

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2025

Public sitting

held on Saturday, 11 October 2025, at 10 a.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:

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as Agent;

and

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as Representative;

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

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

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

Mr Samuel K. Lanwi, Jr., Deputy Permanent Representative Embassy and Permanent Mission of the Republic of the Marshall Islands to the UN Office and other international organizations in Geneva, Switzerland,

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Equatorial Guinea is represented by:

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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,

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

as Adviser.

1 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Good morning. The Special
2 Chamber will continue its hearing in the “*Heroic Idun*” (No. 2) Case. I now invite
3 Mr Akande to the podium to make his statement.

4
5 You have the floor, sir.

6
7 **MR AKANDE:** Good morning, Mr President and Members of the Special Chamber.
8 We are grateful to you for agreeing to sit at the weekend. This morning, I will
9 continue Equatorial Guinea’s submissions on the merits of the case before you. I will
10 be making two submissions.

11
12 The first is that the interception and detention of the “*Heroic Idun*” did not violate
13 Article 225 of the UN Convention on the Law of the Sea.

14
15 The second is that the interception and detention of the vessel did not violate the
16 principle of reasonableness.

17
18 I start with my first point, that Equatorial Guinea did not act in violation of Article 225.

19
20 Perhaps sensing that its arguments with respect to violations of freedom of
21 navigation, exclusivity of flag State jurisdiction, and due regard do not have much, if
22 any, purchase, the Marshall Islands seeks to have recourse to more general
23 provisions of the Convention in its attempt to accuse Equatorial Guinea. As is often
24 the case, though, the recourse to general provisions when breaches of specific and
25 relevant provisions cannot be established is the sign of a weak position.

26
27 In particular, the Marshall Islands claims that Equatorial Guinea breached its
28 obligation under Article 225 of the Convention to avoid adverse consequences in the
29 exercise of enforcement measures. The relevant provision, we have on screen, and
30 reads as follows:

31
32 In the exercise under this Convention of their powers of enforcement against
33 foreign vessels, States shall not endanger the safety of navigation or otherwise
34 create any hazard to a vessel, or bring it to an unsafe port or anchorage, or
35 expose the marine environment to an unreasonable risk.

36
37 This is a fairly self-explanatory provision. It stands to reason that in exercising
38 enforcement powers, a State shall not create unreasonable risks to navigation, or to
39 the vessel, or to the marine environment. This means risks that go beyond those that
40 are normally inherent in the operation of a vessel while navigating or while in port, or
41 with respect to the marine environment.

42
43 There is absolutely no evidence that, in this particular situation, the conduct of
44 Equatorial Guinea exposed the “*Heroic Idun*” to any sort of danger at all, let alone
45 any unreasonable danger or risk. We have shown in our written pleadings that the
46 Equatoguinean authorities took measures to ensure that both the vessel and the
47 crew would be safe and protected during the vessel’s detention in Equatorial Guinea
48 and throughout the relevant investigation.¹ You have already heard evidence that the
49 interception and detention of the vessel on the part of the Equatoguinean Navy took

¹ Counter-Memorial, paras. 48, 252; Rejoinder, paras. 45, 239.

1 place without any resort to force. That the anchorage that was provided for the
2 vessel was safe and appropriate for vessels of this type and size. That no concerns
3 were raised with the Equatoguinean authorities regarding the safety of the vessel
4 during its stay in Luba Bay.² And that the vessel and its equipment were ultimately
5 found – even after its detention in Nigeria, on which, of course, Equatorial Guinea
6 cannot comment – but even after that detention, they were found to be in good
7 condition given its type and age.³

8
9 There is, thus, no harmful action that Equatorial Guinea took that may fall foul of its
10 obligation under Article 225, nor is there any reasonable and necessary action that it
11 omitted to take in order to ensure the safety of the vessel, or the safety of navigation,
12 or of the marine environment.

13
14 The Marshall Islands knows all of, this of course, but, in its attempt to somehow
15 claim a breach of Article 225, it ties itself into a pretzel: it tries to link this provision,
16 225, which refers quite obviously to the obligations of a coastal or port State, it tries
17 to link that provision to Article 94 – which I showed you yesterday, and which notably
18 refers to the obligations of the flag State – in an attempt to make use of the reference
19 in that provision, 94, to “generally accepted international regulations, procedures and
20 practices”.⁴ It then uses that reference in 94 to try and import the SOLAS
21 Convention, the COLREGs and the STCW Convention into Article 225.

22
23 Mr President, Members of the Chamber, this kind of artful pleading, while admittedly
24 impressive in its ingenuity, ultimately does not do the job it is sought to do. There is
25 no connection between a provision on the duties of the coastal or port State –
26 Article 225 – and a provision on the duties of a flag State – Article 94. I shall return to
27 the issues raised under the external instruments, the IMO instruments, in my
28 presentation later today.

29
30 Mr President, Members of the Chamber, let me now take up the final submission
31 I plan to make in relation to the interception and arrest of the vessel. This is our
32 submission that Equatorial Guinea's actions are not in breach of the principle of
33 reasonableness.

34
35 My colleague, Professor Haeri, will be making submissions next and will show that
36 there was no breach of humanity or the principle of humanity, which is sometimes
37 said to be an aspect of the principle of reasonableness.

38
39 This Tribunal and others constituted under Part XV of the Convention have held that
40 a State which has a valid basis for taking enforcement measures under the
41 Convention is to ensure that those measures are carried out in accordance with
42 international law, including with the principle of reasonableness.⁵ As the Tribunal is
43 well aware, the origin of this principle was specifically in the context of the use of

² Witness Statement of Howard James McDowall, REG-WS-006, para. 10; Second Witness Statement of Howard James McDowall, REG-WS-008, para. 11.

³ Condition Survey Report, EK 78, pp. 280, 283, 299.

⁴ Memorial, para. 321.

⁵ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 209; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 222.

1 force, with the Tribunal making clear that, where force is used, the State doing so
2 must still act reasonably, and, in particular, in accordance with the principles of
3 necessity and proportionality.⁶ It is true that, in subsequent cases, it's been stated
4 that the requirement to act reasonably extends beyond the use of force.

5
6 I have three points to make in relation to the principle of reasonableness.

7
8 First, the principle is not nearly as expansive as the Marshall Islands would have this
9 Chamber believe, and it is not a freestanding principle that is divorced from
10 assessing violations of specific provisions of the Convention.

11
12 Second, in assessing whether a State has complied with the principle of
13 reasonableness in relation to specific obligations, account must be taken of the
14 discretion that is given to States; and, also, care must be taken not to impose
15 specific obligations through the principle of reasonableness when the Convention
16 has not done so.

17
18 Third, and if, contrary to my first point, there is a freestanding principle of
19 reasonableness, it is simply an application of the principle of good faith that is
20 contained in Article 300 of the Convention.

21
22 Let me take up my first point, which is that the principle of reasonableness is not a
23 freestanding principle to be divorced from specific provisions of the Convention.
24 Tribunals have generally not relied on the principle of reasonableness as an
25 independent basis for finding State responsibility. What they have used the principle
26 of reasonableness to do is to assess violations of provisions of the Convention.

27
28 You will see this clearly in the decision by the Annex VII tribunal in the *Duzgit*
29 *Integrity* case, where the tribunal used the principle of reasonableness to assess
30 whether there had been a violation of Article 49 of the Convention dealing with the
31 exercise of sovereignty by an archipelagic State. If one looks at that decision, and
32 you just need to look at the table of contents, the Tribunal in that case includes no
33 separate heading entitled "Principle of Reasonableness", which is somehow divorced
34 from its consideration of specific substantive provisions of the Convention. It only
35 considered alleged breaches of specific provisions and, when it found a breach, it did
36 so on account of the evident disproportionality of certain measures taken by
37 São Tomé and Príncipe.⁷ In our case, the Marshall Islands is asserting a
38 freestanding principle of reasonableness which just does not exist in that fashion. It
39 needs to point to specific provisions of the Convention that are violated by acting
40 unreasonably.

41
42 Members of the Chamber, I turn to my second point relating to the principle of
43 reasonableness. When a court or tribunal is assessing compliance with specific
44 obligations relating to enforcement by reference to reasonableness, account must be
45 taken of the discretion given to States in matters of enforcement. It is true that
46 tribunals have held that reasonableness encompasses the principles of necessity

⁶ *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, para. 155.*

⁷ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), PCA Case No. 2014-07, Award, 5 September 2016, para. 261.*

1 and proportionality.⁸ However, it should also be recalled that in the *Duzgit Integrity*
2 case, that Tribunal spoke of “the discretion that [the State] enjoys as part of its law
3 enforcement jurisdiction.”⁹ This case shows that it is not correct to say, as the
4 Marshall Islands says, that tribunals constituted under Part XV have not endorsed
5 the idea that States have a margin of appreciation.¹⁰
6

7 The point is not whether they have used those specific words. Rather, the point is
8 that they have afforded discretion to States in exercising their law enforcement
9 jurisdiction. In addition, I admit, though, this is in a different context – in addition, but
10 in a different context – the Annex VII tribunal in the *South China Sea* arbitration
11 noted that the term “reasonable” contains an element of discretion for the State
12 concerned.¹¹
13

14 The Marshall Islands insists that it is not asking you to act as a court of appeal. That
15 is a good thing, as the tribunal in *Duzgit Integrity* also emphasized that it “cannot act
16 as an appeals court”.¹² However, in reality, the strict approach to necessity and
17 proportionality suggested by the Marshall Islands is not just asking you to be a court
18 of appeal, it is asking you to consider *de novo* the correctness, indeed the
19 appropriateness, of law enforcement measures taken by the State.
20

21 What we say is that necessity does not mean that the Chamber has to assess
22 whether a State’s law enforcement measure was the only way in which the State
23 could have achieved its aims, nor does proportionality mean, in this context, that it is
24 the Chamber that should engage in balancing up costs and benefits and in choosing
25 the one, the measure, that does the least amount of harm.
26

27 Those are questions that are left to the State. If one looks at the Marshall Islands’
28 claims regarding reasonableness, you are asked to make decisions as to whether
29 the size of a fine is justifiable having regard to the offence in question, or whether
30 deprivation of liberty is justifiable having regard to the nature of the offence. In our
31 submission, the question must be one of whether the State’s measures were
32 exercised within the reasonable range, or margin if you like, of discretion that is
33 afforded to States in making these decisions. To put in it a different way: Was the
34 decision of the State one that no reasonable State could make?
35

36 Related to this point of respecting the discretion that ought to be afforded to States in
37 law enforcement is a further point: care must be taken not to impose specific
38 obligations in relation to matters of enforcement when the drafters of the Convention
39 chose not to do so. An obligation of reasonableness must not be used to rewrite the
40 Convention. To take one example, the Marshall Islands argues that Equatorial
41 Guinea is in breach of the principle of reasonableness because it failed to notify the

⁸ *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 209; *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, paras. 221-224.

