

DECLARATION OF JUDGE AD HOC COUVREUR

1. I have concurred willingly with several significant decisions of the Special Chamber in this somewhat unique case that arose from a series of unfortunate misapprehensions. The Judgment handed down today is paramount in that it strikes a careful balance between the critical need, on the one hand, to safeguard the most fundamental freedom in the law of the sea – the freedom of navigation on the high seas (with the correlative rights deriving therefrom for the flag State) – and, on the other hand, to effectively counter the oldest form of international crime, *viz.*, piracy.

2. The Special Chamber, akin to many other bodies, recognizes that serious threats loom over the freedom of navigation and the development of States bordering the Gulf of Guinea on account of the repeated acts of piracy committed in those waters in recent years. In so doing, the Special Chamber brings to the fore the importance of the close cooperation between these States in their efforts to eradicate this scourge, in particular under the Yaoundé Code of Conduct. At the same time, the Chamber also rightfully lays emphasis on the fact that cooperation to prevent and repress the criminal acts referred to in this Code must, as expressly stated in its article 2, be consistent with “applicable rules of international law”, which include those of the United Nations Convention on the Law of the Sea (UNCLOS); measures taken pursuant to the Yaoundé Code to counter the various crimes committed in the Gulf must therefore remain compatible at all times with the Convention, not least where, as in the instant case, they affect the freedom of navigation on the high seas of ships flying the flag of non-signatory States to the Code. Ultimately, the heart of the case lay therein.

3. On 8 August 2022, the Marshall Islands-flagged “*Heroic Idun*” engaged in conduct in the exclusive economic zone of Nigeria that could have reasonably been construed as unusual. At the request of Nigeria, Equatorial Guinea intercepted the “*Heroic Idun*” on 12 August while the ship was in the exclusive economic zone of São Tomé and Príncipe, or – for the purposes of the case at hand – on the high seas. Equatorial Guinea then compelled it and its crew to proceed, under armed

escort, to the Equatoguinean Luba Freeport, where the ship would remain in detention for 92 days before being transferred to Nigeria, at the request of the latter, on 11 November 2022. To account for its actions, Equatorial Guinea claimed that it had legitimate suspicions of piracy on the basis of UNCLOS. The Special Chamber scrutinized all the information available to it and was unable to identify sufficient evidence in the case file that might have substantiated such suspicions. Admittedly, in the messages it sent to Equatorial Guinea to request its cooperation under the Yaoundé Code, Nigeria had reported that the “*Heroic Idun*” “came to load crude without approval” in the Akpo Offshore Terminal and that it was “suspected of being involved in an illegal fuel supply operation”;¹ and such supply operation could have been part of an act of piracy within the meaning of article 101 (c) of UNCLOS (any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)), especially since the practice of refuelling by mother ships was not uncommon in the region. That being so, Equatorial Guinea could have reasonably believed that it was incumbent upon it to comply with the request of its powerful neighbour, likewise signatory to the Yaoundé Code, and that its actions would thus be legitimate; the Special Chamber in fact noted Equatorial Guinea’s “zero tolerance” policy on acts of piracy. This notwithstanding, at no time whatsoever did Nigeria make any reference to acts of piracy – or even the suspicion of such acts – in its various communications requesting the arrest of the “*Heroic Idun*”, whose physical characteristics (size, speed, etc.) would have anyhow made it unlikely to have been able to play a role as a mother ship. Equatorial Guinea does not seem to have conducted any specific investigations itself into the suspected acts of piracy once the ship was detained in Luba Freeport (even if, at the completion of its own investigation into the alleged violation of its merchant marine laws, it “joined” the investigation into the events of 8 August conducted by Nigerian officials in Luba and Malabo). It is plausible that Equatorial Guinea acted under time pressure, without ever conceiving, given the agreements between the two States, that Nigeria’s request for the ship’s apprehension could have been leading it to commit an unlawful act. Nevertheless, I am of the opinion, along with the Special Chamber, that the utmost caution is necessary when the freedom of navigation on the high seas of a ship flying the flag of a third State is at issue, and that Equatorial Guinea itself should have carried out

¹ See paragraph 183 of the Judgment.

the necessary verifications before undertaking actions that could undermine such a fundamental freedom. Again, whatever the particular circumstances might have been to explain the missteps of the authorities of Equatorial Guinea in the present case, in my view it was crucial for the Chamber to reiterate as clearly as possible, as a matter of principle, the strict limits within which measures to repress piracy on the high seas must be circumscribed.

