

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2025

Public sitting

held on Tuesday, 7 October 2025, at 3 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President of the Special Chamber, Judge Albert J. Hoffmann, presiding

THE M/T “HEROIC IDUN” (No. 2) CASE

(Marshall Islands/Equatorial Guinea)

Verbatim Record

Special Chamber
of the International Tribunal for the Law of the Sea

<i>Present:</i>	President	Albert J. Hoffmann
	Judges	María Teresa Infante Caffi Kathy-Ann Brown
	Judges <i>ad hoc</i>	Gudmundur Eiriksson Philippe Couvreur
	Registrar	Ximena Hinrichs Oyarce

The Marshall Islands are represented by:

Ms Meredith Kirby, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator,

as Agent;

and

Mr Bernard J. Adiniwin, Attorney-General,

as Representative;

Sir Daniel Bethlehem KC, Barrister, Twenty Essex, London, United Kingdom; Member of the Bar of England and Wales,

Ms Penelope Nevill, Barrister, Twenty Essex, London, United Kingdom; Member of the Bar of England and Wales; Barrister and Solicitor of the High Court of New Zealand,

Mr Paolo Busco, Barrister, Twenty Essex, London, United Kingdom; Member of the Bar of England and Wales; Member of the Rome Bar,

Mr Manuel Casas Martínez, Barrister, Twenty Essex, London, United Kingdom; Member of the Bar of England and Wales; Member of the Bar of New York; Member of the Bar of Caracas,

Ms Courtney Grafton, Barrister, Twenty Essex, London, United Kingdom; Member of the Bar of England and Wales,

as Counsel and Advocates;

Mr Richard M. Gunn, Partner, Reed Smith LLP, London, United Kingdom,

Mr Jiahui Huang, Barrister, Twenty Essex, London, United Kingdom; Member of the Bar of England and Wales,

Ms Julia Z. Cyron, Associate, Reed Smith LLP, London, United Kingdom,

as Counsel;

Mr James Myazoe, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator,

Mr Joseph Bigler, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator,

Mr Baron Bigler, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator,

as Advisers.

Equatorial Guinea is represented by:

Mr Carmelo Nvono-Ncá, Ambassador of the Republic of Equatorial Guinea to France; Permanent Delegate to UNESCO, Paris, France,

as Agent;

and

Mr Hussein Haeri KC, Partner, Withers LLP, London, United Kingdom; Solicitor-Advocate of England and Wales, SOAS, University of London, London, United Kingdom,

Ms Floriane Lavaud, Partner, Withers LLP, New York, United States of America; Member of the Bars of New York and Paris; Solicitor of England and Wales,

Mr Dapo Akande, Barrister at Essex Court Chambers; Chichele Professor of Public International Law, University of Oxford, Oxford, United Kingdom; Member of the Bar of England and Wales; Member of the International Law Commission,

Mr Francisco Moro Nve Obono, State Lawyer Office of the Republic of Equatorial Guinea,

as Counsel and Advocates;

Mr Juan Olo Mba Nseng, Vice-President of the Legal Commission of State Lawyers, Government of Equatorial Guinea,

Mr Antonios Tzanakopoulos, Professor of Public International Law, University of Oxford, Oxford, United Kingdom,

Ms Clàudia Baró Huelmo, Senior Associate, Withers LLP, Geneva, Switzerland; Solicitor-Advocate of England and Wales; *Abogada* of the Bar of Barcelona,

Ms Maanya Tandon, Associate, Withers LLP, London, United Kingdom; Barrister and Solicitor of the High Court of New Zealand,

Ms Sudipta Purkayastha, Associate, Withers LLP, London, United Kingdom; Solicitor of England and Wales, Advocate of the Bar Council of India,

Ms Eva Keita, Associate, Withers LLP, New York, United States of America; Member of the New York Bar,

Mr Niccolò Dell'Alba, Paralegal, Withers LLP, London, United Kingdom,

Mr Adalberto Acumu Ncogo Angono, State Lawyer of the Republic of Equatorial Guinea,

Ms Gladys Delcourt Ncara Nzang, State Lawyer of the Republic of Equatorial Guinea,

Ms Anouch Sedef, Adviser to the Ministry of Transport, Telecommunications and Artificial Intelligence Systems,

as Counsel;

Ms Carmen Matas Gallardo, Communications Adviser to the Agent, Paris, France,

as Adviser.

1 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Good afternoon. The Special
2 Chamber will now continue its hearing in the “*Heroic Idun*” (No. 2) Case. This
3 afternoon’s session will be extended until approximately 6.20 p.m.
4

5 I now give the floor to Dr Busco to make his statement.
6

7 **DR BUSCO:** Thank you, Mr President.
8

9 Mr President, Members of the Special Chamber, I’m honoured to take the podium
10 again after my submission this morning. This time, I will be on my feet for about 30
11 minutes.
12

13 In this submission, I will address Equatorial Guinea’s exercise of prescriptive
14 jurisdiction in breach of UNCLOS. This unlawful exercise arises from Equatorial
15 Guinea’s enactment and then implementation and enforcement of criminal and other
16 laws purporting to regulate the lawful activities of the “*Heroic Idun*” in the Exclusive
17 Economic Zone of Equatorial Guinea. The activity in question, in particular, was the
18 navigation of the “*Heroic Idun*”, the quintessential freedom governed by the regime of
19 the high seas.
20

21 Equatorial Guinea had no authority to regulate the “*Heroic Idun*”’s navigation within
22 its EEZ in the way that it did, let alone to impose a fine for the “*Heroic Idun*”’s alleged
23 failure to comply with such unlawful laws and regulations.
24

25 Mr President, Members of the Chamber, for the sake of clarity, the argument on
26 prescriptive jurisdiction is without prejudice to those that I presented this morning.
27 The measures adopted by Equatorial Guinea after the seizure of the “*Heroic Idun*”
28 are unlawful *ipso jure*, as we saw, because the seizure itself was unlawful. This,
29 of course, includes the fine imposed by Equatorial Guinea. I addressed you on this
30 point this morning.
31

32 What we are now saying is that, even if, for the sake of argument, the “*Heroic Idun*”
33 had been brought lawfully into Luba, Equatorial Guinea’s subsequent exercise of
34 jurisdiction and the measures adopted pursuant to that exercise would nonetheless
35 be unlawful. The measures taken after the interception, including the fine, are
36 therefore unlawful, not only because they stem from an unlawful interception, but
37 also because they are the consequence of an unlawful exercise of prescriptive
38 jurisdiction; they are unlawful for both reasons, Mr President, and Members of the
39 Chamber.
40

41 One final preliminary observation before I start.
42

43 In its Rejoinder, Equatorial Guinea has not addressed any of the points raised by the
44 Marshall Islands concerning its unlawful exercise of prescriptive jurisdiction. Instead,
45 it merely makes a two-line reference to arguments that Equatorial Guinea advanced
46 in its Counter-Memorial. This is remarkable, and I invite the Special Chamber to take
47 note of this, considering how heavily Equatorial Guinea has relied on this legislation
48 to justify the measures that it adopted in respect of the “*Heroic Idun*” and her crew.
49

1 Mr President, Members of the Chamber, with this clarification, I will now address you
2 on the general principles governing prescriptive jurisdiction under UNCLOS and
3 international law. I will do so briefly, as it appears that these principles are not in
4 dispute between the Parties. I will therefore confine myself to a few relevant
5 propositions that emerge from law of the sea jurisprudence on this topic.
6

7 First, and I quote from the “*Enrica Lexie*” tribunal here, prescriptive jurisdiction is –
8 and I open the quote – “the authority of a State to make laws in relation to persons,
9 property or conduct”.¹
10

11 The second proposition is that ITLOS, in the *M/V “Virginia G”* case, indicated that
12 tribunals constituted under UNCLOS can rule over “whether in enacting or
13 implementing its laws, a State Party has acted in conformity with the Convention”.²
14 I emphasize the word “enacting” here. This means that a law of the sea tribunal can
15 rule whether a piece of legislation – *per se* and irrespective of its implementation – is
16 consistent with UNCLOS. Of course, and all the more so, it can rule whether the
17 implementation of the enacted legislation is consistent with UNCLOS.
18

19 In our case, this means that the Special Chamber can look both at the legality of the
20 laws Equatorial Guinea relies on to justify the fine and the measures it adopted, and
21 at the legality of the fine and of those measures as being based on those laws.
22

23 The third proposition is related to what I just said, and it is that a measure that is
24 adopted pursuant to an unlawful exercise of prescriptive jurisdiction is, in itself,
25 *ipso jure*, unlawful. In the “*Saiga*” No. 2 case, ITLOS first found that, by applying its
26 custom laws to a custom radius that included the Exclusive Economic Zone, Guinea
27 had acted contrary to the Convention. It then went on to state that “accordingly”, and
28 I stress “accordingly”, the arrest and detention of the “*Saiga*”, the prosecution and
29 conviction of the Master, the confiscation of the cargo and the seizure of the ship
30 were, in turn, contrary to the Convention.³
31

32 Mr President, Members of the Chamber, the use of the adverb “accordingly” is
33 significant here because it signals consequentiality: a measure adopted pursuant to
34 a law that is unlawful is, by way of consequentiality, unlawful. Again, in our case, this
35 means that all the measures adopted pursuant to the unlawful laws – first of all the
36 fine – are themselves unlawful.
37

38 The fourth proposition is that measures adopted pursuant to an unlawful exercise of
39 prescriptive jurisdiction are unlawful regardless of where a vessel happens to be
40 located at sea at the time of their adoption. What matters is that such measures arise
41 from an exercise of prescriptive jurisdiction that is contrary to UNCLOS.
42

43 For example, in the “*Norstar*” case, this Tribunal found that Italy had breached the
44 freedom of navigation of a vessel registered in Panama by arresting it under laws

¹ *The “Enrica Lexie” Incident (Italy v. India)*, Perm. Ct. Arb. Case No. 2015-28, Award of 21 May 2020 at para. 526.

² *M/V “Virginia G” (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014 at para. 227.

³ *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999 at para. 136.

1 that unlawfully sought to regulate the activities of foreign ships on the high seas. In
2 that case, it was bunkering.

3
4 It did not matter to the Tribunal that the arrest occurred in the internal waters of
5 Spain, where a State ordinarily possesses enforcement powers. Likewise, in our
6 case, what matters is that Equatorial Guinea's laws sought to regulate the lawful
7 activities of the "*Heroic Idun*" in the Exclusive Economic Zone of Equatorial Guinea.
8 It is immaterial that the enforcement of those laws, including the imposition of the
9 fine, took place when the vessel was in Luba, in Equatorial Guinea.

10
11 The fifth proposition is that there are essentially three ways in which a State's
12 exercise of prescriptive jurisdiction can be contrary to UNCLOS: one is because the
13 exercise of prescriptive jurisdiction is expressly prohibited by UNCLOS; two is
14 because the content of the provision is, on its face, *prima facie*, we would say,
15 inconsistent with UNCLOS; and, three, because the exercise of prescriptive
16 jurisdiction has no positive basis in the Convention.

17
18 Mr President, Members of the Chamber, let me take each of these examples in turn,
19 and I will base my arguments on the case law of law of the sea tribunals as far as
20 possible.

21
22 The first circumstance in which prescriptive jurisdiction is exercised in breach of
23 UNCLOS arises where the Convention expressly prohibits the coastal State from
24 exercising such prescriptive jurisdiction, typically because this exercise of
25 prescriptive jurisdiction is reserved for another State. And, indeed, the prohibition
26 mostly concerns the preservation of the regime of the freedom of the high seas for all
27 States. Such regime is applicable to the EEZ by virtue of Article 58(2).

28
29 So, it is a breach of Articles 92, 87 and 89 of the Convention for a coastal State to
30 regulate activities in its Exclusive Economic Zone that fall within the regime of
31 freedom of the high seas.

32
33 I will address here in particular Articles 92 and 87. So let's start with Article 92,
34 exclusive flag State jurisdiction.

35
36 In "*Norstar*", this Tribunal indicated that exclusive flag State jurisdiction "prohibits not
37 only the exercise of enforcement jurisdiction on the high seas by States other than
38 the flag State, but also the extension of their prescriptive jurisdiction to lawful
39 activities conducted by foreign ships on the high seas".⁴

40
41 The arbitral tribunal in "*Enrica Lexie*" confirmed this reading of Article 92. It found
42 that "the principle of exclusive flag State jurisdiction under the Convention is violated
43 when a State other than the flag State seeks to prescribe laws, rules or regulations
44 over a ship of the flag State, or applies or enforces such laws, rules or regulations
45 in respect of such a ship".⁵

4 M/V "*Norstar*" (*Panama v. Italy*), Merits Judgment of 10 April 2019, ITLOS Reports 2018–2019 at para. 225.

5 The "*Enrica Lexie*" Incident, Perm. Ct. Arb Case No. 2015-28 at para. 527.

1 As far as freedom of navigation under Article 87 is concerned, again, in “*Norstar*”,
2 this Tribunal indicated that “it does not matter whether or not a chilling effect is
3 produced. Regardless of such effect, any act which subjects activities of a foreign
4 ship on the high seas to the jurisdiction of States other than the flag State constitutes
5 a breach of freedom of navigation [...].”
6

7 As I indicated, and as you know, ITLOS was concerned with prescriptive jurisdiction
8 in this case.
9

10 Mr President, Members of the Chamber, the second of the three ways in which the
11 exercise of prescriptive jurisdiction can be contrary to UNCLOS is when the content
12 of a provision is, on its face, *prima facie*, incompatible with the Convention. This is
13 essentially the case discussed in the Commentary by the International Law
14 Commission to Article 12 of the Articles on the responsibility of States for
15 internationally Wrongful Conduct.
16

17 As the ILC put it, there are, “cases where the content of the legislation conflicts
18 *prima facie* with what is required by the international obligation”.⁶ The ILC went on to
19 note that “certain obligations may be breached by the mere passage of incompatible
20 legislation.”
21

22 Mr President, Members of the Chamber, to be clear, this is the case of a law that, for
23 example, prescribes conduct in direct breach of a provision of UNCLOS.
24

25 The last instance of exercise of prescriptive jurisdiction contrary to UNCLOS is when
26 prescriptive jurisdiction does not find a positive basis in the Convention.
27

28 Now, that a positive basis in the Convention is required was established by this
29 Tribunal in the case of the *M/V “Saiga” No. 2*. There, the Tribunal addressed the
30 legality of the extension of the custom laws of Guinea to its Exclusive Economic
31 Zone. It put the issue in these terms:⁷
32

33 The question is whether, under the Convention, there was a justification for
34 Guinea to apply its custom laws in the Exclusive Economic Zone.
35

36 What the Tribunal referred to as “justification” is, in essence, shorthand for a legal
37 basis. The question was whether the Convention provided any positive legal basis
38 for Guinea to apply its custom laws in the Exclusive Economic Zone. The Tribunal
39 found that there was no such basis and, once again, emphasized the requirement for
40 a positive legal basis. On this occasion, the Tribunal used the word “empower”,
41 stating that:⁸
42

43 In the view of the Tribunal, the Convention does not empower a Coastal State
44 to apply its custom laws in respect of any other part of the Exclusive Economic
45 Zone not mentioned above.

