

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2025

Public sitting

held on Friday, 10 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,

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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

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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,

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

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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 the hearing in the “*Heroic Idun*” (No. 2) Case. I now call
3 on Ms Floriane Lavaud to make her statement. You have the floor, Madam.

4
5 **MS LAVAUD:** (*Interpretation from French*) Mr President, Members of the Special
6 Chamber, good afternoon. It is an honour and a privilege for me to appear before
7 you today on behalf of the Republic of Equatorial Guinea.

8
9 (*Continued in English*) Equatorial Guinea submits that several of the Marshall
10 Islands’ claims are inadmissible because of the failure to exhaust local remedies.
11 I will elaborate on this submission in three steps.

12
13 First, I will discuss the application of the rule of exhaustion of local remedies in
14 international law and under Article 295 of UNCLOS.

15
16 Second, I will explain how certain claims of the Marshall Islands preponderantly
17 relate to the treatment of individuals and I will highlight the importance of applying
18 the rule of exhaustion of local remedies in this case.

19
20 Finally, I will show that none of the exceptions raised by the Marshall Islands applies
21 here. At this juncture, I will ask my colleague, Mr Francisco Moro Nve Obono, to set
22 out the local remedies available under Equatoguinean law, before concluding my
23 submission.

24
25 Mr President, Members of the Special Chamber, I turn now to my first point
26 concerning the application of the rule of exhaustion of local remedies.

27
28 As the Chamber is aware, Article 295 of UNCLOS provides that any dispute between
29 States Parties concerning the interpretation or application of the Convention may be
30 submitted under UNCLOS, only after local remedies have been exhausted, where
31 this is required by international law.

32
33 The International Law Commission concluded that the rule of exhaustion of local
34 remedies is a well-established principle of customary international law¹ and a
35 principle of general international law.² This principle, for example, is reflected in
36 Article 44(b) of the Articles on the Responsibility of States for Internationally
37 Wrongful Acts, which provides that the responsibility of a State may not be invoked if
38 “the claim is one to which the rule of exhaustion of local remedies applies and any
39 available and effective local remedy has not been exhausted”.³

40
41 Without revisiting the detailed origins of the rule, it is important to recall that its
42 underlying rationale is that, as a matter of both fairness and efficiency, the host State

¹ *Interhandel* (Switzerland v. United States of America, Preliminary Objection Judgment, I.C.J. Reports 1959, p. 27.

² International Law Commission Draft Articles on Diplomatic Protection 2006 (in Yearbook of the International Law Commission (2006), Vol. II (Part 2), p. 26), (“Draft Articles on Diplomatic Protection”), Commentary to Article 14, para. 1.

³ International Law Commission, “Responsibility of States for Internationally Wrongful Acts”, *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, A/CN.4/SER.a/2001/Add.1 (Part 2), Article 44, para. b.

1 should have a sufficient opportunity to remedy the injury.⁴ In its judgment in the
2 *Interhandel* case, the International Court of Justice underscored that “the State
3 where the violation occurred should have an opportunity to redress it by its own
4 means, within the framework of its own domestic system.”⁵

5
6 Many international instruments, including multilateral human rights treaties, have
7 since adopted this rule. Notably, the two human rights treaties invoked by the
8 Marshall Islands – namely, the International Covenant on Civil and Political Rights
9 and the African Charter on Human and Peoples’ Rights⁶ – both expressly require the
10 exhaustion of local remedies.

11
12 It would therefore be striking – and legally incoherent – to use UNCLOS, which itself
13 contains the requirement of exhaustion of local remedies, to bypass certain
14 procedural safeguards, including the requirement to exhaust local remedies
15 enshrined in the very international treaties on which the claims of the Marshall
16 Islands are based.

17
18 Mr President, Members of the Special Chamber, I turn now to my second point, that
19 certain claims brought by the Marshall Islands preponderantly relate to the treatment
20 of individuals and, therefore, were subject to the exhaustion of local remedies.⁷

21
22 The parties do not dispute that, in international law generally, including under
23 UNCLOS, the rule of exhaustion of local remedies will apply where an international
24 claim is brought preponderantly on the basis of an injury to an individual.

25
26 This acknowledges the reality that a claim can be “mixed” in the sense that it may
27 contain elements of both injury to the State and injury to individuals or, put
28 differently, it may contain both elements of direct and indirect injury to the State. In
29 that case, a tribunal must assess which element is preponderant for the purpose of
30 determining whether exhaustion of local remedies applies. The Tribunal reaffirmed
31 this approach in “*Virginia G*”.⁸

32
33 A similar approach is the “but for” test. Under that test, the question is whether the
34 claim comprising elements of both direct and indirect injury would have been brought
35 were it not for the claim on behalf of individuals.⁹ If the answer is no, if a claim
36 preponderantly concerns allegations based on the treatment of individuals,
37 exhaustion of local remedies is required for such a claim to be admissible.

⁴ *Interhandel*, Preliminary Objection Judgment, I.C.J Reports 1959, p. 6, at p. 27; James Crawford and Thomas D Grant, “Local Remedies, Exhaustion of” (January 2007) *Max Planck Encyclopedia of Public International Law*, para. 7.

⁵ *Interhandel (Switzerland v. United States of America)*, Preliminary Objection Judgment, I.C.J. Reports 1959, p. 27.

⁶ Memorial, paras. 254, 438(f); Reply, paras. 86, 333(f).

⁷ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Article 41(1)(c); African Charter on Human and Peoples’ Rights, 27 June 1981, 1520 U.N.T.S. 217, Article 50.

⁸ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, para. 157.

⁹ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, para. 7.

1 The Parties agree on the fact that both the preponderance test and the “but for” test
2 apply in the circumstances. In fact, the Marshall Islands confirmed on Monday that it
3 is “content to rest on either test”.¹⁰ Where the Parties disagree is on how such tests
4 should be applied in this case.

5
6 Mr President, Members of the Special Chamber, Equatorial Guinea submits that
7 certain claims brought by the Marshall Islands relate preponderantly to the treatment
8 of individuals. Such claims are therefore subject to exhaustion of local remedies.

9
10 I will demonstrate this in three steps: first, by showing that, contrary to what it says,
11 the Marshall Islands advances two independent sets of claims; second, by showing
12 that these claims preponderantly relate to the treatment of individuals; and third, by
13 explaining why the application of this rule in this case is essential to preserve the
14 integrity of the Convention and a cornerstone rule of international law.

15
16 I begin with the first step of my demonstration: that the Marshall Islands, in fact,
17 advances two independent sets of claims.

18
19 The Tribunal made clear in “*Saiga*” (No. 2), “*Virginia G*”, and “*Norstar*” that the
20 correct object of inquiry for the Chamber is the nature of the rights alleged to have
21 been violated.¹¹

22
23 In this regard, the Marshall Islands’ submissions are inconsistent. On the one hand,
24 we heard earlier this week from counsel that

25
26 it is the rights of the Marshall Islands [...] that are being pursued in this case, not
27 damages claims by individual members of the crew through claims in respect of
28 which the Marshall Islands is simply a litigation proxy.¹²

29
30 Yet, on the other hand, just a few hours later, another Counsel for the Marshall
31 Islands devoted much – if not most – of her time recounting allegations of violations
32 of the human rights of the crew and the impact on their personal lives. Counsel even
33 concluded her pleadings with a quote from a crew member, which strongly suggests
34 that the purpose of the human rights claims brought before this Chamber is to seek
35 “justice” for the alleged injuries of the crew.¹³ But it also suggests that the Marshall
36 Islands is, in fact, acting as a litigation proxy.

37
38 Now, Equatorial Guinea respectfully submits that, in assessing the nature of the
39 rights alleged by the Marshall Islands, the Chamber should distinguish between the
40 “case” as a whole, and separate “claims” that comprise that case. Indeed, a
41 distinction should be drawn between, on the one hand, cases where the alleged
42 injury to individuals is factually and legally inseparable from the injury to the flag
43 State – thus justifying their treatment as a single claim; and, on the other hand,
44 cases where, although factually related, claims relating preponderantly to the rights

¹⁰ ITLOS/PV.25/C32/2, p. 6 (lines 2-3) (Bethlehem).

¹¹ See e.g., *M/V “Norstar” (Panama v. Italy)*, *Preliminary Objections, Judgment*, ITLOS Reports 2016, p. 44, 4 November 2016, para. 267.

¹² ITLOS/PV.25/C32/1, p. 33 (lines 6-9) (Bethlehem).

¹³ ITLOS/PV.25/C32/2, p. 41 (lines 1-2) (Grafton).

1 of individuals are legally independent from those of the flag State and therefore must
2 be addressed separately.

3
4 As the International Court of Justice made clear in the *Avena* case, a State can bring
5 a claim on behalf of an individual without first exhausting local remedies only “in
6 special circumstances of interdependence of the rights of the State and of individual
7 rights”.¹⁴

8
9 In the present case, the Marshall Islands’ two sets of claims are clearly not
10 interdependent. A finding on the rights of the flag State would not affect a finding on
11 whether standards of treatment of the crew were violated in this case. Conversely, a
12 finding of violation of the prohibition on torture,¹⁵ or the right to a fair trial,¹⁶ as
13 alleged by the Marshall Islands, sits entirely apart from any finding on freedom of
14 navigation or exclusivity of flag State jurisdiction. It follows that, contrary to the
15 Marshall Islands’ assertion, the claim for damage to the natural and juridical persons
16 connected to the ship does not arise from the injury to the flag State.¹⁷

17
18 In cases such as this one, drawing this distinction ensures the preservation of the
19 principle that, consistent with elementary rules of the international legal system, a
20 host State must be afforded the opportunity to redress the alleged injury by its own
21 means, within the framework of its own domestic legal system.

22
23 On this basis, we submit that the application of the rule of exhaustion of local
24 remedies should be assessed in relation to each set of claims advanced by the
25 Marshall Islands: those concerning the alleged violations of the flag State rights, and
26 those concerning the alleged treatment of the crew.

