support of the existence of the obligation apply to specific factual circumstances and do not apply in the circumstances of the present

⁵²³ See *Pulp Mills*, at para. 113, referring to the obligation to notify construction works under Article 7 of the 1975 Statute of the River Uruguay: “the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them (...) if necessary, to negotiate (...)”; and *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, at para. 74. This is also implicit in the Tribunal's recognition in the “*Camouco*” that the purpose of the notification requirement in Article 73(4) of the Convention is to ensure the flag State is able to exercise its rights and obligations under the Convention: the observation that it has a bearing on the ability of the flag of the arrested vessel to invoke Article 73(2) must implicitly assume that the arresting State may respond to such invocation. Otherwise the provision could not perform its purpose.

⁵²⁴ **Memorial**, paras. 97(a) and (b).

⁵²⁵ Thus, in *Pulp Mills*, at paras. 109–110, the ICJ acknowledged that Argentina was notified of the planned works in Uruguay by private actors, but nevertheless expressed the view at para. 113 that Uruguay's obligation to notify Argentina was important for the purposes of “successful co-operation between the parties”.

⁵²⁶ The meetings between flag's representative, Captain Mustapha and the Director-General of Ports of Equatorial Guinea and Attorney-General on 8 and 13 September 2022 were well after the detention on 12 August 2022, i.e., were not prompt or immediate on the part of Equatorial Guinea, were instigated by the Marshall Islands and were not followed by any further communications by Equatorial Guinea to the Marshall Islands, despite the Marshall Islands' subsequent attempts, as set out in the **Memorial**, para. 97.

⁵²⁷ **Memorial**, paras. 356–387.

⁵²⁸ **Counter-Memorial**, para. 321.

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case.⁵²⁹ Specifically, Equatorial Guinea says that “none of these provisions were formulated in the context of the apprehension of a vessel for suspected illegal activities or piracy.”⁵³⁰

265. The Marshall Islands makes three points in response.

266. First, Equatorial Guinea’s key point, repeatedly stated, is that each of the treaty and other provisions relied on as material sources for the existence of the primary rule are “not applicable to the present case.”⁵³¹ That is not the question. The question is whether, applying the secondary rules concerning the identification of principles or rules of customary law in light of these sources, it is established that there exists a principle or customary rule of international law. The Marshall Islands addressed this in detail in its Memorial.⁵³² The points below address specific points potentially relevant to that question raised by Equatorial Guinea’s submissions:

a. Equatorial Guinea appears to suggest that subject-matter specificity of treaties and instruments is relevant to the question of whether their prompt release provisions can be evidence of the existence of a principle of international law. What is required for the identification of a general principle in existing norms, according to the work of the ILC in its Draft Conclusions on General Principles of Law, is “an analysis of existing rules in the international legal system (...) in order to find principles reflected in those rules or underlying them, and having an autonomous status.”⁵³³ This does not require that the existing rules concern the same specific subject-matter.⁵³⁴ The sources set out in the Memorial reflect a common principle, which is that vessels and their crew must be released promptly without undue delay once the reason for having detained them no longer obtains. This is well illustrated by the fact the IMO has produced Procedures for Port State Control which are of general application to all IMO treaties,⁵³⁵ as well as the use of the same or functionally equivalent wording in the provisions concerning release across the various treaties and instruments.⁵³⁶ The pol-

⁵²⁹ **Counter-Memorial**, paras. 324, 326–332.

⁵³⁰ **Counter-Memorial**, para. 332.

⁵³¹ **Counter-Memorial**, para. 327; see paras. 324, 325, 326, 328, 330, 331, 332, 334.

⁵³² **Memorial**, paras. 357–372.

⁵³³ Chapter IV, “General principles of law”, in Report of the International Law Commission on the work of its seventy-fourth session, A/78/10 (2023), p. 10, at p. 23, commentary to Conclusion 7, para. (3).

⁵³⁴ Nowhere does the ILC suggest principles of international law can only be drawn from treaties and instruments concerning the same specific subject-matter, assuming that it is even possible to identify what is the same subject-matter in every case. What is the “same” must be relative to the selection of the “subject-matter”. For example, what is the “same” will differ if the subject-matter selected is “rules governing vessel source pollution” or “rules governing detention of vessels”.

⁵³⁵ IMO Assembly Resolution A.1185(33), adopted on 6 December 2023 (available at [https://wwwcdn.imo.org/localresources/en/OurWork/IIIS/Documents/A%2033-Res.1185%20-%20PROCEEDURES%20FOR%20PORT%20STATE%20CONTROL,%202023%20\(Secretariat\)%20\(1\).pdf](https://wwwcdn.imo.org/localresources/en/OurWork/IIIS/Documents/A%2033-Res.1185%20-%20PROCEEDURES%20FOR%20PORT%20STATE%20CONTROL,%202023%20(Secretariat)%20(1).pdf)); see Annex, p. 3, para. 1.2.1.

⁵³⁶ “[S]hall be *promptly released* upon the posting of a reasonable bond” (UNCLOS Article 73(2)); “whereby compliance with requirements for bonding (...) has been assured, the coastal State (...) *shall allow the vessel to proceed*” (UNCLOS Article 220(7)); “release *shall be made promptly* subject to reasonable procedures” (UNCLOS Article 226(1)(b)); “[a]ll possible efforts shall be made to *avoid a ship being unduly detained or delayed*” (MARPOL Article 7, SOLAS Regulation I/19(f), STCW Article X(4), BWMC (Ballast Water Management Convention) Article 12, and the IMO PSC Procedure Chapter 2, para. 2.1.4 (set out in the **Memorial**, paras. 362, 365); “the Authorities will make all possible efforts *to avoid unduly detaining or delaying* a ship (numerous Port State MOUs, set out in the **Memorial**, paras. 363–364); “States shall be liable for loss (...) when such action is unlawful

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icy reasons underpinning this principle (to avoid undue burden on the owners, managers, charterers, crew, and for humanitarian reasons⁵³⁷) are of general application and relevance to all vessel detentions, irrespective of the reason for the detention.

b. Similar considerations apply to the identification of custom. As set out above, “the existence of similar provisions in a number of bilateral or other treaties” may attest to the existence of a corresponding rule of customary international law.⁵³⁸ What is required is an investigation into whether there are instances of practice accepted as law (accompanied by *opinio juris*) that support the written rule.⁵³⁹ This is provided in the statement of the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator.⁵⁴⁰

c. Contrary to Equatorial Guinea’s assertion,⁵⁴¹ provisions requiring release of detained vessels without undue delay are obviously drafted “in the context of the apprehension of a vessel for suspected illegal activities”⁵⁴² – for example, for violation of fisheries legislation or to check compliance with such laws and regulations. The exercise of lawful enforcement action under international law is predicated on the existence and exercise of criminal or regulatory prescriptive jurisdiction under international law.

d. The *M/V “Louisa”* does not provide Equatorial Guinea any support.⁵⁴³ That case turned on the Tribunal’s finding that it had no jurisdiction to entertain the application because the vessel was detained while in port in the context of criminal proceedings relating to violations of Spanish laws, not while exercising freedom of navigation under the Convention.⁵⁴⁴ Furthermore, Saint Vincent and the Grenadines did not seek to rely on a general obligation to release without undue delay.⁵⁴⁵

e. The principle that detained vessels should be released promptly without undue delay is also reflected in the Yaoundé Code on which Equatorial Guinea relies. According to Article 3(5) of the Guiding Principles, “[t]he Signatories intend to ensure that, in seeking fulfilment of the above objectives, a balance is maintained between the need to enhance maritime security and facilitation of maritime traffic and *to avoid any unnecessary delays* to international maritime trade in West and Central Africa.”⁵⁴⁶

or exceeds that reasonably required” (Fish Stocks Agreement Article 21(18)); “all possible efforts [should be made] *to avoid unduly delaying the vessel*” (PSMA (Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009) Article 13(2)(f) (**Memorial**, para. 366) (emphases added)).

⁵³⁷ As set out in the **Memorial**, paras. 367, 368 and 369. As set out in para. 369, the humanitarian rationale underpinning the obligations of prompt release in the Convention have been recognized by the Tribunal in the *Juno Trader*, the *Louisa*, and the *Enrica Lexie*, *Merits Award*, and Judge Laing in his declaration in the *Camouco* in the context of prompt release applications under Article 73 and provisional measures applications seeking release.

⁵³⁸ Draft Conclusions on Identification of Customary International Law, at p. 107, commentary para. (8).