⁹ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 277.

¹⁰ ITLOS/PV.25/C32/4, p. 11 (lines 20-22) (Casas).

¹¹ *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, PCA Case No. 2013-09, Award, 12 July 2016, para. 948.

¹² *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 210.

1 Marshall Islands of the exercise of enforcement action. The Convention provides an
2 obligation of notification to the flag State in a number of specific instances, none of
3 which applies on these facts – as our friends on the other side noted on Tuesday.¹³
4 However, it is now being argued that the principle of reasonableness means that
5 there should, or there must, always be notification to the flag State in the case of
6 detention of a vessel. This approach would render the specific provisions of the
7 Convention which require notification in specific instances redundant. What work
8 would they be doing in the Convention if a general principle of reasonableness itself
9 establishes an obligation of notification in all of these instances?

10
11 In any event, and specifically on the notification point, a notification would have
12 been, in this case, redundant and a matter of mere form, as the Marshall Islands was
13 well aware of the interception and detention of the vessel from the earliest stages.
14 Furthermore, contrary to what was argued on Tuesday, the *Duzgit Integrity* case
15 does not support a requirement of notification, but, rather, that tribunal found that
16 “there is no relevant explicit provision in the Convention requiring that the flag State
17 be notified.”¹⁴ That tribunal was not content to imply a requirement from
18 reasonableness, but sought out a specific provision.

19
20 Members of the Chamber, my third point is that, if there is a freestanding principle of
21 “reasonableness” at all, as contended by the Marshall Islands, then, putting it at its
22 highest, what it would require is consideration of whether the exercise of powers
23 under the Convention so far exceeded what might be reasonable in the
24 circumstances as to border on bad faith. At that point, though, the principle would, in
25 effect, be a repetition of Article 300 of the Convention, which deals with the
26 obligation to act in good faith. Now, again, this connection is evident in *Duzgit*
27 *Integrity*, where the Tribunal held that it “sees no need to determine a violation of
28 Article 300 given that it has already determined that Article 49(3) has been violated.”
29 And it determined that Article 49(3) had been violated on the basis of
30 reasonableness. In short, all the points we have made on why there is no violation of
31 the obligation of good faith – a point I made yesterday – also apply with respect to
32 any alleged violation of the principle of reasonableness.¹⁵

33
34 There is nothing in the record to indicate that Equatorial Guinea acted in bad faith in
35 dealing with the Nigerian request to intercept and detain the “*Heroic Idun*”. It was
36 acting in response to a request from Nigeria, it was reasonable for it not to dismiss
37 that request from a partner, it was reasonable for it to proceed to the arrest of the
38 vessel rather than conducting an investigation on the high seas, given the difficulties
39 that we heard about the boarding of a vessel of this nature, in ballast, high in the
40 water. Nor is there anything in the record to indicate that Equatorial Guinea acted
41 unreasonably in the manner in which it eventually handled the interception. There
42 has been some focus in these proceedings on the threat of force. However, this
43 Tribunal held in “*Virginia G*”, that a threat of force may not be unreasonable in certain

¹³ ITLOS/PV.25/C32/4, p. 35, lines 15-17 (Nevill).

¹⁴ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 268.

¹⁵ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 262.

1 circumstances.¹⁶ In fact, going further, in *M/V “Saiga” (No. 2)*, the Tribunal went so
2 far as to state that firing a shot across the bow of a vessel might, in some
3 circumstances, be reasonable.¹⁷ Needless to say, Equatorial Guinea did not go so
4 far in this case.

5
6 Mr President, Members of the Chamber, this concludes my presentation on whether
7 Equatorial Guinea acted unlawfully in intercepting and arresting the vessel. In our
8 submissions, Equatorial Guinea did not breach its obligations under Article 225 of
9 UNCLOS nor was it in breach of any principle of reasonableness.

10
11 I thank you for your kind attention, and I would request that you kindly call
12 Professor Haeri to the podium to continue our submissions.

13
14 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akande. I invite
15 Mr Haeri to make his statement.

16
17 **MR HAERI:** Good morning, Mr President, Members of the Special Chamber. I will
18 address you on the principle of humanity and the treatment of the crew.

19
20 Mr President, Members of the Special Chamber, I will address the Marshall Islands’
21 claims that Equatorial Guinea violated the human rights of the crew. Professor
22 Akande has addressed Equatorial Guinea’s jurisdictional objection in this regard and
23 Ms Lavaud has addressed the inadmissibility of claims that are subject to the
24 exhaustion of local remedies – remedies, which Mr Moro explained, were and are
25 available in Equatorial Guinea.

26
27 I will therefore focus in particular on considerations of humanity, showing how the
28 principle was undoubtedly met in this case.

29
30 Notably, the Marshall Islands draws comparisons from the *Diallo* and *Arctic Sunrise*
31 cases several times in its submissions on non-material damages.¹⁸ I will return to
32 non-material damages later today, but with reference to considerations of humanity,
33 I would like to take a step back and recall the very different circumstances and
34 treatment in those cases. In the *Diallo* case before the International Court of Justice,
35 Mr Diallo had, among other things, been wrongfully expelled from a country where
36 he had resided for 32 years, where he had engaged in significant business activities
37 before he tried to recover a debt from the host State and State entities. It was in that
38 context that the Court’s findings on psychological suffering and loss of reputation
39 must be understood. The tribunal in *Arctic Sunrise* noted that “the circumstances of
40 the *Diallo* case [were] more extreme than the circumstances in [*Arctic Sunrise*]”.¹⁹
41

¹⁶ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, paras. 360-362.

¹⁷ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, para. 156.

¹⁸ ITLOS/PV.25/C32/5, p. 16 (lines 28-37) and p. 17 (lines 1-7) (Casas).

¹⁹ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.

1 And we see here the circumstances in the *Arctic Sunrise* case, where Russian
2 special forces descended by helicopter on the intercepted vessel, fired warning
3 shots, threatened to open direct fire and boarded the “*Arctic Sunrise*”. The crew was

4
5 confined to cold and unsanitary cells for 23 hours per day, the remaining hour
6 consisting of solitary exercise in a small concrete box. Most [were] unable to
7 speak to their families. Requests for telephone calls were not granted until
8 several weeks later. The members of the [crew] held separately from one
9 another.²⁰

10
11 The Tribunal described this as “not optimal” treatment of the crew. What is important
12 to note is how far removed from that mistreatment is the situation here as described
13 by the vessel’s agent, Mr Hernández Martín, and reflected in the contemporaneous
14 documents.²¹

15
16 Let us consider how the crew of the “*Heroic Idun*” were treated in this case.

17
18 We heard from Mr Hernández Martín that the vessel’s local agent, Besora, were
19 asked by the owners of the “*Heroic Idun*” to take care of the needs of the crew
20 members at all times from 14 August 2022, and that they did so until the departure of
21 the vessel from Equatorial Guinea on 11 November 2020. That is, from the moment
22 the crew arrived at Equatorial Guinea until their return to Nigeria, the needs of the
23 crew were attended to by Besora, which was granted unrestricted access to the
24 crew.

25
26 As Mr Hernández Martín testified, even before the vessel had arrived at the Luba
27 port, the vessel’s owners assigned Besora to assist the crew members in Equatorial
28 Guinea and meet their various needs.²² The Equatoguinean authorities accepted this
29 request from Besora on the vessel arriving at the port and, in Mr Hernández Martín’s
30 words, “allowed” Besora to assist the crew members with whatever they needed at
31 all times therefrom.²³

32
33 This was the first of the numerous requests from Besora and the crew members that
34 Equatoguinean authorities granted. Until the time that the vessel left to return to
35 Nigeria, Besora would make daily requests of the Equatoguinean authorities on
36 behalf of the crew members, and these requests were always granted,²⁴ as
37 Mr Hernández Martín testified before this Special Chamber. As you heard from
38 Mr Hernández Martín on Thursday, the Equatoguinean authorities allowed Besora to
39 accompany the crew in all their interactions with the authorities and to ensure that

²⁰ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.

²¹ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.

²² ITLOS/PV.25/C32/6 (confidential), p. 46 (lines 39-40) and p. 47 (lines 11-13) (Hernández Martín). See also Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 12.

²³ ITLOS/PV.25/C32/6 (confidential), p. 47 (line 15) (Hernández Martín).

²⁴ ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 36-45) (Hernández Martín). See also Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 12.

1 the requirements of the crew, such as for food, water and regarding their
2 accommodation, were met to the appropriate standard.²⁵

3
4 Mr Hernández Martín spent a lot of time at the facility with the crew members and
5 testified to the conditions.²⁶ As he explained, the authorities provided a large and
6 new accommodation facility, with suitable bathrooms, air conditioning and a large
7 outside area where the crew were able to freely move around, exercise and play
8 sports such as football and cricket, for which suitable equipment was provided.²⁷ We
9 can see that here in the receipts, from Besora, of provisions.

10
11 As Mr Hernández Martín testified, and receipts confirm, the Equatoguinean
12 authorities also allowed Besora to provide the crew with additional items for a
13 comfortable stay, including mattresses, pillows, a fridge, a stove, a cooker, a
14 microwave and a toaster.²⁸

15
16 The crew members also never complained to Besora about the conditions at the
17 accommodation facility, including the level of hygiene, cleanliness of water tanks,
18 about any pests, or about the security personnel – things that come up for the first
19 time in their witness statements in this case. Nor did Besora receive any such
20 complaints through OSM, the vessel's managers. Had such complaints been made,
21 Besora would have taken steps directly to raise or address these with the
22 Equatoguinean authorities, as Mr Hernández Martín explains in his witness
23 evidence.²⁹ And if Besora did not act, the Equatoguinean authorities would have
24 stepped in. There are no documents recording any such complaints, as would have
25 been expected had that been the case.

