

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

**THE M/T "*HEROIC IDUN*" (NO 2) CASE**

**REPUBLIC OF THE MARSHALL ISLANDS / REPUBLIC OF EQUATORIAL  
GUINEA**

**COUNTER-MEMORIAL OF THE REPUBLIC OF  
EQUATORIAL GUINEA**

**VOLUME I**

**15 JULY 2024**

**PART I - COUNTER-MEMORIAL  
OF THE REPUBLIC OF EQUATORIAL GUINEA**

# COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

## Table of contents

CHAPTER 1 INTRODUCTION .....	1
CHAPTER 2 EXECUTIVE SUMMARY .....	2
CHAPTER 3 STATEMENT OF RELEVANT FACTS .....	4
I.    The <i>Heroic Idun</i> disobeyed the orders of the Nigerian Navy, fled from the Nigerian Navy and issued a false alarm of piracy .....	4
II.   Equatorial Guinea intercepted and apprehended the <i>Heroic Idun</i> at Nigeria's request.....	6
III.  Nigeria investigated the <i>Heroic Idun</i> and crew while stationed in Equatorial Guinea.....	15
IV.   The crew of the <i>Heroic Idun</i> was treated in accordance with applicable standards at all times .....	19
V.    Equatorial Guinea transferred the <i>Heroic Idun</i> and crew to Nigeria.....	24
VI.   Equatorial Guinea has no knowledge of and is not privy to the details of the stay of the <i>Heroic Idun</i> and its crew in Nigeria.....	28
CHAPTER 4 JURISDICTION AND ADMISSIBILITY .....	30
I.    Several claims in the dispute fall outside the jurisdiction of the Chamber, or in the alternative are inadmissible, due to the <i>Monetary Gold</i> doctrine .....	30
A.   The <i>Monetary Gold</i> principle represents a well-established principle of international law that a tribunal has no jurisdiction or a claim is inadmissible where the rights of another non-participating State would form the subject-matter of the decision.....	31
B.   The rights and interests of Nigeria form the " <i>subject-matter</i> " of several claims in this dispute, rendering them outside the jurisdiction of the Chamber or in the alternative, inadmissible .....	36
II.   The Marshall Islands has failed to exhaust local remedies where required by international law .....	44
III.  The Chamber does not have jurisdiction over claims relating to alleged breaches of treaties outside UNCLOS.....	47
CHAPTER 5 APPLICABLE LAW .....	51
CHAPTER 6 STATEMENT OF LAW ON THE MERITS.....	53
I.    Equatorial Guinea acted in accordance with its duty to cooperate to suppress piracy and did not breach freedom of navigation or exclusivity of flag State jurisdiction.....	53

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

A.	The prohibition on piracy is a norm of international law over which States have universal jurisdiction .....	55
B.	Freedom of navigation and the exclusivity of flag State jurisdiction are subject to rules concerning the suppression of piracy .....	57
C.	Article 100 UNCLOS contains an explicit duty on States to cooperate in the repression of piracy.....	60
D.	Equatorial Guinea acted lawfully under its obligation of cooperation in the suppression of piracy and with due regard for the rights of other States .....	62
II.	Equatorial Guinea acted in accordance with the principle of reasonableness in exercising its enforcement jurisdiction .....	67
A.	Interpretation of Article 225 UNCLOS.....	67
B.	Reasonableness in enforcement measures.....	68
C.	Equatorial Guinea acted in accordance with Article 225 UNCLOS and the principle of reasonableness in the exercise of enforcement measures .....	70
III.	There is no general obligation to notify the flag State of enforcement measures .....	72
IV.	Equatorial Guinea acted pursuant to lawful prescriptive jurisdiction.....	75
V.	Equatorial Guinea did not breach any other international obligations alleged by the Marshall Islands.....	77
VI.	Equatorial Guinea acted in accordance with the principle of humanity and did not violate the human rights of crew members.....	80
VII.	UNCLOS' prompt release obligations were not applicable to the <i>Heroic Idun</i> , consequently Equatorial Guinea has not violated these obligations.....	84
VIII.	Equatorial Guinea did not breach its obligations to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings.....	87
CHAPTER 7 THE MARSHALL ISLANDS IS NOT ENTITLED TO COMPENSATION OR SATISFACTION .....		90
I.	There is no causal link between the losses allegedly suffered by the Marshall Islands and any internationally wrongful act attributable to Equatorial Guinea .....	90
II.	The Marshall Islands' characterisation of Equatorial Guinea's responsibility to make reparations is misleading.....	92
III.	The Marshall Islands is not entitled to compensation for material damages ..	93
A.	Costs and expenses of the <i>Heroic Idun</i> and its crew.....	93

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

B.	Payments and costs incurred after the release of the <i>Heroic Idun</i> and its crew.....	94
C.	Costs related to the repair and future operation of the <i>Heroic Idun</i> .....	95
D.	Loss of hire profits .....	95
IV.	The Marshall Islands is not entitled to compensation for moral damages.....	96
V.	The Marshall Islands is not entitled to interest.....	97
VI.	It is not appropriate to allocate the costs of the proceedings to the Marshall Islands .....	98
VII.	The Marshall Islands is not entitled to satisfaction.....	98
CHAPTER 8	SUBMISSIONS.....	99

# COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

## CHAPTER 1

### INTRODUCTION

1. Pursuant to the Order of the President of the Special Chamber (the "**Chamber**") dated 16 November 2023, the Republic of Equatorial Guinea ("**Equatorial Guinea**") has the honour to submit to the Chamber of the International Tribunal for the Law of the Sea (the "**Tribunal**" or "**ITLOS**") its Counter-Memorial to the Memorial of the Republic of the Marshall Islands (the "**Marshall Islands**"), filed in the Registry on 18 December 2023.
2. Following this introduction, this Counter-Memorial is structured as follows:
  - a) **Chapter 2** provides an executive summary of the facts and the dispute before the Tribunal;
  - b) **Chapter 3** sets out the relevant facts relating to the dispute, including those points of fact on which disagreement remains between the parties;
  - c) **Chapter 4** details why the Chamber does not have jurisdiction over several claims advanced by the Marshall Islands in the dispute or, alternatively, why the Chamber should declare those claims inadmissible;
  - d) **Chapter 5** details the applicable law to the dispute under the relevant provisions of the United Nations Convention on the Law of the Sea ("**UNCLOS**") and the Statute of the Tribunal;
  - e) **Chapter 6** rebuts the merits of the Marshall Islands claims and details why Equatorial Guinea has not breached any of the applicable provisions of UNCLOS;
  - f) **Chapter 7** outlines why the Marshall Islands is not entitled to compensation or satisfaction in this dispute; and
  - g) **Chapter 8** contains the submissions of Equatorial Guinea.

# COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

## CHAPTER 2

### EXECUTIVE SUMMARY

3. On 10 August 2022, upon the request of the Federal Republic of Nigeria ("**Nigeria**"), Equatorial Guinea apprehended the *M/T "Heroic Idun"* (IMO registration number 9858058) ("**Heroic Idun**" or the "**Vessel**"). The Vessel, having traversed the Exclusive Economic Zone ("**EEZ**") of Equatorial Guinea multiple times, was then in the EEZ of São Tomé and Príncipe. Equatorial Guinea did so on reasonable suspicion of piracy as communicated by Nigeria and pursuant to its international obligations under UNCLOS and its commitments of cooperation under the Code of Conduct concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa (the "**Yaoundé Code**"), to which both Equatorial Guinea and Nigeria are parties. Equatorial Guinea acted in direct response to Nigeria's request and did so using reasonable and humane measures at all times.
4. The Vessel was brought to and anchored at Luba, where it remained safely for the duration of its stay in Equatorial Guinea. The crew of the *Heroic Idun* either remained onboard the Vessel or were stationed on shore in Malabo, where they were at all times treated in accordance with the principle of humanity, and provided all requested provisions, accommodation, and high-quality medical care when needed.
5. Nigeria's actions were foundational to those of Equatorial Guinea regarding the *Heroic Idun*. While the Vessel was stationed in Luba further to the apprehension request of Nigeria, the Nigerian authorities investigated the acts of the Vessel and crew committed in Nigerian waters (where the Vessel had been prior to its apprehension by Equatorial Guinea). Nigeria then requested the formal transfer of the Vessel and crew to Nigeria for investigation. Equatorial Guinea, acting in line with its international obligations, agreed to the transfer to Nigeria and the Vessel and crew departed Equatorial Guinea for Nigeria safely on 11 November 2022. The rights and duties of Nigeria as a non-party to this dispute form an inextricable part of the subject-matter of several of the claims made by the Marshall Islands, rendering them outside the jurisdiction of this Chamber or, in the alternative, inadmissible.
6. The Marshall Islands asserts that Equatorial Guinea has breached the principles of freedom of navigation and exclusive flag State jurisdiction under UNCLOS. However, Marshall Islands' claims do not address – and indeed entirely fail to acknowledge – the long-held and applicable exception, as set out in UNCLOS, namely the right and obligation for all States to cooperate in the suppression of piracy. Such an obligation gives effect to the prohibition on piracy and is implemented in the context of the Gulf of Guinea by the Yaoundé Code.
7. The assertions made by the Marshall Islands, if upheld, would have severe and indeed dangerous implications for international cooperation and the rule of law to counter the global scourge of piracy. They would create a chilling effect on lawful measures taken by States in cooperative and joint efforts against piracy and maritime crime, which are of the gravest nature and greatest importance. This would run counter to the international legal framework established to counter piracy as reflected in UNCLOS, and would fly in the face of numerous recent decisions of the United Nations Security Council ("**UNSC**") and the Yaoundé Code, which has had a material positive impact

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

on reducing piracy and maritime crime in the Gulf of Guinea region, as recognised before the UNSC.

8. Secondly, lawful State action in response to a reasonable concern about piracy is not the same as – and does not require – a definitive conclusion that piracy has, in fact, occurred. The contrary conclusion would be inconsistent with UNCLOS and would render redundant international legal obligations and commitments made by States in relation to piracy.
9. Equatorial Guinea acted in response to Nigeria's request under the Yaoundé Code for countering piracy in the context of its reasonable suspicion of piracy. Equatorial Guinea was not then – and is not now – in a position to elaborate the factual circumstances of what happened in Nigeria and what underpinned Nigeria's request for assistance. Nevertheless, the Vessel appears – on the account even of the Marshall Islands – to have subsequently accepted liability under Nigerian anti-piracy legislation.
10. As Equatorial Guinea will set out in the following pleading, the dispute – even on the evidence presented by the Marshall Islands – fundamentally pertains to events that occurred in Nigerian jurisdiction. By responding to a legitimate and reasonable request from Nigeria under UNCLOS and the Yaoundé Code, Equatorial Guinea's actions could not have breached freedom of navigation or exclusivity of flag State jurisdiction. In responding reasonably and appropriately to Nigeria's request consistent with its obligations, Equatorial Guinea complied with all applicable provisions of UNCLOS – including the obligation to avoid adverse consequences in the exercise of enforcement jurisdiction – and acted in accordance with the principles of reasonableness and humanity towards the crew members.
11. Furthermore, Marshall Islands' various claims in relation to breaches of treaties external to UNCLOS are not ones over which the Chamber has jurisdiction. Several of the claims the Marshall Islands makes under UNCLOS are also plainly inapplicable to the facts of the dispute and must be dismissed.



CHAPTER 3

STATEMENT OF RELEVANT FACTS

I. The *Heroic Idun* disobeyed the orders of the Nigerian Navy, fled from the Nigerian Navy and issued a false alarm of piracy

12. The present case has been brought by the Marshall Islands on behalf of the *Heroic Idun* for events that took place in Nigerian maritime zones and for actions commenced by the Nigerian authorities for fleeing the Nigerian Navy, disobeying orders of the Nigerian Navy and issuing a false alarm of piracy.
13. The Marshall Islands contends that, on 4 August 2022, the *Heroic Idun* received orders to load oil at Akpo offshore oil terminal (the "**Terminal**") on 8 August 2022.<sup>1</sup> Equatorial Guinea understands that, on 7 August 2022, the *Heroic Idun* entered the EEZ of Nigeria intending to load at the Terminal. However, as the Marshall Islands admits,<sup>2</sup> the *Heroic Idun* did not have proper legal authorisation to do so at that time.<sup>3</sup> As a result, the following day, the *Heroic Idun* purportedly moved 10 nautical miles away from the Terminal security zone to await further instructions. Equatorial Guinea had no part in nor is it privy to the details of these events, which are central to what happened thereafter.
14. While in this location, Equatorial Guinea understands that the Nigerian Navy vessel *NNS Gongola* approached the *Heroic Idun* to investigate its presence and its activities. This would not be unusual, particularly considering the Marshall Islands acknowledges that the *Heroic Idun* did not meet Nigeria's regulatory requirements at the time and that the *Heroic Idun* admitted as much over radio to the *NNS Gongola* when asked.<sup>4</sup>
15. The Marshall Islands contends that the *NNS Gongola* ordered the *Heroic Idun* to proceed to Bonny Fairway Buoy to enable further enquiries by the Nigerian authorities.<sup>5</sup> The Marshall Islands makes a series of allegations concerning the actions of the *NNS Gongola*.<sup>6</sup> Equatorial Guinea understands that, contrary to the orders issued by the *NNS Gongola*, the *Heroic Idun* evaded the *NNS Gongola*, raised a false alarm of piracy and escaped southwards.<sup>7</sup> Equatorial Guinea is not privy to the details of these events, which are critical to what happened thereafter. The Marshall Islands admits that, in

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<sup>1</sup> Memorial, ¶ 27.