4. Equatorial Guinea, referring to the well-known decision of the International Court of Justice in the case concerning *Monetary Gold removed from Rome in 1943*, argued in the instant case that the Special Chamber was precluded from exercising its jurisdiction to examine the lawfulness of Equatorial Guinea's arrest of the "*Heroic Idun*" because this had been done at the request of Nigeria, a third party to the proceedings; furthermore, any ruling on this arrest would automatically entail a judgment on the lawfulness of the request triggering that act, in such a way that the rights of Nigeria would, in part, be the subject matter of the case without Nigeria's consent. I subscribe to the Special Chamber's finding that the *Monetary Gold* principle is not applicable to the question of the arrest of the "*Heroic Idun*"; the assessment of the lawfulness of Nigeria's request, on the one hand, and that of the lawfulness of the ship's arrest, on the other, are – absent any allegations of coercion on the Government of Equatorial Guinea in this context – clearly separable. It seemed to me that the material and logical "distance" between the acts at issue was sufficient to enable the Chamber to make a ruling on the acts of Equatorial Guinea without necessarily having to also adjudicate on those of Nigeria. As delicate as the situation may have been for Equatorial Guinea, faced with Nigeria's exhortations in the specific circumstances recalled above, Equatorial Guinea, as a sovereign State, remained in principle free to choose how it responded to Nigeria's requests. Equatorial Guinea appears to have acted as it did of its own full accord, and the ensuing consequences under applicable law have no bearing on any legal characterization of Nigeria's conduct.

5. That being said, I unfortunately cannot align myself with the Special Chamber when it decides that this finding disposes of the question whether the *Monetary Gold* principle is apposite in the present case and rejects on that basis, *in limine* and in full, the objection predicated on that principle raised by Equatorial Guinea. I am of

the view that this principle is particularly germane with regard to the acts carried out in Luba and Malabo after the rather precipitous completion of the investigations by Equatorial Guinea into the alleged offences under its merchant marine laws. It should be recalled that the “*Heroic Idun*” arrived at the Luba anchorage on 13 August 2022, that the crew members were questioned about those offences by the Equatoguinean authorities on 17 August and that these same authorities stated that they had finished their investigation on 23 August. Yet, according to the case file, as of that date, it is the officials sent there by Nigeria who were in control and conducted, in Equatorial Guinea, other investigations into a different matter, i.e., the conduct of the ship and its crew while in the exclusive economic zone of Nigeria on 8 August 2022.² These investigations, which took place subsequently as of late August 2022, were significantly lengthier: the crew members were questioned at least four times (on 31 August, 9 September, 15 September and 20 September 2022) and the inquiries continued on Equatoguinean territory well beyond September 2022. To wit, during the interviews conducted by the Nigerian officials on board the “*Heroic Idun*” on 20 September, these officials stated that the inquiries would continue. Indeed, the Chief Engineer was questioned anew by the staff of the Embassy of Nigeria on 6 November 2022 while he was hospitalized. In addition, the repeated requests by Nigeria for the transfer of the ship and its crew to its territory, together with the extensive exchange of correspondence with the Equatoguinean authorities arising from these requests throughout September and October 2022, testify to the firm resolve of the Nigerian authorities to continue these investigations even further.³ Equatorial Guinea, discreetly represented during the interviews of the crew conducted solely by Nigerian officials, had very quickly been relegated to an essentially passive role – leaving aside the fine imposed on the ship’s Master on 23 September 2022 by the authorities of Equatorial Guinea for violation of its merchant

² It should nevertheless be noted that as of 24 August 2022, Nigeria, “while waiting for the multi-sectorial team of investigators”, appointed the Defence Adviser and the Consul of the Embassy in Malabo “as its representatives in the on-going investigation of the Ship by the Equatorial Guinea Government” (emphasis added) and that, on 29 August, Equatorial Guinea “authorise[d] the incorporation of the Commission that carries out the ongoing investigations on the ship “*Heroic Idun*” ... in favour of [the two officials appointed by Nigeria]” (emphasis added). It seems therefore, at least initially, that combining the investigations of the two States, to a certain extent, was contemplated, which is not devoid of interest for assessing the degree of interdependence between their respective actions.