26
27 The crew members kept their phones and were given local SIMs to facilitate
28 communications with their families and anyone else whom they wished to speak
29 with.³⁰ The Equatoguinean authorities authorized the agent to provide the crew with
30 numerous other foods and drinks, which can hardly be said to be consistent with
31 "inhumane" treatment.³¹

32
33 Mr Hernández Martín described to this Chamber how the crew members freely
34 asked for whatever they wanted and that this was provided to them to ensure a
35 comfortable stay. For example, "they decided they wanted pizza or Chinese food or
36 hamburgers, whatever. So we provided them".³² Besora arranged for "one of the
37 good restaurants in Malabo" to provide the crew members with what he described as

²⁵ ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 36-45) (Hernández Martín). See also Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 6.

²⁶ ITLOS/PV.25/C32/6 (confidential), p. 49 (lines 10-14) (Hernández Martín).

²⁷ Receipts from Besora for provisions for the crew of the Heroic Idun, REG-013, p. 10; Costs and expenses relating to the Vessel and crew, RMI 61, p. 78.

²⁸ Receipts showing provision of food, provisions and cleaning items to crew, 23 August 2022, REG-042, p. 3; Costs and expenses relating to the Vessel and crew, RMI-061, pp. 2, 4.

²⁹ Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, paras. 15-16.

³⁰ ITLOS/PV.25/C32/3 (confidential) p. 26 (lines 45-50), and p. 27 (lines 1-10) (Master).

³¹ Receipts from Besora for provisions for the crew of the Heroic Idun, REG-013, p. 28.

³² ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 10-12) (Hernández Martín).

1 “elaborate” meals twice a day, including Indian dishes as they had requested, made
2 up for them by the chef per their requirements.³³

3
4 Indeed, the documentary evidence shows that the owners themselves were “grateful
5 that the crew ‘had been treated well by those tasked to guard them’”.³⁴

6
7 The Marshall Islands has made much about the length of the crew’s stay in
8 Equatorial Guinea and not knowing why they were there.³⁵ This is easily answered.
9 As we heard from the testimony of Captain Esono Nchama, the vessel and its crew
10 were held in Equatorial Guinea until such time that the transfer proceedings with
11 Nigeria were completed.³⁶

12
13 The Marshall Islands’ own representative, Captain Mustapha, understood as of
14 16 September 2022:

15
16 I think that the final decision expected from the Guinean authorities depends
17 on the completion of the investigation by the Nigerian Navy. I think this is
18 expected.³⁷

19
20 Equatorial Guinea also appointed security watchmen at the facility for the crew’s
21 safety, as Mr Hernández Martín testified.³⁸ At no point did Mr Hernández Martín see
22 any weapons at the accommodation facility, despite many visits there, and he
23 confirmed that he neither witnessed nor was ever made aware of any threats or
24 intimidation of any members of the crew.³⁹ In Mr Hernández Martín’s words, the
25 Equatoguinean authorities always treated the crew “respectfully”. Indeed, far from
26 being threatened by the security personnel, the crew had a good relationship with
27 them and would often play football together, as Mr Hernández Martín confirmed in
28 his testimony.⁴⁰

29
30 The crew was subsequently moved to Hotel Anda, chosen by Mr Hernández Martín,
31 as he testified, because it was “one of the best hotels” in Equatorial Guinea, with a
32 gym, swimming pool and two restaurants.⁴¹ The hotel brochure also shows that there
33 is a casino and two bars.⁴² The crew freely ordered room service and made use of
34 the hotel’s buffet and various other facilities.⁴³

35

³³ ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 14-24) (Hernández Martín).

³⁴ Letter from OSM to the Equatoguinean Attorney General, 16 September 2022, EK 36, p. 115.

³⁵ ITLOS/PV.25/C32/5, p. 17 (lines 11-12) (Casas); ITLOS/PV.25/C32/4, p. 23 (lines 32-33) (Grafton).

³⁶ ITLOS/PV.25/C32/6 (confidential), p. 32 (lines 14-17) (Esono Nchama).

³⁷ Captain Mustapha’s Daily Reports from Malabo, WG2-1, p. 355.

³⁸ ITLOS/PV.25/C32/6 (confidential), p. 62 (line 40) (Hernández Martín).

³⁹ ITLOS/PV.25/C32/6 (confidential), p. 47 (lines 24-27) (Hernández Martín).

⁴⁰ ITLOS/PV.25/C32/6 (confidential), p. 49 (lines 24-34) (Hernández Martín). See also Second
Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 16.

⁴¹ ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 33-35) (Hernández Martín).

⁴² Hotel Anda China brochure, REG-014. See also Witness statement of Jorge Gaona Reina, 1 July
2024, REG-WS-005, paras. 5-8.

⁴³ Invoice from Hotel Anda China, REG-016.

1 In late October 2022, the Indian Ambassador visited the Indian crew members at the
2 Hotel Anda for *Diwali*, an Indian national holiday.⁴⁴ The Indian Ambassador brought
3 Indian food and presents for the crew members.⁴⁵

4
5 The crew members who remained on board the “*Heroic Idun*” were similarly always
6 able to contact Besora seeking necessary supplies provisions, including food,
7 beverages, toiletries and restaurant meals.⁴⁶ The crew never complained to Besora
8 about any ill treatment by Equatoguinean authorities on board the vessel at that
9 time.⁴⁷

10
11 Indeed, we heard from the Chief Officer of the vessel on Monday that the crew
12 aboard the vessel would regularly play sports, such as basketball and cricket, and
13 the Equatoguinean security personnel often joined in playing with the crew.⁴⁸ In the
14 Chief Officer’s words “these Navy people were there, two or three of them, they
15 knew how to play basketball, so they joined us”.⁴⁹ It is difficult to see how allegations
16 of mistreatment, such as are made, tally with the crew members and the
17 Equatoguinean security personnel freely playing sports together regularly.

18
19 Equatoguinean authorities similarly authorized Besora to take care of the crew
20 members’ medical needs, in line with the “*Heroic Idun*”’s managers and owners’
21 wishes. Besora selected and arranged the crew’s medical visits with doctors and
22 hospitals which were, as Mr Hernández Martín testified, the La Paz Hospital, the
23 premier hospital in Equatorial Guinea, and, alternatively, the Loeri Comba Hospital,
24 another good hospital.⁵⁰

25
26 The Marshall Islands does not dispute that La Paz is generally considered the best
27 hospital in Malabo.⁵¹ Mr Hernández Martín attested the crew all received appropriate
28 medical care based on their ailments at the hospital, with attendant translations into
29 English, such as he did for the Master, and he never heard of any serious illnesses
30 of any crew members.⁵² He also attested that instances of typhoid and malaria
31 among the crew reflected “common illnesses in Equatorial Guinea”.⁵³ Simply put, at
32 no point during their stay in Equatorial Guinea were the crew members denied

⁴⁴ See ITLOS/PV.25/C32/3 (confidential), p. 3 (lines 2-3) (Master). All references are made to uncorrected versions of the transcripts received by the Parties at the time of drafting.

⁴⁵ ITLOS/PV.25/C32/3 (confidential) p. 3 (lines 2-3) (Master); Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 23. See also Witness statement of Howard James McDowall, 2 July 2024, REG-WS-006, para. 12; Daily reports of the *Heroic Idun* provided by Besora, 13 August 2022 - 10 November 2022, REG-036, p. 5.

⁴⁶ Receipts from Besora for provisions for the crew of the *Heroic Idun*, REG-012; Receipts showing provision of food, provisions and cleaning items to crew, 23 August 2022, REG-042; Receipts from Besora for provisions for the crew of the *Heroic Idun*, REG-013.

⁴⁷ Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 13.

⁴⁸ ITLOS/PV.25/C32/2, p. 24 (lines 49-50) and p. 25 (lines 1-15) (Chief Officer).

⁴⁹ ITLOS/PV.25/C32/2, p. 25 (lines 14-15) (Chief Officer).

⁵⁰ ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 41-49) and p. 51 (lines 1-2) (Hernández Martín). See also Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 27.

⁵¹ ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 42-43) (Hernández Martín). See also Witness statement of Dr Irvin Simbarashe, 10 July 2024, REG-WS-004, paras. 5, 8; Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 27.

⁵² ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 41-49) to p. 51 (lines 1-5) and p. 51 (lines 10-26) (Hernández Martín). See also Witness statement of Dr Irvin Simbarashe, 10 July 2024, REG-WS-004, para. 12.

⁵³ ITLOS/PV.25/C32/6 (confidential), p. 64 (lines 34-41) (Hernández Martín).

1 medical treatment.⁵⁴ The Equatoguinean authorities also authorized a chaplain to
2 visit the crew in August 2022.⁵⁵

3
4 The full circumstances of the conditions of the crew members' stay in Equatorial
5 Guinea clearly do not support the Marshall Islands' alarming suggestion of
6 mistreatment, let alone of torture, as is implied.⁵⁶

7
8 The Marshall Islands has repeatedly insisted to this Chamber that the good living
9 conditions of the crew are irrelevant, because Besora was the one physically
10 meeting the various requests of the crew members and providing them with
11 provisions. There is no jurisprudence to support that considerations of humanity
12 applicable to the law of the sea require, as the Marshall Islands suggests, that State
13 agents must be the ones directly providing the required care and treatment. There
14 can be no breach of the principle and certainly no inhumane treatment where the
15 State allows, facilitates and even encourages others to meet those needs after they
16 have requested to do so. In this case, the evidence shows that the owners appointed
17 Besora who asked the Equatoguinean authorities if they could have access to and
18 take care of the crew from even before they had arrived in Equatorial Guinea, a
19 request to which the authorities acceded. Had the Equatoguinean authorities refused
20 to allow Besora to take care of the crew in this way as requested, that would
21 doubtless have formed the subject of criticism.

22
23 Moreover, let us ask the question: Why would the Equatoguinean authorities deny
24 the wishes of the managers and owners of the "*Heroic Idun*" to appoint a local agent
25 for the crew? Is the Marshall Islands suggesting that Equatorial Guinea should have
26 refused this? Equatorial Guinea did everything possible in the circumstances to keep
27 the crew comfortable and to respect and ensure respect for their human rights.