⁵³⁹ *Ibid.*

⁵⁴⁰ Gallagher-1, paras. 13, 19, 22, 25 (**Annex RMI/-30**), as noted at para. 258.b above.

⁵⁴¹ At para. 332.

⁵⁴² **Counter-Memorial**, para. 332.

⁵⁴³ Cf. **Counter-Memorial**, para. 335.

⁵⁴⁴ *Louisa*, at paras. 113, 109.

⁵⁴⁵ It relied on Articles 73(2), 226 and 227 (see *Louisa*, at paras. 100, 113).

⁵⁴⁶ **REG-001** (emphasis added).

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267. Second, Equatorial Guinea's approach elides the question of the existence of the primary rule with its applicability and breach. Whether or not Equatorial Guinea intercepted and detained the Vessel on grounds of piracy as it now contends is irrelevant to the existence of the principle or customary rule of international law.

268. Third, even if Equatorial Guinea had in fact intercepted and detained the Vessel on grounds it had been engaged in piracy, as it claims for the first time in its Counter-Memorial (and which it did not), the principle or customary rule would still have an object and be applicable. Once it is established that a vessel detained on the grounds of piracy has not engaged in piracy, it must be released without undue delay because the grounds on which it was detained no longer justify its continued detention. In this case, none of the contemporaneous evidence relied on by Equatorial Guinea provided any basis for forming or maintaining the belief that the Vessel had been engaged in piracy⁵⁴⁷ and, accordingly (and without prejudice to the argument that it should never have detained the Vessel and crew in the first place), having detained the Vessel, Equatorial Guinea should have released it and the crew immediately without undue delay.

IX. Equatorial Guinea's breach of the obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings⁵⁴⁸

269. Equatorial Guinea addresses the Marshall Islands' claim that it breached the obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings at paragraphs 337 to 345 of the Counter-Memorial.

270. It does not contest the Marshall Islands' account of the law,⁵⁴⁹ but disputes the claim on the facts. Specifically, Equatorial Guinea disputes that it breached the obligation under Article 283 or that its transfer of the Vessel and crew to Nigeria aggravated the dispute. Each of these contentions is addressed in turn.

271. Breach of Article 283. Equatorial Guinea disputes that it breached the obligation under Article 283, relying on letters to the Marshall Islands dated 12 June 2023 and 22 May 2023⁵⁵⁰ and the Special Agreement.⁵⁵¹ None of this evidence establishes compliance with Article 283. A letter of 12 June 2023, (i) which is sent some 11 months after the Marshall Islands first raised the dispute,⁵⁵² (ii) which does not reply to any of the letters or notes verbales raising the dispute,

⁵⁴⁷ See the Reply at paras. 121–129 above.

⁵⁴⁸ **Memorial**, paras. 388–397.

⁵⁴⁹ **Memorial**, paras. 388–395. The obligation is particularized in para. 397 of the Memorial, i.e., the obligation under general international law not to extend or aggravate the dispute, to which the Chamber may have recourse by virtue of Article 293, and the obligations under Article 283 and Part XV of the Convention.

⁵⁵⁰ **Counter-Memorial**, paras. 339–340.

⁵⁵¹ **Counter-Memorial**, paras. 339, 342.

⁵⁵² As set out in the **Memorial**, paras. 96–99, the Marshall Islands first raised the dispute on 16 August 2022, followed by letters and notes verbales of 26 August 2022, 8 September 2022, 13 September 2022, 18 October 2022, 28 October 2022, 4 November 2022, and 14 November 2022. Equatorial Guinea did not reply to any of these communications.

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(iii) which is sent *after* proceedings have been commenced under Section 2 of Part XV,⁵⁵³ and (iv) which seeks settlement of those proceedings, is not “expeditious” and cannot be an “exchange of views” for the purpose of Article 283. Similarly, agreeing to the Special Agreement on 18 April 2023, after the initiation of an Annex VII arbitration by the Marshall Islands under Section 2 of Part XV on 18 December 2022, does not satisfy the obligation under Article 283.

272. Aggravation of the dispute by transfer of the Vessel and crew to Nigeria. Equatorial Guinea maintains that transferring the “*Heroic Idun*” and its crew to Nigeria, despite the Marshall Islands having raised the dispute and the initiation of Prompt Release Proceedings under UNCLOS before ITLOS, did not breach the obligation of non-aggravation, because it was acting pursuant to its duty of cooperation with Nigeria and the transfer was not prohibited at the time by any particular international obligation.⁵⁵⁴

273. This is no answer to the claim. Equatorial Guinea’s response presumes to answer (and self-judge) the very issue that was submitted by the Marshall Islands to ITLOS on 9 November 2022 for its determination in the Prompt Release Proceedings. Equatorial Guinea could have and should have raised these arguments before ITLOS then. Indeed, it should have raised these arguments with the Marshall Islands from the outset, in response to the many letters and notes verbales sent by the Marshall Islands between 16 August 2022 and 4 November 2022. There can be no real doubt that, by transferring the Vessel and crew to Nigeria before the Prompt Release Application was heard, and putting it out of the Tribunal’s power to order the Vessel and crew’s release or make any other appropriate order, Equatorial Guinea disregarded and frustrated the dispute settlement procedure it had agreed to under the Convention, and seriously aggravated and extended the dispute.

⁵⁵³ As set out in the *Proelß Commentary*, citing *Louisa*, Article 283 “introduces a preliminary procedural step that *must precede invocation by a party to a dispute of the compulsory procedures* under Arts. 286 and 287, and is a condition precedent to the jurisdiction of the forum selected under the latter” (*Proelß Commentary*, at p. 1830, emphasis added).

⁵⁵⁴ **Counter-Memorial**, para. 344.

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CHAPTER 7

REMEDIES

I. Introduction

274. The Marshall Islands is entitled to reparation from Equatorial Guinea due to its internationally wrongful conduct, i.e., for its breaches of UNCLOS and other applicable rules of international law, detailed in the Memorial and Chapters 4 to 6 above. Specifically, the Marshall Islands is entitled to restitution, compensation (including interest and costs) and satisfaction in the form of an acknowledgment of wrongdoing, together with an assurance and guarantee of non-repetition.

275. This Chapter replies to Equatorial Guinea's arguments on liability, causation, and reparation, and shows how the damages suffered by the Marshall Islands were caused by Equatorial Guinea's internationally wrongful acts.

276. The standard of causation, including the applicable standard for causation, is addressed in **section II**; compensation for material damages in **section III**; compensation for non-material damage in **section IV**; interest in **section V**; costs in **VI**; and satisfaction and guarantees of non-repetition in **section VII**.

II. Causation

A. The Applicable Standard for Causation

277. Equatorial Guinea argues that, to establish liability, international law requires "establishing the existence of a 'sufficiently direct', 'certain' and 'clear and unbroken' causal link between an internationally wrongful act (...) and the injury suffered."⁵⁵⁵ It also relies on the ILC's work on State responsibility to assert that the "damage suffered must be 'proximate', 'foreseeable' and 'consequential.'"⁵⁵⁶

278. As a preliminary point, in the passages quoted above, Equatorial Guinea refers to many of the expressions used to qualify the required causal link between an internationally wrongful act and the damage that it causes. It does not, however, specify which of those many standards should be applied here.

279. There is no single standard for causation under international law. As the ILC has explained, "the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation."⁵⁵⁷ The standard that has been adopted and constantly applied by the Tribunal is articulated in the *M/V "Saiga" (No. 2)*, where it held that "[i]t is a well-established rule of international law that a State which suffers damage as a result of an inter-

⁵⁵⁵ Counter-Memorial, para. 350.

⁵⁵⁶ Counter-Memorial, para. 351.

⁵⁵⁷ Commentary to Articles on State Responsibility, at p. 93.

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nationally wrongful act by another State is entitled to obtain reparation for the damage suffered.”⁵⁵⁸ The Tribunal developed that standard in the *M/V “Norstar,”* holding that there is a requirement of directness: “only damage directly caused by the wrongful act (...) is the subject of compensation.”⁵⁵⁹ This is a broad, relatively flexible standard. There is no reason to depart from the Tribunal’s approach in this case.

B. Equatorial Guinea’s Wrongful Conduct Caused the Damage

280. As explained in the Memorial and in this Reply, Equatorial Guinea is responsible for all the damage suffered by the Marshall Islands. Equatorial Guinea, however, contends that, because some of the damage suffered by the Vessel and crew was the result of actions that took place when the Vessel and crew were unlawfully detained in Nigeria, there is no sufficient causal link between Equatorial Guinea’s conduct and the damage suffered.⁵⁶⁰ That is wrong. There is a sufficient causal link. All of the damage suffered and claimed by the Marshall Islands was “directly caused” by and “a result” of Equatorial Guinea’s internationally wrongful acts.