<sup>2</sup> Memorial, ¶ 27; Email, 8 August 2022, MT 20: "[...] *they are still waiting for nomination for our vessel and there is no naval clearance*".

<sup>3</sup> See Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, REG-019; Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 24 August 2022, REG-020; Note No. 150/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 12 September 2022, REG-021.

<sup>4</sup> Memorial, ¶ 30; Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, MT 26, p. 271: "*Yes sir, that is correct we do not have the clearance yet*".

<sup>5</sup> Memorial, ¶ 30.

<sup>6</sup> Memorial, ¶ 32.

<sup>7</sup> Memorial, ¶ 33; Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, REG-019.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

fleeing from Nigerian authorities, the *Heroic Idun* sailed through the EEZs of Nigeria, São Tomé and Príncipe, and Equatorial Guinea on 9 and 10 August 2022.<sup>8</sup>

16. Despite Equatorial Guinea not being a party to these events, the evidence filed by the Marshall Islands shows a number of unanswered and serious issues. For example:

- a) On 8 August 2022, the transcript of the voyage data recorder of the *Heroic Idun* shows that the Terminal and the *NNS Gongola* had a number of exchanges relating to security issues in the area before the *NNS Gongola* approached the *Heroic Idun*.<sup>9</sup> Clearly, the *NNS Gongola* was known to the Terminal. These exchanges were heard by the crew of the *Heroic Idun* in real time, leading them to think that "*the vessel that was speaking with the Terminal was a patrolling boat*".<sup>10</sup> Moreover, the Terminal explicitly told the *Heroic Idun* that: "*very soon, she's just 4 nm from you, the [Nigerian] navy ship, the vessel navy ship is coming to investigate your ship so this is just for your information, you are free to do anything you want with it. Over*".<sup>11</sup> Despite the Master's apparent refusal to accept this information when the *NNS Gongola* approached,<sup>12</sup> the Chief Officer of the *Heroic Idun* appears to have had no trouble at all identifying it as belonging to the Nigerian Navy:

*"A Nigerian boat is coming our way, man. Nigerian Navy".*<sup>13</sup>

- b) Once the *NNS Gongola* made contact with the *Heroic Idun*, the *NNS Gongola* made clear that the *Heroic Idun* was required to "*get your clearance, both the Nigerian National Petroleum Company clearance, and the naval clearance before you proceed here*".<sup>14</sup> Upon further confirmation that the *Heroic Idun* did not have the required clearances, the *NNS Gongola* stated that: "*You can't remain here. You follow me and proceed to Bonnie Fairway Buoy. When your approval is given, you will be released to come and commence your loading*".<sup>15</sup> Despite these very clear instructions from the Nigerian Navy and after having been granted 10 minutes to confer with its owners, the Master of the *Heroic Idun* instead instructed the vessel to "*[i]ncrease the speed, increase the speed*".<sup>16</sup> Subsequently, the Chief Officer made contact with the Terminal and asked to confirm the identity of the *NNS Gongola*, to which the Terminal replied:

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<sup>8</sup> **Memorial**, ¶ 35.

<sup>9</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 269.

<sup>10</sup> Witness statement of Chief Officer, 9 June 2023, **RMI 5**, ¶ 17.

<sup>11</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 270.

<sup>12</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 270: "*Yeah thanks for the confirmation, I'm turning my vessel and I'm moving away because nobody has passed on the information to me. So as far as I know whether it is a navy ship or not the navy ship, so I really don't know*".

<sup>13</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 270 (emphasis added).

<sup>14</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 271.

<sup>15</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 271.

<sup>16</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 272.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*"Yes, this Nigerian navy boat, I have a chat with her. She confirmed that. She's Nigerian navy boat NNS Gongola".<sup>17</sup>*

- c) When asked a second time, the Terminal noted that it could not provide the specific confirmation requested by the *Heroic Idun* but noted that: *"I was told on the VHF it was Nigerian navy ship Gongola. But what I know is this their is their [sic] modus of operation when they go for investigation. When they go covert, they switch off their AIS"*.<sup>18</sup> Accordingly, the crew was informed that having their Automatic Identification System ("AIS") off was standard practice for the Nigerian Navy when investigating. Yet the *Heroic Idun* nonetheless and extraordinarily proceeded to flee from the Nigerian Navy.
  - d) The following day, on 9 August 2022, the *Heroic Idun* received further confirmation that the *NNS Gongola* was a Nigerian navy patrol ship.<sup>19</sup> Curiously, rather than proceeding to return to comply with the direction of the Nigerian Navy, the *Heroic Idun* chose to continue fleeing.<sup>20</sup>
  - e) The actions of the *Heroic Idun* appear to have led to the cancellation of its clearance to return to the Terminal, as admitted by one of the experts of the Marshall Islands.<sup>21</sup> The Master does not explain this in his statement whereas the Chief Officer admits that he *"thought that there would be repercussions for not following the orders of the Nigerian Navy"*.<sup>22</sup>
17. Only Nigeria would be able to provide correction or clarification to the version of events presented by the Marshall Islands, troubling as the evidence adduced by the Marshall Islands is on its own terms. Equatorial Guinea is not in a position to shed light on these events nor the serious questions raised in the context of the Vessel's activities in Nigeria. All that can be said for certain is that the conduct of the Vessel, based on the evidence only of the Marshall Islands, shows highly unusual and suspicious conduct on the part of the *Heroic Idun* in Nigeria, which led ultimately to the Vessel accepting liability under Nigeria's anti-piracy legislation.

## II. Equatorial Guinea intercepted and apprehended the *Heroic Idun* at Nigeria's request

18. On 10 August 2022, the Director General of Military Cooperation of the Ministry of National Defence of Equatorial Guinea (the "**Director General of Military Cooperation**") received a distress note from the Military Attaché of the Nigerian

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<sup>17</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 272 (emphasis added).

<sup>18</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 272.

<sup>19</sup> **Memorial**, ¶ 35; Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 81; Email, 9 August 2022, **MT 33**, p. 309; Witness statement of Chief Officer, 9 June 2023, **RMI 5**, ¶ 38.

<sup>20</sup> **Memorial**, ¶ 36.

<sup>21</sup> First Expert Report of Tim Horne including annexes, 14 December 2023, **RMI 39**, ¶ 12: *"On 11.08.22 she was requested to return to AKPO terminal as all clearances were in place. However, on 12.08.22 that order was reversed and thereafter the Vessel was approached by the Equatorial Guinean Navy"*; Email, 12 August 2022, **MT 36**.