⁶ International Law Commission, “General Commentary to the Articles on State Responsibility” in *Yearbook of the International Law Commission (2001)*, vol. II, Part Two, p. 31; at p. 57, para. (12) of the commentary to Article 12.

⁷ *M/V “Saiga” (No. 2)* at para. 126.

⁸ *M/V “Saiga” (No. 2)* at para. 127.

1
2 The bottom line on this, Mr President, Members of the Chamber, is that the rights of
3 a coastal State in its Exclusive Economic Zones are limited. They are exhaustively
4 set out in Article 56(1) of the Convention, and UNCLOS provides a full and complete
5 list of these rights.
6

7 For these reasons, a coastal State that seeks to regulate conduct in its Exclusive
8 Economic Zone beyond the limited rights set out in Article 56(1) of UNCLOS or
9 beyond any other express basis provided for in the Convention, acts in contravention
10 of Article 56(1) of UNCLOS.
11

12 Mr President, Members of the Chamber, I have given you the theoretical framework.
13 Let us now turn to Equatorial Guinea's specific exercise of prescriptive jurisdiction
14 over the "*Heroic Idun*" in this case.
15

16 The fine that Equatorial Guinea imposed on the Master of the "*Heroic Idun*" clearly
17 set out both the reason for, and the legal basis of, Equatorial Guinea's exercise of
18 prescriptive jurisdiction. That fine cites four pieces of legislation, and, for clarity, it is
19 these very legislative instruments that constitute the exercise of prescriptive
20 jurisdiction contested by the Marshall Islands in these proceedings.
21

22 The fine imposed on the "*Heroic Idun*" is one of the measures adopted pursuant to
23 this legislation, and it is a measure that the Marshall Islands equally challenges in
24 these proceedings.
25

26 Now, the first one of the provisions relied on by Equatorial Guinea is Article 10 of
27 Law No 2/2020, dated 8 July. This is at the top of your slide. According to this
28 provision, "every ship, vessel or naval craft of Equatoguinean nationality shall fly the
29 flag of the Republic of Equatorial Guinea at the stern, if in port, or at the mast or
30 mast-top during navigation".⁹
31

32 The second is Article 12 of Law No. 2/2020 dated 8 July.¹⁰ According to this, "all
33 ships, vessels and naval craft shall request authorization from the National Maritime
34 Authority for entry, stay and dispatch in the jurisdictional waters and ports of the
35 Republic of Equatorial Guinea."
36

37 The third piece of legislation is Article 698(2)(b) and (c) of Law No. 2/2020 dated
38 8 July. This is a lengthy provision. I don't propose to quote this provision in full. You
39 have it in front of you. But, in essence, this concerns infractions for failure to navigate
40 with the proper paperwork and administrative authorizations.
41

42 And last is Article 581 of the Community Code of the Merchant Navy. This provides
43 that, "the competent maritime authority has the discretionary power to establish the
44 following offences concerning navigation police, namely, not displaying the flag".¹¹
45

⁹ RMI/-42.

¹⁰ RMI/-42.

¹¹ RMI/-42.

1 Mr President, Members of the Chamber, it must be made perfectly clear: there is no
2 conceivable reason why these provisions should apply to the “*Heroic Idun*” in the
3 light of the facts and circumstances of this case.

4
5 By way of example, it is entirely unclear why a provision such as Article 10 of Law
6 No. 2/2020 of 8 July, which regulates the type of flag that an Equatoguinean vessel
7 must fly, could possibly apply to the “*Heroic Idun*”, which is plainly not an
8 Equatoguinean vessel.

9
10 It is equally unclear and unexplained why a provision concerning failure to display a
11 flag should be applicable in the circumstances, when the port of registration of the
12 “*Heroic Idun*”, Majuro, the capital of the Marshall Islands, was printed in very large,
13 visible letters at the stern of the vessel.

14
15 Equatorial Guinea itself admits that the CEMAC Code referred to in the fine had
16 actually been repealed in 2012. Clearly, this one was not applicable either.

17
18 The evident inapplicability of the provisions that Equatorial Guinea relied on proves
19 yet again how Equatorial Guinea is in the business of coming up with *ex post facto*
20 justifications for its conduct.

21
22 Evidently, at the time of these events, some sort of justification was needed for
23 Equatorial Guinea to explain why it kept detaining the vessel for months and why it
24 fined it with a hefty fine. Breach of the provision that I took you through is the
25 concocted justification that Equatorial Guinea came up with at the time.

26
27 But this is a poor justification, and it is also a justification that now engages the
28 international responsibility of Equatorial Guinea for acting contrary to the Convention
29 and international law.

30
31 Mr President, Members of the Chamber, in this regard, I invite you to adopt the same
32 approach as ITLOS did in the “*Saiga*” No. 2 case. In that case, the Tribunal was not
33 persuaded of the applicability of the provisions relied upon by Guinea; yet, it
34 proceeded to assess their lawfulness under UNCLOS on the assumption that those
35 provisions applied as Guinea had asserted.

36
37 The Tribunal noted:

38
39 ... that Guinea produces no evidence in support of its contention that the laws
40 cited provide a basis for the action taken against the *Saiga* [...]. even if it is
41 conceded that the laws of Guinea which the *Saiga* is alleged to have violated
42 are applicable in the manner that is claimed by Guinea, the question remains
43 whether these laws, as interpreted and applied by Guinea, are compatible with
44 the Convention.¹²

45
46 Now, paraphrasing, even if it is conceded that the laws of Equatorial Guinea which
47 the “*Heroic Idun*” is alleged to have violated are applicable in the manner that is
48 claimed by Equatorial Guinea, the question remains as to whether these laws, as
49 interpreted and applied by Equatorial Guinea, are compatible with the Convention.

¹² *M/V “Saiga” (No. 2)* at para. 122.

1
2 Mr President, Members of the Chamber, the answer to this question in the present
3 case is that the laws relied upon by Equatorial Guinea are not compatible with the
4 Convention. In fact, Equatorial Guinea's laws breach UNCLOS in all three manners
5 that I discussed earlier on during my submission.
6

7 I will discuss this in just a minute, but I would like to make one preliminary
8 consideration. In its Counter-Memorial, Equatorial Guinea advances a circular
9 argument to justify the lawfulness of its exercise of prescriptive jurisdiction. It
10 essentially contends that certain conduct is lawful, simply because it is permitted by
11 the domestic law of Equatorial Guinea.
12

13 For example, it argues that Article 581 of the Community Code of the Merchant Navy
14 establishes an offence for failing to fly a physical flag and that, on this basis, the
15 imposition of the fine for failure to fly a physical flag was lawful.¹³
16

17 But this is not how assessing the lawfulness of prescriptive jurisdiction works. The
18 lawfulness of a State's exercise of prescriptive jurisdiction must be assessed against
19 international law, not against domestic law.
20

21 And, in any event, Mr President, Members of the Chamber, seeking to justify the
22 legality of a measure by reference to domestic law is a futile exercise before an
23 international tribunal, because it is well-established that domestic law cannot be
24 invoked to excuse or justify a breach of international law.¹⁴
25

26 Mr President, Members of the Chamber, Equatorial Guinea's exercise of prescriptive
27 jurisdiction directly encroaches upon fundamental elements of the high seas regime.
28 Equatorial Guinea directly targeted the navigation of the "*Heroic Idun*" by seeking to
29 subject such navigation to authorizations, conditions and modalities that are not for
30 Equatorial Guinea, but for the Marshall Islands alone to prescribe.
31

32 Take Article 12 of Law No. 2/2020 dated 8 July. Equatorial Guinea provides the
33 interpretation of this provision in its Counter-Memorial. It claims that all vessels, and
34 I note the unqualified all-encompassing reach of this expression, all vessels must
35 seek authorization for entry into and stay in Equatorial Guinea's jurisdictional waters.
36

37 Equatorial Guinea explains that the term "jurisdictional waters" includes the
38 Exclusive Economic Zone of Equatorial Guinea, and is not limited to the territorial
39 sea of Equatorial Guinea. So, in essence, for Equatorial Guinea, the provision
40 means that a foreign-flagged vessel, any foreign-flagged vessel, cannot enter the
41 Exclusive Economic Zone of Equatorial Guinea and stay there, unless Equatorial
42 Guinea so authorizes. It is for this alleged unauthorized entry into its EEZ that the
43 "*Heroic Idun*" was fined.
44

¹³ Counter-Memorial, para 279.

¹⁴ Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion (4 February 1932), Permanent Court of International Justice, P.C.I.J Series A/B No. 44 at p.24.

1 However, Mr President, Members of the Chamber, this is precisely the point: how
2 can Equatorial Guinea legislate to make a foreign vessel's entry into, or stay within
3 its Exclusive Economic Zone conditional upon its authorization?
4

5 In its Counter-Memorial, Equatorial Guinea contends that Article 12 is intended to
6 ensure safety of navigation.¹⁵ I mean, frankly, there is nothing in the law that
7 supports this reading; but, even if that was the case, UNCLOS does not permit the
8 adoption of such a drastic measure as conditioning entry into and stay in an EEZ
9 upon the coastal State's approval.
10

11 In fact, this kind of drastic measure is not allowed even in the territorial sea. In
12 respect of the territorial sea, Article 22 of UNCLOS provides, and I quote, that "the
13 coastal State may, where necessary having regard to the safety of navigation,
14 require foreign ships exercising their right of innocent passage through its territorial
15 sea to use such lanes and traffic separation schemes as it may designate or
16 prescribe", and that "tankers (...) may be required to confine their passage to such
17 lanes."
18

19 So, Mr President, Members of the Chamber, even in the territorial sea, at most, the
20 issue is one of where to transit, not whether to transit.
21

22 Equatorial Guinea now claims that there is, and I quote, "a new norm of customary
23 international law"¹⁶ that allows the coastal State to restrict access to an EEZ. It does
24 so by relying on one scholarly article.¹⁷
25

26 But I would like to unpack a little Equatorial Guinea's position, because it is
27 remarkable indeed to suggest that there is a "new norm of customary international
28 law" that effectively displaces century-old freedoms of the high seas.
29

30 It is true that there have been a few isolated and exceptional attempts to restrict the
31 entry of certain categories of vessels into an Exclusive Economic Zone, typically on
32 the grounds of preventing oil pollution. These measures concerned single-hull
33 tankers aged fifteen years or older, carrying heavy fuel oils. By contrast, the
34 provision on which Equatorial Guinea relies refers in unqualified terms to "all
35 vessels". The purported restriction is therefore unqualified and extends far beyond
36 any such limited precedents that may have existed.
37

38 Moreover, there is no indication anywhere that Equatorial Guinea's asserted right to
39 condition entry into its EEZ upon prior authorization is related to the prevention of oil
40 pollution.
41

42 And, for the avoidance of doubt, I want to make it clear that the "*Heroic Idun*" is a
43 state-of-the-art double hull crude carrier, built in 2020. But, anyway, the main point in
44 any case is that the legality of these very exceptional attempts to limit entry into an
45 EEZ is highly contested. Scholars have qualified this practice as incompatible with
46 UNCLOS, and I refer you to the Marshall Islands' pleadings on this matter.¹⁸

¹⁵ Counter-Memorial, para. 275.

¹⁶ Counter-Memorial, para. 278.

¹⁷ Counter-Memorial, footnote 437.

¹⁸ Rejoinder, para. 173.

1
2 But, even more crucially, a few instances of highly contested attempts to restrict
3 entry into an EEZ to specific types of vessels cannot justify a new rule of customary
4 international law that allows a State to subject all vessels to the coastal State
5 authorization.
6

7 Freedoms of the high seas have customary status, and an exception to these
8 freedoms would also have to have customary status. It would have to be supported
9 by consistent practice, as well as *opinio juris et necessitatis*. Both are clearly lacking
10 here.
11

12 Mr President, Members of the Chamber, I do not think I need to elaborate on this
13 aspect very much in front of a panel of consummate international lawyers.
14

15 Mr President, Members of the Chamber, Equatorial Guinea also contends that,
16 under Article 581 of the 2021 CEMAC Code, it was entitled to impose an offence in
17 respect of the “*Heroic Idun*”’s alleged failure to fly a physical flag while in the
18 Exclusive Economic Zone of Equatorial Guinea and to levy fines on the Master for
19 this reason. It advances a similar claim under Article 10 of Law No. 2/2020 of 8 July
20 2025. Now, as I have already noted, the “*Heroic Idun*” did, in fact, fly a physical flag,
21 and Article 10 applies only to vessels of Equatoguinean nationality. Nevertheless, let
22 us, for the sake of argument, take these assertions at face value and assume that
23 the law applies as Equatorial Guinea claims.
24

25 Now, if this is the case, then there is nothing in UNCLOS and in international law that
26 authorizes a coastal State to impose on a foreign-flagged vessel the duty to display a
27 specific type of physical flag in its Exclusive Economic Zone.
28

29 And allow me to begin with UNCLOS. Article 91 sets out that vessels have the
30 nationality of the flag that they have the right to fly and that they are entitled to fly. An
31 entitlement to fly, a right to fly, is very different from a duty to fly.
32

33 Let me now move on to what the International Law Commission’s Special
34 Rapporteur noted, already in 1955, in a review of the international law on the issue:
35

36 It was generally accepted that warships had the right to demand that merchant
37 vessels at sea should show their flag upon request. Such a request for
38 identification was perfectly natural because it was not the usual practice for
39 merchant vessels to continually fly their flag at sea.¹⁹
40

41 I stress, “upon request,” not continuously.
42

43 And, indeed, scholars who have looked into the matter have reached the exact same
44 conclusion. Let me quote this very simple yet very telling passage from a recent
45 article: “We learned that basically there is no international law requiring that a ship fly

¹⁹ *Yearbook of the International Law Commission (1955)*, vol. I, summary of the 288th meeting, at p. 26, para. 12.

1 a flag on the high seas.”²⁰ This quote is based on a recent review of the practice as
2 the academic article I am quoting from was published in 2017.

3
4 Mr President, Members of the Chamber, to conclude on these issues: Equatorial
5 Guinea has adopted rules and regulations that directly interfere with the navigation of
6 the “*Heroic Idun*” in the EEZ of Equatorial Guinea. It has done so by placing undue
7 restrictions and conditions of that navigation. It has applied this law in the Exclusive
8 Economic Zone of Equatorial Guinea. It has sanctioned the “*Heroic Idun*” heavily for
9 failure to abide by these unlawful restrictions and regulations. This is in breach of
10 Article 56(1) of UNCLOS as well as of Articles 87, 92 and 89 which apply to the
11 Exclusive Economic Zone of Equatorial Guinea by way of Article 58(2) of the
12 Convention.

13
14 Mr President, Members of the Chamber, this concludes my presentation and I thank
15 you very much for your attention.

16
17 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I thank Dr Mr Busco for his
18 statement and I now invite Dr Manuel Casas to take the floor. You have the floor, sir.