27
28 I now turn to the application of the preponderance test. Applying this test
29 demonstrates that several of the Marshall Islands’ claims preponderantly relate to
30 the treatment of individuals.¹⁸ The application of the “but for” test leads to the exact
31 same conclusion.

32
33 The ILC identified key factors that must be considered in deciding whether a claim is
34 direct or indirect. The principal factors to be considered in making this assessment
35 are the subject of the dispute, the nature of the claim, and the remedy claimed.¹⁹

36
37 Applying this test to the Marshall Islands’ claims concerning the alleged treatment of
38 the crew yields only one conclusion: first, the subject in dispute is the treatment and
39 human rights violations allegedly suffered by the crew in Equatorial Guinea; second,
40 the nature of these claims is therefore inherently private; and third, the remedy
41 sought is the payment of over \$15 million for non-material damages.²⁰

42

¹⁴ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, para. 40.

¹⁵ Memorial para. 265.

¹⁶ Memorial para. 278.

¹⁷ Memorial para. 119(b).

¹⁸ Memorial, paras. 253-282; Reply, paras. 208-226.

¹⁹ ILC Draft Articles on Diplomatic Protection, Commentary on Article 14, p. 46, para. 12.

²⁰ Reply, paras. 318, 334(a)(i)(2).

1 As such, these claims relate – preponderantly, if not exclusively – to the treatment of
2 individuals; that is, the crew of the vessel. They were therefore subject to the
3 exhaustion of local remedies in order to be admissible before the Chamber.

4
5 Now, in response, the Marshall Islands makes several unconvincing arguments in its
6 written submissions in an attempt to demonstrate otherwise. All of them fail, as I will
7 demonstrate.

8
9 For example, in its submissions, the Marshall Islands attempts to connect these
10 human rights-based claims to the Convention, by alleging that Equatorial Guinea
11 breached the so-called gateway provisions of UNCLOS that incorporate, *par renvoi*,
12 other rules of international law, including fundamental human rights standards and
13 general principles or rules of international law.²¹

14
15 Equatorial Guinea contests this jurisdictional analysis, which is wrong, as Professor
16 Akande has demonstrated this morning. It also rejects such submissions of violation
17 of considerations of humanity on the merits, as Professor Haeri will explain.

18
19 Beyond those two failings in the claims of the Marshall Islands, in any event, this
20 attempt to connect these claims to the Convention does not change the relevant
21 inquiry before this Special Chamber – that is, what do such claims “preponderantly”
22 relate to? Nor can it make us overlook the fact that, by nature, human rights are not
23 rights that belong to the State.

24
25 The Marshall Islands also argues – and we heard that a number of times earlier this
26 week – that, at its core, this case concerns freedom of navigation and exclusive flag
27 State jurisdiction.²² Here, the Marshall Islands’ case certainly includes several claims
28 relating to its rights as a flag State under UNCLOS. That is not in dispute. However,
29 as I explained earlier, the Marshall Islands also makes extensive independent claims
30 concerning the treatment of the crew.

31
32 In any event, the preponderance test does not turn on the characterization by the
33 Marshall Islands of its own claims. For that matter, the Special Chamber is not bound
34 by this characterization and will make its own assessment.²³

35
36 The Marshall Islands also attempts to rely on the cases of “*Saiga*” (No. 2),
37 “*Virginia G*” and “*Norstar*” to argue that this case concerns freedom of navigation and
38 exclusive flag State jurisdiction, and that the principal rights which have allegedly
39 been violated are, by essence, State rights under UNCLOS, thereby excluding the
40 application of the rule of exhaustion of local remedies.²⁴

41
42 However, these cases do not support the Marshall Islands’ argument. For one, in
43 “*Saiga*” (No. 2) and “*Virginia G*”, the flag State did not allege breaches of human
44 rights of individual crew members in the way that the Marshall Islands presently

²¹ Reply, para. 82.

²² ITLOS/PV.25/C32/1, p. 33 (lines 6-7) (Bethlehem).

²³ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, para. 5.

²⁴ Reply, paras. 80-82.

1 does. In those cases, the treatment of the crew was not the subject of an
2 independent alleged breach of UNCLOS. By contrast, the Marshall Islands has
3 chosen to make specific submissions focusing exclusively and extensively on the
4 treatment and human rights of crew members.

5
6 The only case where human rights violations were alleged and developed is
7 *Norstar*.²⁵ Even that case does not help the Marshall Islands. Indeed, Panama
8 confirmed in its written pleadings that it sought no compensation for any alleged
9 human rights violations.²⁶ Moreover, it did not include human rights claims in its final
10 submissions. The Tribunal observed that

11
12 while Panama, in the course of the written proceedings, extensively argued its
13 claims regarding human rights violations by Italy, it did not, however, include
14 those claims in its final submissions. The Tribunal, therefore, is not required
15 to address those claims.²⁷
16

17 Mr President, Members of the Special Chamber, the contrast with this case could not
18 be sharper. The Marshall Islands seeks more than \$15 million for non-material
19 damages on the basis of alleged human rights violations. That alone demonstrates
20 how far the Marshall Islands has gone. If there is a threshold below which the
21 Chamber may assess indirect injury claims as part of a broader case under the
22 preponderance test, the Marshall Islands has gone way beyond that threshold.

23
24 It advances private claims on behalf of individuals who did not exhaust local
25 remedies and now requests that the Special Chamber transform such claims into
26 inter-State injury. That is not acceptable in this forum, and it is not consistent with the
27 rules provided for in the Convention or customary international law.

28
29 I now come to the third step of my demonstration: that is that there are compelling
30 reasons in this case why the Special Chamber should find that several of the
31 Marshall Islands' claims relate preponderantly to the treatment of individuals.

32
33 Indeed, the Marshall Islands seeks to persuade the Special Chamber that, where a
34 dispute concerns freedom of navigation and exclusive flag State jurisdiction, all
35 claims forming part of that dispute are therefore transformed. In its view, claims
36 concerning the treatment of individuals – and which require exhaustion of local
37 remedies – are recast as claims concerning the rights of a State under UNCLOS and
38 therefore become exempt from that requirement. That is not the law.

39
40 In fact, the *travaux préparatoires* show that the consensus reached by the States
41 Parties in the final text was that the existing rules of international law regarding
42 exhaustion of local remedies would apply to disputes relating to the law of the sea,
43 and that Article 295 of UNCLOS would neither narrow nor broaden these rules.²⁸

²⁵ *M/V "Norstar" (Panama v. Italy)*, Memorial of Panama no. 25, 11 April 2017, paras. 129 *et seq.*

²⁶ *M/V "Norstar" (Panama v. Italy)*, Reply of Panama no. 25, 28 February 2018, para. 404.

²⁷ *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 49, para. 146.

²⁸ *United Nations Convention on the Law of the Sea, 1982: A Commentary (the "Virginia Commentary")*, edited by Myron H. Nordquist, Satya N. Nandan (general ed.), and others, p. 81, para. 295.6.

1 Clearly, the consensus was not to create an exceptional or derogatory regime to
2 those rules for disputes arising under UNCLOS.

3
4 Judges of this Tribunal have already cautioned against an interpretation that would
5 diverge from the customary rules regarding exhaustion of local remedies, noting that
6 it would have serious and far-reaching consequences. Indeed, following this
7 interpretation, it is difficult to imagine any inter-State dispute under UNCLOS that
8 would not relate in some way to the rights of the State concerned. As Judge Wolfrum
9 observed in *Saiga (No. 2)*, this would effectively render Article 295 “meaningless”
10 and therefore “violate one of the most basic rules concerning the interpretation of
11 international treaties, namely that interpretation should not render a provision
12 inoperative”.²⁹

13
14 As Judges Cot and Kelly explained in “*Virginia G*”:

15
16 It is not enough to say that Guinea-Bissau has violated the direct rights of the
17 flag State and that there is no obligation to exhaust local remedies simply
18 because there has been a direct injury to these rights. The Tribunal must assess
19 the overall situation and legally qualify the dispute brought before it. To proceed
20 differently would amount to striking out Article 295 from UNCLOS by
21 considering that, whenever there is a violation of a provision of the Convention,
22 there is no necessity to exhaust local remedies.³⁰

23
24 One must therefore ask: if the present case does not engage Article 295 of
25 UNCLOS, then what case ever will? If a mere factual link to the alleged injury of the
26 flag State is enough, how could the Tribunal ever conclude that certain claims
27 preponderantly relate to the treatment of individuals? And, thus, why would any
28 individual exhaust local remedies in navigation cases, if they could, instead, attach
29 their claims to that of the flag State and, therefore, circumvent the requirement to
30 exhaust local remedies?

31
32 This runs counter to the letter of the law and could not have been the intent of the
33 drafters of UNCLOS.

34
35 I now turn to the final point of my submission, that no exception to the rule of
36 exhaustion of local remedies applies in the present case.

37
38 Customary international law only provides for a limited number of exceptions to that
39 rule.³¹ Although the Marshall Islands has said little on this matter this week, it has
40 invoked two of these exceptions in its written pleadings. Specifically, it alleged that
41 seeking redress before Equatorial Guinea’s courts would have been futile,³² and that
42 no valid or lawful jurisdictional connection existed between the crew members and
43 Equatorial Guinea.³³ I will address these two points in turn.

²⁹ *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Separate Opinion of Vice-President Wolfrum, 1 July 1999, para. 51.

³⁰ *M/V “Virginia G” (Panama/Guinea-Bissau)*, *Judgment, ITLOS Reports 2014*, p. 4, Joint Separate Opinion of Judges Cot and Kelly, paras. 13-14.

³¹ ILC Draft Articles on Diplomatic Protection, Article 15, p. 46.

³² Second Witness Statement of Stephen Askins, 25 November 2024, RMI 52, para. 6.