281. Further, Equatorial Guinea (wrongly) contends that the Marshall Islands is trying to attribute to it responsibility for the “actions of another sovereign State.” That is the wrong characterization. The correct test to determine whether the Marshall Islands is entitled to recover those damages is whether the damage it suffered was “a result” of Equatorial Guinea’s internationally wrongful acts. Here, the answer is “yes.” The damage suffered by the Marshall Islands was a direct result of Equatorial Guinea’s breaches of its international obligations:

a. First, all the damage suffered and claimed by the Marshall Islands was a result of Equatorial Guinea’s breach of its obligations by unlawfully detaining the Vessel and crew on 12 August 2022. Equatorial Guinea then compounded that damage by handing over the Vessel and crew to the control and custody of Nigeria instead of releasing them, as it (i) promised to do upon payment of the Fine and (ii) would have been obliged to do if the Marshall Islands’ pending Prompt Release Application to the Tribunal was successful. None of the damage that the Vessel and crew suffered – either in Equatorial Guinea or in Nigeria – would have happened otherwise, and they are thus a direct consequence of Equatorial Guinea’s conduct. Therefore, the damage suffered by the Marshall Islands was a result of, and directly caused by, Equatorial Guinea’s wrongful acts.

b. Second, the damage suffered by the Vessel and the crew, both in Equatorial Guinea and in Nigeria, was foreseeable.⁵⁶¹ As to the damage suffered in Equatorial

⁵⁵⁸ *Saiga (No. 2)*, at para. 170, cited in *Virginia G*, at para. 428 and *Norstar, Merits Judgment*, at para. 316.

⁵⁵⁹ Similarly, in the *Virginia G* the Tribunal held that Panama was entitled to recover damages for the “direct consequences of the illegal confiscation,” at para. 435.

⁵⁶⁰ **Counter-Memorial**, paras. 358–360.

⁵⁶¹ As to the relevance of foreseeability as a test for causation, see: *Decision No. 7: Guidance Regarding Jus ad Bellum Liability*, Eritrea-Ethiopia Claims Commission (27 July 2007) at para. 13, stating that: “[T]he necessary connection is best characterised through the commonly used nomenclature of ‘proximate cause.’ In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity.”

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Guinea, this was foreseeable given: (i) the length of the detention; and (ii) the conditions in which both the Vessel and crew were detained. As to the damage suffered in Nigeria, this was also foreseeable by Equatorial Guinea, insofar as it was evident (or should have been evident) that the detention of the Vessel and crew would continue, including from: (i) the communications it had received from the Government of Nigeria requesting “repatriation” for “investigations and further action,”⁵⁶² and (ii) Nigeria’s previous history of detaining vessels and their crews, some of which have been subject to proceedings before the Tribunal.⁵⁶³ Indeed, the fact that Equatorial Guinea took steps to secure an undertaking from Nigeria that the Vessel’s crew would be treated “in accordance with the provisions of the International Convention of Civil and Political Rights,” as well as to “equally guarantee the safety of the vessel while under investigation in Nigeria,”⁵⁶⁴ demonstrated that it knew they would be detained in Nigeria with all the attendant risks that entails.

282. Finally, Nigeria’s detention of the Vessel is not an intervening factor. It does not break the causal chain between Equatorial Guinea’s conduct and the damage suffered by the Marshall Islands. Rather, Equatorial Guinea is responsible for the damage caused by the detention of the Vessel and crew in that State because that was a direct consequence and result of Equatorial Guinea’s unlawful detention of the Vessel and crew on 12 August 2022 and Equatorial Guinea’s unlawful transfer of the Vessel and crew on 11 November 2022.

283. The critical point is that the handover of the Vessel to Nigeria meant that the wrongful act (the Vessel’s and crew’s detention) continued. The position would be very different had Equatorial Guinea released the Vessel and crew (as it was obliged to do) and they had subsequently been detained by Nigeria.⁵⁶⁵ That would have broken the causal chain. But handing over the Vessel and crew to Nigeria, in circumstances in which Equatorial Guinea knew they would continue to be detained for a significant period or had no regard for how long the Vessel and crew would be detained, does not. Even if Nigeria’s conduct is considered a concurrent cause of some of the damage suffered by the Marshall Islands, Equatorial Guinea would nevertheless be internationally liable for that damage.⁵⁶⁶ Equatorial Guinea is thus responsible for all the damages suffered by the Marshall Islands whilst the Vessel and crew were unlawfully detained.

⁵⁶² Letter from the Ministry of Defence of the Republic of Nigeria to the Ministry of Foreign Affairs of Equatorial Guinea dated 12 October 2022 (**REG-040**); see also Nigeria’s Notes Verbales to Equatorial Guinea dated 26 October 2022 (**REG-044**) and 1 November 2022 (**REG-046**), and Equatorial Guinea’s Note Verbale to Nigeria dated 27 October 2022 (**REG-047**).

⁵⁶³ See e.g., *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2019*.

⁵⁶⁴ **Counter-Memorial**, para. 95; **REG-011**.

⁵⁶⁵ See *Norstar, Merits Judgment*, at paras. 365–370.

⁵⁶⁶ See Articles 31 and 47 of the Articles on State Responsibility; see also *Armed Activities in the Congo*, at paras. 97–98.

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III. Compensation for Material Damages

A. Heads of Damage

284. The Marshall Islands set out eight specific heads of material damage that it is entitled to recover at paragraph 413(a)–(h) of the Memorial. In addition to challenging causation, addressed above, Equatorial Guinea also challenges the evidential basis for the damages claims or their quantum. The Marshall Island responds to these arguments below. It also updates certain of the amounts claimed to reflect the most up-to-date figures as those figures have further crystallised. For ease of reference, the Marshall Islands repeats each of the heads of damage set out in its Memorial, with the updated figures together with, as relevant, responses to Equatorial Guinea’s submissions. The total up to date figure is US\$43,017,837.72.

1. *Costs and expenses to assist the crew during their unlawful detention*

285. The Marshall Islands is claiming costs and expenses to assist the crew during their unlawful detention (including costs of medical and psychological assistance) in the sum of US\$1,712,336.15,⁵⁶⁷ broken down as follows:

- a. €15,255.44 (equivalent to US\$14,772.40) and US\$6,136.93 to provide psychological support in Equatorial Guinea;
- b. €126,436.33 (equivalent to US\$124,940.90) in correspondent costs incurred due to detention and release efforts;
- c. US\$1,567.55 in Captain Ramaswamy’s travel costs for discussions with Indian authorities regarding detention and release;
- d. US\$373,986 in additional salary paid to the crew from August to November 2022 due to the detention;
- e. US\$26,000 as a Christmas bonus paid to the crew due to their detention;
- f. US\$104,416 as a high-risk bonus paid to the crew due to their detention;
- g. US\$78,000 as additional bonuses paid to the crew due to their detention;
- h. US\$520,000 in compensation paid to the crew on disembarkation, due to their detention;
- i. US\$121,302.32, €151,532.04 (equivalent to US\$161,722.59) and INR 290,396 (equivalent to US\$3,523.08) in medical expenses for the crew;
- j. US\$107,227.46 in sick wages of the crew during detention;

⁵⁶⁷ See **Annex RMI/-60** for further documentary evidence supporting this claim.

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k. US\$236.54 and PHP 68,339.70 (equivalent to US\$1,226.68) in medical costs for the crew receiving treatment at home; and

l. US\$20,375.08, €225.00 (equivalent to US\$240.81) and NOK 482,204.61 (equivalent to US\$46,611.81) in travel costs, including those of the crew's family across India for family updates and for the Manager's representatives to travel to West Africa.

286. Equatorial Guinea asserts that the Marshall Islands “has not submitted a single piece of evidence to support” the amounts it claims as costs and expenses.⁵⁶⁸ Equatorial Guinea relies on *Ahmadou Sadio Diallo* to make that point. This is misplaced. There, the claim concerned vague, unspecified claims about the loss of assets, which were not supported by evidence.⁵⁶⁹

287. Here, in contrast, the damage suffered by the Vessel and crew is specified and the Marshall Islands has produced witness,⁵⁷⁰ expert,⁵⁷¹ and documentary evidence⁵⁷² to support its claims, as addressed in detail below in relation to each specific claim. Furthermore, part of the documentary evidence regarding the provisions delivered by the local agents to the crew whilst they were unlawfully detained are in Equatorial Guinea's possession and it has annexed them in these proceedings.⁵⁷³ Insofar as necessary and relevant, the Marshall Islands has adduced additional witness and documentary evidence with this Reply.