28
29 To conclude, notably at the time of handing over the crew, the Equatoguinean
30 authorities sought an undertaking from Nigeria that it would respect the crew's
31 human rights and treat them in accordance with the International Covenant on Civil
32 and Political Rights.⁵⁷ This is entirely in keeping with Equatorial Guinea's consistent
33 consideration for the crew members' well-being, which evidently would not have
34 been done had Equatorial Guinea treated the crew inhumanely when they had been
35 in Equatorial Guinea.

36
37 Captain Esono Nchama testified that at the time of being transferred to Nigeria that
38 "many were crying, 'I don't want to go to Nigeria. We want to stay in Equatorial
39 Guinea', up to the last minute."⁵⁸

⁵⁴ ITLOS/PV.25/C32/6 (confidential), p. 64 (lines 37-41) (Hernández Martín). See also Second
Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, paras. 12, 19-22.

⁵⁵ ITLOS/PV.25/C32/6 (confidential), p. 51 (lines 28-33) (Hernández Martín). See also Email,
29 August 2022, EK 18; Email, 31 August 2022, EK 19.

⁵⁶ ITLOS/PV.25/C32/1, p. 26 (lines 40-45) (Bethlehem). All references are made to uncorrected
versions of the transcripts received by the Parties at the time of drafting.

⁵⁷ ITLOS/PV.25/C32/6 (confidential), p. 41 (lines 11-14) (Esono Nchama). See also Official handing
over of the tanker MT Heroic Idun between the governments, Addendum, 10 November 2022,
REG-011.

⁵⁸ ITLOS/PV.25/C32/6 (confidential), p. 32 (lines 19-25) (Esono Nchama).

1 This would not have been the case had the crew been mistreated in Equatorial
2 Guinea. Indeed, it was the prospect of being returned to Nigeria where the crew
3 would need to face the repercussions of what had happened there which caused the
4 reaction.

5
6 In conclusion, and as Mr Hernández Martín clearly explained, for the entirety of the
7 time that the “*Heroic Idun*” crew were in Equatorial Guinea, they were provided with
8 everything they asked for to make their stay as comfortable as possible, being
9 treated at all times with dignity and respect by the Equatoguinean authorities. Any
10 allegations of ill treatment against Equatorial Guinea simply do not withstand
11 scrutiny.

12
13 I will conclude my submissions here, Mr President, distinguished Members of the
14 Special Chamber, and I would respectfully invite the Chamber to invite my colleague,
15 Ms Lavaud, for further submissions for Equatorial Guinea.

16
17 Thank you.

18
19 **THE PRESIDENT OF THE SPECIAL CHAMBER:** I thank you Mr Haeri. I now call
20 upon Ms Lavaud to make a statement.

21
22 You have the floor, Madame.

23
24 **MS LAVAUD:** (*Interpretation from French*) Mr President, distinguished Members of
25 the Special Chamber, good morning. It is both an honour and a privilege for me to
26 appear once again before you to continue the presentation of the oral submissions of
27 the Republic of Equatorial Guinea now.

28
29 Today, I am going to deal with three aspects of the instant case. To start with, I will
30 start by demonstrating that Equatorial Guinea acted in compliance with its legitimate
31 prescriptive jurisdiction.⁵⁹

32
33 In a second stage, I will look at the alleged existence of an obligation to notify the
34 flag State, and I will demonstrate that, contrary to what the Marshall Islands asserts,
35 this obligation does not exist. It doesn't exist either in customary international law nor
36 as a general principle of international law.

37
38 I will finally conclude by explaining that Equatorial Guinea has no obligation of
39 prompt release, be it under the Convention, under customary international law, or
40 under a general principle of international law.

41
42 Mr President, distinguished Judges, let me start, first of all, with the argument
43 submitted by the Marshall Islands, whereby the fine imposed on the Captain of the
44 vessel constituted an unlawful exercise of its prescriptive jurisdiction.

45
46 Equatorial Guinea rebuts this affirmation. The exclusive character of flag State
47 jurisdiction in no way bars the lawful exercise by another State of its own prescriptive

⁵⁹ Memorial, paras. 227-238; Reply, paras.166-180.

1 jurisdiction, when this is provided by treaty or is relatively based in customary
2 international law.

3
4 To rehearse the terms of Judge Wolfrum:

5
6 Coastal States have jurisdiction to adopt laws and regulations relating to
7 navigational safety and vessel-source pollution from foreign ships in their
8 exclusive economic zone (legislative jurisdiction) – where vessels enjoy the
9 freedom of navigation – and they have far-reaching enforcement jurisdiction.⁶⁰

10
11 To avoid all ambiguity, I would like to recall that Equatorial Guinea did not apprehend
12 the vessel for having violated its own laws. Professor Akande set out yesterday, in
13 clear and precise fashion, the way in which Equatorial Guinea responded to Nigeria's
14 request for assistance. Formulated by Nigeria, as I said, Equatorial Guinea acted
15 pursuant to its obligations of cooperation under the Convention and the Yaoundé
16 Code of Conduct.

17
18 It was only after the vessel had been led to the Port of Luba and was subject to
19 investigations that offences were found and the Captain fined.

20
21 The fine and the national law on which it is based were themselves based on the
22 provisions of the Community Code of the Economic and Monetary Community of
23 Central Africa, CEMAC. This community brings together six States of Central Africa,
24 to wit, Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon and the
25 Republic of Congo, and establishes regional rules on customs and maritime
26 governance.

27
28 CEMAC seeks to promote peace, cooperation and economic integration among its
29 members. It also seeks to create "a growing integrated economic area where
30 security, solidarity and good governance prevail".⁶¹

31
32 In a region where piracy and maritime security remain pressing and urgent
33 challenges requiring multilateral and harmonized responses, CEMAC constitutes an
34 essential element of regional architecture which enables cooperation and joint
35 responses to these issues.

36
37 As His Excellency Mr Carmelo Nvono-Ncă recalled, Equatorial Guinea takes its
38 responsibilities very seriously in the framework of these regional agreements,
39 particularly the Yaoundé Code, which was the basis for Nigeria's request and the
40 response of Equatorial Guinea in this case.

41
42 Equatorial Guinea also considers the CEMAC Merchant Shipping Code as a key
43 element of its commitment to the regional maritime architecture.

44
45 Equatorial Guinea recognizes as such its responsibility to actively contribute both to
46 the upholding and to the effective exercise of the powers recognized by this
47 institutional framework. Equatorial Guinea, for its part, has given full effect to the

⁶⁰ Statement of Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, "Freedom of Navigation: New Challenges" (available on the ITLOS website), p. 3.

⁶¹ CEMAC, "La CEMAC en bref", REG-028.

1 CEMAC Code by integrating it into its own domestic legal system. This legislative
2 framework seeks to ensure the effective protection of the jurisdictional rights of
3 Equatorial Guinea in its EEZ, in accordance with the provisions of the Convention.
4

5 It was subsequent to the finding of violations of applicable provisions under this
6 Code and Equatoguinean law that a fine was imposed on the Captain of the vessel.
7 This fine included administrative costs as well as those expenses incurred during the
8 investigation of the vessel and its crew during the time that they were in Equatorial
9 Guinea. Similar administrative costs have already been accepted in other cases.⁶² In
10 this case, as the Marshall Islands underscored, the “*Heroic Idun*” is a vast oil tanker
11 of exceptional proportions. It has even been compared to the Empire State
12 Building.⁶³ The maintenance of such a vessel of such dimensions in the Port of Luba
13 inevitably gave rise to considerable costs for Equatorial Guinea. For all these
14 reasons, Equatorial Guinea maintains that the imposition of the fine constituted a
15 legitimate exercise of its prescriptive jurisdiction.
16

17 Mr President, Members of the Special Chamber, now let me move on to the claim
18 made by the Marshall Islands regarding the alleged existence of an obligation of
19 notification.
20

21 The Marshall Islands submits that Equatorial Guinea failed to discharge its obligation
22 to inform the Marshall Islands, as the flag State, of the measures taken with respect
23 to its vessel.⁶⁴ However, as I shall demonstrate, neither the Convention nor
24 customary international law, nor the general principles of law impose an obligation to
25 notify the flag State in the circumstances of the instant case.
26

27 First, as the tribunal affirmed in *Duzgit Integrity*:

28
29 (Continued in English) There is no relevant explicit provision in the Convention
30 requiring that the flag State be notified.⁶⁵
31

32 (Interpretation from French) Indeed, the Marshall Islands themselves recognize:

33
34 There is no express provision in the Convention requiring notification where
35 enforcement measures have been exercised over a foreign vessel in the high
36 seas or the EEZ of a third State.⁶⁶
37

38 In his declaration in the “*Norstar*” case, Judge Kittichaisaree clarified that only two
39 provisions of the Convention address the duty to promptly notify the flag State of any
40 exercise of jurisdiction against a vessel flying its flag.⁶⁷ These are Article 27(3),
41 which relates to innocent passage in the territorial sea, and Article 73(4) regarding

⁶² *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 255.

⁶³ ITLOS/PV.25/C32/4, p. 27 (line 43) (Nevill).

⁶⁴ Memorial, paras. 325-355; Reply, paras. 255-262.

⁶⁵ *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 268.

⁶⁶ Memorial, para. 329.

⁶⁷ *M/V “Norstar” (Panama v. Italy)*, Judgment, Declaration of Judge Kittichaisaree, ITLOS Reports 2018–2019, p. 10, 10 April 2019, paras. 20-21.

1 the enforcement of laws and regulations of the coastal State in the exclusive
2 economic zone.

3
4 The Marshall Islands does not challenge that neither of these provisions apply in our
5 case. Moreover, they confirmed that at the beginning of the week.⁶⁸ To the contrary,
6 the Marshall Islands seeks to rely on the commentary of Article 231 of the
7 Convention to demonstrate the existence of a general notification obligation; yet, this
8 argument is flawed. Article 231 is to be found in section 7 of Part XII of the
9 Convention, which deals exclusively with enforcement measures relating to the
10 protection and preservation of the marine environment. Its scope is limited to the
11 application of specific measures described in section 6 of that selfsame part.