<sup>22</sup> Witness statement of Chief Officer, 9 June 2023, **RMI 5**, ¶ 39.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Embassy in Malabo.<sup>23</sup> In this message, Nigeria requested Equatorial Guinea's assistance in the tracking, detention and repatriation of the *Heroic Idun* to Nigeria for proper investigation following the events in Nigeria.<sup>24</sup> The Director General of Military Cooperation forwarded this message to the Inspector General of the Equatoguinean armed forces, Captain Juan Nsue Esono Nchama. Upon receipt of this message, Captain Nsue Esono Nchama instructed the Equatoguinean naval vessel *CC David Eyama Angüe Osa* ("**Capitán David**") to intercept and apprehend the *Heroic Idun*.<sup>25</sup> In the context of maritime cooperation between the two States,<sup>26</sup> such a request was entirely reasonable, as the *Heroic Idun* was situated within zone D of the Yaoundé Code which includes the EEZs of Equatorial Guinea and São Tomé and Príncipe.

19. Equatorial Guinea's apprehension of the *Heroic Idun* was taken in full compliance with international law and regional security and cooperation frameworks to counter the scourge of piracy in the Gulf of Guinea and Equatorial Guinea's international commitments to this effect.
20. Equatorial Guinea is part of the Gulf of Guinea and is comprised of two regions: (1) a continental region composed of the continental strip and adjacent islets; and (2) an insular region, which includes the Equatoguinean islands of Bioko and Annobón.



<sup>23</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 18.

<sup>24</sup> See Request from Nigeria regarding *Heroic Idun* (WhatsApp messages), **REG-002**; Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 18.

<sup>25</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 19.

<sup>26</sup> For example, see Bilateral agreement between the Government of Federal Republic of Nigeria and the Government of Equatorial Guinea on the establishment of the combined maritime policing and security patrol committee, 15 March 2016, **REG-007**; Minutes of the first technical meeting between Equatorial Guinea and Nigeria on the implementation of the bilateral agreement on joint maritime surveillance and security, 6 October 2020, **REG-004**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

21. Equatorial Guinea has long worked hard to curb piracy and promote maritime security in the Gulf of Guinea, including through the creation of a naval military school in 2011.<sup>27</sup> As noted by Captain Nsue Esono Nchama:

*Piracy in our region undermines security and creates physical and economic instability. We are obliged to maintain constant vigilance to reduce piracy, illegal oil bunkering and other illicit activities at sea. We maintain permanent maritime surveillance to combat piracy in this region. The only effective means to counter this transboundary issue is for States in the Gulf of Guinea to actively collaborate and assist each other, which we routinely do. Without such assistance, pirates would thrive and there would be no effective means to prevent their activities through individual State actions.*<sup>28</sup>

22. Piracy has been recognised by the United Nations ("UN") Secretary General as a "threat to international peace and security".<sup>29</sup> In particular, "[i]n the Gulf of Guinea, piracy is related to the theft of oil and linked with the regional black market and organized crime".<sup>30</sup> The scourge of piracy is particularly severe in Africa but is by no means confined there; it is also a crucial concern in other areas of the world such as the Caribbean and Latin America.<sup>31</sup>
23. The seriousness of the threat of piracy to modern maritime and international peace and security is evidenced by the range of recent multilateral measures taken against it. The UNSC has recognised piracy as a threat to international peace and security and mandated States to take measures in response in recent years. For example, in Resolution 1816 of 2008, the UNSC recalled that UNCLOS' provisions on piracy:

*provide guiding principles for cooperation to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state, including but not limited to boarding, searching, and seizing vessels engaged in or suspected of engaging in acts of piracy, and to apprehending persons engaged in such acts with a view to such persons being prosecuted.*<sup>32</sup>

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<sup>27</sup> Decree No. 9/2.011 creating the Naval Military School in Equatorial Guinea (Excerpt), 20 January 2011, **REG-022**, p. 1: "the integration of the Republic of Equatorial Guinea into the security structures of the Region implies the assumption of commitments and responsibilities, in this case, related to maritime security in the Region's space; thus resulting in an additional need for the personnel of the countries concerned to have access to a Training Centre, in conditions to train the elements of their respective units of the Naval Forces and other Services related to security missions at sea".

<sup>28</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 6.

<sup>29</sup> United Nations Secretary General, "Remarks to Security Council Debate on Maritime Piracy as a Threat to International Peace and Security", 19 November 2012, **REG-023**.

<sup>30</sup> United Nations Secretary General, "Remarks to Security Council Debate on Maritime Piracy as a Threat to International Peace and Security", 19 November 2012, **REG-023**, p. 1.

<sup>31</sup> Neptune P2P Group, "Maritime Crime - Is South America the latest hotspot?", Intelligence Report, 25 January 2022, **REG-024**.

<sup>32</sup> United Nations Security Council, Resolution 1816, S/RES/1816 (2008), 2 June 2008, **REG-025**, preamble.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

24. In this regard, the Gulf of Guinea has been widely referred to as the world's hotspot for piracy.<sup>33</sup> Concerns raised before the International Maritime Organization ("**IMO**") led to the 2013 IMO Resolution on Prevention and Suppression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in the Gulf of Guinea. The IMO appealed to all States to take all measures to ensure that all acts or attempted acts of piracy are terminated.<sup>34</sup>
25. In recognition of the urgency and magnitude of the threat to maritime security in the Gulf of Guinea, 25 States in the region (including Equatorial Guinea and Nigeria) convened to sign the Yaoundé Code in 2013. The Yaoundé Code was entered into to:
- a) "[develop] [...] *a regional framework to counter piracy and armed robbery at sea, including information-sharing and operational coordination mechanisms in the region*";<sup>35</sup>
  - b) recognise "*the urgent need to devise and adopt effective and practical measures to counter piracy and armed robbery at sea in the Gulf of Guinea*";<sup>36</sup> and
  - c) "*promote regional maritime cooperation and a stable maritime environment, contribute to the peace, good order and continuing prosperity of the West and Central Africa*".<sup>37</sup>
26. The Yaoundé Code covers piracy, armed robbery at sea and transnational organised crime in the maritime domain, which explicitly includes illegal oil bunkering.<sup>38</sup> Its purpose is for States to "*co-operate to the fullest extent in the repression of transnational organized crime in the maritime domain [...] and other illegal activities at sea*".<sup>39</sup> This includes:
- a) "*interdicting ships [...] suspected of engaging in in [sic] transnational organized crime [...] and other illegal activities at sea*";<sup>40</sup> and
  - b) "*ensuring that persons committing or attempting to commit in transnational organized crimes in the maritime domain [...] and other illegal activities at sea are apprehended and prosecuted*".<sup>41</sup>

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<sup>33</sup> See, for example, ICC, "*Gulf of Guinea remains world's piracy hotspot in 2021, according to IMB's latest figures*", 14 April 2021, **REG-026**.

<sup>34</sup> International Maritime Organization, Resolution A.1069(28), 29 November 2013, **REG-027**, ¶ 4.

<sup>35</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble.

<sup>36</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble.