288. For example:

a. The Marshall Islands has adduced witness evidence, from Mr Kulblik and the Master, explaining the medical treatment that was provided to the crew. The Master explains that he and some of the crew had to receive medical treatment for malaria and other illnesses,⁵⁷⁴ and Mr Kulblik explains that OSM “arranged to send a private medical doctor to the detention facility” and that, once the crew was released, they had “medical checks (...) and some sessions with a psychiatrist.”⁵⁷⁵

b. The Marshall Islands has adduced evidence from Dr Perman-Kerr, who provided psychological assistance to the crew, both via video link whilst they detained and in person in Cape Town, South Africa, once they had finally been released.⁵⁷⁶

⁵⁶⁸ **Counter-Memorial**, para. 365.

⁵⁶⁹ In *Diallo* the Court dismissed the Republic of Guinea's claim over “certain high-value items not specified in the inventory [of assets],” those high-value items included a “a diamond-studded watch and two paintings by a renowned artist.” The Court concluded—at the paragraph immediately before the one Equatorial Guinea cites—that the Republic “offers few details and provides no evidence to support the assertion that the items were located in Mr. Diallo's apartment at the time of his detentions (...) There is no statement by Mr. Diallo describing these goods. There are no records of purchase, even as to items allegedly purchased from well-known establishments (...) Guinea has put forward no evidence whatsoever that Mr. Diallo owned these items (...) or that they were lost as a result of his treatment by the DRC,” see: *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, *Compensation Judgment of 19 June 2012*, *I.C.J. Reports 2012* (“*Diallo*”), at para. 34.

⁵⁷⁰ **Memorial**, para. 281(d).

⁵⁷¹ See Perman-Kerr-1 (**Annex RMI/-38**).

⁵⁷² See e.g., **EK/32**, **EK/-33**.

⁵⁷³ See **Counter-Memorial**, paras. 82–83; see also **REG-012**, **REG-013**, **REG-042**.

⁵⁷⁴ Master-1, paras. 117–119 (**Annex RMI/-1**).

⁵⁷⁵ Kulblik-1, paras. 30 and 94 (**Annex RMI/-2**).

⁵⁷⁶ See Perman-Kerr-1 (**Annex RMI/-38**).

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c. The Marshall Islands has adduced contemporaneous documentary evidence that shows that the crew was provided with medical and psychological assistance.⁵⁷⁷

d. Equatorial Guinea's own witness, Mr Hernández Martín, accepts that during their unlawful detention in Equatorial Guinea the crew had to receive medical treatment at private medical facilities⁵⁷⁸ (including due to the "bad care" provided to the crew at the hands of Equatorial Guinea's navy and government hospitals).⁵⁷⁹ It is undisputed that such medical treatment was paid for by Owners and not by Equatorial Guinea.

289. Further, Equatorial Guinea wrongly asserts that the Marshall Islands is claiming material damages to recover the crew's wages, relying on the *M/V "Norstar"*.⁵⁸⁰ That is incorrect. The Marshall Islands is not, and has never, claimed any form of material damage based on the crew's regular wages, which is what the Tribunal was addressing in the *M/V "Norstar"*. It is, however, claiming damages based on the additional payments that were made to the crew because of the conduct of Equatorial Guinea.

290. The detailed breakdown presented shows that the Marshall Islands details only the additional bonuses that were paid to the crew during detention.⁵⁸¹ The Tribunal in the *M/V "Norstar"* did not exclude the payments of bonuses or additional compensation caused by the crew's detention. Equatorial Guinea also attempts to characterize those payments as Owners' "voluntary expense."⁵⁸² They were not: the reason Owners had to grant those payments were because the crew were detained, and because of the conditions of that detention.⁵⁸³

291. In relation to the provisions for the crew, the Master explained that whilst they were unlawfully detained, "at no time did the Equatorial Guinean police or authorities provide food or water. All food and water was provided by the local agents."⁵⁸⁴ This is accepted by Equatorial Guinea's own witness, Mr Hernández Martín, who states that "[f]or the entire time the crew was in Equatorial Guinea, Besora would provide the crew with all provisions (...) including of course good food and water."⁵⁸⁵

⁵⁷⁷ See e.g., **Annex EK/-4**, Log, p. 27, at 11:24: "Master reports health concern for himself (...) He was advised to contact agent for medical assistance"; p. 29 at 13:29: "In process of arranging medical assistance via agent to attend ashore crew member"; **Annex EK/-17**, p. 68; **Annex EK/-26**, email dated 4 November 2022: "A crew member feeling ill today afternoon has received a medical assistance," and "Budd representative [local agent] received a call for (...) the urgent medical assistance for (...) [pumpman], as he suffered from an epileptic seizure," p. 88; **Annex EK/-28**: "the crew has been forwarded to another Medical Centre LA PAZ and was diagnosed suffering from malaria," p. 94.

²¹ Hernández-Martín-1, para. 27 (**REG-WS-003**).

⁵⁷⁹ Master-1, para. 119 (**Annex RMI/-1**).

⁵⁸⁰ **Counter-Memorial**, para. 367.

⁵⁸¹ **Counter-Memorial**, para. 367.

⁵⁸² **Counter-Memorial**, para. 368.

⁵⁸³ Kulblik-1, paras. 97-98, explaining that: "Unsurprisingly, given the conditions they were facing, the Crew demanded an increase in their remuneration (...) The Crew raised this in almost all the calls and meetings with our team." (**Annex RMI/2**). Note that the Marshall Islands is only claiming for the bonus elements of the crew's compensation, not the regular wage element (nor even the increase in normal wages).

⁵⁸⁴ Master-1, para. 111 (**Annex RMI/-1**).

⁵⁸⁵ Hernández Martín-1, para. 16 (**REG-WS-003**).

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292. In short, there is no doubt that the crew received the assistance mentioned above during the period that they were unlawfully detained and shortly after being released. The Marshall Islands has produced additional documentary evidence of those expenses with this Reply.

2. *Costs and expenses relating to the Vessel and crew*

293. The Marshall Islands is claiming US\$3,052,184.08 for costs and expenses relating to the Vessel and crew (i.e., bunkers, port charges, provisions),⁵⁸⁶ broken down as follows:

- a. US\$1,029,409 for bunkers consumed between 12 August 2022 and 26 December 2022 (these bunkers were already on the Vessel at the time of detention);
- b. US\$1,179,122.58 for bunkers consumed between 26 December 2022 to 23 July 2023;
- c. US\$809,349.54 in agency fees and related costs;
- d. US\$17,054.86 in Vessel investigation expenses; and
- e. US\$17,248.10 for provisions.

294. As to the claims based on the costs and expenses relating to the Vessel and crew during their unlawful detention, Equatorial Guinea again wrongly alleges that the Marshall Islands has not provided evidence for this. It is undisputed that these expenses were incurred, as set out in the Memorial and below. Further, these costs had to be incurred because it was necessary to provide the Vessel with bunkers (fuel) to continue operating, as well as to pay agency and port charges corresponding to the location where the Vessel was detained.

3. *Payments made to secure the release of the Vessel and crew*

295. The Marshall Islands claims compensation for, or restitution of, the payments made to secure the release of the Vessel and crew, which includes the Fine of €2,000,132 (equivalent to US\$1,960,821) paid to Equatorial Guinea, plus the US\$15,000,000 and 5,000,000 Nigerian Naira (equivalent to US\$11,957).

296. Equatorial Guinea's answer to the claim of restitution / compensation for the Fine is that the Marshall Islands "has not established that the imposition of the Fine is an internationally wrongful act under UNCLOS."⁵⁸⁷ That is incorrect. For the reasons set out in the Memorial and this Reply,⁵⁸⁸ the imposition of the Fine was unlawful and the Marshall Islands is entitled to receive sums corresponding to the payments made thereunder as restitution or compensation for material damage.

⁵⁸⁶ See **Annex RMI/-61** for further documentary evidence supporting this claim, as well as **Annex RMI/-63**.

⁵⁸⁷ **Counter-Memorial**, para. 362.