12
13 This brings me to my second point. Contrary to what the Marshall Islands asserts,
14 such an obligation does not exist in customary international law nor as a general
15 principle of law. Article 293 of the Convention in no way modifies this finding. As
16 Professor Akande explained, this provision provides that “[a] court or a tribunal
17 having jurisdiction under this section shall apply this Convention and other rules of
18 international law not incompatible with this Convention.” It cannot – it cannot –
19 empower the Chamber to create new obligations where none exist.

20
21 It is well established that the criterion for the determination of a rule of customary
22 international law requires two elements: a general practice by States and acceptance
23 of that general practice as law, *opinio juris*.⁶⁹ The International Law Commission also
24 explained that a treaty rule reflects customary international law only if it codifies an
25 existing rule, crystallizes an emerging rule, or gives rise to a new rule of law through
26 consistent practice accepted as law.⁷⁰

27
28 Furthermore, according to the terms of the Commission: “The fact that a rule is set
29 out in a number of treaties may, but does not necessarily, indicate that the treaty rule
30 reflects a rule of customary international law.”⁷¹

31
32 In the case before us, the submissions presented by the Marshall Islands to attempt
33 to demonstrate a general practice by States are limited to provisions for notifications
34 found in sectoral instruments, *inter alia*, the MARPOL Convention, the BWMC
35 Convention, the STCW Convention, the SOLAS Convention, the IMO Port State
36 Vessel Control Procedures, and memoranda of understanding with port States.⁷²

37
38 The various provisions and procedures relating to notifications contained in these
39 instruments are specific to the regulatory frameworks and enforcement mechanisms
40 of their respective regimes. Thus, the Marshall Islands cannot extrapolate them to
41 claim the existence of a rule of customary international law which would apply across
42 the board to all enforcement measures adopted by every State in all circumstances.

⁶⁸ International Law Commission, “*Draft conclusions on identification of customary international law*”, A/CN.4/L.908, 17 May 2018, conclusion 2.

⁶⁹ International Law Commission, “*Draft conclusions on identification of customary international law*”, A/CN.4/L.908, 17 May 2018, conclusion 2.

⁷⁰ International Law Commission, “*Draft conclusions on identification of customary international law*”, A/CN.4/L.908, 17 May 2018, conclusion 11(1).

⁷¹ International Law Commission, “*Draft conclusions on identification of customary international law*”, A/CN.4/L.908, 17 May 2018, conclusion 11(2).

⁷² Memorial, paras. 333-339.

1 As noted by the International Law Commission in its Draft conclusions on the
2 identification of international customary law, treaties cannot, in and of themselves,
3 create a rule of international customary law nor can they conclusively attest to its
4 existence or its content.⁷³ What is more, in its commentary on conclusion 11 – and
5 we have reproduced the relevant part in English on the screen – the International
6 Law Commission says:

7
8 (Continued in English) Paragraph 2 seeks to caution that the existence of
9 similar provisions in a number of bilateral and other treaties, thus establishing
10 similar rights and obligations for a possibly broad array of States, does not
11 necessarily indicate that a rule of customary international law is reflected in
12 such provisions. While it may be the case, indeed, that such repetition attests
13 to the existence of a corresponding rule of customary international law (or has
14 given rise to it), it “could equally show the contrary” in the sense that States
15 enter treaties because of the absence of any rule or in order to derogate from
16 an existing but different rule of customary international law. Again, an
17 investigation into whether there are instances of practice accepted as law
18 (accompanied by *opinio juris*) that support the written rule is required.⁷⁴

19
20 (*Interpretation from French*) The Marshall Islands explained on Tuesday that “the
21 question to you is whether repetition alone can evidence both elements of custom.”⁷⁵
22 The Marshall Islands, on this matter, qualified the text of the Commission’s
23 commentary as “equivocal”.⁷⁶ If we read the text, the reply seems to be perfectly
24 clear. The extract from the Commission’s commentary that I have just read to you
25 strongly suggests that repeating the provisions in different treaties does not suffice,
26 in itself, to conclusively establish the existence of a customary rule of international
27 law.

28
29 In any event, in the case before us, repetition of the norm in the different treaties
30 does not support the Marshall Islands’ argument. Indeed, most of the multilateral
31 instruments that the Marshall Islands relies on to claim the presumed existence of a
32 general notification obligation – *inter alia*, as I said previously – MARPOL, the STCW
33 and SOLAS, and numerous memoranda of understanding, predate the signature and
34 entry into force of the Convention.

35
36 Mr President, Members of the Special Chamber, if States Parties to the Convention
37 had intended to include a general obligation to notify flag States, or if such an
38 obligation already existed under international customary law, one might reasonably
39 expect this to have been expressly included in the text of the Convention, whereas
40 that is not the case.

41
42 The absence of such an explicit provision is not only revealing in itself, it also
43 confirms that no general notification obligation exists under the Convention or under
44 international customary law.
45

⁷³ International Law Commission, “*Draft conclusions on identification of customary international law*”, A/CN.4/L.908, 17 May 2018, conclusion 11, paragraph 2.

⁷⁴ International Law Commission, “*Draft conclusions on identification of customary international law*”, A/CN.4/L.908, 17 May 2018, conclusion 11, paragraph 8.

⁷⁵ TIDM/PV.25/C32/4, p. 36 (lines 26-27) (Nevill).

⁷⁶ TIDM/PV.25/C32/4, p. 36 (lines 27-30) (Nevill).

1 The other source relied upon by the Marshall Islands to assert the existence of an
2 *opinio juris* is the statement made by the Senior Deputy Commissioner of the
3 Marshall Islands Maritime Administrator.⁷⁷ As explained in our written submissions,
4 this declaration does not meet the requirements for identifying an *opinio juris* to
5 establish a rule of international customary law.⁷⁸

7 The Marshall Islands seeks also to rely on the so-called induction method which
8 requires demonstrating the existence “of a sufficiently extensive and convincing
9 practice”.⁷⁹ However, even taken together, the specific instruments referred to by the
10 Marshall Islands do not prove *opinio juris*, which is, in fact, necessary to identify a
11 rule of international customary law according to this criterion.

13 Subsequently, by simply referring to a number of bilateral or multilateral instruments
14 on different issues, the Marshall Islands does not meet the two *sine qua non*
15 conditions for a customary rule to be established, in other words, extensive State
16 practice and *opinio juris*.

18 The sources and authorities that the Marshall Islands seeks to rely on also do not
19 demonstrate that a general obligation to notify the flag State exists as a general
20 principle of law.⁸⁰

22 The International Law Commission explains that, in order to determine the existence
23 of such a principle, it is necessary to ascertain: “(a) the existence of a principle
24 common to the various legal systems of the world; and (b) its transposition to the
25 international legal system.”⁸¹

27 Contrary to the allegations made on Tuesday by the Marshall Islands,⁸² Equatorial
28 Guinea has referred to this matter and we would refer you to the relevant sections of
29 our written submissions on this.⁸³

31 This brings me to my third point. In any case, the objective of the notification
32 obligations provided for in certain provisions of the Convention is to allow the flag
33 State to have knowledge of the event that has occurred in order to intervene as soon
34 as the initial measures are taken against the vessel.⁸⁴ In this instance, the Marshall
35 Islands cannot claim that, as the flag State, it did not have knowledge of the actions
36 of the vessel and its interception by Equatorial Guinea. Evidence tendered confirms
37 that they were:

⁷⁷ Counter-Memorial, paras. 263-266; Rejoinder, paras. 295-302.

⁷⁸ Rejoinder, para. 297-298.

⁷⁹ ITLOS/PV.25/C32/4, p. 37 (lines 16-18) (Nevill); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2023, p. 447, para. 77.

⁸⁰ Counter-Memorial, paras. 263-266; Rejoinder, paras. 295-302.

⁸¹ International Law Commission, “General principles of law: Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading”, 12 May 2023, A/CN.4/L.982, draft conclusion 4.

⁸² TIDM/PV.25/C32/4, p. 38 (lines 41-43) (Nevill).

⁸³ Rejoinder, paras. 295-309.

⁸⁴ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, 14 April 2014, para. 328.

1 (Continued in English) notified about Equatorial Guinea Navy's interception,
2 diversion, and detention of the HEROIC IDUN ... on 12 August 2022 shortly" –
3 (Interpretation from French) and I repeat – (Continued in English) "shortly after the
4 vessel was intercepted and diverted by the Navy to Malabo....⁸⁵
5

6 The various communications between Marshall Islands with Nigeria and Equatorial
7 Guinea show that the Marshall Islands was informed not only of the interception of
8 the vessel but also of its detention in Equatorial Guinea.⁸⁶ As to discussions
9 concerning the way in which this notification can be communicated, once again we
10 refer you to our written submissions.⁸⁷
11

12 For all of these reasons, Equatorial Guinea maintains that the Marshall Islands has
13 not established the existence of a general obligation to notify the flag State whether
14 under the Convention, international customary law or a general principle of law.
15

16 Mr President, Members of the Special Chamber, I shall conclude by turning to the
17 assertion that Equatorial Guinea allegedly failed to fulfil its obligation of prompt
18 release under the Convention or general international law.⁸⁸
19

20 This argument fails for a significant number of reasons similar to those that I have
21 already referred to concerning the notification obligation. I refer, therefore, to the
22 arguments I have already set out and also to my written submissions and, therefore,
23 Mr President, I shall restrict myself to a brief response on this matter.
24

25 Firstly, the Marshall Islands acknowledges that "[t]here is no express provision in the
26 Convention requiring prompt release and without undue delay" that could be applied
27 in this instance.⁸⁹
28

29 The Marshall Islands attempts to establish that there is an obligation of prompt
30 release under international customary law or general principles of law but in vain.
31

32 The elements and sources cited by the Marshall Islands do not meet the requirement
33 of a norm under international customary law or a general principle of law.
34

35 Moreover, I should underline the fact that adopting such a general obligation of
36 prompt release under international law would result in voiding the specific provisions
37 of the Convention relating to this procedure.
38

⁸⁵ Witness statement of William Gallagher, 17 December 2023, RMI 30, para. 27.