<sup>37</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble.

<sup>38</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 1.

<sup>39</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 2.1.

<sup>40</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 2.1(b).

<sup>41</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 2.1(c).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

27. This is recognised in the evidence filed by the Marshall Islands, for instance, in the Best Management Practices in West Africa document.<sup>42</sup>
28. In particular, Article 6 of the Yaoundé Code on measures to repress piracy explicitly sets out that: "*each Signatory to the fullest possible extent intends to co-operate in (a) arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy*".<sup>43</sup>
29. The importance of the Yaoundé Code, including its cooperation obligations, cannot be understated. As Captain Nsue Esono Nchama explains:

*The Yaoundé Code, which is in force, requires States Parties to support each other in countering activities of piracy, illegal oil bunkering, and other illegal activities at sea and to respect calls for help – such as the one issued by the Nigerian authorities in the case of the Heroic Idun. Equatorial Guinea respects the agreements we have signed in this area – most imperatively, for our country's own security. Without such cooperation we would each be left to the mercy of the pirates.*

[...]

*The Equatoguinean Navy takes the obligations of cooperation under the Yaoundé Code very seriously. To my knowledge, no request for cooperation under the Yaoundé Code has ever been denied. If a State made a request for assistance under the Yaoundé Code and no response was given, the regional mechanism would cease to be effective as it is based on the foundational and critical principle of reciprocity. If we found ourselves in such a situation, which I do not envisage, I expect Equatorial Guinea would strongly reiterate the demand for compliance, request an urgent explanation for the inaction and issue a note of protest at a minimum.*

*Other than the Yaoundé Code, Equatorial Guinea is seeking to reinforce its cooperation with Nigeria in the fight against piracy and oil theft in the Gulf of Guinea. The first discussions on the Protocol started in 2020 or 2021. I have held two meetings with Nigerian representatives on this mechanism, which it is intended would come into force in the near future. The Protocol is aimed at surveying the presence of maritime crime in the combined waters of Nigeria and Equatorial Guinea, including through joint patrols and hot pursuit of suspected pirates.*<sup>44</sup>

30. Equatorial Guinea is also a member of the *Communauté Économique et Monétaire de l'Afrique Centrale* ("CEMAC"), an organisation that seeks to promote peace,

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<sup>42</sup> Best management practices to deter piracy and enhance maritime security off the coast of West Africa including the Gulf of Guinea, **MT 6**, p. 92.

<sup>43</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 6.1(a).

<sup>44</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶¶ 8, 10-11.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

cooperation and the economic integration of its members.<sup>45</sup> Its vision is to create "*an integrated, emerging economic space where security, solidarity and good governance reign*".<sup>46</sup>

31. As part of its mandate, on 3 August 2001, CEMAC implemented Regulation No. 03/01-UDEAC 088-CM-06 (the "**CEMAC Code**") which aimed, *inter alia*, to curb piracy and oil theft. Article 581 of the CEMAC Code, for example, gives member States' competent maritime authorities the discretionary power to deem activities such as theft, destruction of a vessel, failure to fly the flag and navigation without title as offences.<sup>47</sup>
32. Despite these significant international efforts, in 2020, over 40% of global piracy incidents (81 out of 195) occurred in the Gulf of Guinea according to the International Maritime Bureau ("**IMB**").<sup>48</sup> Indeed, just a few months prior to the incident involving the *Heroic Idun* in this case, the UNSC expressed its:

*deep concern about the grave and persistent threat that piracy, armed robbery and transnational organized crime at sea in the Gulf of Guinea pose to international navigation, security, and sustainable development of States in the region.*<sup>49</sup>

33. The UNSC also reiterated that "*States in the region have a leadership role to play in countering the threat*".<sup>50</sup>
34. The adverse financial impact of these pirate activities in the region is extensive. The UN Office on Drugs and Crime has estimated that the combined financial loss caused by instances of piracy in the Gulf of Guinea is "*at least \$1.925 billion*" per year.<sup>51</sup> The Gulf of Guinea encompasses much of Central and West Africa, with a surface area of approximately 1.225 million square kilometres.<sup>52</sup> It represents some 25% of all African maritime traffic and has nearly 20 commercial seaports.<sup>53</sup>
35. A major share of piracy incidents now occur in waters in and surrounding the Economic Community of Central African States ("**ECCAS**"), including Equatorial Guinea, as reported by the UN Assistant Secretary-General for Africa to the UNSC in 2022.<sup>54</sup> While in the fourth quarter of 2020, only 20% of reported incidents in the Gulf of Guinea occurred in ECCAS' waters – just a year later, in the fourth quarter of 2021,

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<sup>45</sup> The six member states of CEMAC are: Cameroon, the Central African Republic, the Democratic Republic of Congo, Gabon, Chad and Equatorial Guinea.

<sup>46</sup> CEMAC website, "*CEMAC in brief*", **REG-028**.

<sup>47</sup> CEMAC Code, No. 03/01-UEAC-088-CM-06, 3 August 2001, **REG-029**, Article 581.

<sup>48</sup> ICC International Maritime Bureau, "*Piracy and Armed Robbery Against Ships - Report for the 1 January - 31 December 2023 period*", January 2024, **REG-030**, pp. 6, 27.

<sup>49</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, p. 1.

<sup>50</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, p. 1.

<sup>51</sup> See United Nations Security Council, "*Situation of piracy and armed robbery at sea in the Gulf of Guinea and its underlying causes, Report of the Secretary-General*", S/2022/818, 1 November 2022, **REG-003**, ¶ 10.

<sup>52</sup> United Nations Security Council, 9355th meeting, S/PV.9355, 21 June 2023, **REG-032**, p. 4, remarks of the President of the Commission of the Economic Community of Central African States.

<sup>53</sup> United Nations Security Council, 9355th meeting, S/PV.9355, 21 June 2023, **REG-032**, p. 20.