³³ Reply, paras. 83-84.

1 Mr President, Members of the Special Chamber, given that the resolution of the first
2 exception turns on the remedies that exist under Equatoguinean law, before
3 I conclude my submission, and with your permission, I respectfully request that you
4 invite my colleague, Mr Francisco Moro Nve Obono, to set out the remedies
5 available to the crew under that law. I thank you for your kind attention.
6

7 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I thank Ms Lavaud. I now invite
8 Mr Francisco Moro Nve Obono to make his statement. You have the floor, sir.
9

10 **MR MORO NVE OBONO:** (*Translation from Spanish*) Mr President, distinguished
11 Members of the Special Chamber, good afternoon.
12

13 It is an honour for me to appear today before you in this Chamber as Counsel for the
14 State of the Republic of Equatorial Guinea. Throughout my submissions, I will briefly
15 be explaining to you the local remedies available in Equatorial Guinea – remedies
16 which were available to the crew of the vessel as well as to the owner of the vessel,
17 had they chosen to use these remedies during their stay in Equatorial Guinea, or
18 subsequently, before bringing this dispute before this international forum. This clearly
19 underscores their refusal to exhaust the local remedies available under
20 Equatoguinean law.
21

22 Mr President, distinguished Members of the Special Chamber, my presentation will
23 be in two parts. First of all, I will be addressing the substantive provisions of
24 Equatorial Guinean law that protects human rights and the treatment of people and,
25 subsequently, I will be explaining how individuals can have these rights addressed
26 by courts.
27

28 First and foremost, the Constitution of Equatorial Guinea has supreme law in our
29 legal system. In its fifth article, subparagraph (a) states that the principles that
30 govern Equatorial Guinea society are, among others, “the respect of all people, their
31 dignity, their freedom and other fundamental rights that are inherent to any human
32 being”.
33

34 In Article 8 of the above-mentioned supreme law of our legal system, it is established
35 that “the Equatoguinean State is governed by the principles of international law and it
36 reaffirms its support for the rights and obligations that arise from international
37 organizations to which it is party.” Among those, we have, of course, the Universal
38 Declaration of Human Rights of 1948 and, in this connection, Equatorial Guinea is
39 party to the main human rights treaties of the United Nations which prohibit
40 mistreatment. The protection of the above-mentioned rights is also the result of the
41 mandatory application of the various international legal instruments to which
42 Equatorial Guinea is a party. Some of these are as follows:
43

- 44 i) the International Pact of Political and Civil Rights;
- 45
- 46 ii) the African Charter of Human Rights and Peoples’ Rights.
47

48 Members of the Court, Article 13 of our Constitution also explicitly refers to
49 fundamental human rights that are guaranteed under the Constitution. Many of these
50 rights are the clear reflection of the rights already enshrined in international

1 instruments to which I have previously referred you. I would point out that this
2 provision includes the right to be defended and the right to legal assistance
3 throughout every stage of the legal process, and also the right to present complaints
4 or petitions and to request *habeas corpus* or legal assistance, should such rights be
5 violated. This is a right that is furthermore protected by our own law regulating the
6 right of complaint and petition.³⁴ In the same connection, we also have, among our
7 institutions, a Centre for the Promotion of Human Rights and Democracy.

8
9 These provisions are of a crucial nature in order to preserve and defend the
10 commitment of Equatorial Guinea, as a member of the United Nations, to the rule of
11 law, human rights and the accountability of its actors and civil servants.

12
13 Mr President, distinguished Members of the Special Chamber, I will now move on to
14 the second part of my presentation concerning the specific appeals that can be
15 presented under Equatoguinean legislation.

16
17 The above-mentioned legislation confirms the availability of legal remedies for any
18 complaint or claim related to mistreatment of individuals by State authorities. To
19 dispel any doubts, these remedies were available to the crew of “*Heroic Idun*” at all
20 times. These remedies are not limited to people who are formally accused or
21 charged under Equatoguinean law, which was not the case with the crew of “*Heroic*
22 *Idun*”. Rather, these are available to any person in Equatorial Guinea and, in this
23 connection, those who has considered them necessary have benefited from them
24 prior to presenting their claims to a foreign or supranational forum, such as ITLOS
25 here.

26
27 First of all, the right to legal remedy is protected by the Equatoguinean Constitution.
28 In fact, Article 13(1)(h) of the above-mentioned law establishes that any citizen has
29 the right to present claims and petitions before the authorities. This right is available
30 both to national citizens as well as to foreigners who are present in Equatorial
31 Guinea. Therefore, even though the crew of the “*Heroic Idun*” was composed
32 completely of foreigners, this very clearly would not have prevented them from
33 presenting any claims or petitions in keeping with the above-mentioned special law.

34
35 Secondly, the law that regulates the right to complain and petition also establishes
36 that these complaints and petitions can be presented before various authorities,
37 including courts and tribunals. It is important to point out that said complaints and
38 petitions can also be presented before the country’s Commission for Human Rights.
39 This is a body that would be in a privileged position to examine the type of claims
40 that the Marshall Islands is currently presenting regarding the alleged inhumane
41 treatment received by the crew of the “*Heroic Idun*”.

42
43 Thirdly, the right of *habeas corpus* is explicitly guaranteed in our Constitution.
44 Article 5 of the above-mentioned law, which is a supreme law of the State, allows
45 any person, their relatives, acquaintances or legal representatives, who consider that
46 they have been witness to or have themselves been subject to unjust detention, to
47 request an investigating magistrate to review the legality or illegality of their
48 detention.

³⁴ Law No. 5/1.991, 10 June, Regulator of the Right to Complain and Petition.

1 Fourthly, in addition to having *habeas corpus* available to them, Equatoguinean
2 legislation also contemplates a Constitutional appeal of a broader nature, and that is
3 the appeal for Constitutional protection, through which any physical or legal person
4 with an alleged legitimate interest that may have been infringed is entitled to
5 challenge acts or omissions committed by the authorities that have violated their
6 fundamental rights.

7
8 Lastly, claims and petitions can also be brought before the Ombudsman. Chapter 10
9 of the Constitution establishes that the functions of said body are, among others, as
10 follows:

11
12 The Ombudsman can verify and remedy any irregular conduct in relations between
13 the public or private administration and citizens, be they nationals or expatriates.

14
15 It can also mediate conflicts that may arise between the administration and
16 taxpayers by suggesting corresponding solutions to the competent bodies.

17
18 Members of the Court, persons who consider that their fundamental rights have been
19 violated, including their right to due process, their right to dignity or to humane
20 treatment, can request the Ombudsman to request explanations from the officials,
21 and that they be assisted through the complaint process, or even in bringing an
22 action requesting protection in their name.

23
24 Likewise, any natural or legal person who claims a legitimate interest such as claims
25 regarding acts or omissions on the part of Equatoguinean authorities, including those
26 of the police, military personnel or civil servants, such a person can also submit a
27 claim to the Ombudsman without any restrictions for reasons of nationality or
28 residency.

29
30 In addition, presenting such claims can be done at no cost and is accessible to all,
31 and it does not make any type of legal assistance mandatory.

32
33 In light of this, Mr President, and distinguished Members of the Special Chamber,
34 there is no legal excuse that would allow the members of the crew to avoid availing
35 themselves of these legal instruments and its legal institutions to demand recognition
36 of their allegedly violated rights.

37
38 Bearing in mind that the objective of the Marshall Islands is to obtain economic
39 compensation for what it considers to be a wrongful act on the part of Equatorial
40 Guinea, Equatoguinean law establishes that

41
42 except for cases of *force majeure*, physical or legal persons shall be entitled to
43 compensation from the State for any damage suffered to their property or rights,
44 provided that such damage is the result of the normal or abnormal functioning
45 of public services.³⁵
46

³⁵ Law No. 2/2015 of 28 May, Legal System of the General State Administration, Article 142.1.

1 In the event that compensation is not granted by the body that caused said damage,
2 the affected person may appeal against the decision through the administrative
3 litigation process.³⁶

4
5 Furthermore, the crew also had other effective means of appeal, and those are the
6 ones established by the Law of Administrative Procedure, which establishes that
7 “any administrative act can be challenged by the person suffering the damage
8 through various administrative appeals reaching the administrative litigation level, if
9 necessary; that is to say, under ordinary jurisdiction”.³⁷

10
11 To conclude, I would like to point out that the crew of “*Heroic Idun*”, at all times, had
12 at their disposal legal assistance from the very prestigious Portuguese-based law
13 firm Miranda to make use of these local remedies under Equatoguinean law and of
14 the institutions I have mentioned. This is an aspect that has not been mentioned by
15 our counterparts before this Special Chamber during their statements.

16
17 Mr President, to conclude now, I would like to underscore that, as Ms Lavaud has
18 demonstrated, Article 295 of the United Nations Convention on the Law of the Sea
19 represents a well-established principle under international law concerning the
20 exhaustion of local remedies.

21
22 Given the fact that such local remedies were not exhausted, even though they exist
23 and were available to the crew, I would say, Mr President, Members of the Special
24 Chamber, that my country considers that the claims by the Marshall Islands on
25 behalf of the crew are inadmissible before this Special Chamber.

26
27 As we have explained, pursuant to a fundamental principle under international law,
28 and also as a gesture of international courtesy, Equatorial Guinea, as a sovereign
29 State, just like all other States, should have been given the opportunity to provide
30 reparation for any damage that happened on its own territory through its own means
31 and through its own legal system.³⁸

32
33 By submitting this case to the Special Chamber, without having exhausted local
34 remedies, the Marshall Islands deprived Equatorial Guinea of this opportunity.

35
36 Mr President, distinguished Members of the Special Chamber, with this, I would like
37 to conclude my presentation, and I thank you sincerely for your attention. At the
38 same time, I would respectfully request that you invite Ms Lavaud once again to the
39 podium to allow her to complete her statements on behalf of Equatorial Guinea on
40 the absence of exhaustion of local remedies by the Marshall Islands.