⁸⁶ Letter from the Marshall Islands Maritime Administrator to the Governor of Luba, 16 August 2022, SA 6; Letter from the Marshall Islands Maritime Administrator to the Chief of Naval Staff at the Nigerian Navy Headquarters, 18 August 2022, SA 7; Letter from the Marshall Islands Maritime Administrator to the Attorney General of Equatorial Guinea, 26 August 2022, SA 9; Letter from the Marshall Islands Maritime Administrator to the Director General of NIMASA, 30 August 2022, SA 10; Letter from the Marshall Islands Maritime Administrator to the Attorney General of Equatorial Guinea, 13 September 2022, SA 11; Letter from the Marshall Islands Maritime Administrator to the Attorney General of Equatorial Guinea, 18 October 2022, SA 15.

⁸⁷ Counter-Memorial, paras. 302-309.

⁸⁸ Memorial, paras. 356-387; Rejoinder, paras. 263-268.

⁸⁹ Memorial, para. 358.

1 Furthermore, international law does not provide for any general obligation to release
2 a vessel that has been intercepted on the basis of a reasonable suspicion of piracy
3 before the vessel's conduct has been definitively established. On the contrary,
4 international law, including the Convention, lays down obligations to curb piracy
5 which, in this case, was incompatible with the prompt release of the vessel.
6

7 For all these reasons, Equatorial Guinea asserts that it has not breached any
8 obligation of prompt release.
9

10 Mr President, Members of the Special Chamber, this concludes my observations for
11 today and I should like to thank you for your attention. It may be that it is a good
12 moment for us to break for coffee, Mr President.
13

14 **THE PRESIDENT OF THE SPECIAL CHAMBER:** *(Continued in English)* Thank you,
15 Ms Lavaud. I believe it is; it may be an appropriate time for us to withdraw for a
16 break of 30 minutes. So we will resume, the hearing will resume at 11.45 a.m.
17

18 *(Adjourned at 11:13 a.m. to 11:45 a.m.)*
19

20 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Mr Akande, you have the floor.
21

22 **MR AKANDE:** Thank you very much, Mr President. In my speech this morning, while
23 going into this afternoon, I will first address the merits of the argument of the
24 Marshall Islands that Equatorial Guinea has breached obligations under international
25 law that are external to the UN Convention on the Law of the Sea. In particular, I will
26 address the arguments that Equatorial Guinea acted in violation of human rights
27 treaties and that its conduct was in breach of its obligations under the IMO
28 instruments. Following this consideration of obligations external to UNCLOS, my
29 second task will be to make some brief submissions on the Marshall Islands'
30 arguments that Equatorial Guinea breached what it describes as an obligation not to
31 aggravate the dispute pending proceedings.
32

33 Members of the Chamber, I begin with the human rights claims, and, with your
34 indulgence, I would like to reiterate a few points that Equatorial Guinea made
35 yesterday with regard to jurisdiction, applicable law, and admissibility as they
36 specifically concern the human rights claims, just to give an overview of our
37 arguments.
38

39 First, in its human rights claims, the Marshall Islands is seeking determination of
40 breaches of treaties other than UNCLOS, and we argue that these claims fall outside
41 the jurisdiction of the Chamber.
42

43 Second, the so-called gateway provisions relied upon in relation to the human rights
44 claims – particularly Articles 2(3), 87, 56(2) and 58(2) – do not, in our view, open the
45 gate for incorporation and application of all rules of international law. These
46 provisions, we say, relate only to those rules which impose limitations specific to that
47 zone in question and some general rules of international law. That was our second
48 argument.
49

1 Our third point was that, while the applicable law before this Chamber may include
2 other rules of international law that are to be used in the interpretation and
3 application of the Convention, those specific rules must, in fact, be applicable to the
4 situation at hand. We say that this means two things: (a) that the provision of the
5 Convention sought to be applied must be applicable; and that (b) the other rule of
6 international law must be relevant to that situation.

7
8 Then fourthly, Ms Lavaud showed you why the Marshall Islands' human rights claims
9 are inadmissible; because there was no exhaustion of the local remedies that
10 Mr Moro demonstrated were, in fact, available in Equatorial Guinea. That is what we
11 argued yesterday.

12
13 Now, before I turn to the merits of the human rights claims, I would like to make a
14 further point which we consider to be important. When we argue that this Tribunal
15 does not have jurisdiction to deal with claims for the violations of human rights law,
16 or that the human rights claims must be limited in the ways that I will get to shortly, or
17 even that the local remedies must be exhausted before claims are brought, this
18 is not because Equatorial Guinea seeks to run away from defending its treatment of
19 the individuals in question. Very far from it. Equatorial Guinea maintains that they
20 were treated with humanity and decency at all times. And you heard this morning
21 these arguments from Professor Haeri. Yesterday, you heard the testimony of
22 Mr Hernández Martín.

23
24 Equatorial Guinea submits these arguments about the jurisdiction of the Tribunal,
25 issues of admissibility, and the questions of when external rules are applicable,
26 because there are important systemic questions at hand regarding the integrity of the
27 Convention, and the role of dispute settlement under Part XV. You are the guardians
28 of the integrity of this system and of the Convention. All States have a legitimate
29 interest, together with you, in ensuring the proper interpretation of the Convention.
30 These are not just matters about the application of human rights law in interpreting
31 the Convention; they raise significant questions of jurisdiction and of methodology
32 with regard to applicable law in cases brought before tribunals exercising jurisdiction
33 under Part XV.

34
35 With all of that as background, I now turn to the human rights claims. Members of the
36 Chamber, the Marshall Islands claims that it is not asking the Chamber to find
37 breaches of the human rights treaties, but only, it says, seeks findings of breaches of
38 UNCLOS. Reference is made in particular to Articles 2(3), 87, 56(2) and 58(2). As
39 I argued yesterday, we disagree with the Marshall Islands' characterization of its
40 claims, but if the Marshall Islands is right on this point, and we are wrong on the
41 second point that I summarized, we come to the third point.

42
43 The arguments that I am going to make today relate to that third point: The
44 provisions of UNCLOS that are sought to be applied must be relevant and the
45 external law invoked as having an effect in the interpretation and application of the
46 Convention provisions must be applicable.

47
48 If the Marshall Islands is, in fact, only seeking determinations of violations of
49 UNCLOS provisions, that characterization has significant consequences. Its human
50 rights claims must then be limited to allegations of violations of human rights at sea.

1 This, Members of the Chamber, is the first substantive point on the merits regarding
2 the territorial scope of human rights law.

3
4 If the Marshall Islands is right on jurisdiction and on applicable law, we need to see
5 whether the law is applicable and, indeed, applicable *ratione loci*. Both the UNCLOS
6 provisions that they referred to, and the human rights treaties themselves, have
7 limitations regarding their territorial scope. The UNCLOS provisions are, of course,
8 limited to acts occurring at sea, and in specific locations. We'll take those UNCLOS
9 provisions one by one, before we then turn to the human rights treaties.

10
11 Let's start with the claim under Article 87 relating to freedom of navigation on the
12 high seas. If the claim is that Equatorial Guinea, in exercising its freedom of
13 navigation, did not do so under conditions laid down by human rights treaties, or that
14 it failed to respect the interests of the Marshall Islands in its exercise of freedom of
15 navigation, we submit that this can only relate to matters taking place on the high
16 seas (or in the EEZ, where, of course, freedom of navigation also applies).

17
18 Similarly, if the claim is that Equatorial Guinea, in engaging in activities in the EEZ,
19 did not give due regard to the rights of the Marshall Islands with regard to the human
20 rights of the crew, then that claim can also only relate to conduct that took place in
21 the EEZ.

22
23 In short, with respect to the Marshall Islands' claims under Articles 56, 58, and 87
24 relating to human rights, the alleged human rights violations must relate to the
25 events that occurred solely on 12 and 13 August 2022. It was only on those days
26 that Equatorial Guinea was undertaking any activities in the EEZ or on the high seas,
27 which could then have engaged those provisions of UNCLOS.

28
29 The Marshall Islands, in a footnote in its Reply,⁹⁰ suggests that Article 87 may be
30 applicable and breached, not only by conduct on the high seas, but also by conduct
31 in respect of the high seas. They point to a statement made by the Tribunal in
32 *M/V "Norstar"* which notes that freedom of navigation on the high seas will be
33 violated where a State extends its laws to activities of foreign ships on the high seas,
34 even if enforcement takes place in internal waters.⁹¹ That was simply a statement
35 that an exercise of prescriptive jurisdiction which seeks to regulate conduct on the
36 high seas can still be a breach of Article 87.

37
38 The idea that exercising prescriptive jurisdiction over conduct that takes place on the
39 high seas can be a breach of Article 87 has nothing to do with an assertion that acts
40 carried out on land or in another zone amount to a violation of freedom of navigation
41 on the high seas. What the Tribunal said in *"Norstar"* relates to acts which deal with
42 or seek to effect conduct on the high seas. Any violation of the obligation to respect
43 freedom of navigation must relate to the interference on the high seas.
44 Consequently, any human rights claims that are said to be part of that interference
45 must also be so limited. The human rights violations that constitute interference must
46 take place on the high seas.

47

⁹⁰ Reply of the Marshall Islands, footnote 419.

⁹¹ *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, para. 226.

1 Permit me also to recall that the claim, or at least part of the claim of the Marshall
2 Islands under Article 87, is that Equatorial Guinea, in the exercise of its freedom of
3 navigation (Equatorial Guinea's freedom of navigation) has not acted in accordance
4 with the rules of international law, and has not paid due regard to the rights of the
5 Marshall Islands. Clearly, Equatorial Guinea only exercises its freedom of navigation
6 on the high seas or in the EEZ.