<sup>54</sup> United Nations Security Council, 9355th meeting, S/PV.9355, 21 June 2023, **REG-032**, p. 2, remarks of the UN Assistant Secretary General for Africa in the Departments of Political and Peacebuilding Affairs and Peace Operations.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

62% of such incidents occurred in ECCAS' waters, with groups "[shifting] some of their activities to the waters off Equatorial Guinea, Gabon and São Tomé and Príncipe".<sup>55</sup>

36. States in this region have regularly recognised that plurilateral, coordinated efforts are necessary to counter this threat. For example, States in Zone D of the Yaoundé Code (comprised of Cameroon, Equatorial Guinea, Gabon and São Tomé and Príncipe) share an operational memorandum of understanding. Since 2014, the navies of Equatorial Guinea, Cameroon and Gabon have regularly conducted joint patrols in Zone D.<sup>56</sup>
37. Requests for cooperation under the Yaoundé Code, such as the ones issued by Nigerian authorities on 10 August 2022, are standard practice. For example, on 6 February 2021, the Equatoguinean Navy was asked to help the tanker *Sea Phantom*, whose flag State was the Marshall Islands.<sup>57</sup> In response to this request, the Equatoguinean frigate *Wele Nzas* was dispatched. As explained by Captain Nsue Esono Nchama:

*I ordered the Equatoguinean Navy to act and arranged for the Wele Nzas to assist the Sea Phantom. The Wele Nzas arrived as the pirates were fleeing. The bridge of the Sea Phantom had been damaged. The Wele Nzas escorted the Sea Phantom to the port of Malabo in Equatorial Guinea. Upon arrival, the captain of the Sea Phantom thanked the crew of the Wele Nzas for saving their lives. The Sea Phantom remained in Malabo port to make some repairs. Equatorial Guinea did not request any compensation for performing this rescue nor for costs incurred. It did not even request payment for the port fees while the Sea Phantom did repairs. The Sea Phantom was also provided with an escort to leave Equatorial Guinea's territorial waters safely. When issues of piracy and security are at stake, we do our utmost to address them and protect those that have been threatened.*<sup>58</sup>

38. As a result of consistent efforts by national authorities and regional cooperation, including by Equatoguinean authorities, piracy in the Gulf of Guinea has declined.<sup>59</sup> The UN Assistant Secretary-General for Africa reported in 2023 that:

*instances of piracy and armed robbery at sea in the Gulf of Guinea have continued to steadily decline [...] due to the significant efforts of national authorities, who bear the primary responsibility for countering piracy and armed robbery at sea in*

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<sup>55</sup> United Nations Security Council, "Situation of piracy and armed robbery at sea in the Gulf of Guinea and its underlying causes, Report of the Secretary-General", S/2022/818, 1 November 2022, **REG-003**, ¶ 8.

<sup>56</sup> United Nations Security Council, "Situation of piracy and armed robbery at sea in the Gulf of Guinea and its underlying causes, Report of the Secretary-General", S/2022/818, 1 November 2022, **REG-003**, ¶ 30; Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 9.

<sup>57</sup> ICC International Maritime Bureau, "Piracy and Armed Robbery Against Ships - Report for the 1 January - 31 March 2021 period", April 2021, **REG-033**, pp. 22-23.

<sup>58</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 14. See also Letter from Captain Juan Nsue Esono Nchama, 29 March 2021, **REG-005**; Letter from Captain Juan Nsue Esono Nchama, 11 February 2021, **REG-006**; INTERPOL Maritime Security Sub-Directorate, "Multiple attacks against merchant vessels in the Gulf of Guinea between 6-9 February 2021", 9 February 2021, **REG-009**; defenceWeb, "Tanker attack in Gulf of Guinea", 10 February 2021, **REG-010**.

<sup>59</sup> New Telegraph, "IMB records lowest piracy in Nigeria, others in decades", 19 October 2022, **REG-034**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*the region [...] [including] [r]egular naval patrols by Gulf of Guinea coastal States.*<sup>60</sup>

39. The UN Assistant Secretary-General for Africa further acknowledged that:

*[a]nother key factor that has contributed to that positive trend is the ongoing operationalization of the interregional maritime security mechanism, the Yaoundé Architecture, which was established following the signing of the Yaoundé Code of Conduct in 2013.*<sup>61</sup>

40. Similarly, the IMB has attributed the reduction of piracy incidents in the Gulf of Guinea to the vigorous action taken by regional authorities and has called for continued coordination and vigilance to ensure the long-term protection of seafarers.<sup>62</sup> This was indeed recognised by OSM Maritime, the managers of the *Heroic Idun*, who wrote to Equatorial Guinea on 16 September 2022 purportedly recognising that they are "grateful for the efforts of all in the success of reducing piracy".<sup>63</sup>
41. The UNSC has continued to encourage regional States to "strengthen measures" to combat piracy in the region and implement the Yaoundé Code, including "with regard to the conduct of patrols, law enforcement at sea [...] [and] land, maritime and air surveillance".<sup>64</sup>
42. It is in this context that Nigerian authorities issued the cooperation request on 10 August 2022. On the same day, the Nigerian Embassy in Malabo followed up with a note verbale to the Ministry of External Affairs and Cooperation of Equatorial Guinea requesting that it "track and arrest the vessel and hand them (both vessel and crew) over to the Nigerian Government for proper investigation".<sup>65</sup> This was because the *Heroic Idun* "was involved in the illegal entry into Nigerian's [sic] territorial waters to load crude oil without proper approval".<sup>66</sup> The Nigerian Embassy in Malabo reported that the *Heroic Idun* "escaped into Equatoguinean maritime domain by raising a false piracy attack alarm"<sup>67</sup> and appointed "[n]avy Captain Azuiké and Lt Col Kwentoh of

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<sup>60</sup> United Nations Security Council, 9355th meeting, S/PV.9355, 21 June 2023, **REG-032**, p. 2, remarks of the UN Assistant Secretary General for Africa in the Departments of Political and Peacebuilding Affairs and Peace Operations.

<sup>61</sup> United Nations Security Council, 9355th meeting, S/PV.9355, 21 June 2023, **REG-032**, p. 2, remarks of the UN Assistant Secretary General for Africa in the Departments of Political and Peacebuilding Affairs and Peace Operations.

<sup>62</sup> ICC International Maritime Bureau, "Piracy and Armed Robbery Against Ships - Report for the 1 January - 31 March 2024 period", April 2024, **REG-035**, p. 25.

<sup>63</sup> Letter from OSM to the Equatoguinean Attorney General, 16 September 2022, **EK 36**.

<sup>64</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, ¶ 6. The UNSC has also called on Gulf of Guinea countries to "criminalize piracy and armed robbery at sea under their domestic laws, and to investigate, and to prosecute or extradite, in accordance with applicable international law [...] perpetrators of piracy and armed robbery at sea, as well as those who incite, finance or intentionally facilitate such crimes". See United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, ¶ 3.