⁵⁸⁸ As set out in the Memorial, the Fine is unlawful for two main reasons, i.e., that is the consequent upon the unlawful interception and detention of the Vessel, and that it is based on an unlawful exercise of prescriptive jurisdiction.

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297. As to the amounts paid to Nigeria, Equatorial Guinea wrongly alleges that the amounts paid for the release of the Vessel and crew from Nigeria was a result of the Owners' own "plea bargain agreement" and that there was "no involvement from Equatorial Guinea."⁵⁸⁹ That is incorrect. Equatorial Guinea glosses over one critical fact: the only reason that the Vessel and crew were detained in Nigeria was due to Equatorial Guinea's wrongful conduct, both in unlawfully detaining the Vessel and crew (in the EEZ of a third State) and subsequently unlawfully handing them over to Nigeria, including (i) after representing that they would be released and (ii) in the face of the Prompt Release Proceedings. This was damage directly caused by Equatorial Guinea's conduct, and Equatorial Guinea is therefore obliged to make reparations for it.

4. *Costs and expenses to repatriate the crew*

298. The Marshall Islands claims US\$699,589.13 for the costs and expenses of repatriating the crew following their release, plus the costs of putting in place a replacement crew,⁵⁹⁰ broken down as follows:

- a. US\$385,740 in the costs incurred hiring a security escort vessel and security guards to be onboard the Vessel for the transit on release;
- b. US\$59,607.70 in travel wages and standby payment for the on-signing crew; and
- c. US\$231,385.99, ZAR 179,032 (equivalent to US\$9,123) and NOK 146,700.16 (equivalent to US\$13,732.44) in costs and expenses incurred by the Vessel's call to Cape Town (including replacing and repatriating the crew on release).

299. Equatorial Guinea complains that the Marshall Islands has not provide documents in support of its claims for costs and expenses to repatriate the crew and that it has not "clarified which particular breach of UNCLOS (...) has a causal link to these damages."⁵⁹¹

300. As explained in detail, in the Memorial and this Reply, this damage arises from Equatorial Guinea's wrongful conduct, including its unlawful detention of the Vessel and crew for a prolonged period of time. It is correct that the Vessel would have had to change crew in normal circumstances.⁵⁹² However, in normal circumstances, it would have been possible to properly plan how and when that change of crew would take place, which would generally allow the costs of doing so to be minimized.⁵⁹³ Furthermore, the urgent need to provide for a replacement crew was caused by the unlawful detention of the Vessel and crew. As Mr Kulblik explains, it was necessary to provide seven additional crew members immediately after the Vessel was released, as some members of the detained crew "did not feel able to carry out their duties."⁵⁹⁴ This evidence is corroborated by Dr Permann-Kerr, who explains that a replacement

⁵⁸⁹ Counter-Memorial, para. 371.

⁵⁹⁰ See Annex RMI/-63 for further documentary evidence supporting this claim, as well as Annex RMI/-60.

⁵⁹¹ Counter-Memorial, para. 372.

⁵⁹² Counter-Memorial, para. 373.

⁵⁹³ Kulblik-2, para. 14 (Annex RMI/-54).

⁵⁹⁴ Kulblik-1, para. 90 (Annex RMI/-2); Kulblik-2, para. 13 (Annex RMI/-54).

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crew was needed “owing to the levels of exhaustion and volatility” of the crew given the prolonged detention.⁵⁹⁵

5. *Costs and expenses to repair the Vessel*

301. The Marshall Islands is claiming US\$466,451.46 for the costs and expenses of repairing the Vessel, broken down as follows:⁵⁹⁶

- a. US\$258,302.02 and NOK182,816.69 (equivalent to US\$17,641.69) in drydocking and de-slopping costs;
- b. US\$140,990.34 in the costs of painting the Vessel;
- c. €18,786 (equivalent to US\$21,092.15) for the repair of Scanjet machines;
- d. US\$7,375 for the servicing of life rafts;
- e. US\$9,229.31 for vetting inspection;
- f. €7,639.75 (equivalent to US\$8,324.96) for the maintenance of the continuous emission monitoring systems (CEMS) unit; and
- g. US\$3,495.99 for miscellaneous repair expenses.

302. Equatorial Guinea contends that the Marshall Islands’ claims for the costs and expenses to repair the Vessel were “speculative and unsupported.”⁵⁹⁷ This ignores the witness and documentary evidence provided by the Marshall Islands in support of these claims.⁵⁹⁸ The Marshall Islands adduced evidence from Mr Kulblik, which in clear terms explains that the damages suffered by the Vessel were caused by its “prolonged detention (...) as well as unsafe manning levels in E[quatorial] G[uinea].”⁵⁹⁹ Mr Kulblik has given specific examples of the damage the Vessel suffered, including:⁶⁰⁰

- a. marks and corrosion on the bow where the anchor chains rubbed against the Vessel;
- b. marine growth (including barnacles) on the hull, rudder, and propeller blades;
- c. high levels of tin in the lube oil used in the stern tube;
- d. low viscosity in the lube oil used in the emergency generator; and
- e. high levels of viscosity in the lube oil used in the auxiliary engine.

⁵⁹⁵ Perman-Kerr-1, para. 19 (**Annex RMI/-38**).

⁵⁹⁶ See **Annex RMI/-64** for further documentary evidence supporting this claim, as well as **Annex RMI/-60** and **Annex RMI/-63**.

⁵⁹⁷ **Counter-Memorial**, para. 376.

⁵⁹⁸ **Counter-Memorial**, para. 376.

⁵⁹⁹ Kulblik-1, para. 100 (**Annex RMI/-2**).

⁶⁰⁰ Kulblik-1, para. 100 (**Annex RMI/-2**).

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303. That damage was identified in a joint survey carried out by Drydocks World Dubai and the Vessel's class surveyor.⁶⁰¹ The survey includes photographic evidence of the damage.⁶⁰² Mr Kulblik personally attended the repair process carried out at Drydocks World Dubai in early July 2023.⁶⁰³

304. Equatorial Guinea attempts to minimize these repairs by contending that they were "minor" and "undertaken in a mere five days."⁶⁰⁴ This is irrelevant. The Marshall Islands has never claimed that the repairs were either major or extensive, nor made any qualification regarding the nature or extent of those repairs. Rather, it has simply stated that, due to the prolonged period of detention, the Vessel required repairs and that it was entitled to recover the costs of those repairs. In any event, it is not negligible for a Vessel to undertake repairs at drydock for an entire working week. This is damage caused by Equatorial Guinea's wrongful acts, and therefore the Marshall Islands is entitled to recover it as compensation for material damage.

305. Further, Equatorial Guinea wrongly claims that the repairs cost "only" US\$205,000. That is also incorrect. That only refers to the drydocking costs. As Mr Kulblik explains, the "drydocking costs alone were over US\$200,000."⁶⁰⁵ In fact, the invoice that Equatorial Guinea relies on in support of its argument only relates to the sums paid to Drydock World Dubai (for drydock costs and labor).⁶⁰⁶ That invoice does not include other expenses arising from those repairs, such as: (i) the value of the materials that had to be purchased to carry out those repairs, including a substantial quantity of specialty paint (Jotun paint); (ii) port charges for the port of Fujairah; and (iii) agency charges in the United Arab Emirates, which were caused by the Vessel's unlawful detention and which the Marshall Islands is entitled to recover. The Marshall Islands has now adduced further documentary evidence of those payments.⁶⁰⁷

306. As to causation, the repairs were carried out immediately after the Vessel was released from its unlawful detention. Given the nature of the damages – marine growth, anchor-chain damage (caused by the Vessel grating on its own axis),⁶⁰⁸ and oil residue – it is evident that these were a direct consequence of the unlawful detention of the Vessel, as these were caused by the Vessel being at anchor (and stationary) for a prolonged period. Rather than being regular wear and tear, this damage was directly caused by the Vessel's prolonged detention.

307. For instance, the Master explains that the "Vessel also had to deal with extended periods of time at anchor. This meant it suffered from a lack of machinery maintenance and increased sea growth on the hull."⁶⁰⁹ Similarly, Mr Kulblik explains that when a Vessel is "on anchor for a long time, it is best practice to heave the anchor and change it for the other anchor (...). The main risk is that the Vessel may drift and there may be twists in both the anchor and

⁶⁰¹ **Annex EK/-78**, p. 280 and 287 and 295-296.

⁶⁰² **Annex EK/-78**, p. 300-301.

⁶⁰³ Kulblik-1, para. 101 (**Annex RMI/-2**).

⁶⁰⁴ **Counter-Memorial**, §377.