7
8 For the avoidance of doubt, the same goes for the EEZ, *mutatis mutandis*. The
9 arbitral tribunal in *Enrica Lexie* was crystal clear on precisely this point in relation to
10 Articles 56 and 58. Italy made the same arguments that the Marshall Islands now
11 seeks to make – that through the due regard provisions in Articles 56 and 58, other
12 rules of international law applied in relation to enforcement action taken on land,
13 after the interference in the EEZ. In that case, *Enrica Lexie*, it was argued by India
14 that the rules on State immunity should be applied. Here, it is argued that Equatorial
15 Guinea has breached human rights treaties. The tribunal in the *Enrica Lexie* case
16 held that the violations of the other rules of international law invoked could not be
17 applied because “those Articles are not pertinent and applicable in the present
18 case.”⁹² And why not? They were not pertinent because the relevant acts relating to
19 detention did not occur in the zones that those articles apply to. The tribunal went on
20 to say:

21
22 Article 2, paragraph 3, 56, paragraph 2, 58, paragraph 2, apply to the exercise
23 of rights and duties in the territorial sea and the exclusive economic zone by
24 the coastal States, while the evidence in the present case demonstrates that
25 India enforced its jurisdiction over the Marines only in its internal waters and
26 on land, when the Marines were arrested and detained.⁹³

27
28 That leaves the human rights claims under Article 2(3). Article 2(3), of course, deals
29 with matters in the territorial waters of Equatorial Guinea.

30
31 Members of the Chamber, let me again, with your indulgence, recall that our primary
32 argument is that Article 2(3) does not grant you jurisdiction to consider these human
33 rights claims. We argue that when Article 2(3) provides that “sovereignty over the
34 territorial sea is exercised subject to this Convention and to other rules of
35 international law”, this does not grant this Tribunal jurisdiction to adjudicate on all
36 violations of international law committed by the coastal State in the territorial sea. In
37 this regard, there is nothing special about human rights treaties. If that provision
38 gives jurisdiction over alleged human rights violations, why not all treaties or any
39 other treaty? That is our primary argument.

40
41 However, even if this argument that Article 2(3) suffices, or does not suffice, to give
42 you jurisdiction, even if that argument is not right, and if they are right, that
43 Article 2(3) does suffice to give you jurisdiction in considering any violation by the
44 coastal State of international law in the territorial sea, this will also have
45 consequences. It means that the human rights claim, in relation to the crew detained
46 on land, cannot be considered – or cannot be covered by this provision – and it
47 would fall outside your jurisdiction. After all, the law relating to the exercise of
48 sovereignty in the territorial sea does not apply on land. You already saw this clearly

⁹² *The “Enrica Lexie” Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 798.

⁹³ *The “Enrica Lexie” Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 798.

1 and expressly stated in the *Enrica Lexie* case. Thus, all that you heard about the
2 conditions in the detention facility, which was on land, is irrelevant to the claims that
3 it is argued you have jurisdiction over. And this is taking the Marshall Islands' case at
4 its best.

5
6 You will notice that you heard precious little about conditions of detention on the
7 vessel itself because, of course, the crew were on their vessel, where they would
8 normally spend significant periods of time at sea. Indeed, in its Memorial, the
9 Marshall Islands' claims relating to cruel, inhuman and degrading treatment and
10 imprisonment and/or failing to treat the crew with humanity and detention are set out
11 almost entirely in relation to the detention facility.⁹⁴

12
13 Finally, even in relation to the vessel, it is very odd that the Marshall Islands relies on
14 Article 2(3), but does not, in fact, make any explicit claim that the vessel, which was
15 at all times anchored in Luba Bay, otherwise known as the Bay of San Carlos, does
16 not make any explicit claims that the vessel was in the territorial sea of Equatorial
17 Guinea, rather than in the internal waters of the Bay.

18
19 Members of the Chamber, my second substantive point relating to the merits also
20 relates to the territorial scope of the human rights claims. However, my focus now
21 shifts to the human rights treaties themselves. My point is this: the Marshall Islands
22 seeks to apply the human rights treaties to conduct of Equatorial Guinea outside of
23 its territory, but without demonstrating how these treaties apply extraterritorially. With
24 respect to Articles 87, 56, 58, any claim of breaches of human rights treaties relates
25 necessarily to conduct which occurred outside the territory of Equatorial Guinea. For
26 the human rights treaties in question to apply to that conduct and in relation to that
27 period of time, it would have to be shown that these treaties apply extraterritorially to
28 the acts of Equatorial Guinea. This is important, because many human rights treaties
29 have provisions that deal with their territorial scope of application. I take just the
30 ICCPR, Article 2(1) of which provides:

31
32 Each State Party to the present Covenant undertakes to respect and to ensure
33 to all individuals within its territory and subject to its jurisdiction the rights
34 recognized in the present Covenant....⁹⁵

35
36 The question of when these treaties apply extraterritorially has been a fraught one in
37 the jurisprudence of human rights tribunals. Yet, the Marshall Islands has not
38 addressed this issue. It passes over it in silence. The jurisprudence of some human
39 rights tribunals, like the European Court of Human Rights, on these matters is, to say
40 the least, confused and confusing. I make this point not to address the issue in
41 detail, but just to note that, if this was a matter that came before a human rights
42 tribunal, this would be the very first question to be addressed, and yet the party that's
43 making the claim here has not addressed it at all.

44
45 There was a passing reference made on Wednesday to a decision of the European
46 Court of Human Rights relating to confinement of a ship that was intercepted and

⁹⁴ Memorial of the Marshall Islands, para. 281(d).

⁹⁵ Emphasis added.

1 escorted to port by a navy vessel,⁹⁶ but no discussion of the significance of the
2 extraterritoriality point in that case. I just wish to note that in that case that was
3 referred to – and this may have been relevant to whether the individuals in question
4 were subject to the jurisdiction of the State on the high seas, and thus within the
5 scope of the human rights treaty, so jurisdiction for the human rights purposes – the
6 State deployed guards on the vessel throughout its journey to port.

7
8 Mr President, Members of the Chamber, permit me now to turn to the Marshall
9 Islands' claims that Equatorial Guinea has breached obligations under various
10 instruments adopted under the auspices of the IMO. In particular, the Marshall
11 Islands seeks findings of violations of the Convention for the Safety of Life at Sea
12 (SOLAS), the International Convention on Standards of Training, Certification and
13 Watchkeeping for Seafarers (the STCW), and the Convention on the International
14 Regulations for Preventing Collisions at Sea (the COLREGs) and, once again, I will
15 refer to them collectively as "the IMO instruments".

16
17 Now, the Marshall Islands argues that the Chamber has jurisdiction over these
18 instruments through Article 297(1)(c) of the Convention. It also argues that this
19 provision confers jurisdiction on the Chamber such that claims can be made
20 independently of UNCLOS. As I pointed out yesterday, this is not, in fact, what the
21 wording of Article 297 says. As I showed you, that provision, the text of it, still only
22 relates to disputes concerning interpretation or application of the Convention; though
23 I accept that if there is jurisdiction, paragraph 1(c) allows for determination in relation
24 to breaches of the external rules.

25
26 Now, although the Convention, and Article 297(1)(c) in particular, does allow for the
27 application of certain external rules, it remains important to determine the precise
28 obligations for States Parties to the Convention by a proper interpretation both of the
29 relevant provisions of the Convention and the external rules referred to. The
30 so-called "gateway" provisions do not simply incorporate external rules into the body
31 of the Convention "wholesale", so that those external rules may be invoked in a
32 general manner without tying them back to the relevant provisions that refer to them,
33 and irrespective of their actual text.

34
35 Let us now examine the particular claims that the Marshall Islands makes under the
36 IMO instruments. Our submission is that these instruments cannot form the basis of
37 claims against coastal or port States – and that is so by their own terms. Rather,
38 these instruments impose obligations on flag States to ensure that ships flying their
39 flag comply with the various rules and regulations contained therein.

40
41 Let me now turn, Mr President, Members of the Chamber, to whether the external
42 provisions invoked by the Marshall Islands may be seen, even at their most general
43 reading, as applicable to the situation at hand, and, if so, breached in this instance.

44
45 Let's start with SOLAS. The Marshall Islands invokes Article I of SOLAS, which is
46 entitled "General obligations under the Convention". Particular reference is made to
47 paragraph 1(b):

⁹⁶ *Case of Medvedyev and Others v. France*, Application no. 3394/03, Judgment, 29 March 2010, para. 74.

1
2 The Contracting Governments undertake to promulgate all laws, decrees,
3 orders and regulations and to take all other steps which may be necessary to
4 give the present Convention full and complete effect, so as to ensure that,
5 from the point of view of the safety of life, a ship is fit for the service for which
6 it is intended.
7

8 The Marshall Islands seeks to derive two points from this provision, and, in our view,
9 both of them are wrong.
10

11 First, it argues that this “general obligation” does not purport to prescribe the specific
12 steps that a party must take, because it includes a duty “to take all other steps”.⁹⁷ In
13 this way, the Marshall Islands suggests that the obligation may be violated without
14 reference to any other specific provision of the SOLAS Convention or of the annexes
15 which constitute “an integral part” of the Convention.
16

17 Second, the Marshall Islands argues that this general obligation applies to a party
18 with control and custody of a vessel.⁹⁸
19

20 However, each of these arguments is incorrect, and in combination, if they were
21 correct, this would have serious consequences for the SOLAS regime. The first
22 argument, that the general obligation may be violated without reference to the
23 specific provisions of SOLAS, is plainly incorrect, as it would render the rest of the
24 SOLAS Convention redundant. If that general obligation is seen simply as an
25 obligation to take any and all conceivable steps to ensure that, from the point of view
26 of safety of life at sea, a ship is fit for service, why do we have the remaining
27 500 pages of the SOLAS Convention and Annexes?
28

29 Article I(b) is doing something different. It merely indicates that, in implementing the
30 Convention, in other words, the specific obligations under the Convention, as laid
31 down in the substantive provisions of the Convention, States must exercise
32 legislative and, more generally, regulatory power within their domestic jurisdiction in
33 order to pass the relevant legislation and regulations that may be required to give
34 effect to the Convention.
35

36 And, furthermore, States Parties must exercise executive authority within their
37 domestic jurisdiction to take the necessary steps to implement the specific obligations
38 under the Convention.
39

40 In other words, Article I(b) is nothing other than a confirmation, for the avoidance of
41 doubt, that the SOLAS Convention imposes significant obligations on States Parties
42 that require action within their domestic jurisdiction and not (solely) at the inter-State
43 level. That provision thus cannot be read in isolation. Rather, it must be related, each
44 and every time, to a specific substantive obligation under the Convention, in order to
45 show that the State Party did not (sufficiently or properly) exercise its domestic
46 jurisdiction in order to comply with obligation x or under provision y.
47

⁹⁷ Reply of the Marshall Islands, para. 232(c).

⁹⁸ Reply of the Marshall Islands, para. 232(c).