³ See, for example, the requests from Nigeria dated 12 September, 12 October, 26 October, 31 October and 1 November 2022 (request for mutual assistance).

marine laws, which was paid on 4 October 2022. What follows is already known. The negotiations between Nigeria and Equatorial Guinea culminated in the conclusion of an agreement on 5 November 2022 to transfer the “*Heroic Idun*” and its crew to Nigeria, which included an addendum dated 10 November, at the initiative of Equatorial Guinea, concerning the protection of the crew’s human rights by the Nigerian authorities. The transfer itself occurred on 11 November after two Nigerian warships and tugs had entered the territorial waters of Equatorial Guinea and were kept docked in Luba to prepare the escort operations of the “*Heroic Idun*” to its new destination. The crew members who had been in the detention centre were forcibly transported aboard one of the Nigerian warships, where they spent the night between 10 and 11 November 2022 in conditions described as uncomfortable. Moreover, armed Nigerian guards boarded the “*Heroic Idun*” on 11 November, resorting to different types of threats to make the crew members present start the ship’s engines. A dozen of these armed guards remained on the ship until its arrival in Nigeria.

6. These numerous overlaps between the acts of the Equatoguinean authorities and the acts of the Nigerian authorities in Equatorial Guinea raise a multitude of legal questions. The Judgment of the Special Chamber examines these overlaps purely for the purposes of verifying whether the acts of Nigeria could have interrupted the *causal link* to which regard was had to determine the consequences for Equatorial Guinea of its own acts. The Special Chamber concludes – somewhat evasively – that they could not have, by merely stating, first, that Equatorial Guinea did not appear to have acted under “the direction and control” of Nigeria and that, even if it had, it would not have been exempted from bearing its part of responsibility,⁴ and, second, that the submissions of the Marshall Islands did not call upon the Special Chamber to make findings on the lawfulness of Nigeria’s conduct.⁵ I do not believe it necessary to comment on the validity of the Special Chamber’s findings pertaining to

⁴ Para. 515 and ref. to article 17 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”). The letters sent directly to Nigerian authorities by the Marshall Islands to obtain the release of the “*Heroic Idun*” before its transfer to Nigeria are quite telling. These letters show that the Marshall Islands not only knew that the ship’s prolonged detention was directly linked to the events of 8 August 2022, but that it also suspected that it was Nigeria – rather than Equatorial Guinea – that was in control of the situation.

⁵ Para. 524. It should be noted that this paragraph of the Judgment refers to its paragraph 133, which concerns only the requests initially sent by the Nigerian authorities to the Equatoguinean authorities for the interception and apprehension of “*Heroic Idun*” following the events of 8 August 2022.

the causal link. In my view, the Chamber should not have reached this stage of reasoning in its Judgment since a critical obstacle – the *Monetary Gold* principle – was already barring it from doing so. The discussions of the Special Chamber on the question of the causal link are nevertheless relevant in assessing the effect of the *Monetary Gold* principle on any consideration given by the Chamber, for the purposes of its Judgment, to the events occurring after 23 August 2022 (conclusion of Equatorial Guinea’s investigation), nay 4 October 2022 (payment of the fine).