41
42 Thank you very much for your attention.

43
44 **THE PRESIDENT OF THE SPECIAL CHAMBER:** (*Continued in English*) I thank
45 Mr Moro Nve Obono. I now give the floor to Ms Lavaud to complete her statement.

46
47 You have the floor, Madam.

³⁶ Law No. 2/2015 of 28 May, Legal System of the General State Administration, Article 142.3.

³⁷ Law No. 1/2014 of 28 July, Administrative Procedure, Article 12.

³⁸ ICJ, *Interhandel (Switzerland v. United States of America)*, Judgment, I.C.J. Reports 1959, p. 27.

1 **MS LAVAUD:** Thank you, Mr President, Members of the Special Chamber.

2
3 Having heard the remedies that are available under Equatoguinean law, I now turn to
4 the legal test that governs the futility exception.

5
6 Article 15 of the draft Articles on diplomatic protection provides that the remedies
7 need not be exhausted where “there are no reasonably available local remedies to
8 provide effective redress, or the local remedies provide no reasonable possibility of
9 such redress”.³⁹

10
11 The determination of whether effective local remedies exist does not turn on the
12 likelihood of success. As explained by the ILC, “[t]he test is not whether a successful
13 outcome is likely or possible but whether the municipal system of the respondent
14 State is reasonably capable of providing effective relief.”⁴⁰

15
16 The late Professor James Crawford observed that a balanced formulation of this rule
17 is that it does not require the taking of every step that might conceivably result in a
18 favourable determination, but the individual must take all steps that offer a
19 reasonable possibility, if not a likelihood, of success.⁴¹

20
21 In addition, Mr President, Judge Hoffmann underlined in “*Virginia G*” that a “total
22 condemnation of legal remedies” in the domestic legal system cannot justify the
23 failure to pursue them.⁴²

24
25 Equatorial Guinea submits that available and effective remedies capable of
26 redressing the alleged injury of the crew exist under its laws, and that individuals on
27 whose behalf the Marshall Islands purports to act failed to take any steps to pursue,
28 let alone exhaust, those remedies.

29
30 And yet, Mr President, Members of the Special Chamber, the Marshall Islands barely
31 gives any explanation on this point. Instead, the applicant only addresses this
32 question in the witness statement of Mr Stephen Askins. This statement mentions, in
33 brief and speculative terms, an assumption that involving local courts would only
34 cause events to drag out longer, that prosecutors could bring unwarranted charges
35 against the crew, and that this would allegedly give the authorities an excuse to
36 delay the case.⁴³ These broad and speculative assertions are clearly insufficient for
37 the Marshall Islands to justify their failure to exhaust local remedies.

38
39 In any event, by initiating international legal proceedings before the individuals on
40 whose behalf it now acts had exhausted available local remedies, the Marshall
41 Islands frustrated the very purpose – or *raison d’être* – of the rule. It deprived

³⁹ ILC Draft Articles on Diplomatic Protection, Article 15(a).

⁴⁰ *Ibid.*

⁴¹ James Crawford and Thomas D Grant, “Local Remedies, Exhaustion of” (January 2007) *Max Planck Encyclopedia of Public International Law*, para. 20, citing Restatement (Second) of Foreign Relations Law of the United States § 207 comment. b (*Am. Law Inst. 1965*).

⁴² ITLOS, *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, para. 12.

⁴³ Witness statement of Stephen Askins, RMI 3, para. 15.

1 Equatorial Guinea of the opportunity to redress any alleged violation by its own
2 means, within the framework of its own domestic system.⁴⁴

3
4 For this reason, the futility exception does not apply.

5
6 I turn now to the second exception on which the Marshall Islands seeks to rely, that
7 is, that no valid or lawful jurisdictional connection existed between the crew members
8 and Equatorial Guinea.⁴⁵

9
10 Equatorial Guinea accepts that, consistent with the approach followed by the
11 Tribunal in “*Saiga*” (No. 2),⁴⁶ the determination of whether such jurisdictional
12 connection existed depends on the Tribunal’s findings on the lawfulness of
13 Equatorial Guinea’s conduct – specifically, the interdiction and stationing of the
14 vessel and its crew in Luba.⁴⁷

15
16 However, the present case is not on all fours with “*Saiga*” (No. 2), as the Marshall
17 Islands contends.⁴⁸

18
19 First and foremost, in this case, the Special Chamber cannot determine the
20 existence of a valid jurisdictional connection between Equatorial Guinea and the
21 crew without ruling on the legality of the actions of a third State; that is, Nigeria. As
22 such, this issue falls squarely within the scope of Equatorial Guinea’s first objection
23 to admissibility based on the *Monetary Gold* principle. I refer back to the arguments
24 made by my colleague, Professor Haeri, this morning. This, of course, was not an
25 issue in “*Saiga*” (No. 2).

26
27 Even assuming *quod non* that this principle does not apply, Equatorial Guinea
28 submits that a valid jurisdictional link exists because its actions were lawful. As
29 Professor Akande will explain, the crew was present in Equatorial Guinea due to
30 actions that the State took lawfully under UNCLOS. Equatorial Guinea acted
31 pursuant to its obligations of cooperation in response to Nigeria’s request for
32 assistance based on a reasonable suspicion of piracy. Equatorial Guinea therefore
33 had a valid jurisdictional basis on which to exercise authority over the crew.

34
35 In conclusion, Equatorial Guinea therefore submits that this exception to the rule of
36 exhaustion of local remedies is inapplicable in the present case, and, for all these
37 reasons, Equatorial Guinea respectfully requests the Special Chamber to declare
38 inadmissible the claims of the Marshall Islands concerning the treatment of
39 individuals.

40
41 Mr President, Members of the Special Chambers, this concludes my submission for
42 today. I thank you for your kind attention, and I respectfully request that you invite
43 Professor Akande to continue Equatorial Guinea’s submissions.

⁴⁴ *Interhandel* (Switzerland v. United States of America), Judgment, I.C.J. Reports 1959, p. 27.

⁴⁵ Memorial, paras. 118(d)-119(c); Reply, paras. 83-84.

⁴⁶ *M/V “Saiga”* (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), Judgment, 1 July 1999, para. 100.

⁴⁷ *M/V “Saiga”* (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), Judgment, 1 July 1999, para. 100.

⁴⁸ Reply, para. 84.

1 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I thank Ms Lavaud for her
2 statement. I now invite Mr Akande to take the floor.

3
4 Mr Akande, I recall that this sitting will be adjourned at approximately 4.30 p.m., so
5 I would, thus, invite you to pause your statement at the convenient moment; and,
6 with this understanding, I give you the floor.

7
8 **MR AKANDE:** Thank you very much, Mr President. I was about to indicate that I
9 anticipate that I will be on my feet for a little over an hour, so if I can find a place that
10 is convenient, as you have just said, for us to have the coffee break, I will let you
11 know. Thank you.

12
13 Good afternoon, Mr President and Members of the Special Chamber. Having dealt
14 with questions of jurisdiction and admissibility, we now turn to the merits of the
15 dispute. I will address you this afternoon on the lawfulness of Equatorial Guinea's
16 actions in intercepting and arresting the "*Heroic Idun*" on 12 August 2022. The facts
17 as they relate to the interception and arrest emerge clearly from the oral testimony
18 that you have heard and also this morning from the overview of the facts presented
19 by my colleague, Professor Haeri. For present purposes, Equatorial Guinea would
20 like to stress that, as has already been noted, the only reason for the interception
21 and arrest of the "*Heroic Idun*", is to be found in the actions of Nigeria. The
22 interception and arrest of the vessel took place in response to the request of Nigeria,
23 whose Navy had earlier sought to approach and eventually to intercept the "*Heroic*
24 *Idun*" in an area designated as a high-risk area for piracy.⁴⁹

25
26 In these oral hearings you have heard the testimony of all the mariners involved
27 about how aware they were of the possibility of piracy in the area. Yesterday
28 afternoon, you heard very clear testimony from Captain Juan Esono Nchama about
29 the scourge of piracy in the Gulf of Guinea, and about his direct experience in
30 combatting it. Earlier in the week, you heard from those on board the "*Heroic Idun*",
31 who also suggested that they had the threat of piracy very much in their minds.

32
33 The need for international cooperation in the repression of piracy is both well-known
34 and well-rehearsed in these proceedings. Indeed, it is such international cooperate
35 that has led to the reduction of the instances of piracy and other maritime crime in
36 the Gulf of Guinea, as aptly recalled yesterday by the Agent of Equatorial Guinea in
37 opening our submissions, and as outlined also by Captain Juan Esono Nchama in
38 his testimony.

39
40 Members of the Chamber, I have three points to make in my submissions this
41 afternoon:

42
43 First, that Equatorial Guinea's seizure of the vessel was lawful because it was
44 carried out in accordance with Equatorial Guinea's obligation to cooperate to repress
45 piracy.

46
47 Second, and as a consequence of this first point, I will demonstrate that Equatorial
48 Guinea's interference with the vessel was not in breach of its obligation to respect

⁴⁹ Counter-Memorial, para. 24; Rejoinder, paras. 29, 33.

1 freedom of navigation on the high seas or in the Exclusive Economic Zone, nor was
2 it in breach of the principle of exclusive flag State jurisdiction on the high seas.

3
4 Third, I will show that the interception and arrest of the vessel was not in breach of
5 the obligation to have due regard to the rights of other States, in particular, those of
6 the Marshall Islands.

7
8 Let me begin with my first general point – that Equatorial Guinea’s arrest and seizure
9 of the vessel was not unlawful because it was carried out in fulfilment of Equatorial
10 Guinea’s obligation to cooperate in the repression of piracy. I will spend most of my
11 time this afternoon elaborating on this point.