⁶⁰⁵ Kulblik-1, para. 101 (**Annex RMI/-2**).

⁶⁰⁶ **Annex EK/-79**, at p. 309.

⁶⁰⁷ See **Annex RMI/-64** and invoices therein. See also: **Annex RMI/-63**.

⁶⁰⁸ See the explanation of Mr Kulblik at Kulblik-1, para. 73 (**Annex RMI/-2**).

⁶⁰⁹ Master-1, para. 175 (**Annex RMI/-1**).

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the anchor's chains (...) By September, the Vessel had performed several 360 degree turns on the same anchor.”⁶¹⁰

6. *Loss of hire*

308. The Marshall Islands claims US\$19,348,560 for loss of hire, broken down as follows:

- a. US\$7,114,807.46 for the hire due between 12 August 2022 and 26 December 2022 (representing the amounts due under the time charter);
- b. US\$9,212,416 for hire due between 26 December 2022 and 27 May 2023 (representing the balance of the time the Vessel remained unlawfully detained); and
- c. US\$3,021,336 for the period between 27 May 2023 and 24 July 2023 (representing the Vessel's release from detention and it re-entering employment under a subsequent time charter).

309. Equatorial Guinea contends that the Marshall Islands should not be entitled to recover for loss of hire because claims for loss of profits are “inherently speculative,”⁶¹¹ and alleged flaws in the analysis of the Marshall Island's shipping expert on quantum for loss of hire, Mr Horne.⁶¹² Both criticisms are incorrect.

310. First, international courts and tribunals often award loss profits, including specific claims for loss profits arising from vessels' loss of hire. For instance, the Annex VII tribunal in the “*Duzgit Integrity*” awarded Malta damages for loss of hire. The tribunal held that:

More importantly, however, while wrongfully detained in São Tomé, the *Duzgit Integrity* was unavailable for service by any charterer, irrespective of whether or not Stena Oil elected to exercise its cancellation option. Malta is entitled to claim for the harm to its vessel that follows from this unavailability.⁶¹³

311. Second, Mr Horne's report provides a detailed expert assessment of the losses incurred by the Vessel's detention (i.e., loss of hire). Mr Horne has decades of ship brokering experience (particularly in the tanker market),⁶¹⁴ and his report is based on economic data, both from the

⁶¹⁰ Kulblik-1, para. 73 (Annex RMI/-2). See also Annex EK/-66 for the NavTracker data showing the Vessel's gyrations.

⁶¹¹ **Counter-Memorial**, para. 381. Equatorial Guinea's reference to the ILC's Articles on State Responsibility is misguided. Article 36(2) provides that “compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

⁶¹² **Counter-Memorial**, paras. 382-385.

⁶¹³ *Arbitration regarding the Duzgit Integrity (Malta v. São Tomé and Príncipe)*, Award on Reparation of 18 December 2019 (“*Duzgit Integrity, Reparations*”), at para. 87. In *M/V “Norstar”* the Tribunal refused to award Panama damages for loss of hire, but that was due to Panama having “failed to provide information, documents or supplementary invoices relating to possible revenues and expenses of the shipowner associated with the operations of the M/V “Norstar” in order to substantiate its claim for loss profits,” rather than to any substantive reluctance to award compensation for loss profits (*Norstar, Merits Judgment*, at para. 432).

⁶¹⁴ Annex TH/-1.

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Vessel's own chartering arrangements and from market benchmark sources.⁶¹⁵ Generally, in the case of charterparties, the general measure of damages when a vessel is detained and where, like here, there is an available market of similar vessels to hire, is based on the "loss of hire during the period of detention."⁶¹⁶

312. Equatorial Guinea wrongly contends that there are "unexplained leaps of logic" in Mr Horne's Report, giving four.⁶¹⁷ This is wrong, for the following reasons:

a. First, Mr Horne correctly referred to the widely used industry hire indices to determine the average hire rates for similar vessels when appropriate. Mr Horne divided his calculation of loss hire in three periods (Periods A, B, and C).⁶¹⁸ This was the correct way to approach that calculation, because:

i. The Vessel was hired under a charterparty for several months of the detention period. For that period (Period A in Mr Horne's Report), Mr Horne calculated the Vessel's lost profits in accordance with the rate applicable under that charterparty.⁶¹⁹ The "*Duzgit Integrity*" tribunal adopted a similar approach.⁶²⁰

ii. For the subsequent periods (Periods B and C), when no charterparty was in place, Mr Horne relied on freight indices, widely used in the shipping industry, to determine at what rate the Vessel would have been hired.⁶²¹ As the hire rate for Very Large Crude Carriers implies some volatility, the hire rates dropped at one point and Mr Horne—fairly and responsibly—reflected those lower rates in his calculation (Period C). This is why Mr Horne considers that the Vessel's adjusted potential daily hire income was US\$60,608 during Period B, but only US\$52,092 during Period C.

b. Second, Mr Horne provided the daily hire rate for each of the three periods he identified. He also provided the start and end day of each period.⁶²²

- i. Period A starts on 12 August 2012 and ends on 26 December 2022;
- ii. Period B starts on 26 December 2022 and ends on 27 May 2023; and
- iii. Period C starts on 27 May 2023 and ends on 24 July 2023.

Therefore, his Report provides sufficient information to determine the compensation due to the Marshall Islands for lost hire in any particular period.

⁶¹⁵ Mr Horne relies on data—mainly freight route indices—provided by GIBSON Shipbrokers, a panel member of the Baltic Exchange, see: Horne-1, para. 39 (**Annex RMI/-39**).

⁶¹⁶ See e.g., *Charter on Charterparties and Bills of Lading*, at para. 12-188.

⁶¹⁷ **Counter-Memorial**, paras. 383-385.

⁶¹⁸ Horne-1, para. 53 (**Annex RMI/-39**).

⁶¹⁹ Horne-1, paras. 55-57 (**Annex RMI/-39**).

⁶²⁰ See, *Duzgit Integrity, Reparations*, para. 88: "With respect to the rate of hire available for the *Duzgit Integrity*, the Tribunal accepts that the rate actually agreed in the Charter Party Agreement (...) represents appropriate evidence of the value of lost hire."

⁶²¹ Horne-1, para. 23, explaining that: "The index is produced from the input of a panel of shipbrokers to the Baltic Exchange, which then calculates the rates representing the daily market rate" (**Annex RMI/-39**).

⁶²² Horne-1, paras. 53-57 (**Annex RMI/-39**).

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c. Third, Mr Horne's claim that the Vessel was efficient is correct and based on evidence. The Vessel is relatively new: it was built in 2020, and was thus only two years old when detained, and it had state-of-the-art efficiency and environmental features that reduce both emissions and fuel consumption.⁶²³ Mr Horne compared the Vessel's performance (particularly fuel consumption) with the average performance used in the relevant index.⁶²⁴ As he explains, "because the model vessel [used in the index] is generic, a specific vessel may perform more efficiently, leading to higher earnings."⁶²⁵

d. Fourth, Mr Horne's hire calculations did take into account expenses that would have "naturally arisen in the course of operation."⁶²⁶ The formula used to calculate hire under the charterparty was partly based on the indices relied on by Mr Horne, and also included adjustments to take into account fuel and port costs.⁶²⁷ Further, as to the periods not covered by the charterparty, Mr Horne relied on the indices "time charter equivalent" figure, which, as he explained, "tak[es] voyage cost (bunkers, port costs, fees, agency, etc.) away from a net freight and dividing the result by the number of days the vessel is employed."⁶²⁸

313. Therefore, the Marshall Islands has adduced adequate and cogent evidence for its claim for loss of hire. It is entitled to recover those amounts.

7. *Increased war risk premium*

314. The Marshall Islands claims an increased war risk premium of US\$304,962.⁶²⁹

315. Equatorial Guinea asserts that the increased war risk premium would constitute an "everyday cost" of the Vessel's "normal course of business."⁶³⁰ This is incorrect. Equatorial Guinea (and Nigeria) are located inside what war risk insurers consider "high-risk areas." Every time a vessel enters a high-risk area it must notify its insurer and pay an additional premium at a daily rate. Because of Equatorial Guinea's unlawful detention of the Vessel and crew and transfer to Nigeria, the Vessel spent far longer in a high-risk area than it would have otherwise, and that required the payment of additional premiums that would not have been incurred otherwise. The Vessel, of course, was not planning to stay at anchor in Luba for several months or in Nigeria. This damage was directly caused by Equatorial Guinea's conduct.