19
20 **DR CASAS:** Mr President, Members of the Chamber, I am honoured, privileged and
21 happy to appear before you on behalf of the Marshall Islands. I will address you for
22 approximately 20 minutes on the first two “other breaches” of UNCLOS based on the
23 other instruments as well as general international law.²¹ Ms Grafton and Ms Nevill
24 will address the remaining “other breaches”.

25
26 The first breach is Equatorial Guinea’s failure to act reasonably and to respect the
27 principle of humanity. The second breach is Equatorial Guinea’s failure to have due
28 regard to the rights and duties of the Marshall Islands.

29
30 I will spend the lion’s share of this time dealing with reasonableness and humanity,
31 and I will then briefly address due regard.

32
33 Mr President, Members of the Chamber, in their detention of the vessel and crew,
34 Equatorial Guinea failed to act reasonably and to respect the principle of humanity.
35 These are requirements under general international law.

36
37 Before going into that, I must address two preliminary points. First, contrary to
38 Equatorial Guinea’s position, these claims are distinct and independent from the
39 Marshall Islands’ claims under Article 225 of UNCLOS. And although the substance
40 of the claims are related, they are also distinct and independent from the Marshall
41 Islands’ human rights-based claims.

42
43 The independent nature of these claims is supported by precedent: this was the
44 approach taken in “*Saiga*”, in the “*Virginia G*”, and in the “*Duzgit Integrity*”.²²

²⁰ 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.

²¹ Memorial, paras. 242-249; Reply, paras. 183-207.

²² *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999 at paras. 136, 150, 155, 183(9); *M/V “Virginia G” (Panama v. Guinea-Bissau)*,

1 Importantly, this is not merely a technicality, an academic point; it has practical
2 significance. These claims, these specific claims, relate to which powers Equatorial
3 Guinea exercised and how, regardless of whether the exercise of those powers was
4 itself justified under the Convention.

5
6 The second preliminary point relates to the standard of review the Chamber should
7 apply.

8
9 The Marshall Islands contends that the Chamber must determine whether Equatorial
10 Guinea's conduct was reasonable, understood as meaning necessary and
11 proportionate. Under that standard, the Chamber must determine whether Equatorial
12 Guinea's measures were necessary, whether they were reasonable, and whether
13 they were proportionate. Doing so, in turn, requires considering the measures
14 against the State's alleged justification for taking them. That is the formulation
15 generally used by law of the sea tribunals.²³ In the words of former President Paik,
16 that is a "fact-intensive and circumstance-dependent"²⁴ analysis. Ultimately, it is a
17 matter of objective determination based on the facts at issue.

18
19 In contrast, Equatorial Guinea contends that the Special Chamber should analyse
20 the legality of its conduct under the margin of appreciation doctrine. That is a
21 standard that is mainly applied by the European Court of Human Rights. It is a
22 standard that law of the sea tribunals have so far refused to apply.

23
24 But, in any event, the difference between the parties is only one of degrees: the
25 degree of deference – the amount of leeway – that the Chamber should grant
26 Equatorial Guinea when assessing its conduct. It is a discussion about shades of
27 grey.

28
29 The main difficulty for Equatorial Guinea is that it cannot point to a single judgment
30 or a single award where a law of the sea tribunal has applied the margin of
31 appreciation doctrine. The authorities it cites are simply not persuasive.

32
33 First, Equatorial Guinea cites an academic article by Professor Yuval Shany which
34 predicted an increase in the application of the margin of appreciation doctrine.
35 Equatorial Guinea perhaps unwittingly fails to mention the year of publication of that
36 article, it is 2005. The article is 20 years old. Professor Shany is an eminent scholar;
37 his predictions, however, have not come true. And I say this without meaning any
38 criticism. We cannot hold this against him. Predictions are hard, especially about the
39 future as either the physicist Neils Bohr or the baseball coach Yogi Berra are
40 competently reported to have said.

Judgment of 14 April 2014, ITLOS Reports 2014 at paras. 360–362, 452(13); Arbitration regarding *the Duzgit Integrity (Malta v. São Tomé and Príncipe)*, Award of 5 September 2016 (2018) 173 I.L.R. 95, at paras. 209, 254.

²³ *Duzgit Integrity*, para. 258 and *Arctic Sunrise*, Compensation Award, paras. 76-77.

²⁴ Separate Opinion of Judge Paik, at para. 17.

1 Second, Equatorial Guinea relies on the Joint Dissent of “*Virginia G*”.²⁵ However, the
2 Joint Dissent’s learned comments must be analysed carefully. They must be viewed
3 in their proper context. Doing so shows that the Joint Dissent does not support
4 Equatorial Guinea’s position. This is for two reasons.

5
6 First, the Joint Dissent’s main disagreement with the majority on this issue relates to
7 whether Guinea-Bissau’s confiscation of the “*Virginia G*” constituted a breach of
8 Article 73 of the Convention.

9
10 The scope of the application of Article 73 - I am pausing here – that is a provision
11 that deals with sovereign rights over marine resources in the EEZ – is quite different
12 from the point at issue here. The key term is “sovereign rights”. That distinction in
13 itself renders the Joint Dissent’s learned comments inapposite. Here we are dealing
14 with enforcement powers, a very different issue. The authorities the Joint Dissent
15 relies on by Judges Cot and Wolfrum illustrate this. They focus on Article 73.²⁶

16
17 But even if I am wrong about that, the Joint Dissent’s concern is with the majority’s
18 approach, insofar as they considered it came too close to acting as an appellate
19 court by “substituting its judgment for that of the local authority”.²⁷ That is far from the
20 Chamber’s task here, which is determining whether Equatorial Guinea’s conduct and
21 its enforcement measures were exercised reasonably.

22
23 More importantly, even if the margin of appreciation doctrine did apply, it does not
24 assist Equatorial Guinea here, because the justification for invoking that doctrine is
25 not satisfied. Equatorial Guinea claims that it should have a margin of appreciation
26 because it is exercising its powers in response to maritime threats.²⁸

27
28 But even if this is true, and of course we say it is not, including for the reasons the
29 Tribunal has heard recently from Dr Busco, those grounds are not satisfied. The
30 Chamber has already heard why the alleged threat from a very large, very slow, very
31 easily identifiable vessel is just not credible; and here, that is a crucial contextual
32 element.

33
34 If, objectively, there was no risk, then also, objectively, there is much less justification
35 for these enforcement measures.

36
37 Turning briefly to considerations of humanity. These also apply to the exercise of
38 enforcement powers.

39
40 Considerations of humanity may influence whether such powers are exercised
41 reasonably. The Tribunal in “*Saiga*” held that, when considering the use of force
42 during the exercise of enforcement powers, and I quote, “considerations of humanity
43 must apply in the law of the sea, as they do in other areas of international law”.²⁹

²⁵ *M/V “Virginia G” (Panama v. Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia.

²⁶ Joint Dissent, para. 52.

²⁷ Joint Dissent, para. 55.

²⁸ Rejoinder, para. 248.

²⁹ *M/V “Saiga” (No. 2)* at para. 155.

1
2 I take it that this is not a disputed point, and there is an overlapping factual issue on
3 the human rights-based claim, which Ms Grafton will address in further detail.
4

5 Mr President, Members of the Chamber, I will now turn to the grounds on which
6 Equatorial Guinea breached the principles of reasonableness and humanity.³⁰
7

8 The Chamber has heard in detail, yesterday and today, the factual basis of those
9 allegations. I will only enunciate the arguments to avoid repetition.
10

11 Equatorial Guinea's conduct was simply not reasonable. That is, it was neither
12 necessary nor proportionate, nor, importantly, was it humane.
13

14 The Marshall Islands takes issue with two points. The first one is with Equatorial
15 Guinea's choice of certain enforcement measures. Those choices, we say, were not
16 reasonable because they were disproportionate, particularly when they are judged
17 against the justification or objective provided by Equatorial Guinea.
18

19 That justification, the alleged threat of marine security, simply lacks basis for the
20 elementary reason that there was no threat.
21

22 The second one is the manner in which those enforcement powers were exercised.
23 This was arbitrary, or, in the words frequently used by the Tribunal, the powers were
24 exercised and it was done on the basis of facts that did not exist and which were
25 patently erroneous.³¹
26

27 To be clear, the Marshall Islands is not asking this Chamber to operate as an
28 appellate court. Rather, we are asking it to objectively ascertain whether the
29 enforcement measures taken were reasonable, whether they were necessary,
30 whether they were proportionate, and whether they were humane. They were not.
31 And this is for the following five points:
32

33 First, Equatorial Guinea detained the vessel and crew for several months. That
34 interception occurred under a very obvious threat of the use of force, which the
35 Tribunal heard about this morning. This was not a situation where that threat was
36 either proportionate or necessary. The disproportionality is highlighted by the fact
37 that the Convention provides for other alternatives, for example, the right to visit the
38 vessel. The application of those more proportional measures would have been
39 preferable.
40

41 Second, Equatorial Guinea failed to show basic considerations of humanity due to
42 the conditions on which it detained the crew for several months. Again, the Tribunal
43 has heard about this in detail yesterday and today.
44

45 Third, Equatorial Guinea imposed the penalty, the fine, without providing any
46 explanation as to how that fine was calculated; and it applied that fine on the basis of
47 laws that were obviously not applicable to the facts at hand.

³⁰ Reply, para. 199.

³¹ *M/V "Virginia G" (Panama v. Guinea-Bissau)* at para. 54.

1
2 The Marshall Islands is not criticizing the possibility of the imposition of a fine, nor is
3 it criticizing the amount of fines that might be imposed. What it is criticizing is the way
4 in which the fine was imposed in this particular case.
5

6 Fourth, Equatorial Guinea deceptively represented that the vessel and crew would
7 be released on payment of the fine; yet, instead of doing that, Equatorial Guinea
8 transferred the vessel and rendered the crew to the Nigerian authorities.
9

10 Fifth, Equatorial Guinea failed to notify the Marshall Islands about its exercise of
11 enforcement actions against a Marshallese-flagged vessel.
12

13 Equatorial Guinea should have done so, particularly when those enforcement actions
14 were severe, and they included the detention of the vessel and the crew, and,
15 importantly, when a two-and-a-half-day period elapsed between the moment it
16 decided to take enforcement measures and the moment the "*Capitan David*" reached
17 the "*Heroic Idun*."
18

19 That two-and-a-half-day period is, in fact, longer than the time we have been sitting
20 here. This was not, to clarify, a matter of a split-second decision in the heat of the
21 moment, where operational requirements demanded instant decisions.
22

23 Mr President, Members of the Tribunal, all these are independently sufficient
24 reasons for concluding that Equatorial Guinea failed to respect its obligations. These
25 measures were not reasonable, they were not necessary, they were not
26 proportionate, and they were not humane.
27

28 Moving on to my second breach regarding the principle of due regard.
29

30 Equatorial Guinea also breached its obligations under Article 56(2) of the
31 Convention, and that is because it failed to pay due regard to the rights and duties of
32 the Marshall Islands when it – Equatorial Guinea – was exercising its rights in
33 performing its duties under this Convention in its Exclusive Economic Zone.
34

35 Equatorial Guinea breached those obligations, first, by improperly restricting the
36 conduct and the movements of the "*Heroic Idun*" in its EEZ.
37

38 Secondly, it did so by imposing substantial penalties for alleged failures to comply
39 with its laws.³² In so doing, Equatorial Guinea failed to give due regard to the rights
40 that the Marshall Islands enjoy in the Equatoguinean EEZ.
41

42 Those rights include freedom of navigation, exclusive flag-State jurisdiction, and the
43 right to be treated reasonably by the coastal State. These rights are fundamental for
44 the law of the sea, and actions that impinge upon them should be approached with
45 caution.
46

47 The impingement on the right to freedom of navigation is obvious. Equatorial Guinea
48 imposed a very large fine, and it detained the "*Heroic Idun*" and its crew for months.

³² *M/V "Virginia G" (Panama v. Guinea-Bissau)* at para. 54.

1 Again, we are in a situation where other, less severe measures, were easily
2 available. Moreover, Equatorial Guinea has, to this day, failed to explain either the
3 basis or the need for requiring prior authorization for, as Dr Busco said, all vessels to
4 enter its EEZ as purportedly required under Article 12 of the merchant marine law.

5
6 Moreover, it has further failed to explain why this requirement would be necessary
7 for a double-hulled state-of-the-art vessel like the “*Heroic Idun*”.

8
9 Briefly, as to Equatorial Guinea’s argument regarding the piracy defence:

10
11 First, Equatorial Guinea is wrong to assert, and I quote, “that reasonable conduct in
12 the execution of enforcement measures taken against piracy cannot” breach due
13 regard.³³

14
15 Pausing there, that is an extreme proposition, and it is a proposition that, if accepted,
16 could have unfortunate consequences.

17
18 At its core, what Equatorial Guinea is saying is that, if a measure is taken on grounds
19 of committing piracy, then that State essentially has *carte blanche*. That simply
20 cannot be right. If so, that would establish a universal rule of conduct, and that is
21 precisely what the “*Enrica Lexie*” and the “*Chagos*” tribunals categorically refused to
22 do.³⁴ Moreover, it would give priority to one activity, addressing alleged piracy
23 concerns, over other activities, such as freedom of navigation and other rights of the
24 flag State. Again, that simply cannot be right.

25
26 The “*Enrica Lexie*” tribunal’s approach is illustrative. The Tribunal did not rule that all
27 actions concerning piracy were excluded from the due regard obligations; nor did it
28 hold that, in circumstances where piracy was involved, those allegations would trump
29 other rights and obligations under the due regard test. Rather, the “*Enrica Lexie*”
30 tribunal held that the purpose of the due regard obligations was to “ensure balance
31 between concurrent rights belonging to coastal and other States.”³⁵ And that
32 balancing is fundamental.

33
34 Alternatively, if Equatorial Guinea’s argument is that it did not breach its due regard
35 obligations, that argument, with respect, is also wrong.

36
37 First, as the Chamber has heard, there was no “reasonable ground” for Equatorial
38 Guinea to contend that the “*Heroic Idun*” should have been intercepted and detained.

39
40 Second, even if there were reasonable grounds to do so, Equatorial Guinea’s
41 conduct did not comply with due regard, insofar as it impinged the Marshall Islands’
42 fundamental right to freedom of navigation, and it breached that by intercepting and
43 detaining a vessel and its crew for almost three months, the 92 days that we have
44 been hearing about.

45

³³ Rejoinder, para. 290.

³⁴ *The “Enrica Lexie” Incident (Italy v. India)*, Perm. Ct. Arb. Case No. 2015-28, Award of 21 May 2020 at para. 973; *Arbitration regarding the Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015 (2018) R.I.A.A. XXXI 359 at para. 519.

³⁵ *Enrica Lexie*, Merits Award at para. 975.

1 To make matters worse, it then transferred that vessel and that crew to a third State,
2 critically, in the pendency of proceedings before ITLOS.

3
4 For these reasons, Mr President, Members of the Chamber, Equatorial Guinea has
5 failed to have due regard for the Marshall Islands' rights.