1 It follows that, even if the Special Chamber had the jurisdiction to determine a breach
2 of SOLAS and a breach of Article I(b), it could not find that breach without relating it
3 to a specific obligation under some regulation in the Annex. No serious argument
4 has been heard as to such a breach.

5
6 The second argument that the Marshall Islands seeks to make from Article I(b), that
7 the general obligation applies to States with custody and control of a vessel, is also
8 wrong. It is not at all clear where the test supposedly comes from. In the main,
9 SOLAS clearly imposes obligations on flag States. Article II provides that “[t]he
10 present Convention shall apply to ships entitled to fly the flag of States the
11 Governments of which are Contracting Governments”.

12
13 Then the annexes typically impose obligations on the administration, with
14 Regulation 2(b) of Chapter 1 of the Annex stating “Administration’ means the
15 Government of the State whose flag the ship is entitled to fly”. In short, SOLAS
16 mainly imposes obligations on flag States and there is no general obligation imposed
17 on States because they have custody and control of the vessel. If that were the case,
18 the specific obligations that SOLAS imposes on port States, and there are some
19 obligations that are specifically imposed on port States – if it was the case that there
20 was this more general obligation – those would, in fact, be meaningless.

21
22 Individually, and especially in combination, the approach to the interpretation of
23 SOLAS suggested by the Marshall Islands unpicks the carefully constructed and
24 detailed rules of the Convention.

25
26 Mr President, Members of the Chamber, let me turn to the STCW. Much of the same
27 analysis as I have just offered on the SOLAS Convention is also applicable to the
28 argument that the Marshall Islands makes under the STCW Convention.

29
30 In particular, and just as with respect to SOLAS, the Marshall Islands claims that
31 Equatorial Guinea breached the obligation under Article I(2) of the STCW
32 Convention. Again, like SOLAS, Article I of the STCW is entitled “General obligations
33 under the Convention”. Paragraph 2, is pretty much the same:

34
35 The Parties undertake to promulgate all laws, decrees, orders and regulations
36 and to take all other steps which may be necessary to give the Convention full
37 and complete effect, so as to ensure that, from the point of view of safety of
38 life and property at sea and the protection of the marine environment,
39 seafarers on board ships are qualified and fit for their duties.

40
41 As you can see, this provision is almost identical to I(b) of SOLAS. If I am correct in
42 my reading of that provision of SOLAS, then a similar reading of this provision is
43 called for.

44
45 What is more, this particular Convention, the STCW, provides specifically for
46 seafarers on board ships to be qualified and fit for their duties. This obligation, of
47 course, falls primarily on the flag State, hence Article II(b) of the Convention defines
48 again as “Administration” “the Government of the Party whose flag the ship is entitled
49 to fly”. It is upon that State that obligations to ensure that seafarers are qualified and

1 fit for duty fall – port States being limited, by virtue of Article X of the Convention, to
2 controlling certification or dispensation on board vessels in port.

3
4 It is thus difficult to conceive how Equatorial Guinea could have breached any
5 provision of the STCW Convention in the case at hand. It is impossible to argue that
6 it has breached Article 1(2) of the Convention in isolation.

7
8 Members of the Chamber, I now turn to the COLREGs. I am afraid, however, that
9 I may have given the game away by now. Surely, you already know what's coming.

10
11 Unsurprisingly, the Marshall Islands claims a breach of Article 1 of the COLREGs
12 which provides:

13
14 The Parties to the present Convention undertake to give effect to the Rules
15 and Annexes constituting the International Regulations for Preventing
16 Collisions at Sea.

17
18 As already discussed, this provision cannot be breached independently, much like
19 the equivalent provisions of the SOLAS and the STCW Conventions. Surprisingly,
20 though, the Marshall Islands seems to accept that this is the case with respect to the
21 COLREGs, as it is more specific in its claims under the COLREGs than it is with
22 respect to SOLAS and the STCW. Be that as it may, this time the Marshall Islands
23 does not claim the breach of only a general obligation, but it seeks to buttress this
24 with reference to specific rules, Rules 2, 6, 7 and 8 of the COLREGs.

25
26 However, there is little in the way of argument as to how Equatorial Guinea may be
27 seen to have violated any of these Rules on 'Responsibility', or 'Safe Speed', 'Risk of
28 Collision', 'Action to Avoid Collision'. In particular, there is no indication that the
29 "*Wele Nzas*" did not adhere to the requirements of proceeding at a safe speed, did
30 not use all available means to determine if a risk of collision exists, and did not take
31 action, indeed successful action, to avoid any collision.

32
33 To conclude on this point, it is evident that Equatorial Guinea did not – indeed could
34 not – breach Article 1 of the COLREGs in isolation. Further, there is no evidence that
35 it violated Article 1 in conjunction with Rules 2, 6, 7 and 8. In particular, there is no
36 evidence that Equatorial Guinea had failed to give effect to the Rules, nor is there
37 any evidence that any of those specific Rules were violated simply because a
38 collision might have happened, but it did not, because – if there was a risk of it
39 happening – it was prevented.

40
41 Members of the Chamber, to conclude these arguments with respect to the IMO
42 instruments, Equatorial Guinea submits that the obligations invoked by the Marshall
43 Islands under SOLAS, the STCW and the COLREGs are either not applicable as
44 pleaded or they cannot have been breached in isolation or, indeed, they were not
45 breached in this instance.

46
47 Let me now turn to one final substantive claim of the Marshall Islands, namely, the
48 obligation not to aggravate the dispute.
49

1 The Marshall Islands argues that there is a freestanding, general duty of
2 non-aggravation of a dispute, in particular where that dispute is, in one way or
3 another, pending before an international court or tribunal. The Marshall Islands
4 argues that Equatorial Guinea breached this obligation by handing over control and
5 custody of the vessel and crew to Nigeria on 11 November 2022, after the Marshall
6 Islands had made an application to ITLOS under Article 292 for prompt release of
7 the vessel and crew, and after the application had been communicated to Equatorial
8 Guinea.

9
10 It is notable that the Annex VII tribunal in the *South China Sea* arbitration which
11 outlined this general duty, indicated that

12
13 when a court or tribunal issues provisional measures directing a party to refrain
14 from actions that would aggravate or extend the dispute, it is not imposing a
15 new obligation on the parties, but rather recalling to the parties an obligation
16 that already exists by virtue of their involvement in the proceedings.⁹⁹

17
18 Whether or not such a general duty of non-aggravation does in fact exist in
19 international law, the content of the duty should be informed by the criteria that
20 tribunals, including this one, would apply were they seized with a request for
21 provisional measures, which of course could be a specific request that a party refrain
22 from aggravating or extending the dispute. The reason why the content of the duty
23 not to aggravate, if it exists, should be informed by the conditions of provisional
24 measures, is because an indication of provisional measures not to aggravate or
25 extend the dispute, is said to be just an application of the general duty. That is what
26 the tribunal said in the *South China Sea*, that it is just an application of the general
27 duty, which it is argued is derived from general international law.

28
29 A court or tribunal constituted under Part XV may prescribe “any provisional
30 measures which it considers appropriate under the circumstances to preserve the
31 respective rights of the parties to the dispute”.¹⁰⁰ That’s Article 290(1) of the
32 Convention. “Any provisional measures which it considers appropriate under the
33 circumstances to preserve the respective rights of the parties to the dispute.” This
34 reference to the respective rights of the parties was considered as particularly
35 relevant by this Tribunal in the “*San Padre Pio*” Provisional Measures order.¹⁰¹
36 Institution of dispute settlement proceedings does not entitle one side to simply deny
37 to the other side rights that the other side would otherwise have. Institution of
38 proceedings is not – and should not be made into – a means of just freezing the
39 situation in order to prevent a party from engaging in lawful acts. In this particular
40 case, Equatorial Guinea’s obligations to cooperate in the repression of piracy did not
41 cease or become non-existent the day the Marshall Islands filed prompt release
42 proceedings.

43
44 Further, had the Marshall Islands brought a request for a prescription of
45 non-aggravation as a provisional measure, it would have had to show that the rights

⁹⁹ *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, PCA Case No. 2013-09, Award, 12 July 2016, para. 1169 (emphasis added).

¹⁰⁰ Emphasis added.

¹⁰¹ *M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019*, p. 375, para. 139.

1 which it sought to protect in that main claim are plausible.¹⁰² It is uncertain how a
2 determination on this question would have come out, given that prompt release
3 proceedings were initiated in a case where there were no allegations of infringement
4 of either fisheries or environmental laws and regulations.

5
6 What a duty of non-aggravation entails in terms of concrete action is far from
7 self-explanatory. The Marshall Islands would have you believe that it requires
8 complete standstill. But that is borne out neither from general international law, nor
9 from the practice of international courts and tribunals who do not just indicate
10 provisional measures of non-aggravation in every case, but who consider the
11 respective rights of the parties and what is appropriate in the circumstances.

12
13 Mr President, Members of the Chamber, just as Equatorial Guinea's rights and
14 Equatorial Guinea's obligations would have had to be taken into account had
15 provisional measures of non-aggravation been requested, such rights and such
16 obligations also have to be taken into account in trying to give content to what a duty
17 of non-aggravation entails. Plainly, the general duty of non-aggravation, if it exists,
18 does not exist as a trump card allowing one side to file proceedings and demand a
19 standstill which has consequences for the rights and the obligations of the other
20 party. Thus, just as it was not certain that a tribunal would order that Equatorial
21 Guinea keep in custody the detained vessel and crew, it cannot be said that
22 Equatorial Guinea has breached obligations of non-aggravation.

23
24 Mr President, this concludes my submissions on behalf of the Republic of Equatorial
25 Guinea. I thank you for your kind attention, and I think it concludes our submissions
26 also for this session, if that is acceptable to you.

27
28 **THE PRESIDENT OF THE SPECIAL CHAMBER:** Thank you, Mr Akande, and of
29 course if it is the wish of Equatorial Guinea to resume in the afternoon, this brings us
30 to the end, then, of this morning's session and the hearing will be resumed at 3 p.m.
31 This sitting is now closed.

32
33 *(Adjourned at 12.32 p.m. to 3:00 p.m.)*

¹⁰² *M/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019, p. 375, para. 77-110.*