12
13 And in relation to this point:

14
15 I will begin by setting out the obligation under the UN Convention on the Law of the
16 Sea for States to cooperate in the repression of piracy; I will show how the Yaoundé
17 Code is merely an operationalization of that obligation in Central and West Africa;
18 and, in this context, I will also discuss the powers that UNCLOS accords to States in
19 the repression of piracy.

20
21 I will then turn to the question of whether Equatorial Guinea must prove that it had
22 “reasonable grounds for suspecting” that the “*Heroic Idun*” was engaged in piracy,
23 when it was acting in response to a request for cooperate under the Yaoundé Code,
24 and indeed under UNCLOS, from Nigeria.

25
26 Before answering that question, I will show that, on the facts, there was such a
27 reasonable suspicion of piracy. In this context, I will address the Marshall Islands’
28 argument that the arrest was not carried out on grounds of piracy and the assertion
29 that the suspicion of piracy was created only *ex post facto*. It is only because the
30 Marshall Islands chooses to ignore both the factual context of piracy in the Gulf of
31 Guinea, as well as what piracy entails as a matter of law, that the Marshall Islands
32 wrongly makes this argument.

33
34 Returning to the question of what Equatorial Guinea must prove, I will show that, in
35 the context of the triangular relationship between Nigeria, Equatorial Guinea, and the
36 Marshall Islands – in the shape of the vessel – all that Equatorial Guinea needs to
37 demonstrate in order to succeed is that it was reasonable for it to respond to the
38 request of Nigeria by arresting the vessel. So that’s the structure of my submissions.

39
40 Mr President, Members of the Chamber, Article 100 of UNCLOS provides that “[a]ll
41 States *shall cooperate to the fullest extent possible* in the repression of piracy on the
42 high seas *or in any other place outside the jurisdiction of any State*.”⁵⁰ This provision
43 is not a mere exhortation as to best practice, nor is it a recommendation. It imposes
44 an obligation on each party to the Convention to cooperate with other States in the
45 repression of piracy.

46
47 Furthermore, it is an obligation to cooperate “to the fullest possible extent”. Going
48 beyond the obligation that Article 100 imposes on parties to UNCLOS in their

⁵⁰ Emphasis added.

1 relations with each other, it can even be said that Article 100 establishes a general
2 duty to repress piracy. That is the logical implication of there being an obligation to
3 cooperate to repress piracy.

4
5 This point emerges clearly from the decision of the Annex VII tribunal in the “*Enrica*
6 *Lexie*” case, where that tribunal held that “[t]he repression of piracy by States ... is ...
7 also, pursuant to Article 100 of the Convention ... a duty incumbent on all States.”⁵¹

8
9 It is in partial implementation of that obligation of cooperation under Article 100 that
10 the Yaoundé Code has been adopted. The Code provides for agreed modalities of
11 cooperation in the Gulf of Guinea, and in West and Central Africa more generally.
12 The Yaoundé Code thus operationalizes the obligation of cooperation under
13 Article 100 of UNCLOS for that specific region. You heard yesterday how important
14 that regime for regional cooperation – the Yaoundé Architecture, as it is also
15 known – has been in winning the fight against piracy in that region.

16
17 The Marshall Islands seeks to make something of the legal status of the Yaoundé
18 Code, describing it as a non-binding code of conduct.⁵² However, it is irrelevant
19 whether the whole of the Yaoundé Code, some of it, or none of it, is binding or
20 non-binding in and of itself. Cooperation in the repression of piracy is an obligation
21 under international law. The Code simply sets out modalities for the implementation
22 of that obligation.

23
24 The Marshall Islands is also wrong to seek to diminish the relevance of the Yaoundé
25 Code on the ground that it is a regional instrument which does not and cannot, they
26 argue, render lawful what is unlawful under UNCLOS. Again, this misunderstands
27 the relationship between the Code and UNCLOS. The relevant provisions of the
28 Code do not cut against UNCLOS, but, rather, constitute an interpretation by the
29 signatories of the appropriate means of giving effect to their obligations of
30 cooperation in the repression of piracy. Indeed, the Code explicitly refers to
31 Article 100 of UNCLOS.

32
33 In considering the relevance of the Code as a tool which can and should be used to
34 interpret UNCLOS, the Marshall Islands is again wrong to focus on the regional
35 nature of the Code. It is correct that in taking into account subsequent practice in the
36 interpretation of a treaty, the Vienna Convention on the Law of Treaties directs the
37 interpreter, this Chamber, to look at practice which establishes the agreement of the
38 parties. That is correct. However, three points are important to bear in mind:

39
40 One, it's been made clear by the International Law Commission that in coming to the
41 conclusion that there is subsequent practice which establishes the agreement of the
42 parties, one does not need to find active practice of all the parties to the treaty. In
43 fact, the ILC does not go as far as to suggest that one must even find active practice
44 of most of the parties. The ILC is clear. Silence on the part of parties may constitute
45 acceptance.⁵³

⁵¹ *The “Enrica Lexie” Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 979.

⁵² Reply, paras. 93 (a), 95, 162.

⁵³ International Law Commission, “Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties”, *Yearbook of the International Law Commission*, 2018, Volume II, Part Two, A/73/10, Draft Conclusion 10(2).

1 Second, the Code was signed by no small number of States – 25. This is significant
2 explicit State practice.

3
4 Third, and in any event, the Code has been overwhelmingly, perhaps even
5 universally, welcomed by the broader international community a number of times. It
6 was explicitly welcomed by the UN Security Council, which, in resolution 2634
7 encouraged “the full and effective implementation of the Code of Conduct”.⁵⁴ This is
8 the Yaoundé Code that it is referring to. Furthermore, the IMO Assembly, which is
9 composed of all members of the IMO, practically all States in the world, “reaffirmed
10 its support” for the Yaoundé Code.⁵⁵

11
12 The regime provided in the Convention with regard to the repression of piracy is well
13 known to you and you have all the relevant provisions in your folder, so I will not put
14 them up. But, with your indulgence, I will summarize the key features of that regime.

15
16 “Piracy” is defined in Article 101 of the Convention and I will return to significant
17 aspects of that definition in a moment.

18
19 Article 105 entitles “every State” to “seize a pirate ship” on the high seas “or in any
20 other place outside the jurisdiction of any State”.

21
22 Article 106 which deals with liability for seizure, confirms that seizure is to be
23 effected “on suspicion of piracy” for which there are “adequate grounds”.

24
25 In addition, the Convention then goes on to confirm in Article 110(1) that States have
26 the right of visit, and a right to board and investigate a foreign-flagged vessel on the
27 high seas, in situations where “there are reasonable grounds for suspecting that: (a)
28 the ship is engaged in piracy....”

29
30 In accordance with Article 110(3), it is only when “suspicions prove to be unfounded,
31 *and provided that the shipboard has not committed any act justifying them*” that the
32 ship “may be compensated for loss or damage that may have been sustained”.⁵⁶
33 Relatedly, according to Article 106, it is only when “the seizure of a ship ... on
34 suspicion of piracy has been effected without adequate grounds” that “the State
35 making the seizure shall be liable to the State, the nationality of which is possessed
36 by the ship ... for any loss or damage caused by the seizure”.

37
38 Mr President, Members of the Chamber, Equatorial Guinea accepts that in the
39 typical situation where a State unilaterally seizes a ship on grounds of piracy, that
40 State will need to show that it has a reasonable suspicion of piracy. However, the
41 situation in which we find ourselves is a bit more complicated. The complication is
42 due to the triangular relationship between the State of the flag, the State requesting
43 the interception and detention of the vessel, and the State effecting the interception
44 and detention upon request. Notably, only two of these States are before you in
45 these proceedings – but this has already been covered this morning by

⁵⁴ United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, REG-031.

⁵⁵ International Maritime Organization, “Prevention and Suppression of Piracy, Armed Robbery Against Ships and Illicit Maritime Activity in the Gulf of Guinea”, Resolution No. A.1159(32), 28 January 2022, REG-087, p. 2.

⁵⁶ Emphasis added.

1 Professor Haeri in our objection to admissibility under the *Monetary Gold* principle,
2 so I won't take this up again, but I merely highlight it for your attention.

3
4 Now, I will deal with the complication introduced by this triangular relationship
5 between these three States shortly. In simple terms, though, it is our submission that
6 Equatorial Guinea does not need to show that it independently established its own
7 reasonable suspicion that the "*Heroic Idun*" was engaged in piracy before acting
8 upon a request for cooperate in the repression of piracy.

9
10 I'll just repeat that again, Mr President. So it is our submission that Equatorial Guinea
11 does not need to show that it independently established its own reasonable
12 suspicion that the "*Heroic Idun*" was engaged in piracy before acting upon a request
13 for cooperate in the repression of piracy.

14
15 Nevertheless, as you heard from Captain Juan yesterday, there was a suspicion of
16 piracy, and, as his testimony indicated, and as I will further elaborate upon, that
17 suspicion was reasonable in the circumstances.

18
19 The Marshall Islands has argued that Equatorial Guinea has failed to show that the
20 vessel was seized on grounds of piracy.⁵⁷ It relies on the exchanges between
21 Nigeria and Equatorial Guinea to suggest that there was no suspicion of piracy at
22 the time. However, this is to ignore (a) the context, the factual context, in which the
23 actions took place, and (b) important aspects of the law relating to piracy. The factual
24 context was well known to both the Nigerian and Equatoguinean authorities, and the
25 exchanges between them have to be interpreted with that context in mind.
26 Captain Juan could not have been clearer yesterday, that he interpreted those
27 changes with that context firmly in mind. And it is that context which not only shows
28 that there was a reasonable suspicion of piracy, but which lays bare the reasons for
29 the actions of those involved in the arrest of the vessel.