6
7 This concludes my submissions, and I invite the President to call Ms Grafton to the
8 podium.

9
10 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I thank Dr Casas for his
11 statement. I now call on Ms Courtney Grafton to take the floor.

12
13 **MS GRAFTON:** Thank you, Mr President, Members of the Chamber. My
14 submissions will take us to approximately 4.30 p.m., right before the break.

15
16 And my task this afternoon is to guide the Chamber through the Marshall Islands'
17 submissions on breaches arising from Equatorial Guinea's repeated failures to
18 respect the crew's human rights.³⁶

19
20 Before I do, I'd like to address one point that has arisen out of the proceedings so
21 far. We have heard quite a lot about the VDR transcripts, and we were taken to brief
22 extracts. It is important to note that the VDR transcript was prepared months after
23 the incident by lawyers, in slow time, and the references to the "*Gongola*" in the
24 transcript do not reflect what the crew actually heard.

25
26 As the Master and Chief Officer attested to in their witness statements, what they
27 heard was that the name of the vessel was "*Angola*" or "*Agola*", and that is what they
28 searched for on Google at the time. That is my brief aside.

29
30 So returning to the human rights. The Marshall Islands' case in this regard can be
31 put shortly. From the point of the "*Heroic Idun*"'s interception, to the transfer of the
32 ship and its crew to Nigeria's custody, Equatorial Guinea consistently failed to
33 respect the crew's human rights. It did so by unlawfully and arbitrarily depriving the
34 crew of their liberty, and by subjecting the crew to treatment that fell short of
35 minimum human rights standards. By that conduct, Equatorial Guinea breached the
36 Law of the Sea Convention.

37
38 Equatorial Guinea has generally failed to engage with the substance of the human
39 rights arguments in its written case.³⁷ Instead, it resists these submissions by
40 primarily arguing that the Tribunal has no jurisdiction to hear them. That is not the
41 case. The Marshall Islands only asks the Chamber to interpret and apply the
42 Convention, and the Chamber has jurisdiction to do just that.

43
44 To make good these points, I will take my submissions in three parts. First, I will
45 address why the Tribunal has jurisdiction to determine the claims; second, I will
46 briefly address the applicable law; and, third, I will turn to the merits of the claims.

47

³⁶ Memorial, paras. 253–282; Reply, 208–226.

³⁷ Counter-Memorial, paras. 301–319; Rejoinder, paras. 259–287.

1 As Sir Daniel noted yesterday, this Chamber has jurisdiction over disputes
2 concerning “the interpretation or application” of the Convention.³⁸ It therefore has
3 jurisdiction over the Marshall Islands’ human rights-related claims. Put simply, these
4 are claims alleging breaches of the Convention, specifically Article 87(1) and (2),
5 Article 58(2), read alongside 58(3), Article 2(3) and Article 56(2).³⁹

6
7 The Marshall Islands makes no claim directly under international human rights
8 treaties or general international law independently of the Convention.⁴⁰

9
10 There are two key issues between the Parties that go to whether the Chamber can
11 adjudicate the human rights-related claims under the gateway provisions, and I note
12 that these provisions are also referred to as rules of reference by ITLOS in its
13 Climate Change Advisory Opinion.⁴¹

14
15 The first question is the extent to which the rules of reference, properly interpreted,
16 require compliance with human rights law.

17
18 The second is whether the rules of reference, and, through them, the human rights
19 obligations relied upon by the Marshall Islands, were applicable to the conduct
20 complained of in this case.

21
22 I will address each in turn. On the first question, the Marshall Islands relies upon two
23 categories of Convention obligations. The first category is provisions that prescribe
24 compliance with “other rules of international law”, including, we say, international
25 human rights law. Specifically, the Marshall Islands invokes Article 87(1),
26 Article 58(2), read alongside Article 58(3), and Article 2(3) of the Convention.

27
28 The second category is provisions that require “due regard” for other States’
29 interests, rights, and duties, which includes compliance with Equatorial Guinea’s
30 human rights obligations. Specifically, the Marshall Islands makes claims under
31 Articles 87(2) and 56(2) of the Convention.

32
33 The critical question for the Chamber is whether these provisions do provide for a
34 *renvoi* to international human rights law. The answer is: Yes.

35
36 The Chamber is no doubt familiar with the text of Articles 87(1), 58(2) and (3) and
37 2(3), which are displayed on the slide. The Marshall Islands relies upon each as the
38 source of positive duties to exercise rights and duties concerning the high seas,
39 EEZ, and territorial sea, in compliance with “other rules of international law”.

40
41 I note, with respect to the EEZ, the reference is limited to rules that are “not
42 incompatible” with Part V of the Convention.⁴²

43

³⁸ UNCLOS, Article 288(1).

³⁹ Memorial, para. 109; Reply, paras 86–89, 333(b).

⁴⁰ Reply, para. 87.

⁴¹ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion, 21 May 2024, para. 131.

⁴² UNCLOS, Article 58(2), (3).

1 The obligatory nature of these provisions is most clearly discernible in Articles 87(1)
2 and 58(3). In Article 87(1), I emphasize the obligatory nature of the words “exercised
3 under the conditions laid down by” that precede “other rules of international law”.
4 And in Article 58(3), the words “shall comply with” that attach to the words “other
5 rules of international law”.

6
7 As Professor Anna Petrig observes, and I will put the quote on the screen as well,
8 the result – and I am looking at the last sentence in the first paragraph – is that:⁴³

9
10 It seems to be the very function of such provisions to incorporate external
11 rules, including international human rights norms, directly into the UNCLOS
12 and to create a pathway for them to enter the UNCLOS legal system. The
13 Tribunal is therefore required to consider these references when assessing
14 the legality of the exercise of these rights.

15
16 “These rights” being the Convention rights.

17
18 Articles 58(2) and 2(3) of the Convention are also properly interpreted as imposing
19 prescriptive obligations to exercise sovereignty in the territorial sea, and rights and
20 duties applicable in a third State’s EEZ, consistently with “other rules of international
21 law”. To the extent that Equatorial Guinea contests this,⁴⁴ it’s wrong.

22
23 Indeed, with respect to the obligation imposed by Articles 58(2) and 2(3), the
24 Chamber can, and should, adopt the interpretation of the Tribunal in the *Chagos*
25 *Marine Protected Area Award*. Following a detailed analysis of Article 2(3), including
26 each of its authentic language versions, its placement within the structural context of
27 the Convention, its object and purpose, and the negotiating history,⁴⁵ the Tribunal
28 concluded that Article 2(3) imposes an “obligation” on States to exercise sovereignty
29 in accordance with other rules of international law.⁴⁶ The *South China Sea* tribunal
30 agreed.⁴⁷ The same reasoning applies *mutatis mutandis* to Article 58(2). It is worth
31 repeating the *Chagos* tribunal’s observation that “a *renvoi* to the material beyond the
32 Convention must be interpreted in a manner that is coherent with respect to all of the
33 foregoing maritime zones”.⁴⁸

34
35 The Chamber can, and should, also adopt the view of the *Chagos* tribunal with
36 respect to the Convention’s due regard obligations, the content of which was
37 addressed by Dr Casas.⁴⁹ The *Chagos* tribunal’s view was that Article 56(2) (and by

⁴³ Anna Petrig and Marta Bo, “The International Tribunal for the Law of the Sea and Human Rights”, *Human Rights Norms in ‘Other’ International Courts*, ed. Martin Scheinin (Cambridge University Press, 2019) p. 401. Equatorial Guinea expressly relies on this chapter in the Counter-Memorial at fn 314.

⁴⁴ Rejoinder, para. 156.

⁴⁵ *Chagos Marine Protected Area, Award*, paras. 499–514.

⁴⁶ *Chagos Marine Protected Area, Award*, para. 514.

⁴⁷ *South China Sea Arbitration (Philippines/China) Award*, 12 July 2016, paras. 808, 812 (therefore finding that “the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the ‘other rules of international law’ applicable in the territorial sea”).

⁴⁸ *Chagos Marine Protected Area, Award*, para. 503.

⁴⁹ See Memorial, paras. 152–156, citing *Enrica Lexie, Merits Award*, para. 975, *Chagos Marine Protected Area Award*, para. 519, *South China Sea Arbitration Award*, para. 742.

1 the same reasoning, Article 87(2)) requires due regard to the interests, rights, and
2 duties of other States, including as acquired outside of the Convention.⁵⁰

3
4 The Marshall Islands has a legal interest in the performance by all States of their
5 human rights obligations.⁵¹ Equatorial Guinea's ICCPR obligations are also owed to
6 the Marshall Islands as another State Party to that treaty.⁵²

7
8 Equatorial Guinea was, accordingly, required to exercise its rights and duties with
9 due regard to performance of human rights obligations.

10
11 Moving on, then, to the scope of “other rules of international law.”⁵³ The “other rules
12 of international law” referred to in the Convention, we say, are all norms of
13 international law within the meaning of Article 38(1) of the ICJ statute that are
14 relevant and applicable to the situation. That is the ordinary meaning of the words
15 read in their context and in light of their object and purpose. With respect to treaties,
16 the reference can, of course, only include treaties to which the State in question is a
17 party. The international human rights obligations relied on by the Marshall Islands
18 were relevant and applicable rules of international law.

19
20 First, only rules applicable to Equatorial Guinea are relied upon; that is, human rights
21 treaties binding upon Equatorial Guinea as a State Party, and customary human
22 rights and general principles of international law concerning the minimum standards
23 of treatment in prisons.⁵⁴ That these rights exist in both treaty and general
24 international law has not been contested by Equatorial Guinea.

25
26 Second, these human rights obligations applied to the entirety of Equatorial Guinea's
27 conduct in issue in this case, including its extraterritorial activities; because
28 Equatorial Guinea exercised effective control over the “*Heroic Idun*” and its crew.

29
30 Equatorial Guinea has not argued otherwise. In any case, the human rights
31 jurisprudence clearly establishes that a State has full and exclusive control over a
32 vessel and its crew, at least *de facto*, from the time it is intercepted by a State's Navy
33 forces and in a continuous and uninterrupted manner while the Navy escorts it to
34 shore.⁵⁵

35
36 Third, and finally, there is nothing to suggest, nor has Equatorial Guinea argued, that
37 the human rights obligations relied on by the Marshall Islands are incompatible with
38 the Convention. It would be highly surprising, and unfortunate, if this Chamber

⁵⁰ *Chagos Marine Protected Area Award*, paras. 503–535.

⁵¹ Human Rights Committee, “General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para. 2; *Barcelona Traction, Light and Power Co, Limited (Belgium v Spain)*, Judgment of 5 February 1970, ICJ Reports 1970, p. 32, p. 32; Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Judgment of 20 July 2012, ICJ Reports 2012, p. 422, p. 449.

⁵² For the avoidance of doubt, the Marshall Islands was specially affected by breaches of Equatorial Guinea's breaches of its human rights obligations with respect to the crew of the *Heroic Idun* because the ship was sailing under its flag.

⁵³ Memorial, paras. 126–128; Reply, paras. 86–89.

⁵⁴ Memorial, paras. 265–280; Reply, para. 88, fn. 166.

⁵⁵ *Medvedyev v France*, App No 3394/03 (Grand Chamber, ECtHR, 29 March 2010) para. 67.

1 concluded that any obligation arising under the Law of the Sea Convention could not
2 be complied with in a way that respected human rights.

3
4 It follows that in order to determine whether Equatorial Guinea complied with its
5 Convention obligations, the Chamber must assess compliance with the relevant and
6 applicable human rights obligations.

7
8 The second key jurisdictional issue is whether the gateway provisions relied upon by
9 the Marshall Islands were applicable *ratione loci* to Equatorial Guinea's mistreatment
10 of the "*Heroic Idun*" crew. Equatorial Guinea argues that the gateway provisions
11 were inapplicable, particularly because none of the conduct forming the basis of the
12 human rights-related claims occurred on the high seas.⁵⁶ This, too, is wrong.

13
14 First, it is a mischaracterization of the Marshall Islands' case to say that its claims
15 only relate to treatment of the crew within Equatorial Guinea's territory. As I will come
16 to, the Marshall Islands claims that the crew were arbitrarily and unlawfully detained
17 contrary to their right to liberty from the time that the "*Heroic Idun*" was intercepted in
18 São Tomé and Príncipe's EEZ on 12 August 2022.⁵⁷ On Equatorial Guinea's own
19 case, therefore, its treatment of the crew was subject to the high seas regime in
20 Part VII of the Convention, including Article 87(1).⁵⁸

21
22 In any case, Equatorial Guinea's treatment of the crew was consequential upon its
23 wrongful interception, diversion and detention of the "*Heroic Idun*" in a third State's
24 EEZ and, therefore, the exercise of high seas freedoms.⁵⁹ Even taking Equatorial
25 Guinea's case at its highest and assuming that its interception and detention of the
26 "*Heroic Idun*" was conducted lawfully pursuant to Article 105 of the Convention,
27 which it was not, Articles 58(2) and (3), and the obligations they impose to exercise
28 Convention rights consistently with international law, would apply to those
29 enforcement powers. Indeed, it is implicit in Equatorial Guinea's own reliance on
30 Article 105 that the enforcement powers provided by it must carry through to the
31 detention of the suspects in its territory and their transfer to a third State; here, of
32 course, Nigeria.

33
34 But Equatorial Guinea cannot have its cake and eat it, too. If it seeks to take the
35 benefit of Article 105 powers to its territory, it must also take the burden: the
36 requirement to exercise those powers in compliance with other rules of international
37 law.

38
39 Second, Equatorial Guinea's objections to the application of Articles 58(2) and 2(3)
40 is not really about their application *ratione loci*; it is about whether these provisions
41 impose an obligation to exercise the rights and duties referred to subject to other
42 rules of international law,⁶⁰ and we have already addressed that question. The
43 answer is: Yes.

44

⁵⁶ Counter-Memorial, para. 319, fn. 479; see also para. 228; Rejoinder, paras. 143–147.

⁵⁷ Memorial, para. 281(a).

⁵⁸ Counter-Memorial, paras. 299, 319, fn. 479; Rejoinder, para. 144.

⁵⁹ Reply, paras. 225–226, fn. 419.

⁶⁰ Rejoinder, para. 146.

1 As a final point, before moving off jurisdiction, I note that Equatorial Guinea has
2 relied upon several decisions of UNCLOS tribunals as purportedly establishing that
3 the Marshall Islands' human rights-related claims fall outside the Chamber's
4 jurisdiction.⁶¹ None do the work that Equatorial Guinea needs them to.

5
6 In the *Arctic Sunrise*, the Netherlands' human rights-related claims were not brought
7 under the Convention.⁶² The tribunal's finding that it does not have jurisdiction "to
8 apply directly provisions such as Articles 9 and 12(2) of the ICCPR" is therefore
9 unsurprising.⁶³

10
11 Similarly, the relief requested by Malta in respect of human rights in the "*Duzgit*
12 *Integrity*" arbitration was separate to the substantive obligations under the
13 Convention. The tribunal's finding that it did not have "jurisdiction to determine
14 breaches of obligations not having their source in the Convention" must be read in
15 that context.⁶⁴

16
17 And, third, the human rights-related allegations in *M/V "Virginia G"* were peripheral
18 and were not substantiated as breaches of the Convention.⁶⁵ It is therefore
19 unsurprising that the Tribunal did not make a finding in respect of the crew's human
20 rights; it was not asked to.