7. At paragraph 312 of the Judgment, the Special Chamber considers the detention on the high seas of the “*Heroic Idun*” a “continuing wrongful international act” and it recalls that, as stated in article 14, paragraph 2, of the ILC Articles, “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”. If this initial continuing wrongful act had been the necessary, immediate and sole cause of all the unlawful acts attributed to Equatorial Guinea after 23 August/4 October 2022, then the Special Chamber likely would have been able to obviate the need to take a decision in any manner on the lawfulness of the concurrent acts of Nigeria and, thereby, skirt the *Monetary Gold* predicament. But the circumstances here are otherwise. At paragraph 498 of the Judgment, the Special Chamber rightfully acknowledges that “[w]hile it may be posited that none of the damage suffered by the *M/T “Heroic Idun”* and its crew would have happened were it not for Equatorial Guinea’s internationally wrongful acts in unlawfully intercepting and detaining the *M/T “Heroic Idun”* and its crew on 12 August 2022, this does not establish the content of the responsibility or answerability of Equatorial Guinea for all the damage occasioned as a result.” In fact, according to the Judgment, the “unbroken causal chain”, which enables the Special Chamber to attribute to Equatorial Guinea the entirety of the damage suffered by the “*Heroic Idun*” and its crew until 11 November 2022, is based on a series of *disparate* grounds of unlawfulness. The only specific measures referred to in the Judgment as being unlawful solely in relation to the apprehension and detention of the ship and its crew are the “law enforcement measures taken ... with a causal connection subsequent to [these acts ... including] Equatorial Guinea’s transfer of a part of the crew from the vessel and its refusal to allow them back onto the vessel to meet the

minimum safe manning requirements.”⁶ The responsibility imputed to Equatorial Guinea on account of the conditions of the crew’s detention seems rather to derive, according to the Judgment, from humanitarian concerns often cited in international case law; here, a distinct and more specific ground of unlawfulness is identified: “the mistreatment of the crew and the procedural injustices imposed upon them during their detention in Equatorial Guinea, and attributable to the acts and omissions of the Equatoguinean authorities.”⁷ As regards the levying of a fine on the Master of the “*Heroic Idun*”, it is found to be unlawful for other reasons still: the exercise of prescriptive jurisdiction and the taking of enforcement measures inconsistent with other provisions of the Convention.⁸ It is likewise on an unrelated basis, clearly distinct from the initial interception of the ship, on which the Special Chamber relies in its Judgment to attribute to Equatorial Guinea the damage resulting from the acts of Nigeria in Luba and Malabo (in particular, the circumstances in which Nigeria conducted its own investigations and contributed to the protraction of the ship’s detention, as well as the detention of its crew in conditions already denounced): the ground of unlawfulness stated here is the disregard for “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.⁹ Lastly, the Chamber seems to rely, at least implicitly, on the same ground of unlawfulness to make a finding of Equatorial Guinea’s responsibility in the transfer of the ship and its crew to Nigeria, while expressly adding another: the transfer was “forced” and done “without consideration of due process of law.”¹⁰

8. My intention here is not to speak to whether this remarkable array of unlawful acts is compatible with the establishment of an “unbroken” causal link. As I have mentioned earlier, my concern relates to what occurred prior. In light of the foregoing, I find it indeed quite difficult to fathom how the Special Chamber could have reached some of its substantive conclusions on Equatorial Guinea’s responsibility *without necessarily addressing the rights of Nigeria*, a third party to this case, while Nigeria has not consented thereto. Accordingly, it would seem to me that

⁶ Para. 456.

⁷ Para. 413.

⁸ Para. 359.

⁹ Para. 517.

¹⁰ Para. 414. The Judgment does not, however, specify what such “due process of law” should have been.

these conclusions are at odds with the *Monetary Gold* principle which, far from being “in decline”, as may have been asserted,¹¹ remains the cornerstone of the exercise of the jurisdiction conferred on international courts and tribunals *inter partes*, in a broader context still deeply rooted in consensualism.¹² This basic principle, in my opinion, finds application in any examination by the Special Chamber of the events occurring after 23 August/4 October 2022, the reasons for which are briefly presented below.

9. The Chamber evidently would not have been able to hold Equatorial Guinea responsible for allowing Nigeria to use its territory had the use made thereof by the latter been lawful. The *unlawful* nature of Nigeria’s conduct is, in this instance, the *necessary premise* for any claims directed at Equatorial Guinea’s conduct, including those regarding the length of detention of the ship and its crew. Additionally, the facts, as recorded in the case file, confirm in concrete terms the inseparability of the acts at issue of both States, just as of the legal assessment of those acts for determining responsibility. It is hardly in dispute that Equatorial Guinea more than “tolerated”, through some negligence, the acts of the Nigerian authorities on its territory: it lent assistance to Nigeria in its investigations, first by facilitating access to the crew and by being present during the crew’s questioning, and then by detaining the crew on its territory during long negotiations with the Nigerian authorities on the procedure for the transfer of the ship which was meant to enable them to continue and conclude these investigations. That the Marshall Islands, as is reiterated in the Judgment, stated that it was not relying on article 16 of the ILC Articles,¹³ is absolutely immaterial. It is, in any event, irrefutable that the investigations in Equatorial Guinea by the officials of Nigeria were carried out *exactly* under the same conditions as those, more brief, conducted earlier by the officials of Equatorial Guinea – conditions which the Special Chamber unhesitatingly considered wrongful by virtue of the “humanitarian concerns” they raised (circumstances of the detention,