30
31 So, was there a reasonable suspicion that the "*Heroic Idun*" was engaged in piracy?
32 The simple answer is yes. What are the facts that both Nigeria, and eventually
33 Equatorial Guinea, through Nigeria, were looking at? The "*Heroic Idun*" was a ship
34 seeking to load oil in an offshore terminal without the required authorization. That
35 fact is undisputed. It was a ship drifting, or, if you want, loitering, in an area which is
36 a hotspot for piracy attacks. That fact is not only undisputed, but was highlighted
37 very acutely by the testimony of the officers of the "*Heroic Idun*" themselves, as they
38 claimed that it was fear of piracy that justified their own apprehensions and actions.
39 This was a ship that had evaded a naval vessel seeking to investigate its actions.
40 The flight of the vessel from the "*NNS Gongola*" is again undisputed.

41
42 We thus have a ship that is acting suspiciously in a high-risk area. It was suggested
43 to you that somehow it was reasonable for the "*Heroic Idun*" to suspect that it was
44 about to be a victim of piracy in this high-risk area, but unreasonable to suspect that
45 it could be involved in piracy. You were told by Counsel that it was "utterly absurd"
46 that this vessel could ever be used as a mother ship.⁵⁸ One witness called by the
47 Marshall Islands made exactly the same claim, when the point was specifically put to

⁵⁷ Reply, paras. 121-134.

⁵⁸ ITLOS/PV.25/C32/1, p. 17 (lines 35-38) (Bethlehem).

1 him. He said “I would say a bigger ship, a VLCC like the *“Heroic Idun”*, cannot be
2 used as a mother ship for piracy for pirates.”⁵⁹ However, it is well known that pirates
3 around the world, and, indeed, in the Gulf of Guinea, use large vessels as mother
4 ships or bases of operation for other pirate ships or attack skiffs. It is also known that
5 large vessels may also be involved in the bunkering of other pirate ships.⁶⁰
6 Captain Juan was very clear on this. The vessels in these news reports that you find
7 on the Internet, they were used as mother ships; they were, in fact, VLCCs.

8
9 On the screen now is a table that compares the VLCCs that were used as mother
10 ships in those incidents reported on the last slide with the *“Heroic Idun”*. This
11 comparison relates to the length of the vessel – so you see the column length
12 overall - the deadweight tonnage of the vessel, the width of the vessel, and the years
13 in activity. So “years in activity” means how old the vessel was when it was used as
14 a mother ship. The Judges have the news reports in their folders as well.

15
16 As you will see, the three vessels are almost identical in size and in weight. The
17 *“Heroic Idun”* is the newest of these vessels by far, as well as being lighter. What this
18 table demonstrates is that if those two vessels could have been used as mother
19 ships, there is no reason why it would be unreasonable to think that the *“Heroic Idun”*
20 could have been a mother ship as well.

21
22 The picture that was sought to be painted (and, in fact, you had a picture right up on
23 the screen) was of a vessel so large, so slow it could not be involved in piracy. In
24 fact, you were told specifically that it could not be involved in piracy because it could
25 not easily evade investigation by naval vessels.⁶¹ That is what one of the witnesses
26 said. I am sure that the irony would not have been lost on the Members of the
27 Chamber. We are all gathered here precisely because this vessel, the *“Heroic Idun”*,
28 did, in fact, evade a naval vessel that was seeking to investigate its activities, a Navy
29 vessel that you were told was a “small, highly manoeuvrable and fast-moving
30 boat”.⁶²

31
32 Captain Juan was taken to a UN document, Annex SA-53, which, far from
33 suggesting that larger vessels are never used as mother ships in the Gulf of Guinea,
34 in fact – and I am quoting from that document that was put to him – “describes the
35 occasional use of larger vessels, hijacked and used by a pirate group as a
36 semi-permanent mother vessel, used for a shorter part-time (e.g. three to five
37 days).”⁶³ True, the document suggests that VLCCs are less commonly used than
38 fishing vessels as mother ships, that’s correct. It is also correct that the document
39 says “the use of mother vessels is occasional, largely opportunistic and for shorter
40 periods than Somalia-based piracy.”⁶⁴ But in the light of even this report, and in the
41 light of the known activities of this vessel, what reasonable and responsible naval
42 commander would conclude that it was absurd that this vessel was used a mother

⁵⁹ ITLOS/PV.25/C32/2, p. 19 (lines 47-48) (testimony of Mr Jose).

⁶⁰ Rejoinder, paras. 39-42, 208-210.

⁶¹ ITLOS/PV.25/C32/2, p. 20 (lines 2-4) (testimony of Mr Jose).

⁶² ITLOS/PV.25/C32/1, p. 20 (line 35) (Bethlehem).

⁶³ UN Office on Drugs and Crime Global Maritime Programme, “Pirates of the Niger Delta: Between Brown and Blue Waters (ANNEX SA/-53)”, p. 342.

⁶⁴ UN Office on Drugs and Crime Global Maritime Programme, “Pirates of the Niger Delta: Between Brown and Blue Waters” (ANNEX SA/-53), p. 342.

1 ship? And let us remind ourselves of the last known activities of this vessel over the
2 few days that preceded its interception. What was it doing? It was fleeing a naval
3 vessel. Now, it might have been silly that it did this with its AIS system on, but what
4 there is no doubt about is that it was fleeing from what was in fact a naval vessel.
5 And you heard the testimony of those in charge of the vessel.

6
7 So against all of this background, the suggestion that this vessel could not
8 reasonably be suspected of piracy simply because it is big, it is slow, has not
9 permanently switched off its AIS, is, with respect, not persuasive.

10
11 It is true there was no conclusive evidence at the time that the “*Heroic Idun*” was
12 engaged in piracy. But the Convention does not require any such conclusive
13 evidence for the interception or even the seizure of a suspected pirate vessel. All
14 that the Convention requires under Article 105 are reasonable grounds to suspect
15 piracy for interception to take place and, under Article 106, what is required for
16 seizure are adequate grounds for suspecting piracy. Neither standard requires
17 certainty that a vessel is a pirate ship before it is seized. Reasonable grounds to
18 suspect something allows a reasonable inference to be drawn from circumstantial
19 evidence that a ship may be engaged in piracy, even if there are other inferences
20 that are available and which may also be reasonable. Requiring a standard of
21 certainty before seizure would be workable and would effectively negate what is,
22 after all, a duty on the part of States to repress piracy and to cooperate in its
23 repression. Likewise, and I touch on this briefly, imposing an obligation to
24 compensate the vessel, even when it is engaged in acts which gave rise to
25 suspicions, can only serve to deter attempts to combat piracy.

26
27 We don’t accept, if I may say so, the contrast that was drawn between Article 106
28 and Article 110.

29
30 Mr President, Members of the Chamber, that was the factual context for the
31 reasonable suspicion of piracy, which the Marshall Islands somehow closes its eyes
32 to, but which the Equatoguinean authorities, being at the centre of all of this, clearly
33 had in view.

34
35 At this point, let me turn to the legal context, fundamental aspects of which the
36 Marshall Islands obscures or even ignores. Let’s start at the beginning – the
37 definition of piracy, which you have in Article 101 of UNCLOS. Counsel for the
38 Marshall Islands showed you the definition, this definition in Article 101. The
39 highlighted bits are from the slide that was put up by Counsel, which takes you to
40 paragraph (a), which provides that piracy consists of “any illegal acts of violence or
41 detention, or any act of depredation, committed for private ends”. He then dismissed
42 Article 101 as irrelevant to the case at hand.⁶⁵ Well, let’s just look at the rest of that
43 provision.

44
45 As you see, Article 101(a) does not exhaust the definition of piracy. Let’s read the
46 *chapeau* and paragraph (c) together. Piracy consists of “any act of inciting or
47 intentionally facilitating an act described in subparagraph (a) or (b)”. Thus – and this
48 is important for our factual context in the Gulf of Guinea – when we are considering

⁶⁵ See ITLOS/PV.25/C32/3, p. 38 (lines 38-39) (Busco).

1 whether there was a reasonable suspicion that the vessel was engaged in piracy.
2 The question is not necessarily one of whether there was a reasonable suspicion
3 that a ship is engaged in illegal acts of violence or detention. One must also assess
4 whether there was a reasonable suspicion that the vessel was intentionally
5 facilitating those acts set out in Article 101(a) and (b).
6

7 A reasonable suspicion can emerge that a ship that is drifting in the vicinity of an
8 offshore oil terminal, without the required documentation or authorization, may be
9 involved in facilitating piracy via bunkering. Such facilitation under paragraph (c)
10 means that the act is, in and of itself, piracy. It's not aiding and abetting piracy, it's
11 not support for piracy, it's not complicity in piracy. The facilitation is piracy. It is no
12 less piracy than the acts described in subparagraph (a). The ship that engages in
13 acts described in subparagraph (c) is a pirate ship, even if it has not itself been
14 involved in ship-on-ship action.
15

16 The connection of bunkering and oil theft to piracy is well rehearsed, especially in the
17 Gulf of Guinea.⁶⁶ This is the factual context in which Nigeria's request was made.
18 Paragraph (c) of Article 101 is the legal context. And it emerged in Captain Juan's
19 testimony yesterday that he was alive to both of these contexts.
20

21 Now, with an appreciation of this factual and legal context, let us now look again at
22 the WhatsApp message that was sent by Nigeria. The allegation was not just of a
23 suspicion of loading oil without approval, but also being involved in illegal fuel supply.
24 It was put to Captain Juan yesterday that there was a difference between piracy and
25 illegal fuel supply. Now, perhaps that was a trick question, but he wasn't fooled. He
26 firmly and correctly rejected that suggestion.
27

28 Members of the Chamber, if bunkering of fishing vessels in the Exclusive Economic
29 Zone brings the act of bunkering within the scope of jurisdiction of Coastal States to
30 regulate fishing activities and eventually within the scope of its enforcement
31 jurisdiction in the EEZ under the Convention, as this Tribunal found in "*Virginia G*",⁶⁷
32 then why would bunkering of pirate vessels not bring the act of bunkering within the
33 scope of jurisdictional powers of States with respect to piracy? Especially given the
34 definition in Article 101(c). After all, to adapt the language of the decision in
35 "*Virginia G*", bunkering of pirate vessels "enables them to continue their activities
36 without interruption at sea".⁶⁸
37

38 You heard from Captain Juan yesterday how bunkering allows pirates to extend their
39 operations in terms of time and also in terms of distance.
40

41 In any event, given that any facilitation of piracy, be it through bunkering or any other
42 means, falls under the definition of piracy in Article 101, the relevant provisions of the
43 Convention with regard to piracy clearly apply, including Articles 100, 105, 106, 110.
44 These provisions justify both the initial approach to the "*Heroic Idun*" as well as the
45 events that followed the initial approach after the flight of the vessel.