21
22 In short, to the Marshall Islands' knowledge, an UNCLOS tribunal has not yet faced
23 claims of the kind made today. But that does not mean that they cannot be made.

24
25 Moving on, then, to my second subject: applicable law. To complete the picture, we
26 must deal with the question whether the international law relied upon by the Marshall
27 Islands constitutes applicable law for the purposes of Article 293(1) of the
28 Convention.⁶⁶ Sir Daniel dealt with this provision yesterday, and the Chamber can
29 move through this analysis swiftly. It is, in truth, a non-issue for the human
30 rights-related claims.

31
32 The law relied upon by the Marshall Islands clearly falls within the scope of the
33 reference in Article 293(1) to the "Convention and other rules of international law not
34 incompatible" with this Convention. The gateway provisions, the rules of reference,
35 fall within the first part of that reference, and the international human rights
36 obligations fall within the second.

37
38 To the extent that Equatorial Guinea argues that Article 293(1) also lays down limits
39 for how this law can be used by the Chamber, its case is confusing and internally
40 inconsistent.⁶⁷ There is simply nothing in Article 293(1) to suggest, as Equatorial
41 Guinea does, that it includes only general international law and not also the rules of

⁶¹ Counter-Memorial, para. 163 and fn. 314 (regarding *The Arctic Sunrise*), para. 161 (regarding *The Duzgit Integrity Arbitration*); Rejoinder, para. 263 (regarding *The M/V "Virginia G" Case*).

⁶² *Arctic Sunrise Award*, para. 140(i)(c), see also para 193. Reply, para. 88.

⁶³ *Arctic Sunrise Award*, para. 198.

⁶⁴ *Duzgit Integrity Award*, para. 207.

⁶⁵ See *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, paras. 345, 378.

⁶⁶ Memorial, 121–130; Counter-Memorial, paras. 168–178; Reply, paras. 91–97; Rejoinder, paras. 148–155.

⁶⁷ Counter-Memorial, paras. 174–178; Rejoinder, para. 146, 262–264.

1 treaties binding upon the parties, or only international law, and soft law, that directly
2 pertains to subject matters covered by UNCLOS. That is what Equatorial Guinea's
3 case seems to require the Chamber to accept. But to do so would cut against the
4 text of Article 293(1), its object and purpose, and the jurisprudence of those tribunals
5 that have interpreted it, as Sir Daniel explained.

6
7 In any event, Equatorial Guinea has conceded that “the Chamber may have regard
8 to international human rights standards so long as they are used to assist in the
9 interpretation and application of provisions of UNCLOS.”⁶⁸ And that is all the
10 Marshall Islands asks the Chamber to do: apply the applicable law in order to
11 interpret and apply the provisions of UNCLOS.

12
13 This brings me to my third and final part of my submissions, and that is the
14 assessment of Equatorial Guinea's compliance with its Convention obligations with
15 respect to human rights. For the purposes of oral submissions,⁶⁹ I will focus on two
16 rights: first, the right to liberty;⁷⁰ and, second, the right to be treated with humanity,⁷¹
17 and to be free from torture and cruel, inhuman and degrading treatment.⁷²

18
19 First, the right to liberty:⁷³ The right to liberty prohibits unlawful and arbitrary
20 deprivations of liberty. It applies to everyone, whatever the legal basis, objective, or
21 form of arrest or detention.⁷⁴

22
23 There are two key questions in assessing Equatorial Guinea's compliance with the
24 right to liberty in its treatment of the crew of the “*Heroic Idun*”: first, whether the crew
25 was deprived of their liberty and, if so, at what intervals of time; second, if so whether
26 that deprivation was justified.

27
28 As you know, the crew of the “*Heroic Idun*” was deprived of their liberty at the time
29 Equatorial Guinea intercepted their ship on 12 August 2022 at gunpoint, with no
30 choice but to follow its orders, and at each stage thereafter, until they were rendered
31 to Nigeria, the crew were deprived of their liberty.

32
33 If the Chamber is of any doubt that the deprivation of liberty began with the “*Heroic*
34 *Idun*”'s interception, I note that the European Court of Human Rights has found that
35 confinement to a means of transport, including specifically a ship intercepted by and

⁶⁸ Rejoinder, para. 141.

⁶⁹ The Marshall Islands' written case also establishes several other human rights violations: Memorial, para. 281.

⁷⁰ ICCPR, Article 9; African Charter, Article 6; UDHR, Article 3; ECHR, Article 5; ACHR, Article 7; Arab Charter, Article 14. Memorial, paras. 273–274.

⁷¹ ICCPR, Article 10(1); African Charter, Article 5; ACHR, Article 5(2); Arab Charter, Article 20(1). Memorial, para. 268–272.

⁷² ICCPR, Article 7; African Charter, Article 5; UDHR, Article 5; ECHR, Article 3; ACHR, Article 5(2); Arab Charter, Article 8(1). Memorial, paras. 265–267.

⁷³ Memorial, paras. 273–274. ICCPR, Article 9; African Charter, Article 6; UDHR, Article 3; ECHR, Article 5; ACHR, Article 7; Arab Charter, Article 14.

⁷⁴ *Ahmadou Sadio Diallo*, Judgment of 30 November 2010, ICJ Reports 2010, p. 639, para. 77 (“*The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued*”).

1 escorted to port by a navy vessel, can constitute a deprivation of liberty;⁷⁵ and the
2 academic literature establishes the same.⁷⁶

3
4 Respect for the right to liberty requires that the deprivation of liberty also meets
5 substantive and procedural legality requirements, and the legal basis for the
6 deprivation of liberty and enforcement of that law is itself not arbitrary.⁷⁷ The Human
7 Rights Committee has clarified that the concept of “arbitrariness” is not to be equated
8 with “against the law” but must be interpreted more broadly to include elements of
9 inappropriateness and justice, lack of predictability and due process of law.⁷⁸

10
11 The crew of the “*Heroic Idun*” were deprived of their liberty: first, Equatorial Guinea
12 has failed to identify any basis in its domestic law for the detention of the crew; and,
13 second, for the reasons given this morning, Equatorial Guinea did not have nor did it,
14 in fact, exercise enforcement power under the Convention to stop and detain the
15 “*Heroic Idun*” on suspicion of piracy.

16
17 Equatorial Guinea’s deprivation of the crew’s liberty was also arbitrary. First,
18 Equatorial Guinea has alleged that there was never any criminal investigation
19 charges or proceedings brought against the “*Heroic Idun*” crew members in
20 Equatorial Guinea.⁷⁹ Notwithstanding this allegation, it continued to hold the crew in
21 detention after the initial investigations were complete and without any formal arrest
22 or court order.

23
24 Second, there was no due process. In addition to there being no formal basis for
25 detention, the crew were not provided with access to any form of judicial review or
26 *habeas corpus* for the crew to contest their detention or Equatorial Guinea’s decision
27 to transfer the crew to Nigeria’s control.

28
29 Third, at critical points of the detention, crew members were denied access to their
30 lawyers and were forced to sign statements in a foreign language.

31
32 Fourth, all of this went on for some months without any real indication of how long
33 the crew would be detained for. This is manifestly unjust and certainly longer than
34 was required for Equatorial Guinea to investigate properly any suspicions of the crew
35 that it in fact had.

36
37 Equatorial Guinea’s treatment of the crew while they were detained also violated the
38 rights to be treated with humanity and respect for the inherent dignity for the person

⁷⁵ *Medvedyev v France* (where the crew were confined to their ship for 13 days) para. 74 (“...it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage the restrictions were relaxed. **In the Court’s view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship’s course was imposed by the French forces**”) (emphasis added).

⁷⁶ Anna Petrig, “Part 4: Arrest and Detention in Light of International Individual Rights”, *Human Rights and Law Enforcement at Sea* (Brill, 2014) pp. 158–159, 161–162, 167.

⁷⁷ Memorial, paras. 273–274.

⁷⁸ E.g. *Marques de Morais v Angola* Comm No 1128/2002 (HRC, 18 April 2005) para. 6.1.

⁷⁹ Rejoinder, para. 285.

1 and without cruel, inhuman and degrading treatment.⁸⁰ These were rights applicable
2 through the crew's detention and irrespective of whether with the detention was
3 unlawful or not.⁸¹ The minimum standard of treatment during detention are set out in
4 the Mandela Rules,⁸² and they provide that the State must provide sufficient floor
5 space and cubic content of air for each prisoner, adequate sanitary facilities,
6 provision of food and drinking water, provision of health care services, the right to be
7 informed promptly of the reasons for their arrest, any charges against them, and
8 access to their lawyer.⁸³

9
10 Equatorial Guinea has not refuted that the crew were entitled to these minimum
11 standards of treatments under international law.⁸⁴ It is contested only whether they
12 were met on the facts and only in respect of some aspects of the crew's treatment in
13 Luba.⁸⁵ Equatorial Guinea has not refuted, for instance, that it held the Chief Officer
14 hostage prior to transferring the crew of "*Heroic Idun*" to Nigeria.⁸⁶

15
16 Whether the Chamber accepts Equatorial Guinea's evidence or the Marshall Islands'
17 evidence on the conditions of detention is, of course, ultimately a question for the
18 Chamber. But I encourage you to closely consider the witness evidence on the
19 record and the witness evidence that we have heard.

20
21 For the avoidance of doubt, Equatorial Guinea cannot escape its failure to afford the
22 crew minimum standard of treatment by pointing to the fact that the vessel owner's
23 local agents Besora provided the crew with some basic necessities.⁸⁷ The
24 obligations to treat detainees humanely and without cruel, inhuman and degrading
25 treatment impose on the State non-delegable positive duties to provide systems that
26 effectively apply the rules concerning the treatment of persons deprived of their
27 liberty.⁸⁸

28
29 By relying upon Besora's provision of necessities to the crew, Equatorial Guinea
30 admits its failure to do so; that is, Equatorial Guinea's case is premised on its own
31 failure to put in place systems that ensured the crew were provided with the

⁸⁰ Memorial, paras. 265–272. The right to be treated with humanity: ICCPR, Article 10(1); African Charter, Article 5; ACHR, Article 5(2); Arab Charter, Article 20(1). The right to be free of cruel, inhuman, and degrading treatment: ICCPR, Article 7; African Charter, Article 5; UDHR, Article 5; ECHR, Article 3; ACHR, Article 5(2); Arab Charter, Article 8(1).

⁸¹ General Comment No. 21, paras. 2, 4.

⁸² Adopted by the General Assembly on 17 December 2015, A/RES/70/175. The minimum standards should "*always be observed... even if economic or budgetary considerations may make compliance with these obligations difficult*": *Mukong v Cameroon* (Communication No. 458/91) (10 August 1994) CCPR/C/51/D/458/1991, para. 9.3; see also *Likhovid v. Belarus* (Communication No. 2703/2015) (17 January 2023) CCPR/C/135/D/2703/2015, para. 7.4. See also Sarah Joseph and Melissa Castan, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2013) pp. 754–755 ("*it can be safely assumed that the Standard Minimum Rules... have been elevated to norms of international treaty law in article 10(1) of the Covenant*").

⁸³ Memorial, para. 271, setting out Rules 1, 13, 15, 16, 18.1, 18.2, 21, 22.1, 22.2, 24.1, 25.2, 27.2, 119.1, 120, 61.

⁸⁴ See, e.g., Counter-Memorial, para. 302.

⁸⁵ Counter-Memorial, paras. 303–319; Rejoinder, paras. 266–283.

⁸⁶ The definition of hostage-taking is widely agreed to be as set out in Article 1 of the International Convention against the Taking of Hostages.

⁸⁷ Rejoinder, paras. 65–70, 71–73, 80, 267–268, 274.

⁸⁸ General Comment No. 21, paras. 3, 6 - 7; General Comment No. 20, paras. 2, 8.

1 fundamental components of humane detention, including basic supplies of food and
2 water.

3
4 The Chamber should therefore reject Equatorial Guinea's bold assertion that "the
5 evidence shows that Equatorial Guinea acted in accordance with the principle of
6 humanity in its treatment of the *"Heroic Idun"* and its crew members at all times".⁸⁹ It
7 plainly did not.

8
9 Joining these threads together, the Marshall Islands submits that Equatorial Guinea
10 breached Article 87(1) of the Convention, because it did not exercise freedom of the
11 high seas in accordance with other rules of international law; namely, international
12 human rights treaties binding upon Equatorial Guinea as a State Party and
13 customary human rights and general principles of international law. For the same
14 reason, it also violated Article 58(2), read with Article 58(3), and Article 2(3).

15
16 Second, Equatorial Guinea breached Articles 87(2) and 57(2) because it did not
17 exercise its own freedom of navigation with due regard for the interest of the
18 Marshall Islands, including its interest in the performance by Equatorial Guinea of its
19 human rights obligations.

20
21 For all these reasons, the Chamber can, and must, consider the Marshall Islands'
22 human rights arguments and declare that Equatorial Guinea has breached the
23 Convention.

24
25 It also should. It is true that human rights were not the primary concern of the
26 drafters of the Convention, but the Convention was intended to be the Constitution of
27 the oceans. It cannot be the case that it allows for a legal black hole regarding the
28 human rights of individuals affected by State action at sea.

29
30 The drafters explicitly laid down tools in the Convention for addressing such topics. It
31 is the duty of this Chamber, and all that the Marshall Islands asks of it is to apply the
32 tools it has been given.

33
34 Thank you, Mr President.

35
36 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Ms Grafton. I believe
37 that this is a good time for the Special Chamber to withdraw for a break of
38 30 minutes.

39
40 We will continue the hearing at 5.00 p.m.

41
42 (Break)

43
44 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I now invite Ms Nevill to the
45 podium. You have the floor, madam.

46
47 **MS NEVILL:** Thank you, Mr President.

48

⁸⁹ Rejoinder, para. 266.

1 Members of the Special Chamber, in this final session today, I will address the
2 Marshall Islands' remaining five claims: these concern the IMO treaties, Article 225,
3 the general obligations to notify the flag State of enforcement measures, and to
4 promptly release the vessel without undue delay, and non-aggravation of the
5 dispute.

6
7 I will take each relatively briefly, as they are detailed in our written pleadings, and
8 much of the ground has already been covered by Mr Bethlehem and Ms Grafton in
9 their submissions yesterday concerning jurisdiction and applicable law and facts.

10
11 Starting with the IMO treaties claim.

12
13 Put very shortly, Equatorial Guinea's violations of SOLAS, the STCW and the
14 COLREGS breached Article 2(3) and Articles 87(1) and (2) of the Convention, as
15 these IMO treaties are rules of reference for the purpose of these provisions.