¹¹ The fact that the conditions for the application of the *Monetary Gold* principle were not satisfied in some cases (for example, because the third State in question was deemed to have consented to the judge or arbitrator to pronounce on its conduct (see, for example, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, *Preliminary Objection, Judgment*, *I.C.J. Reports 2023*, p. 292, para. 107) in no way diminishes the essential nature of this principle which, moreover, is reaffirmed at the same time.

¹² See *Monetary Gold removed from Rome in 1943 (Preliminary Question)*, *Judgment of 15 June 1954*; *I.C.J. Reports 1954*, pp. 32-33.

¹³ Para. 523.

lack of guarantees of due process and legal assistance, etc.). It is equally undeniable that Nigeria's investigations played a significant role in the protraction of the detention of the ship and its crew, also found by the Chamber to be non-compliant with minimum standards of humanity. The acts of both States had therefore incontrovertibly become, during the relevant period, not only concurrent and inextricably tied but also strictly interdependent as to their lawfulness which, accordingly, cannot be assessed individually.

10. The same considerations are valid, *mutatis mutandis*, as for the transfer to Nigeria of the ship and its crew on 11 November 2022, insofar as the transfer necessarily implicates the use that Equatorial Guinea permitted of its territory by Nigeria, its warships and its armed guards. But the application of the *Monetary Gold* principle becomes even more crucial here for another reason. The transfer unquestionably constituted a *bilateral* act, and was moreover reported, as has already been recalled, in two documents co-signed by the representatives of both States, on 5 and 10 November, respectively. *Both* parties to the act of transfer and the associated agreements are, by necessity, the *co-perpetrators*. Once again, I struggle to comprehend how a decision on the unlawfulness of Equatorial Guinea's conduct in that regard could be taken without necessarily postulating the unlawfulness of Nigeria's conduct at the same time. Asserting that there was a lack of prior "due process" in the domestic legal system of Equatorial Guinea is of no import. Regardless of whether the transfer of the ship was unlawful on this ground – by reason of the use of the territory of Equatorial Guinea which made it possible or because it was "forced" or done "under duress" – it still remains, in any event, that this transfer was unarguably the act of *both* States and that any decision finding that the transfer was unlawful with respect to the rights of the Marshall Islands directly and automatically affects the rights of Nigeria, without Nigeria's having consented thereto.

11. In conclusion, insofar as the rights of Nigeria constituted the "subject matter of the case", I am of the view that the Special Chamber could not have, nor should have, exercised its jurisdiction over the events occurring after 23 August 2022 or, at

the latest, 4 October 2022.¹⁴ Therefore, I have had to vote against all the decisions of the Special Chamber that relied on its consideration of a 92-day detention period of the ship and its crew. I do, however, agree with the thorough *methodology* applied by the Chamber in its calculation of the various heads of damage and the corresponding interest rates.

(Signed) Ph. Couvreur

¹⁴ The present case is clearly different in this respect from *Certain Phosphate Lands in Nauru*, in which the International Court of Justice considered that it could exercise jurisdiction to make a ruling on the requests by Nauru against Australia without needing to make a finding on the rights of two former administrative powers, New Zealand and the United Kingdom, whose interests could not constitute the subject matter of the judgment to be rendered on the merits (see *Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55). This is because in that case, Australia had, for all practical purposes, *exclusive authority* over the administration of Nauru, as the late Judge Shahabuddeen very convincingly explained in his separate opinion attached to the Court's judgment (*id.*, in particular, pp. 278 *et seq.*).