⁶⁶ Rejoinder, paras. 201-207.

⁶⁷ *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, 14 April 2014, paras. 217, 255.

⁶⁸ *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, 14 April 2014, para. 215.

1
2 However, whether Nigeria was justified in entertaining a reasonable suspicion that
3 the “*Heroic Idun*” was engaged in piracy is neither something that Equatorial Guinea
4 needed to determine, nor something that the Chamber ought to determine in the
5 absence of Nigeria. Rather, should the Chamber consider that there is a question
6 that it can determine in these proceedings, that question can only be whether
7 Equatorial Guinea acted lawfully in responding to Nigeria’s request for cooperation in
8 the repression of piracy, and it is to that question that I now wish to turn.

9
10 So Mr President, that’s the focus of my next set of submissions, but perhaps this
11 might be a convenient place to have the coffee break.

12
13 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akande. I agree
14 with you that this would be an appropriate moment for the Special Chamber to
15 withdraw for a break of 30 minutes. You may continue your statement after the
16 break.

17
18 The hearing will resume at 5.00 p.m.

19
20 *(Break 4.28 p.m. – 4.57 p.m.)*

21
22 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I now invite Mr Akande to
23 continue with his statement. You have the floor, Sir.

24
25 **MR AKANDE:** Thank you very much, Mr President. Before the coffee break, I had
26 asked the question whether Equatorial Guinea needs to show that it had a
27 reasonable suspicion of piracy, but then sought to demonstrate that, in any event,
28 there was such a reasonable suspicion, both based on the factual context and based
29 on the law. But if I can come back to that question that I asked and resume from
30 there.

31
32 So Members of the Special Chamber, the Marshall Islands does not dispute that
33 Nigeria’s request to Equatorial Guinea to intercept the “*Heroic Idun*” was the only
34 reason that Equatorial Guinea did so. Equatorial Guinea received a request that it
35 had an obligation to consider in good faith, in line with the provisions of UNCLOS
36 and with its commitments under the Yaoundé Code.

37
38 I stress again that Article 100 of UNCLOS requires – requires – States to cooperate
39 in the repression of piracy to the fullest extent possible. And as part of the regional
40 regime for achieving such cooperation, Article 13(1)(b) and paragraph 2 of the
41 Yaoundé Code provides that a Signatory “may request any other Signatory ...
42 directly, to co-operate in detecting [...] pirate ships, where there are reasonable
43 grounds to suspect that those ships are engaged in piracy; [and]” – then in
44 paragraph 2 – “to take effective measures in response ...”.

45
46 The proper understanding of this provision goes beyond merely restating the
47 obvious, that is that a State may request the cooperation of another State. A State,
48 after all, can always request the cooperation of another State. There is no need to
49 write that down in a formal document. The point of including a provision such as this
50 is to highlight that proper consideration should be given to such a request for

1 cooperation. Indeed, we should recall that Article 13, the provision that we have just
2 been looking at, is headed: "Assistance among Signatories". The point of the
3 provision is to promote assistance given by one signatory to another. Thus, the
4 requests that "may" be made should not be declined without some convincing
5 justification on the part of the requested State. Without such a justification, a State
6 would be failing in its duty to cooperate to the fullest extent possible in the repression
7 of piracy.

8
9 A State receiving a request to cooperate in detecting a suspected pirate ship and in
10 taking effective measures against it is thus required to accede to that request, unless
11 there is some convincing justification for declining. What could such a justification
12 be? Well, obvious justifications would include lack of capacity of the requested State
13 in taking effective measures against a suspected pirate ship, or it taking effective
14 measures against a ship that is beyond its reach; for example, due to lack of naval
15 assets in the vicinity. Similarly, it may not be reasonable to accede to a request to
16 dispatch warships against a suspected ship that is many days' travel away from the
17 nearest naval vessel of the requested State.

18
19 It is then this question – the reasonableness of the response to a request to
20 cooperate, rather than the reasonableness of the suspicion of the requested
21 State – that must be the focus of our examination. Was it reasonable for Equatorial
22 Guinea to accede to Nigeria's request to intercept and detain the vessel?

23
24 Article 106 of UNCLOS provides that where the seizure of a ship on suspicion of
25 piracy has been effected without adequate grounds, the State making the seizure
26 shall be liable. The question is, what constitutes "adequate grounds" in the context of
27 a request for cooperation. And we submit that "adequate grounds" does not mean in
28 this case that the requested State has its own reasonable grounds for suspicion –
29 though we also insist that there were, in fact, reasonable grounds for suspecting the
30 "*Heroic Idun*" was facilitating piracy and thus engaging in it. It would be adequate
31 grounds in the context for a request for the requested State to show that it was
32 reasonable to accede to that request.

33
34 A State that is requested by another State to cooperate in the interception and
35 detention of a suspected pirate ship cannot typically be reasonably expected to
36 undertake its own detailed examination or assessment of the facts that led the
37 requesting State to suspect the vessel in question. Such a *de novo* assessment on
38 potentially limited facts and in the context of presumed urgency, would very much
39 defeat the purpose of the obligation of cooperation in the repression of piracy.

40
41 By the time that the requested State had undertaken a thorough enough review to
42 establish the reasonableness of the suspicion, the suspected pirate ship would be
43 long gone. This, for the added reason that presumably the State receiving the
44 request has been selected precisely because of the proximity of the suspected
45 vessel to its coast, or because of the presence of its naval assets in the relevant
46 area.

47
48 Be that as it may, in the circumstances of the case before you, and as far as
49 Equatorial Guinea is concerned, the Nigerian request would appear to be a
50 reasonable request. Equatorial Guinea was requested to intercept and detain a

1 vessel that had been drifting in a high risk area for piracy, and that had evaded an
2 approach by the Nigerian Navy. If that is not enough to trigger cooperation duties in
3 the repression of piracy under international law, then it is not clear what remains of
4 the relevant obligation.

5
6 The Marshall Islands suggests that a State is not entitled to arrest on the grounds of
7 piracy as provided for in Article 105 until it has first exercised the right to visit
8 provided for in Article 110, has boarded the ship, examined its papers, and
9 confirmed a reasonable suspicion of piracy. No doubt, this will be the natural
10 progression of things in some cases, maybe many cases. However, there is
11 absolutely nothing in the Convention that conditions the exercise of the power
12 conferred in Article 105 on the right that is provided for in Article 110. Article 110
13 provides possible justifications for boarding a vessel on the high seas. It is absurd to
14 suggest that there is a requirement of boarding before seizure.

15
16 Whether the right to board, which is provided for in Article 110, is exercised or not
17 will be dependent on a whole host of circumstances. For one thing, it depends on
18 whether the assessment that is being made will be aided by boarding the vessel.
19 Imagine a scenario where a warship visually witnessed an act of piracy being
20 committed and gave chase. It would be absurd to say that it must first go through the
21 formalities of boarding the vessel. Or imagine a scenario where it is clear that the
22 pirates on board the ship have significant weapons which can be used against the
23 crew of the investigating warship were they to board, and were they to come into
24 close proximity. It would again be absurd to say they must first exercise a right of
25 visit.

26
27 A visit is reasonable where it can assist in establishing the allegation and where it
28 will be effective, also where it's possible. A visit cannot be required in all cases, and
29 nothing in UNCLOS suggests this. Now, Counsel suggested on Tuesday that there
30 might be "exceptional situations" where there is no requirement to first board⁶⁹ –
31 exceptional situations. But it is wrong to characterize the legal position as a situation
32 of rule and exception. Whether the right of visit is exercised will always be
33 contextual.

34
35 In this particular case, Counsel and the witness called by the Marshall Islands spoke
36 of circumstances that would appear to make boarding on the high seas difficult. You
37 were told that this is a very large crude carrier in ballast, and that it was high in the
38 water.⁷⁰ You were also told that even when the vessel was brought into port,
39 debarking in port was difficult.⁷¹ It would make no sense in such a case for the
40 Convention to demand boarding on the high seas before seizure.

41
42 It is useful here to refer to the "*Norstar*" case, as we have already done. In that case,
43 Spain acted on an obligation of cooperation that was similar to that established by
44 Article 100 of UNCLOS, as operationalized by the Yaoundé Code. In particular,
45 Spain acted upon a request of Italy on the basis of the 1959 Strasbourg Convention,
46 Article 1 of which establishes an "undertaking" between the parties "to afford each

⁶⁹ ITLOS/PV.25/C32/3, p. 46 (lines 14-17) (Busco).

⁷⁰ ITLOS/PV.25/C32/1, p. 19 (lines 21-23) (Bethlehem).

⁷¹ Testimony of Chief Officer.

1 other in accordance with the provisions, the widest measure of mutual assistance in
2 proceedings in respect of certain offences.”⁷²

3
4 So it was an obligation to afford the widest measure of mutual assistance in
5 proceedings in respect of certain offences. Now, this obligation is not fundamentally
6 different from the obligation to cooperate to the fullest extent possible in the
7 repression of piracy under Article 100 of UNCLOS. Further provisions of the
8 Strasbourg Convention then operationalized the obligation of mutual assistance,
9 much like the Yaoundé Code does with Article 100.