8. *Wasted costs of the Prompt Release Proceedings*

⁶²³ See Horne-1, para. 18 (**Annex RMI/-39**).

⁶²⁴ Horne-1, para. 23, explaining that "the Vessel was considerably more efficient than the model vessel used in the applicable route calculation ... Because the model vessel is generic, a specific vessel may perform more efficiently, leading to higher earnings." (**Annex RMI/-39**)

⁶²⁵ Horne-1, para. 23 (**Annex RMI/-39**).

⁶³ **Counter-Memorial**, para. 385.

⁶²⁷ See **Annex TH/-2**, pp. 553-554 (clause 55 of the charterparty).

⁶²⁸ Horne-1, para. 24 (**Annex RMI/-39**).

⁶²⁹ See **Annex RMI/-65** for further documentary evidence supporting this claim.

⁶³⁰ **Counter-Memorial**, para. 378.

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316. Finally, the Marshall Islands claims wasted costs for the Prompt Release Proceedings of £376,923.5 (equivalent to US\$460,977.44).⁶³¹

317. Equatorial Guinea contends that the Marshall Islands should not be entitled to recover the wasted costs of the Prompt Release Proceedings.⁶³² Other than citing the fact that ITLOS has not awarded costs in other prompt release proceedings,⁶³³ Equatorial Guinea has not raised any specific argument as to why the Marshall Islands is not entitled to recover wasted costs here. The situation is specific to this case. The Marshall Islands' claim is for the wasted costs of those proceedings caused by Equatorial Guinea's internationally wrongful acts; it is not a claim for costs in the case in the usual sense. Those costs were wasted because Equatorial Guinea, in breach of its obligations under the Convention and international law to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings, transferred the Vessel and crew to the control of another State. The Marshall Islands is entitled to recover these damages accordingly.

IV. Compensation for Non-Material Damage

318. The Marshall Islands has claimed damages for non-material injury to compensate the unlawful detention of the Vessel's crew in the sum of US\$15,028,000.⁶³⁴ Equatorial Guinea alleges that this claim is "factually unfounded."⁶³⁵ This is patently not the case. The Marshall Islands set out in detail in the Memorial the conditions in which the crew was detained and the impact on the crew,⁶³⁶ with supporting witness evidence from the Master,⁶³⁷ the crew and others, and contemporary documents.⁶³⁸ Equatorial Guinea's specific allegations at paragraphs 387 to 391 of the Counter-Memorial are addressed in turn.

319. First, the Marshall Islands' claim for a higher daily rate than the one awarded in *Diallo* or in the *Arctic Sunrise* is not based on a "vague assertion."⁶³⁹ The Marshall Islands set out twelve specific reasons in its Memorial, based on the particular facts at issue here, that justify a higher daily rate being awarded.⁶⁴⁰

320. Second, as to the treatment of the crew during detention:

a. Although the crew was sometimes allowed to be assisted by Besora, they were denied the right to legal representation when they were being interrogated by the authorities. For example, the Master was interrogated for 11 hours without access to a lawyer.⁶⁴¹

⁶³¹ See **Annex RMI/-66** for further documentary evidence supporting this claim.

⁶³² **Counter-Memorial**, para. 396.

⁶³³ **Counter-Memorial**, para. 396.

⁶³⁴ A detailed breakdown of this figure is at **Memorial**, para. 421.

⁶³⁵ **Counter-Memorial**, para. 387.

⁶³⁶ **Memorial**, paras. 45-81.

⁶³⁷ Master-1, paras. 108-153 (**Annex RMI/-1**); see also: (**Annex RMI/-6** to **Annex RMI/-29**).

⁶³⁸ **Counter-Memorial**, paras. 387-389.

⁶³⁹ **Counter-Memorial**, para. 387.

⁶⁴⁰ **Memorial**, para. 421.

⁶⁴¹ See **Memorial**, paras. 51 and 281(c); Master-1, paras. 125-127 (**Annex RMI/-1**).

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b. Although Equatorial Guinea allowed Besora to supply the crew with food, water, and basic supplies, the fact remains that Equatorial Guinea unlawfully detained the crew and failed to provide them with “bedding and sanitary washing facilities (...) food and access to drinking water.”⁶⁴²

c. The 15 crew members that were held ashore were allowed to stay at a hotel for only 10 of the 92 days of their months-long detention. The rest of the time they were held in the Detention Facility or in other atrocious conditions, before being handed over into the control of Nigeria, which Equatorial knew or should have known would entail a further period of detention.

d. The crew were only allowed to receive treatment (at Owners’ expense) at a private hospital, following the inadequate and sub-standard care they received by an Equatorial Guinean military doctor, and because several crew members suffered serious ailments that include, amongst others, malaria, impetigo, lumbago, seizures, gastroenteritis.⁶⁴³

321. Third, as to the claims of psychological harm, Equatorial Guinea’s allegation that the Marshall Islands “failed to demonstrate that the mental injury (...) suffered (...) is linked to a specific UNCLOS violation by Equatorial Guinea” is incorrect.⁶⁴⁴ The psychological injury was caused by the unlawful detention of the crew and the conditions of their detention, as explained in section A(1) of this Chapter.

322. Similarly, Equatorial Guinea is also wrong to claim that Dr Perman-Kerr only “assess[ed] the state of the mental health of the crew members in April and June 2023.”⁶⁴⁵ That is incorrect. Dr Perman-Kerr spoke on the phone with some crew members whilst they were in Equatorial Guinea and could observe the “anxiety experienced by the crew.”⁶⁴⁶ Moreover, the reason it was not possible to carry out more in-depth psychological assessments in Equatorial Guinea was that the governmental authorities refused to grant the necessary permits for doing so.⁶⁴⁷ Equatorial Guinea cannot obstruct a proper, contemporaneous psychiatric evaluation, and then contend that the psychiatric evaluation available (carried out after the crew were released) is inadequate because it is not contemporaneous. That would allow Equatorial Guinea to benefit from its own wrong.⁶⁴⁸

⁶⁴² **Memorial**, para. 281(d).

⁶⁴³ See **Memorial**, para. 65 and references therein.

⁶⁴⁴ **Counter-Memorial**, para. 389.

⁶⁴⁵ **Counter-Memorial**, para. 389.

⁶⁴⁶ Perman-Kerr-1, para. 8 (**Annex RMI/-38**). See also **Annex EK/-25**, which is a contemporaneous email stating that: “all crew members are extremely scared (...) Everyone who has suffered must receive psychiatric counselling and medical advice.”

⁶⁴⁷ See Kulblik-1, para. 33 (**Annex RMI/-2**): “OSM was continuing to try to arrange psychological support, but was struggling to get a psychiatrist to visit the Crew in EG because of the difficulties in obtaining the necessary permit” and at para. 45: “On 10 October, the Club correspondents advised that they never received a reply to their request that a psychiatrist and psychologist from Cameroon (who had arrived in EG to consult with the Crew) be allowed to assist the Crew (...) *the psychiatrist and psychologist returned to Cameroon on or around 6 October without seeing the Crew.*” See also: **Annex EK/-49**.

⁶⁴⁸ See: Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 149: “No one can be allowed to take advantage of his own wrong’ declared the Umpire in *The Montijo Case* (...) A state may not invoke its own illegal act to diminish its own liability.”

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323. Accordingly, the Marshall Islands is entitled to recover compensation for non-material damages / moral injury, calculated at the rate of two-thousand dollars (US\$2,000) per day, per crew member, for the entire period of their unlawful detention.

V. Interest

324. Equatorial Guinea makes three submissions in response to the Marshall Islands' claim for interest,⁶⁴⁹ all of which are incorrect.