<sup>65</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>66</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>67</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*the Defence Section of the [Nigerian] Embassy" to work with Equatoguinean authorities.<sup>68</sup>*

43. In light of this request and the framework of cooperation within the Yaoundé Code, Equatorial Guinea had a clear duty to act as it did.
44. When the *Capitán David* was 10-15 miles away from the *Heroic Idun*, the *Heroic Idun* started its engine and increased its distance.<sup>69</sup> The *Capitán David* made radio contact with the *Heroic Idun* and ordered it to stop the engine. The *Capitán David* also requested that the *Heroic Idun* follow it to the port of Malabo.<sup>70</sup> The managers of the *Heroic Idun* were kept informed of the situation.<sup>71</sup>
45. Even though the *Heroic Idun* had no doubt of the identity of the *Capitán David* and its status as an Equatoguinean navy ship,<sup>72</sup> the Master admits to considering fleeing as an option, as the Vessel had previously done in Nigeria.<sup>73</sup> This is despite the fact that the *Heroic Idun* was fully aware of the "*security apparatus in the Gulf of Guinea*" and knew that the *Capitán David* "*was coming to check on them*".<sup>74</sup>
46. The *Capitán David* was later joined by the *Wele Nzas*, an Equatoguinean Navy frigate on patrol in the area, which joined the former in escorting the *Heroic Idun* to Malabo.
47. The *Heroic Idun* was instructed to go to Luba Freeport, a port which is particularly suitable and used for oil vessels.<sup>75</sup> As Mr Howard McDowall, the general manager of Luba Freeport explains:

*the bay is well-suited to receive and host vessels the size of the Heroic Idun. Luba is a large, sheltered and protected bay, with minimal tide and wave activity – compared to the port at Malabo, which is more exposed to weather conditions, and has larger waves. Luba Freeport serves many large vessels operating in the oil industry – for example, most of the larger oil vessels that stay for a long period of time in Equatorial Guinea are kept at Luba Freeport.<sup>76</sup>*

48. The *Heroic Idun* arrived at Luba Freeport late on the night of 13 August 2022 – with both vessel and crew unharmed.<sup>77</sup> A security perimeter of half a mile was set up around the *Heroic Idun*, which was in place for the duration of its stay in Luba Freeport.<sup>78</sup>

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<sup>68</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>69</sup> Witness statement of Deck Cadet, 8 June 2023, **RMI 9**, ¶ 12.

<sup>70</sup> **Memorial**, ¶¶ 38, 40.

<sup>71</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 95.

<sup>72</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 89.

<sup>73</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 95.

<sup>74</sup> **Memorial**, ¶ 38.

<sup>75</sup> See Website of Luba Freeport Ltd, Home section, **REG-017**; Website of Luba Freeport Ltd, Facilities section, **REG-018**.

<sup>76</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 9.

<sup>77</sup> Log, **EK 4**, 13 August 2022, p. 17, entry at 23h54: "*Vessel safely anchored off Puerto De Luba*".

<sup>78</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 8.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

### III. Nigeria investigated the *Heroic Idun* and crew while stationed in Equatorial Guinea

49. Upon arrival to Luba Freeport on 13 August 2022, the maritime agency Besora Marítima ("**Besora**"), which had been contracted by the owner of the Vessel, was present at port. Equatoguinean authorities permitted their access to the crew to provide amenities and assist in the response to any other needs from the crew.<sup>79</sup>
50. From this point onwards, Besora also acted as a liaison between the crew and the Equatoguinean Ministry of National Defence.<sup>80</sup> As explained by Mr Hernández Martín of Besora, all matters related to the treatment and care of the crew were decided by Besora and then permission was requested from the relevant Equatoguinean authorities. As explained by Mr Hernández Martín:

*My main contact in the Equatoguinean government was Captain Juan Nsue Esono Nchama. We would make requests to deliver whatever provisions the crew required and he would always grant them.*<sup>81</sup>

51. Once the *Heroic Idun* arrived at Luba Freeport, Equatoguinean authorities commenced investigations on its activities.<sup>82</sup> Over the course of the following days, Equatoguinean authorities conducted a series of investigations, including interviews of some crew members.
52. The Equatoguinean authorities ensured that Besora representatives were present during the interviews of the Master, the Chief Engineer and the Second Officer, and facilitated translation to English for crew members of all communication from the authorities.<sup>83</sup> According to Mr Hernández Martín, this was in line with the Equatoguinean authorities' intentions to ensure communication was as clear as possible and that "*there were no misunderstandings*".<sup>84</sup> Mr Hernández Martín of Besora would translate each question into English for the crew members, who would answer in English. Mr Hernández Martín would then translate their remarks into Spanish for the Equatoguinean authorities.<sup>85</sup> The questions the authorities asked were simple factual questions about the vessel and its journey.<sup>86</sup>

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<sup>79</sup> Daily reports of the *Heroic Idun* provided by Besora, 13 August 2022 - 10 November 2022, **REG-036**.

<sup>80</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 21.

<sup>81</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 20. Cf Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶ 19; Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 21.

<sup>82</sup> Technical report of the *Heroic Idun* conducted by Equatoguinean customs agents Mr Nve Edu and Mr Nguema Nkisogo, 15-16 August 2022, **REG-037**.

<sup>83</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 12.

<sup>84</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 12.

<sup>85</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 13: "*The statements for the crew members who were interviewed were typed in Spanish. I read these aloud and translated them into English. I asked the crew members if they agreed with the statements. If there were any issues, the crew could make amendments to the statements, and I recall that they did so a few times. I am confident that the crew therefore understood what they were signing and signed their statements freely*". Cf Email, 17 August 2022, **EK 11**; Cf Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 17; Witness statement of Second Officer, 8 June 2023, **RMI 6**, ¶ 18; Witness statement of Chief Engineer, 8 June 2023, **RMI 7**, ¶ 11.

<sup>86</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 12. Cf Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 18.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

53. In his evidence, Mr Kulblik (one of the witnesses for the Marshall Islands) remarks that there was a prosecutor present during the interviews.<sup>87</sup> This is standard procedure in Equatorial Guinea, as it is in many other civil law jurisdictions around the world, where the Public Prosecutor's office plays a role in ensuring that interviews are conducted in accordance with the law and all procedural requirements in investigations. The Marshall Islands' own evidence shows that these were for an "*administrative offence*".<sup>88</sup>
54. The final statements of the Master, the Chief Engineer and the Second Officer were prepared in Spanish and then read out to the crew members in English by Mr Hernández Martín.<sup>89</sup> The crew members were asked for their comments on the statements and were allowed to make (and did make) amendments to their statements.<sup>90</sup> Mr Hernández Martín confirms that the crew members "*understood what they were signing and signed their statements freely*".<sup>91</sup>
55. During the course of these interviews, on 17 and 18 August 2022, the Marshall Islands wrote to Equatorial Guinea and Nigeria separately noting, which is apparent, that the *Heroic Idun* evading Nigerian authorities and its subsequent apprehension "*may be directly linked*".<sup>92</sup>
56. On 20 August 2022, the Nigerian Navy published a press release noting how "*the suspected rogue vessel, MT Heroic Idun, which veered into Nigerian waters with the intention to load oil illegally could not do so before it was accosted by Nigerian Navy Ship, Gongola at the Akpo Oilfield Terminal*".<sup>93</sup> It also made clear that:
- [...] *the Captain [of the Heroic Idun] after contacting the master/shipping agent refused to cooperate with NNS Gongola and stated that she had been told not to take directives from the Nigerian Navy Ship,' the Naval Chief said.*
- He noted that the defiance to constituted authority by the Captain of the vessel necessitated the Navy to invoke the collaboration of neighbouring Equatorial Guinea through the Yaoundé architecture to arrest the vessel.*<sup>94</sup>
57. On 24 August 2022, Equatoguinean authorities received another note verbale from the Nigerian Embassy in Malabo.<sup>95</sup> In this note, Nigeria expressed its "*profound gratitude [...] for the prompt arrest and progress made so far regarding the on-going*

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<sup>87</sup> Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 17.