10
11 This Tribunal found in that case that “the Decree of Seizure and the request for its
12 enforcement by Italy were central to the eventual arrest of the vessel”.⁷³ It was clear
13 for the Tribunal that “without the Decree of Seizure, there would have been no
14 arrest”.⁷⁴ Further, according to the Tribunal, it was

15
16 Italy [that is, the requesting State] that adopted legal positions and pursued legal
17 interests with respect to the detention of the “*M/V Norstar*” through investigation
18 and proceedings. Spain [the requested State] merely provided assistance in
19 accordance with its obligations under the 1959 Strasbourg Convention.⁷⁵

20
21 Spain merely provided assistance in accordance with its obligations under the 1959
22 Strasbourg Convention. It would not be reasonable to expect Spain, in that case, to
23 establish its own legal basis for the arrest and detention of the “*Norstar*” any more
24 than it would be reasonable in our case to expect Equatorial Guinea to establish an
25 independent reasonable suspicion that the “*Heroic Idun*” was engaged in piracy,
26 before responding to a request for cooperation under the Convention and the
27 Yaoundé Code.

28
29 But even if the Chamber were to find that Equatorial Guinea could not intercept
30 without forming its own independent reasonable suspicion with regard to the “*Heroic*
31 *Idun*”, the result should very much be the same. As I demonstrated earlier, the
32 factual context (taking into account the legal definition of piracy) shows why it was
33 reasonable to suspect piracy. Also, it was reasonable for Equatorial Guinea to rely
34 on intelligence provided by Nigeria about the conduct of the vessel. After all, the
35 essence of cooperation is also to be able to make use of, and rely on, the
36 intelligence of other States. In the Gulf of Guinea, Nigeria has the most sophisticated
37 intelligence apparatus from amongst the littoral States. And the conduct of the
38 vessel, as relayed, was nothing if not suspicious. This should then suffice for
39 Equatorial Guinea to form its own reasonable suspicion with regard to the “*Heroic*
40 *Idun*”, allowing its interception and detention for further investigation.

41
42 In any event, it should be clear that Equatorial Guinea acted in accordance with the
43 obligation to cooperate in the repression of piracy under UNCLOS, as

⁷² European Convention on Mutual Assistance in Criminal Matters, Article 1.

⁷³ *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, para. 165.

⁷⁴ *Ibid.*

⁷⁵ *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, para. 167.

1 operationalized by the Yaoundé Code, in intercepting and detaining the “*Heroic Idun*”
2 upon the request of Nigeria.

3
4 Mr President, Members of the Chamber, with your permission, I now turn to the
5 second general submission I wish to make this afternoon. This is that Equatorial
6 Guinea’s interference with the vessel was not in breach of its obligations to expect
7 freedom of navigation on the high seas as provided for in Article 87 of UNCLOS or in
8 the Exclusive Economic Zone; nor was it in breach of the principle of exclusive flag
9 State jurisdiction (provided for in Article 92).

10
11 Here, I can be extremely brief, because this submission is intricately connected to
12 my first submission that Equatorial Guinea’s actions were lawful since it arrested the
13 vessel in accordance with its obligation to cooperate in the repression of piracy and
14 had adequate grounds to do so.

15
16 Freedom of navigation on the high seas and the principle of exclusive flag State
17 jurisdiction are, without doubt, important, maybe fundamental, rules of the law of the
18 sea. Important but not unlimited. They are subject to exceptions, in particular – and
19 explicitly – with respect to the repression of piracy. As I have just been discussing,
20 UNCLOS establishes the right and the duty of States to take measures, on the high
21 seas and in the EEZ, to repress piracy, including by seizure of vessels. In addition,
22 UNCLOS establishes the obligation of all States to cooperate in the repression of
23 piracy to the fullest extent possible. I have already discussed these provisions,
24 particularly Articles 100, 105, 106.

25
26 This Tribunal in the “*Norstar*” case, stated that freedom of navigation and the
27 principle of exclusive flag State jurisdiction are not breached when the relevant
28 interference is “justified by the Convention or other international treaties”.⁷⁶ In the
29 case before you, since the interference was justified by the Convention’s provisions
30 relating to piracy, the obligation to respect freedom of navigation and the principle of
31 exclusive flag State jurisdiction could not have been breached.

32
33 Mr President, Members of the Chamber, my third general submission is that the
34 interference cannot be in breach of the relevant due regard obligations under the
35 Convention. Article 56(2) provides that “[i]n exercising its rights and performing its
36 duties under this Convention in the Exclusive Economic Zone, the Coastal State
37 shall have due regard to the rights (...) of other States.” Similarly, under Article 58(3),
38 all other States, “[i]n exercising their rights and performing their duties under the
39 Convention in the Exclusive Economic Zone, ... shall have due regard to the rights
40 and duties of the Coastal State”. Finally, Article 87(2) also provides that the High
41 Seas freedoms “shall be exercised by all States with due regard for the interests of
42 other States in their exercise of the freedom of the high seas”. In short, these
43 provisions establish an obligation of due regard in areas where rights and duties may
44 collide or come into conflict or tension. This is reasonable, given that the ocean, and
45 especially the Economic Zones and high seas are a shared space. Collisions – I
46 mean of rights, not of vessels – conflicts, tensions between the rights of one State
47 and the rights of another inhere in inaction in shared spaces.

⁷⁶ *M/V “Norstar” (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, para. 222; see also para. 225.

1 However, these due regard provisions must be read as balancing provisions in
2 situations where the Convention has not struck the relevant balance explicitly. It is
3 impossible for any set of rules to foresee all possible tensions between rights (and
4 obligations) which might emerge in countless factual constellations. That much is
5 trite. The due regard obligations thus function as a default balancing mechanism in
6 situations where tensions between rights have not been explicitly regulated.

8 However, this is not the case in the situation where the freedom of navigation and
9 the principle of exclusive flag State jurisdiction are pitted against the right and duty to
10 repress piracy. The balance between these two has been struck unequivocally by
11 the Convention, which provides that the right and the duty to repress piracy is an
12 explicit exception to freedom of navigation and exclusive jurisdiction of the flag State.
13 In such a situation, there cannot be *de novo* balancing of the rights in tension under
14 a “due regard” heading; that would render the relevant explicit provisions of the
15 Convention redundant.

17 The Annex VII tribunal in *Enrica Lexie* has confirmed that this is the appropriate
18 reading of the relevant due regard obligations. In particular, it found that

19
20 if protection from and repression of piracy comprise a right and duty of India and
21 Italy alike, including within India’s exclusive economic zone, the conduct of the
22 Marines on board the “*Enrica Lexie*” in responding to a perceived piracy threat
23 cannot have “*unreasonably interfere[d]*” with, and thus have failed to show “due
24 regard” to, India’s rights as the coastal State.⁷⁷

26 Similarly, the right and duty to repress piracy is incumbent upon both the Marshall
27 Islands and Equatorial Guinea – not to mention Nigeria or indeed São Tomé and
28 Príncipe. The interception and detention of a vessel suspected of piracy thus cannot
29 have unreasonably interfered with, and thus have failed to show due regard to, the
30 rights of the Marshall Islands as the flag State.

32 Even if the Chamber were to find that it may address the question of balancing of
33 rights already explicitly balanced and ordered by the Convention under a “due
34 regard” heading, *quod non*, then Equatorial Guinea submits that this balancing
35 should be done with the lightest of touches. This would mean that, in the absence of
36 any specific evidence as to how interference with the freedom of navigation was an
37 obvious abuse of the right of seizure under the Convention, there can be no violation
38 of the obligation of due regard.

40 Now, in this connection, it is worth noting that the Marshall Islands raises the issue of
41 good faith under Article 300 of the Convention.⁷⁸ However, the Marshall Islands fails
42 to explain why the good faith that Equatorial Guinea owes to it is somehow more
43 important than the good faith that Equatorial Guinea owes to Nigeria, a co-signatory
44 of the Yaoundé Code and an important collaborator in maritime security in the Gulf of
45 Guinea, who requested it to act in the circumstances. I have already explained how
46 Equatorial Guinea was under a good faith obligation to honour a reasonable request
47 for cooperation in the repression of piracy under the Convention, and especially so

⁷⁷ The “*Enrica Lexie*” Incident (*Italy v. India*), PCA Case No. 2015-28, Award, 21 May 2020, para. 980 (emphasis added).

⁷⁸ Memorial, paras. 157-159; 179; 238.

1 when that reasonable request comes from a co-signatory of the Yaoundé Code with
2 significant intelligence apparatus and maritime domain awareness capability in the
3 relevant maritime area.

4
5 To conclude on these points, in acting in accordance with its obligations under
6 Article 100 of UNCLOS, as operationalized in the Yaoundé Code, Equatorial Guinea
7 could not have breached the principles of freedom of navigation or of exclusive flag
8 State jurisdiction. It acted within the scope of a limitation that is applicable to these
9 two principles for the purpose of the repression of piracy, as provided for by the
10 Convention itself.

11
12 Relatedly, in acting in accordance with the same obligations, Equatorial Guinea
13 could not have violated any obligation to have due regard to the rights of the flag
14 State with respect to freedom of navigation and exclusive flag State jurisdiction. The
15 Convention has already balanced these principles against the need to repress
16 piracy, and it is the Convention that has struck a balance in favour of the latter – the
17 need to repress piracy – in these circumstances.

18
19 Mr President, Members of the Chamber, that not only concludes my submissions but
20 also concludes the submissions of Equatorial Guinea for this afternoon. I thank you
21 for your kind attention.

22
23 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akande. This
24 brings us to the end of this afternoon's sitting. The hearing will be resumed tomorrow
25 at 10 a.m. This sitting is now closed.

26
27 *(The sitting closed at 5.28 p.m.)*