325. First, Equatorial Guinea contends that the Marshall Islands has not “elaborate[d] on which basis its claim for interest is founded,” including as to the applicable rates.⁶⁵⁰ This submission is groundless. The Annex VII tribunal in the *Arctic Sunrise* held that the interest rate that should be applied was that of the “commercial conditions prevailing in the countries where the expenses were incurred.”⁶⁵¹ Those are precisely the rates that the Marshall Islands submitted in its Memorial should be applied. For material damages, the rate claimed is the US prime rate plus 1, as the overwhelming majority of those amounts were paid in US dollars. For the Fine, the applicable rate is the EURIBOR six-month rate plus 5%, as those sums were paid by Owners, in Euros. These are both reasonable commercial rates prevailing at the relevant markets at the time those payments were made.⁶⁵²

326. Second, Equatorial Guinea argues that the Marshall Islands' claim for “compounding every six months” is “unexplained.” Again, that is incorrect. Both ITLOS and Annex VII tribunals have held that the payment of interest—including compound interest—is an element of full reparation and have, accordingly, awarded compound interest.⁶⁵³ Further, the *Arctic Sunrise* tribunal recognized it is “is well established [that] the Tribunal has a wide margin of discretion to determine questions of interest.”⁶⁵⁴

327. When determining compensation, the Chamber thus has discretion to apply the interest rate and method of calculation that would best achieve the full reparation of the Marshall Islands, including compounding semi-annually / at six-month intervals. As the arbitral tribunal in *Cyprus Popular Bank v Hellenic Republic* explained, “the question whether interest should be accumulated periodically to the principle has been the subject of diverging decisions. While older case law tended to repudiate this possibility, recent case law tends to accept annual or semi-annual capitalization of unpaid interest.”⁶⁵⁵ Here, interest compounded semi-annually / at six-month intervals is appropriate because it would more closely track market conditions, and the rate of interest being claimed is the EURIBOR six-month rate (plus 5%).

⁶⁴⁹ **Memorial**, para. 393.

⁶⁵⁰ **Counter-Memorial**, para. 393.

⁶⁵¹ *Arctic Sunrise, Compensation Award*, at para. 122.

⁶⁵² **Memorial**, para. 427.

⁶⁵³ See e.g., *Duzgit 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.

⁶⁵⁴ *Arctic Sunrise, Compensation Award*, at para. 118.

⁶⁵⁵ *Cyprus Popular Bank Public Co. Ltd v Hellenic Republic*, ICSID Case No. ARB/14/16, Award, at para. 426. See also: *Cube Infrastructure Fund SICAV v Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, where a tribunal (chaired by Prof. Vaughan Lowe) held at para. 28 that: “Interest shall be payable on the sum awarded computed at the six-month EURIBOR rate compounded semi-annually.”

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328. Third, relying on *M/V “Saiga” (No. 2)*, Equatorial Guinea contends that a different interest rate should apply to material and non-material damage. Whilst it is the case that the Tribunal in *M/V “Saiga” (No. 2)* applied a different rate of interest to material and non-material damages, more recent decisions of international courts have applied the same interest rate to material and non-material damage, including the ICJ in *Diallo*,⁶⁵⁶ the European Court of Human Rights⁶⁵⁷ and the Inter-American Court of Human Rights.⁶⁵⁸ The explanation given by the ICJ in *Diallo* is that “post-judgment interest on the principal sum due will accrue (...) at an annual rate of 6 per cent. This rate has been fixed taking into account *the prevailing interest rates on the international market* and the importance of prompt compliance.”⁶⁵⁹ The interest paid to or by individuals by retail banks on personal accounts is based on rates set by reference to central bank rates in the same way as commercial interest rates are set. Accordingly, it is appropriate for the same interest rate to be applicable for all heads of damages.

VI. Costs

329. Equatorial Guinea contends that there “is no reason in the present case” to award the Marshall Islands its costs.⁶⁶⁰ Equatorial Guinea also relies on the fact that ITLOS has so far not awarded costs.⁶⁶¹ It is undisputed, however, that Article 34 of the ITLOS Statute authorizes the Chamber to award costs. There are particular reasons why it would be appropriate for the Chamber to award costs in this case.

330. As explained in the Memorial and above, there are several aspects of Equatorial Guinea’s conduct that indicate that it has acted in bad faith.⁶⁶² In particular:

- a. Equatorial Guinea refused to engage diplomatically with the Marshall Islands. This precluded the possibility of the Parties reaching a negotiated settlement to this dispute;⁶⁶³
- b. Equatorial Guinea misled Owners into believing that paying the Fine would be the only way to secure the release of the Vessel and crew, only to renege on those representations after the Fine had been paid;⁶⁶⁴ and
- c. Equatorial Guinea aggravated this dispute by wrongly handing over the Vessel and crew to Nigeria in the face of the Prompt Release Proceedings.⁶⁶⁵

⁶⁵⁶ *Diallo*, at para. 56.

⁶⁵⁷ See e.g., *Drozdyk and Mikula v. Ukraine*, Applications nos. 27849/15 and 33358/15, Judgment dated 24 October 2024, at dispositive point 5(a)–(c), applying the same interest rate to payments for pecuniary and non-pecuniary damage.

⁶⁵⁸ See e.g., *Caso Hidalgo v. Ecuador, Merits, Reparations and Costs* (Series C No. 534), Judgment dated 28 August 2024, at para. 139.

⁶⁵⁹ *Diallo*, at para. 56 (emphasis added).

⁶⁶⁰ **Counter-Memorial**, para. 396.

⁶⁶¹ **Counter-Memorial**, para. 396.

⁶⁶² **Memorial**, para. 431.

⁶⁶³ **Memorial**, paras. 96–99.

⁶⁶⁴ **Memorial**, paras. 56–62; Kulblik-2, paras. 5–8 (**Annex RMI/-54**).

⁶⁶⁵ **Memorial**, paras. 388–397.

VII. Satisfaction and Guarantees of Non-Repetition

331. Finally, Equatorial Guinea asserts that the Marshall Islands is not entitled to satisfaction, in the form of assurances and guarantees of non-repetition, as well as an acknowledgment that Equatorial Guinea breached UNCLOS.⁶⁶⁶

332. As explained in the Memorial,⁶⁶⁷ given the seriousness of Equatorial Guinea's breaches, and the nature of the obligations breached, a judicial declaration from the Chamber stating that Equatorial Guinea has breached UNCLOS is insufficient. The Marshall Islands is the third largest registry in the world and is responsible for over 5,500 vessels that fly its flag. A significant percentage of those vessels operate in West Africa – in 2022, 550 or approximately 10%. Because of that, the effects of Equatorial Guinea's actions have serious and wider implications. They are not limited to the Vessel and crew, but rather expand to other vessels that are part of the Marshall Islands' fleet (as well as other flag States whose vessels operate off West Africa). Accordingly, proper assurances and guarantees of non-repetition, as well as an express acknowledgement that Equatorial Guinea has breached UNCLOS, are particularly necessary in this case.

⁶⁶⁶ **Counter-Memorial**, paras. 397–398.

⁶⁶⁷ **Memorial**, para. 435 and Chapters 5–8.

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SUBMISSIONS

333. The Marshall Islands requests the Chamber to dismiss all of Equatorial Guinea's defenses and 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 to Equatorial Guinea, Equatorial Guinea breached Articles 87(1), 90 and 92 of UNCLOS.

a. 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.

b. 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.

c. By enacting and implementing its criminal laws (including by the imposition of lengthy periods of detention and hefty fines) in respect of activities of the "*Heroic Idun*" and her crew in the EEZ of Equatorial Guinea without any basis in UNCLOS, and/or by usurping the Marshall Islands' exclusive prescriptive jurisdiction in respect of those activities, and/or by exceeding the limits of prescriptive jurisdiction allowed by UNCLOS 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.

d. 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.

b. 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 acted contrary to rules and principles of international law not incompatible with the Convention to which the Chamber may have recourse under Article 293 and breached:

- i. 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;"
- ii. Article 87(2) of UNCLOS, in respect of its obligation to have due regard for the interests of the Marshall Islands;
- iii. Article 2(3) of UNCLOS, in respect of its obligation to exercise sovereignty in the territorial sea subject to other rules of international law;

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- iv. 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.
- e. 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.
- f. 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.
- g. 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 maneuvering of its naval vessel “*Wele Nzas*” on 26 September 2022 in respect of the “*Heroic Idun*,” Equatorial Guinea breached Article 225 of UNCLOS.
- h. 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 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.
- i. 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

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Articles 87(1) and 87(2), read with Article 58(2), and Article 56(2), and/or Article 294(2) of the Convention and/or Article 300 of the Convention read alongside these provisions.

j. 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. Article 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.

334. These breaches are imputable to Equatorial Guinea alone. They directly 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 forty-three million, seventeen thousand, eight hundred thirty-seven dollars, with seventy-two cents (US\$43,017,837.72);
 - 2. for non-material damage of fifteen million and twenty-eight hundred dollars (USD \$15,028,000);
 - ii. insofar as not already paid as compensation, to pay two million, one hundred and thirty-two Euros (€2,000,132) in restitution;
- 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;
 - 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 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.

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- 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.

335. 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.

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25 November 2024



Ms. Meredith Kirby

Agent of the Republic of the Marshall Islands

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