16
17 It also breached Article 94, duties of the flag State, and Article 217, enforcement by
18 flag States, which make direct *renvoi* to generally accepted international regulations,
19 procedures, practices, rules and standards, the so-called GAIRS.

20
21 The Chamber also has direct jurisdiction over the claims of breach of the IMO
22 treaties under Article 297(1)(c) of the Convention, as explained by Sir Daniel
23 yesterday.

24
25 These claims are detailed in our written submissions, to which I have provided
26 references in the footnotes.

27
28 The purpose of SOLAS is to promote safety of life at sea by establishing uniform
29 principles and rules. The purpose of the STCW is to promote safety of life and
30 property at sea, and the protection of the marine environment by establishing in
31 common agreement international standards of training, certification and
32 watch-keeping for seafarers.

33
34 One of the measures required to achieve these objectives, under both treaties, is to
35 ensure that vessels carry sufficient crew, with the necessary qualifications, to ensure
36 the safety of life at sea and the marine environment.

37
38 Regulation V/14 of SOLAS, "Ships' manning", and Article III of the STCW, together
39 require each ship to be provided with, and carry, a minimum Safe Manning
40 Certificate issued by the government of the flag State. This must include the number
41 of crew the ship must carry, in what positions, and the training requirements of those
42 crew in accordance with the STCW.⁹⁰

43
44 Ms Grafton took you yesterday to the Safe Manning Certificate of the vessel.
45

⁹⁰ Memorial, paras. 294-301; Reply, paras. 238-242.

1 To recap, and I am not showing it again now, it specifies that the “*Heroic Idun*” must
2 carry a minimum of 16 crew, in positions that are specified in the certificate, and with
3 the STCW certifications, which each of those crew must have.⁹¹

4
5 Regulation VIII/1 of the STCW regulates the relationship between safe manning and
6 watch-keeping.⁹²

7
8 By way of explanation, watch-keeping on a vessel is the continuous operation and
9 manning of a ship by crew members, working in shifts or watches, to avoid collisions
10 and respond to emergencies.

11
12 These obligations are reflected in the Convention. Article 217(3) requires flag States
13 Parties to ensure that vessel certificates required by and issued pursuant to
14 international rules and standards are carried on board the vessel. These include the
15 Safe Manning Certificate.

16
17 The COLREGS set out the rules for preventing collisions. They apply to all vessels
18 on the high seas and in all waters navigable by seagoing vessels. The relevant rules
19 in this case are Rules 5, 6, 7 and 8. They are set out in full in paragraph 305 of the
20 Memorial and here on the slide.

21
22 These provisions are also part of the international safe manning regime, because it
23 is necessary to have sufficient qualified crew on board to comply with the
24 COLREGS.

25
26 For example, rule 5 requires that “every vessel shall at all times maintain a proper
27 lookout by sight”.

28
29 Sufficient crew are also needed on board to avoid collisions, because they can man
30 the ship to move it out of the way.

31
32 When, on 14 August 2022, Equatorial Guinea took 15 of the 26 crew, including the
33 Master and the Chief Engineer, off the vessel and detained them onshore in the
34 detention facility, it left the vessel with 11 crew onboard, below the minimum 16, and
35 without crew holding the necessary STCW certifications,⁹³ and also without enough
36 crew to ensure that the COLREGS could be complied with.

37
38 It is useful to recall in this context both the characteristics of the “*Heroic Idun*” and
39 the location where it was detained by Equatorial Guinea.

40
41 As was explained earlier, the “*Heroic Idun*” is a huge VLCC. It is 336 metres long,
42 60 metres across, has a depth of 29.5 metres, and weighs nearly 160,000 tonnes.⁹⁴
43 The size comparison given earlier in the week was to the Empire State Building.

44
45 The location where the “*Heroic Idun*” was detained by Equatorial Guinea was not
46 suitable for VLCCs, and was not, contrary to Equatorial Guinea’s assertion, used by

⁹¹ Memorial, paras. 306-307.

⁹² Reply, para. 231.

⁹³ Memorial, para. 308.

⁹⁴ Master-1, para. 10, Memorial/III/3.

1 vessels the size of the “*Heroic Idun*”, as the Master and the Chief Officer explain in
2 their witness statements.⁹⁵

3
4 The vessel was anchored in Luba Bay, outside the port, around about 1 to 1.3
5 nautical miles offshore, in what was, in SOLAS and STCW terms, an unsheltered
6 anchorage or open roadstead. The anchorage was close to the grounding depths for
7 the vessel, in conditions where it was exposed to wind and waves, and to a variable
8 and relatively strong current.

9
10 There was a high risk of the vessel dragging the anchor, which meant that it could
11 have run aground or collided with another vessel, especially as it was
12 undermanned.⁹⁶ It was also detained in a busy area, with marine traffic going in and
13 out of the Port of Luba.⁹⁷

14
15 The Master described the change of port to Luba by the Equatoguinean authorities in
16 his first statement as “extremely dangerous”.⁹⁸ The evidence of the Chief Officer,
17 who, as you will recall was detained onboard, is that the vessel and crew “suffered
18 frequent bad weather, including strong winds”, which necessitated him “to prepare
19 the engines requiring the help of two engineers and two crew who were sent forward
20 for anchor stations. These crew were exposed to high risk because the ship was
21 anchored 1 mile off land”.⁹⁹

22
23 The Senior Deputy Commissioner of the Marshall Islands Maritime Administrator,
24 William Gallagher, attests that the “vessel was anchored in an unsafe condition,
25 without appropriate crew to safely man or operate it”.¹⁰⁰

26
27 The Marshall Islands’ Maritime Administrator, the Marshall Islands Ministry of
28 Foreign Affairs, the vessel’s managers, OSM, and the Master and the Chief Officer
29 all repeatedly raised concerns about the unsafe manning of the “*Heroic Idun*” with
30 Equatorial Guinea.

31
32 I will not take the Chamber through all the safe manning requests, which are listed
33 on the slide, and you have been taken to some of them earlier, but there are at
34 least 11 in total.

35
36 In addition to these requests, the Marshall Islands’ Maritime Administrator issued a
37 detention order on 7 November 2022, detaining the vessel for non-compliance with
38 minimum safe manning requirements and preventing it from leaving unless the safe
39 manning requirements were met, and, in addition, a safety inspection completed.¹⁰¹

40
41 These conditions were imposed by the flag State in compliance with its IMO treaty
42 obligations.

43

⁹⁵ Master-2, paras. 23-24, Reply/II/12-13; Chief Officer-2, para. 29, Reply/II/26-27.

⁹⁶ Master-2, para. 22, Reply/II/12.

⁹⁷ Reply, para. 237; Kulblik-1 para. 74, Memorial/II/44.

⁹⁸ Master-1, para. 106, Memorial/II/19.

⁹⁹ Chief Officer-1 para. 50, Memorial/II/77; Chief Officer-2, para. 11, Reply/II/20-21.

¹⁰⁰ Gallagher-1, para. 30, Memorial/II/227.

¹⁰¹ Annex MT/-43, Memorial/III.

1 All safe manning requests fell on deaf ears. As the Master puts it, “the authorities did
2 not seem to care about this”.¹⁰² The flag State’s detention order was ignored. The
3 vessel was forced to sail before the detention order had been complied with.

4
5 The unsafe manning and unsafe location of the “*Heroic Idun*” had real and serious
6 consequences, and posed real and serious risks to the vessel, to those on board,
7 and others in the vicinity, and to the marine environment.¹⁰³

8
9 The Master explains that the vessel was “completely unable to handle any
10 emergencies”,¹⁰⁴ and did not have enough crew “to keep the vessel and crew on
11 board the vessel safe”,¹⁰⁵ and that “the day-to-day management of the vessel was
12 also a significant issue, because the crew were under extreme stress.”¹⁰⁶

13
14 I also refer you to the evidence of the Chief Officer¹⁰⁷ and others who were detained
15 on board,¹⁰⁸ which is also listed on the slides.

16
17 Crew detained on board reported feeling exhausted, stressed, scared and unsafe.
18 The Chief Officer emphasizes that “the atmosphere was very threatening and we
19 were all afraid for our lives”.¹⁰⁹ I also refer you to the evidence of the Junior Third
20 Officer,¹¹⁰ the Third Engineer,¹¹¹ the Electrician,¹¹² the Deck Cadet, the Third
21 Ordinary Seaman, the Third Able Seaman and the Motorman.¹¹³

22
23 As detailed in the Marshall Islands’ pleadings in evidence, it was also unsafe for the
24 “*Heroic Idun*” to be at anchor for such an extended period without proper
25 maintenance, especially because she was swinging on the anchor and she was
26 undermanned.¹¹⁴

27
28 There were at least two potentially serious accidents. The first was when the “*Wele*
29 *Nzas*,” the Equatoguinean warship posted to guard the “*Heroic Idun*,” dragged
30 anchor nearby on the 26 September, almost causing a collision.¹¹⁵ There were not
31 enough crew on board to move the vessel safely out of the way. Collision was only
32 averted because the “*Wele Nzas*” regained control after the Chief Officer himself
33 informed the warship that it was dragging anchor.¹¹⁶

¹⁰² Master-1, para. 173, Memorial/II/28.

¹⁰³ Memorial, paras. 314-316.

¹⁰⁴ Master-1, para. 173, Memorial/II/28.

¹⁰⁵ Master-2, para. 21, Reply/II/11.

¹⁰⁶ Master-1, para. 174, Memorial/II/28.

¹⁰⁷ Chief Officer-1, para. 51, Memorial/II/77.

¹⁰⁸ Second Engineer, para. 16, Memorial/II/110.

¹⁰⁹ Chief Officer-2, paras. 8, 10, 12, Reply/II/19, 21.

¹¹⁰ Junior Third Officer, para. 26, Memorial/II/93.

¹¹¹ Third Engineer, paras. 14, 16, Memorial/II/115.

¹¹² Electrician, para. 20, Memorial/II/129.

¹¹³ Motorman-1, para. 13, Memorial/II/187.

¹¹⁴ Master-2, para. 25-27, Reply/II/12-14; Chief Officer-2, paras. 11, 26, 28, Reply/II/20-21, 25-26.
Memorial, para. 66 – 67; Reply, paras. 228, 237, 302, 307; Annex MT/-48, Annex MT/-6, page 62,
Annex RMI/-50, paras. 25–28.

¹¹⁵ Chief Officer-1, para. 55, Memorial/II/78.

¹¹⁶ Chief-Officer-2, para. 30, Reply/II/27.

1 The second potentially serious accident was on 9 October, when a supply vessel
2 bringing supplies to the vessel caught fire while alongside the “*Heroic Idun*.”

3
4 It takes little imagination to see that this could have caused a major accident.¹¹⁷

5
6 The “*Heroic Idun*” simply did not have enough crew on board to fight a serious fire,
7 and we must record that the crew that were on board were seriously fatigued.

8
9 The Master mariner, Ms Blount, in her expert evidence, also records her concern
10 that other large vessels calling at the Port of Luba were unnecessarily forced to pass
11 between the “*Heroic Idun*” and the “*Wele Nzas*”,¹¹⁸ noting the particular example of
12 the “*UAL BODEWES*”.

13
14 This, she says, raises questions as to the port management and pilotage in the
15 area.¹¹⁹

16
17 What is Equatorial Guinea’s answer to all of this?

18
19 First, it maintains that the Special Chamber does not have jurisdiction to assess
20 whether specific obligations under SOLAS, the STCW and the COLREGS have been
21 breached.¹²⁰

22
23 I have already referred to Sir Daniel Bethlehem’s submissions on jurisdiction
24 yesterday, and I will not repeat those submissions here, except to expand on certain
25 points concerning the relevant rules of reference in the context of the breaches.

26
27 Article 94(3), read with Article 94(5) is relevant, because, as explained by the
28 Annex VII Tribunal in the South China Sea arbitration, Article 94(3) incorporates IMO
29 rules and regulations that apply to flag states.¹²¹

30
31 In this context, the flag State is Equatorial Guinea and the relevant IMO rules and
32 regulations as regards the warship the “*Wele Nzas*” are the COLREGS.
33 Article 2(3) is the relevant gateway here because, and Equatorial Guinea has not
34 disputed this, the vessel was detained in Equatorial Guinea’s territorial sea.

35
36 The purpose of Article 2(3) is not, as submitted by Equatorial Guinea, “to recognize
37 that the Convention does not expand or narrow a State’s powers in its territorial sea
38 vis-à-vis those on its land territory”.¹²²

39
40 As explained by the Annex VII tribunal in the *Chagos Marine Protected Area*
41 arbitration, the purpose of Article 2(3) is to “exercise sovereignty subject to the

¹¹⁷ Chief Officer-1, para. 55, Memorial/II/78; Kulblik-1, paras. 76-78, Memorial/II/44-45; Electrician, para. 22, Memorial/II/129-130; Chief Officer-2, para. 14, Reply/II/21-22.

¹¹⁸ Blount, paras. 12-13, 27-35, 37, Memorial/II/258-263.

¹¹⁹ Blount, para. 29.

¹²⁰ Rejoinder, paras. 141-142.

¹²¹ *South China Sea, Award*, at para. 1083; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, at para. 138.

¹²² Rejoinder, para. 146(a).

1 general rules of international law”,¹²³ and it is “a *renvoi* to material beyond the
2 Convention”.¹²⁴

3
4 Article 87(1) is also a relevant rule of reference, because Equatorial Guinea was in
5 the EEZ of São Tomé and Príncipe when it intercepted and detained the “*Heroic*
6 *Idun*”, and, indeed, it purports to rely on the provisions of Part VII of the Convention
7 to justify its interception and detention of the vessel and crew.

8
9 Article 87(2) is also relevant because, by this conduct, Equatorial Guinea also failed
10 to have due regard to the interests of the Marshall Islands in meeting its obligations
11 under Articles 94 and 217 of the Convention.

12
13 I turn now to Equatorial Guinea’s second argument, which is that it is not liable for its
14 repeated refusals of safe manning requests because it did not have any obligations
15 under SOLAS or the STCW vis-à-vis the “*Heroic Idun*”.¹²⁵

16
17 It says that the IMO treaties impose obligations primarily on flag States, and that its
18 obligations were limited to the backup role of Port State inspection.¹²⁶

19
20 The Marshall Islands does not deny that SOLAS, the STCW and the COLREGS
21 impose obligations on it as a flag State. Its case is that it was prevented from
22 meeting those requirements because of the conduct of Equatorial Guinea while it
23 had the vessel and crew in its custody and control and that, in so doing, Equatorial
24 Guinea breached its obligations under Article 1(b) of SOLAS, Article I(2) of the
25 STCW, and Article 1 of the COLREGS, which is shown on the slide. These
26 provisions plainly apply to all parties to the treaties, not only parties when they act in
27 their capacity as flag State. I touch on each in turn.

28
29 Starting with SOLAS, the parties to SOLAS undertake in Article 1(b) to “take all other
30 steps which may be necessary to give the present Convention full and complete
31 effect, so as to ensure that from the point of view of safety of life, a ship is fit for the
32 purpose for which it is intended”.¹²⁷

33
34 The parties to the STCW undertake in Article I(2), to “take all other steps which may
35 be necessary to give the Convention full and complete effect, so as to ensure that,
36 from the point of view of safety of life and property at sea and the protection of the
37 marine environment, seafarers on board ships are qualified and fit for their duties”.¹²⁸

38
39 The parties to the COLREGS undertake in Article 1 to give effect to the Rules and
40 other Annexes constituting the COLREGS.¹²⁹

41
42 The ordinary meaning of these terms is plain: The contracting parties must take all
43 steps which may be necessary to give SOLAS and the STCW full and complete

¹²³ *Chagos Marine Protected Area*, Award, para. 516; see generally 502-516.

¹²⁴ *Chagos Marine Protected Area*, Award, para. 503.

¹²⁵ Rejoinder, paras. 323-326, 333, 336-339, 341.

¹²⁶ Rejoinder, paras. 323-326, 336-339.

¹²⁷ Memorial, para. 295, Annex RMI/-48; Reply, paras. 234-235.

¹²⁸ Memorial, para. 300, Annex RMI/-49; Reply, paras. 232-233.

¹²⁹ Memorial, para. 302, Annex RMI/-47.

1 effect, and to give effect to the COLREGS. Equatorial Guinea, in repeatedly refusing
2 to allow the vessel which it had detained and which was within its control to be
3 properly and safely manned, was plainly not taking all steps which were necessary to
4 give SOLAS and the STCW full and complete effect by allowing and enabling the
5 Marshall Islands as the flag State to meet its obligations. Given these terms anything
6 other than their ordinary meaning would evidently fail to give effect to the object and
7 purpose of these treaties.

8
9 Equatorial Guinea's third argument is that SOLAS and STCW did not, in any event,
10 apply because the vessel was at anchor and not at sea.¹³⁰ This is not a correct
11 interpretation and application of the relevant provisions in those treaties, and, in this
12 respect, I invite the Chamber to refer to the detailed explanation the Marshall Islands
13 gives in its reply, with supporting evidence of how the safe manning obligations apply
14 to the vessel where it was detained by Equatorial Guinea at anchor in Luba Bay.¹³¹

15
16 As to the COLREGS, Equatorial Guinea does not appear to dispute that it had
17 obligations under the COLREGS, but says that it did not breach the COLREGS
18 because the vessel was not damaged.¹³² This simply misses the point of the Rules
19 which is to avoid accidents, injuries and environmental damage. It is no answer to a
20 charge of breach to say that there were, in the event, no accidents, injuries or
21 damage.

22
23 Equatorial Guinea also says that the Marshall Islands' expert concluded that there
24 was no concern for the safety of the vessel.¹³³ That is simply not true. I refer you to
25 the evidence of Ms Blount at paragraphs 21, 33, 36 and 37 of her expert report.

26
27 It is notable in this regard that Equatorial Guinea has produced no expert evidence of
28 its own. It relies on the evidence of Mr McDowall, the Director and Port Manager at
29 Luba Freeport who says the "*Wele Nzaz*" dragging anchor and the supply boat fire
30 did not pose a material risk to the vessel.¹³⁴ However, it is difficult to understand
31 what he bases this assessment on. He is not an expert witness, not an expert
32 mariner, was not on the vessel at the time of the incidents, and nor, as his evidence
33 suggests, even in the port at the time of the incidents. He also says that these
34 incidents were never raised with the port, but you heard evidence on this during the
35 closed session yesterday afternoon, and I refer you to page 29 of the transcript at
36 lines 27-35.

37
38 To conclude my submissions on the IMO treaties claim, the overwhelming evidence
39 of all of those involved with the vessel was that the vessel and its crew were unsafe,
40 because Equatorial Guinea detained the vessel in an unsafe location, removed more
41 than half its crew and failed to respond to repeated safe manning requests. The
42 vessel was exposed to at least two very close misses when the "*Wele Nzaz*" nearly
43 collided with it and the supply vessel caught fire. In so doing, Equatorial Guinea

¹³⁰ Rejoinder, paras. 331-335 and 342-344.

¹³¹ Reply, paras. 236-240.

¹³² Counter-Memorial, paras. 296-297; Rejoinder, paras. 348-349.

¹³³ Rejoinder, para. 348.

¹³⁴ Rejoinder, para. 348.

1 breached its obligations under SOLAS, the STCW, the COLREGS and the
2 Convention as detailed in paragraphs 312 and 313 of the Memorial.¹³⁵

3
4 I move now to the Marshall Islands' next claim that Equatorial Guinea breached
5 Article 225 of the Convention.¹³⁶

6
7 Article 225, which is up on the slide, provides that "in exercise under this convention
8 of their powers of enforcement against foreign vessels, States shall not endanger the
9 safety of navigation or otherwise create any hazard to a vessel or bring it to an
10 unsafe port or anchorage or expose the marine environment to an unreasonable
11 risk".

12
13 This Tribunal held in *M/V Virginia* that "although Article 225 of the Convention is
14 found in Part XII of the Convention concerning protection of preservation of the
15 marine environment, it has general application".¹³⁷ The Tribunal considered that it
16 followed that all these requirements were applicable to enforcement activities
17 undertaken pursuant to article 73(1) of the Convention.

18
19 The Marshall Islands contended in its Memorial that it would also follow that the
20 obligation extends to all enforcement measures taken against a foreign vessel.¹³⁸
21 Equatorial Guinea, for its part, concurs that Article 225 applies when port and coastal
22 States exercise their powers of enforcement against foreign ships.¹³⁹ It also agrees
23 with the Marshall Islands that Article 225, must, in order to be effective, and I am
24 quoting here from the submissions, "be interpreted in light of those measures and
25 standards" and that these include Article 94 of the Convention and the COLREGS
26 and SOLAS, and this is "to keep the Vessels and the marine environment safe and
27 unharmed" and to meet the provisions of UNCLOS regarding obligations on all states
28 regarding the marine environment.¹⁴⁰

29
30 However, despite this apparent agreement, Equatorial Guinea also maintains that
31 Article 94 and SOLAS, the STCW, and the COLREGS do not form part of the
32 relevant interpretive context in this case, in respect of Article 225, because
33 "obligations undertaken by flag States in relation to their vessels flying their flag" do
34 not "*ipso facto* become opposable to coastal States when exercising enforcement
35 powers generally".¹⁴¹

36
37 In effect, it runs the same defence as it did in respect of the previous claim
38 concerning the IMO treaties.

39
40 This answers an argument the Marshall Islands did not make. The Marshall Islands
41 does not say or claim that Article 94 and the IMO treaties are "directly opposable" to
42 Equatorial Guinea under Article 225. Rather, the Marshall Islands' argument is that
43 Article 94, which makes a *renvoi* to IMO rules, is relevant context under Article 31(2)

¹³⁵ Memorial, para. 312 and 313.

¹³⁶ Memorial, para. 351-355.

¹³⁷ Memorial, para. 318 and fn. 362.

¹³⁸ Memorial, paras. 319-322.

¹³⁹ Rejoinder, para. 228.

¹⁴⁰ Rejoinder, paras. 231, 237.

¹⁴¹ Rejoinder, para. 232-237.

1 of the VCLT for the purpose of the interpretation of Article 225, and that the IMO
2 rules are themselves relevant rules applicable in the relations between the parties for
3 the purposes of Article 31(3)(c) of the VCLT.

4
5 They are relevant context, via Article 94 of UNCLOS, and relevant applicable rules
6 between the Parties because they represent the consensus of States as to what
7 endangers the safety of navigation, is an unsafe port or anchorage, or exposes the
8 marine environment to an unreasonable risk.¹⁴²

9
10 Indeed, Equatorial Guinea itself expressly agrees that “the content and objectives of
11 regimes set out in the COLREGS and SOLAS may inform what is considered to be
12 ‘adverse consequences’ under Article 225.”¹⁴³ Turning to the application of
13 Article 225 to the facts, it follows from the foregoing that the same facts which go to
14 Equatorial Guinea’s breaches of SOLAS, the STCW, the COLREGS, and Articles
15 2(3), 87 and 94 of the Convention addressed under the Marshall Islands’ IMO
16 treaties claim also go to breach of Equatorial Guinea’s obligations under Article 225.

17
18 These include Equatorial Guinea’s repeated refusals to allow the “*Heroic Idun*” to be
19 safely and sufficiently manned, detaining it in an unsafe location, given the
20 characteristics of the vessel and its unsafe manning, and the unsafe manoeuvres
21 engaged in by its warship, the “*Wele Nzaz*”.¹⁴⁴

22
23 The evidence establishes that the “*Heroic Idun*” faced real dangers to its safety as a
24 consequence of this conduct, which also exposed the marine environment to the
25 serious risk of a VLCC leaking bunkers from damage caused by a collision or from
26 catching fire.

27
28 The fact that, in the end, there was no indication in the condition survey report that
29 the stay in Equatorial Guinea had any ill effects on the vessel is irrelevant. It is plain
30 from its wording that Article 225 does not require physical damage to establish
31 breach. It is sufficient that the safety of navigation was endangered, a hazard to the
32 vessel was created, or the vessel was brought to an unsafe anchorage, or the
33 marine environment was exposed to an unreasonable risk.

34
35 Indeed, again, Equatorial Guinea recognizes this. It states that Article 225 operates
36 to ensure that coastal and port States “act with due regard by adopting the
37 necessary measures to avoid endangering the safety of navigation”,¹⁴⁵ and so on.

38
39 While the Marshall Islands does not consider it helpful or necessary to import “due
40 regard” wording into Article 225, given its specific use and meaning in other
41 provisions of the Convention, it is evident that the Parties agree that Article 225
42 may be breached when a party fails to undertake necessary measures or fails to
43 refrain from measures that may have adverse consequences.

44
45 It was so breached by Equatorial Guinea in this case, as set out at paragraphs 323
46 and 324 of the Memorial.

¹⁴² Reply, para. 250.

¹⁴³ Rejoinder, para. 237.

¹⁴⁴ Memorial, paras. 323-324; Reply, paras. 252-254.

¹⁴⁵ Rejoinder, paras. 228.

1
2 I move now to the Marshall Islands' next "other breaches" claim, which is that
3 Equatorial Guinea breached the Convention and applicable law by failing to notify
4 the Marshall Islands, as flag State, of its enforcement measures against the "*Heroic*
5 *Idun*".¹⁴⁶
6

7 Equatorial Guinea does not dispute that it did not notify the Marshall Islands of its
8 enforcement measures, but it says that it had no obligation to do so under the
9 Convention or applicable law.
10

11 Its secondary argument is that, even if it had a notification obligation, it was not
12 breached because the Marshall Islands was notified by the vessel's Managers,
13 OSM, of Equatorial Guinea's actions. I address each of these submissions in turn.
14

15 There is no dispute between the Parties that the Convention does not contain an
16 express notification obligation which would have applied on these facts. The issue
17 between the Parties is whether there is a general notification obligation.
18

19 And I pause here to note that we also disagree on whether there is a general
20 obligation to promptly release vessels which have been detained without undue
21 delay. Accordingly, my submissions concerning the identification of a general
22 notification obligation will apply *mutatis mutandis* to the prompt release obligation.
23

24 In our Memorial, we identified two potential sources for a general notification
25 obligation. One is general principles of international law formed within the
26 international legal system, identified through an inductive analysis of existing
27 notification rules in treaties and other instruments.¹⁴⁷ The other is customary
28 international law,¹⁴⁸ rooted in the conduct of States as evidenced by the same
29 treaties.
30

31 Equatorial Guinea argues that there is no customary rule, and it does not address
32 the Marshall Islands' submissions identifying a general principle of international law
33 formed within the international legal system.
34

35 For the avoidance of doubt, the Marshall Islands relies entirely on its written
36 pleadings concerning the existence of a general principle of international law.
37 Therefore, given the time available, I propose to focus on Equatorial Guinea's
38 arguments on custom, but, as I will come to, both rely on an inductive process.
39

40 On the existence of a customary rule, the principle point of difference between the
41 parties concerns the significance of treaties for the identification of customary law
42 and whether a series of similar treaty provisions can evidence a customary rule. Both
43 Parties draw on the ILC's 2018 "Draft conclusions on the identification of customary
44 international law".¹⁴⁹

¹⁴⁶ Memorial, paras. 325-355.

¹⁴⁷ Memorial, paras. 330, 358.

¹⁴⁸ Memorial, paras. 350, 372.

¹⁴⁹ Draft conclusions on the identification of customary international law (2018), *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, p. 117, at p. 146; Memorial, para. 350 and n. 410; Rejoinder, para. 296.

Paragraph 2 of conclusion 11 of the “Draft conclusions” addresses the situation where a rule is set forth in a number of treaties. It explicitly recognizes that “the fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.”

The Marshall Islands has identified at least 26 treaties and instruments which contain requirements to notify the flag State of enforcement measures. They are detailed in the Memorial and Reply,¹⁵⁰ and a document containing the relevant provisions is included in your Judges’ folders. The provisions do not contain identical language, but we say that they either employ similar language or apply the same general rule to a specific context; in this instance, enforcement action under the law of the sea and maritime law.

This is clearly more than a “select few instruments” as Equatorial Guinea contends.¹⁵¹ The list includes UNCLOS with 170 parties; the key IMO treaties, which have near-universal acceptance and represent nearly 100 per cent of the world’s tonnage;¹⁵² it includes the IMO Port State Control Guidance; Port State Control MOUs, which, between them, cover large parts of the globe; the Fish Stocks Agreement and the Agreement on Port State Measures to combat IUU fishing; bilateral consular treaties which expressly contain consular functions *vis-à-vis* shipping; the codes of conduct developed with IMO technical assistance to address maritime security and safety, that is the Yaoundé and Djibouti Codes,¹⁵³ and the Maritime Labour Convention.

The question for you is whether repetition alone can evidence both elements of custom. And I say here that the commentary to conclusion 11 may be described as equivocal, eventually concluding that “an investigation into whether there are instances of practice accepted as law (*opinio juris*) that support the written rule is required.” A relevant factor in the Commission’s reasoning was that, citing the ICJ’s *Diallo* judgment, repetition could show the contrary, “in the sense States enter into treaties because of the absence of any rule or in order to derogate from existing but different rule of customary international law”.¹⁵⁴

However, here, there are no established rules of international law that the obligation to notify the flag State of enforcement measures would depart from. This is not a case like *Diallo*, where the ICJ rejected the argument that the large number of investment treaties was sufficient to show that there had been a change in the customary rules of diplomatic protection to allow protection by substitution.¹⁵⁵ Rather, the repetition evidences that, when States conclude treaties, instruments, codes or understandings which concern port or coastal State enforcement action against

¹⁵⁰ Memorial, paras. 332-339.

¹⁵¹ Rejoinder, para. 299.

¹⁵² Memorial, para. 350.

¹⁵³ <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/A2%20Revised%20Code%20Of%20Conduct%20Concerning%20The%20Repression%20Of%20Piracy%20Armed%20Robbery%20Against%20Ships%20Secretariat.pdf>.

¹⁵⁴ Commentary to conclusion 11, para. (8), p. 146, citing *Diallo*, *Preliminary Objections*, para. 90.

¹⁵⁵ *Diallo*, paras. 88-91.

1 foreign-flagged vessels, a provision concerning notification of the flag State is
2 included as a matter of course.

3
4 Equatorial Guinea contends that the only evidence of *opinio juris* is the witness
5 statement of the Senior Deputy Commissioner of the Marshall Islands' Maritime
6 Administrator, Mr Gallagher.¹⁵⁶

7
8 While this is compelling evidence of *opinio juris*, given his experience working for
9 large flag States for more than 32 years, it is not the only evidence. In this
10 connection, the Marshall Islands refers to the ICJ's treatment of the identification of
11 custom in *Continental Shelf*, (*Nicaragua v. Columbia*) and the Advisory Opinion on
12 *Climate Change*, both of which post-date the ILC's 2018 draft conclusions.

13
14 In *Nicaragua v. Colombia*, the ICJ held that State practice can be indicative of
15 *opinio juris*, that "State practice given its extent over a long period of time may be
16 seen as an expression of *opinio juris*",¹⁵⁷ and that "[o]*pinio juris* may be
17 demonstrated by induction based on the analysis of a sufficiently extensive and
18 convincing practice".¹⁵⁸

19
20 In its Advisory Opinion on *Climate Change*, the ICJ further observed that "customary
21 principles may even develop under the influence of the [treaty]" and "[t]his is more
22 likely where the relevant customary and treaty rules 'flow from a common
23 fundamental principle'".¹⁵⁹

24
25 The Marshall Islands contends that the treaties and instruments which it has listed
26 evidence a general State practice over a long period of time, which is sufficiently
27 extensive and convincing to be seen as an expression of *opinio juris*.

28
29 Furthermore, the obligation to notify the flag State of enforcement measures flows
30 from common fundamental principles. And, in this regard, I invite the Chamber to
31 refer to the Marshall Islands' submissions at paragraphs 341 to 249 of its Memorial
32 and, in particular, those at paragraphs 346 to 349. These submissions demonstrate,
33 for the purpose of identifying a general principle of international law, that the
34 obligation to notify the flag State of enforcement measures is intrinsic to the legal
35 order of the seas and oceans and the international legal system more generally: it
36 protects the primacy of the flag State; allows the implementation of the flag State's
37 obligations and rights under the Convention and other international rules; and it
38 enables the flag State to exercise the remedies available to it under international law.
39 These principles can be equally characterized as "fundamental principles" for the
40 purpose of the ICJ's inductive approach to the identification of custom.

41
42 I move now to Equatorial Guinea's alternative submissions, which are that any
43 notification obligation was satisfied when the vessel's Managers contacted the

¹⁵⁶ Rejoinder, para. 298.

¹⁵⁷ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2023, p. 413, para. 77.

¹⁵⁸ *Id.*

¹⁵⁹ *Obligations of States in Respect of Climate Change*, Advisory Opinion, 23 July 2025, para. 312.

1 Marshall Islands and that the Marshall Islands has accepted that it suffered no
2 prejudice from Equatorial Guinea's failure to notify.

3
4 As to the first of these submissions, Equatorial Guinea relies on the "*Duzgit Integrity*"
5 Annex VII arbitration.¹⁶⁰ However, this decision tends to support the existence of a
6 notification obligation, given that São Tomé and Príncipe notified Portugal of its
7 enforcement action and that the tribunal determined that such notification of a third
8 State "was sufficient",¹⁶¹ especially in light of the fact they were both EU member
9 States. And the tribunal simply does not address whether there is a general duty to
10 notify the flag State.

11
12 Equatorial Guinea also contends that the Marshall Islands' reliance on the ICJ's
13 judgments in *Pulp Mills* and *Djibouti v. France* in its Reply was misplaced. Equatorial
14 Guinea's argument is that, because these cases concerned specific treaties, they
15 do not support a more general proposition that information submitted by or through
16 private actors cannot substitute for the State's obligation to inform. However, it is
17 evident from the reasoning into *Djibouti v. France* and *Pulp Mills*¹⁶² that it was not the
18 source of the obligation that was critical, but what communications could meet that
19 obligation given its object and purpose in a context of that treaty. Thus, it was
20 obvious that the obligation in *Djibouti v. France* to give reasons for any refusal of
21 mutual assistance could not be satisfied through press reports.¹⁶³

22
23 Likewise, the obligation to notify construction works in *Pulp Mills*, the purpose of
24 which was to create the conditions for successful cooperation between the States
25 Parties, could not be met by the information being conveyed through companies
26 involved or non-governmental sources.¹⁶⁴

27
28 Likewise, and for the reasons given by the Marshall Islands in its Reply, direct
29 interstate communication is required to ensure one of the objects of notification,
30 which is the opening of a formal channel of communication to enable and facilitate
31 dialogue, diplomacy and dispute settlement.¹⁶⁵ This is also explained by the Senior
32 Deputy Commissioner at paragraph 25 of his first statement.¹⁶⁶

33
34 Finally, it is plain that the Marshall Islands did not accept that the absence of
35 communication by Equatorial Guinea did not prejudice or impact any of its rights and
36 obligations. The Marshall Islands invites the Special Chamber to refer to
37 paragraph 226(b) of its Reply where the prejudice caused to the Marshall Islands is
38 set out and paragraph 36 of the Senior Deputy Commissioner's first statement.

39
40 To conclude, there is a general duty to notify the flag State of enforcement measures
41 and it was applicable in this case. Furthermore, Equatorial Guinea did not comply
42 with it in violation of the Convention as set out in paragraphs 353 to 355 of the
43 Memorial.

¹⁶⁰ Rejoinder, paras. 303-304.

¹⁶¹ *Duzgit Integrity*, para. 266-268.

¹⁶² *Pulp Mills*, para. 110.

¹⁶³ *Djibouti v France*, para. 150.

¹⁶⁴ *Pulp Mills*, para. 113.

¹⁶⁵ Reply, para. 262.b and fn. 523.

¹⁶⁶ Gallagher-1, para. 25, Memorial /III/226.

1
2 I turn now to the claim that Equatorial Guinea breached its obligation to release the
3 “*Heroic Idun*” and its crew promptly without undue delay.¹⁶⁷

4
5 The Marshall Islands’ claim is that Equatorial Guinea, in breach of the Convention
6 and applicable law, did not comply with its obligation to release the vessel and crew
7 promptly. As I have already noted Equatorial Guinea said that it had no obligation to
8 promptly release the vessel.¹⁶⁸ In any event, it says, the international legal system
9 does not indicate any support for a generally obligation to release a vessel which has
10 been apprehended under suspicions of piracy.

11
12 Given the shortness of time, I will not take the Chamber through the Marshall
13 Islands’ submissions on the existence of a general prompt release obligation, but
14 invite you to refer to our submissions in paragraphs 357 to 372 of the Memorial, and
15 paragraphs 266 to 268 of the Reply. I propose to only address issues arising from
16 Equatorial Guinea’s submission in its Rejoinder.

17
18 As I have already noted, the Marshall Islands’ submissions on potential sources and
19 identification of the general notification obligation apply *mutatis mutandis* to the
20 general obligation of prompt release without undue delay.

21
22 Your Judges’ folder contains a document setting out the prompt release obligations
23 in the various treaties and instruments listed in our written pleadings,¹⁶⁹ and this is
24 also shown on the slide. This list is clearly more than a “handful” of treaties as the
25 Equatorial Guinea erroneously suggests.¹⁷⁰ I note that more could be added, such
26 as Article 8(bis)(10)(ix) of SUA.

27
28 Equatorial Guinea again contends that the only evidence of *opinion juris* is the
29 witness statement of the Senior Deputy Commissioner of the Marshall Islands
30 Maritime Administrator.¹⁷¹ As to that, the Marshall Islands refers back to its argument
31 concerning the existence of a customary notification obligation. The treaties,
32 instruments, codes and MOUs listed by the Marshall Islands evidence a widespread
33 and uniform State practice that extends over a long period of time and is extensive
34 and convincing. Again, the repetition evidences that, when States conclude treaties,
35 instruments, codes or understandings which concern action against foreign vessels,
36 a provision concern prompt release without undue delay is included.

37
38 Again, this rule flows from common fundamental principles which have been affirmed
39 by this Tribunal and individual judges when addressing prompt release, and these
40 are set out in our Memorial.¹⁷² These include the humanitarian principle underpinning
41 prompt release¹⁷³ and safeguarding the balance between the rights and obligations
42 of the States Parties to the Convention and between flag States and port and coastal

¹⁶⁷ Memorial, paras. 357-378.

¹⁶⁸ Rejoinder, paras. 310-311.

¹⁶⁹ Memorial, paras. 360-366; Reply, para. 266(e).

¹⁷⁰ Rejoinder, para. 299.

¹⁷¹ Rejoinder, para. 313.

¹⁷² Memorial, paras. **.

¹⁷³ Memorial, paras. 369, 371.

1 States.¹⁷⁴ Indeed, the account of the negotiations of Article 292 of the Convention
2 given in the *Virginia Commentary*¹⁷⁵ demonstrates that the obligation to promptly
3 release a vessel, if necessary on the payment of a bond, is an important procedural
4 safeguard. The importance of the fundamental principles underpinning the rule is
5 also reflected in the evidence of the Senior Deputy Maritime Commissioner at
6 paragraphs 18 and 19 of his statement.¹⁷⁶

7
8 The other arm to Equatorial Guinea's defence to this claim is specific to its piracy
9 defence. It argues that the international legal system does not indicate any support
10 for a general obligation to release a vessel which has been apprehended under
11 suspicion of piracy, pending final determination of the lawfulness of its acts; and that
12 it was "not for Equatorial Guinea to determine the existence or lack of piracy
13 allegations arising from acts committed in Nigeria"; and that it could not release the
14 vessel pending such investigations of piracy by Nigeria because of its anti-piracy
15 obligations under UNCLOS and the Yaoundé Code.¹⁷⁷

16
17 I can take these points very briefly in turn. First, the policy and principles
18 underpinning the rule apply with equal force to vessels detained on grounds of piracy
19 once it has been established that they had not been engaged in piracy. There is
20 simply no reason for it not to apply in the same way.

21
22 Second, as set out in our submissions this morning, Equatorial Guinea is not relieved
23 of its obligations to the Marshall Islands under the Convention simply because
24 Nigeria has made a cooperation request. The Yaoundé Code does not, and does not
25 report to, depart from or amend UNCLOS.

26
27 Third, the facts simply do not support Equatorial Guinea's piracy case, as you have
28 heard earlier.¹⁷⁸

29
30 To conclude, there is a general obligation of prompt release without undue delay
31 applicable in this case, and Equatorial Guinea failed to comply with it in violation of
32 the Convention as set out in paragraphs 375 to 378 of the Memorial.

33
34 I turn now to the Marshall Islands' final "other breaches" claim, and with a bit more
35 time to hand than I had expected, Mr President.

36
37 The Marshall Islands' final "other breaches" claim is that Equatorial Guinea breached
38 its obligations under general international law and the Convention to preserve the
39 rights of the parties and not aggravate the dispute pending proceedings.

40
41 As detailed in the Memorial, Equatorial Guinea breached these obligations by
42 repeatedly failing to engage with the Marshall Islands' communications raising a
43 dispute under the Convention from 16 August 2022 onwards and by handing the

¹⁷⁴ Memorial, paras. 368, 370-371.

¹⁷⁵ Para. 292.1.

¹⁷⁶ Annex RMI/-30, Memorial/II/224.

¹⁷⁷ Rejoinder, paras. 316, 318-320.

¹⁷⁸ Memorial, para. 375-378.

1 vessel and crew over to Nigeria in the face of prompt release proceedings before this
2 Tribunal.¹⁷⁹

3
4 Equatorial Guinea contends in its Rejoinder that the “dispute” at issue for the
5 purpose of the claim of breach of Article 283 is the one at issue before this Chamber,
6 and that this was raised by the Marshall Islands in its communications of November
7 2022, after the transfer of the “*Heroic Idun*” to Nigeria on 11 November 2022.¹⁸⁰

8
9 In this respect, Equatorial Guinea’s argument confuses demonstration of compliance
10 with Article 283 to establish jurisdiction and admissibility in a proceeding under
11 Part XV. It confuses that with the claim here, which is that it breached its obligation
12 under Article 283 to proceed expeditiously to an exchange of views once a dispute
13 had arisen. It plainly did breach this obligation. Equatorial Guinea does not dispute
14 that it did not respond to any of the Marshall Islands’ letters or Notes Verbales
15 raising a dispute under the Convention from 16 August and nor does it dispute that it
16 did not proceed expeditiously to an exchange of views.

17
18 Regarding the transfer of the vessel and the crew to Nigeria on 11 November 2022,
19 Equatorial Guinea says that this did not breach its obligation not to aggravate the
20 dispute and to preserve the rights of the Marshall Islands pending the determination
21 of the prompt release application, because it had an obligation to hand the vessel
22 and crew over to Nigeria and that it simply could not have done otherwise. For
23 reasons we have already explained this morning, Equatorial Guinea plainly had no
24 such obligation under UNCLOS or the Yaoundé Code.

25
26 Equatorial Guinea has also failed to provide any convincing explanation as to why,
27 after detaining the crew and vessel for three-and-a-half months, it suddenly could not
28 wait 13 days until the hearing set down before this Tribunal on 24 November by the
29 President. It makes vague and unsubstantiated references to the timing being
30 necessitated by Nigerian requests and administrative procedures. However, even if it
31 had been able to substantiate this claim, that would not excuse it from responsibility
32 for breach. As the Marshall Islands explained in its Reply, Equatorial Guinea’s
33 response presumes to answer and self-judge the very issue that was submitted by
34 the Marshall Islands to the Tribunal on 9 November 2022 for its determination. What
35 it did, in doing that, handing the vessel and crew over to Nigeria in the face of prompt
36 release proceedings, seriously aggravated and extended this dispute as attested by
37 our presence before you today.

38
39 By this conduct, Equatorial Guinea breached its obligations under Part XV of the
40 Convention and the applicable law, as set out in paragraphs 396 and 397 of the
41 Memorial.

42
43 Mr President, Members of the Special Chamber, this concludes the Marshall Islands’
44 submissions today, a little earlier than we had perhaps anticipated, and we plan to
45 address the Marshall Islands’ remedies claims in our final session in this round
46 tomorrow morning.

47

¹⁷⁹ Memorial, paras. 396-397; Reply, paras. 269-273.

¹⁸⁰ Rejoinder, paras. 352-354.

1 I should add, in relation to that, given that we have finished some time earlier than
2 we expected, tomorrow we expect to take less than two hours and finish comfortably
3 within the time allowed and, also, that this will allow us to reserve sufficient time for
4 our proposed cross-examination.

5
6 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Very well. Thank you very much,
7 Ms Nevill.

8
9 This brings us to the end of the afternoon's sitting. The hearing will be resumed
10 tomorrow morning at 10 am. The sitting is now closed.

11
12 *(The session closed at 5.48 pm)*