<sup>88</sup> Letter from the Marshall Islands' Maritime Administrator to the Attorney General of Equatorial Guinea, 18 October 2022, **SA 15**.

<sup>89</sup> See Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 13; Log, **EK 4**, 18 August 2022, p. 26, entry at 11h48: "*Crew is well supported by Agent; they are all together back in the same place as before; Captain, CE and 2O were requested to sign statements on completion of Interview (all statements were in Spanish language, Agent was assisting with translation); [...]*".

<sup>90</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 13.

<sup>91</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 13.

<sup>92</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, p. 370; Letter from the Marshall Islands' Maritime Administrator to Governor of Luba, 16 August 2022, **SA 6**, p. 85; Witness statement of William Gallagher, 17 December 2023, **RMI 30**, ¶ 29.

<sup>93</sup> Nigerian Navy press release, 20 August 2022, **SA 5**, p. 81.

<sup>94</sup> Nigerian Navy press release, 20 August 2022, **SA 5**, p. 82.

<sup>95</sup> Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 24 August 2022, **REG-020**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*investigation*".<sup>96</sup> It also re-introduced Navy Captain Azuike Chukwuma (Defence Advisor) and introduced Mr Isoken Ikponmwosa (Consul of the Embassy) as its representatives in the investigation.<sup>97</sup> A few days later and in the context of the Yaoundé Code, Equatorial Guinea agreed to Nigeria's direct involvement in the investigations.<sup>98</sup>

58. Nigeria started its own parallel investigation, as admitted by the witness evidence filed by the Marshall Islands.<sup>99</sup> At interviews where Equatoguinean authorities were present, the questions of the Nigerian authorities concerned the actions of *Heroic Idun* on arrival at the Terminal, the actions of the crew on leaving the Terminal, and whether they were aware that their naval clearance was not ready at the time.<sup>100</sup> However, most of these interviews "*were solely conducted by the Nigerian officials*".<sup>101</sup>
59. On 30 August 2022, the Marshall Islands again wrote to Nigeria referencing its interpretation of the position under UNCLOS.<sup>102</sup> Equatoguinean authorities were not copied to this letter.<sup>103</sup>
60. Over the course of its own investigation, Nigeria provided Equatorial Guinea with some information concerning suspected infractions committed by the *Heroic Idun* in the Nigerian maritime space. For example, on 12 September 2022, Nigeria via note verbale set out various infractions that the *Heroic Idun* was understood to have committed in the Nigerian maritime space, including:
  - a) attempting to conduct illegal loading operations at the Terminal;
  - b) evading arrest by the Nigerian Navy; and
  - c) fleeing Nigeria's waters towards São Tomé and Príncipe, where it was subsequently arrested by Equatorial Guinea "*based on a request by Nigerian Government*".<sup>104</sup>

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<sup>96</sup> Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 24 August 2022, **REG-020**, p. 1.

<sup>97</sup> Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 24 August 2022, **REG-020**, p. 1.

<sup>98</sup> Note No. 2022/1722/100 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 29 August 2022, **REG-038**.

<sup>99</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶¶ 121, 129-131; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 23, 28, 32, 38; Witness statement of Chief Officer, 9 June 2023, **RMI 5**, ¶ 52; Witness statement of Able Seaman No. 3, 8 June 2023, **RMI 19**, ¶ 25; Witness statement of Ordinary Seaman No. 1, 8 June 2023, **RMI 20**, ¶ 20; Witness statement of Chief Cook, 8 June 2023, **RMI 27**, ¶ 20.

<sup>100</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 15: "*I accompanied the crew while they were interviewed by the Nigerian officials. Most of the conversations were about what the Heroic Idun did on arrival at Akpo, what happened when the crew left Akpo, when they received instructions, and if they were aware that their naval clearance was not ready at the time. This interview was about three hours long. I do not recall that the crew signed any document*".

<sup>101</sup> Witness statement of Stephen Askins, 14 December 2023, **RMI 3**, ¶ 23.

<sup>102</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, p. 372.

<sup>103</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, p. 372.

<sup>104</sup> Note No. 150/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 12 September 2022, **REG-021**, p. 1.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

61. Nigeria also recalled the Yaoundé Code, to which both States were parties, requesting that Equatorial Guinea accordingly transfer the Vessel and its crew to Nigeria.<sup>105</sup>
62. The following day, in a letter dated 13 September 2022, the Marshall Islands stated that:
- a) the Equatoguinean investigation "*has been completed*";<sup>106</sup>
  - b) it had concerns about the Nigerian investigation, as "*the repeated questioning [of the Master] by the Nigerian Embassy has become excessive*";<sup>107</sup> and
  - c) "*representatives of the Nigerian government continue to make unfounded allegations against the ship and maintain their desire to have the vessel transferred to Nigeria*".<sup>108</sup>
63. On 23 September 2022, Equatorial Guinea imposed a fine based on infractions committed by the *Heroic Idun* and falling under the CEMAC Code as well as the expenses of the Equatoguinean authorities involved in the investigation of the *Heroic Idun* (the "**Fine**").<sup>109</sup>
- a) As a preliminary matter, it is notable that the Marshall Islands has filed multiple translations of this document.<sup>110</sup> However, it relies on an inaccurate version of this translation. The version that the Marshall Islands relies upon in its Memorial refers to the illegal entry of the *Heroic Idun* in the "*territorial waters*" of Equatorial Guinea.<sup>111</sup> However, the correct translation of "*aguas jurisdiccionales*" is "*jurisdictional waters*", not "*territorial waters*".<sup>112</sup>
  - b) As provided under Article 18 of the CEMAC Code, the EEZ of a Member State is part of the "*waters under national jurisdiction beyond the territorial sea*".<sup>113</sup> In this regard, the Marshall Islands admits that the *Heroic Idun* entered into the EEZ of Equatorial Guinea, thereby coming under the jurisdictional waters of Equatorial Guinea as per the CEMAC Code.
  - c) Article 595 of the CEMAC Code provides that the repression of piracy "*falls within the competence of the judicial authority of each Member State*".<sup>114</sup>

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<sup>105</sup> Note No. 150/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 12 September 2022, **REG-021**, p. 3.

<sup>106</sup> Letter from the Marshall Islands' Maritime Administrator to the Attorney General of Equatorial Guinea, 13 September 2022, **SA 11**, p. 122.

<sup>107</sup> Letter from the Marshall Islands' Maritime Administrator to the Attorney General of Equatorial Guinea, 13 September 2022, **SA 11**, p. 122.

<sup>108</sup> Letter from the Marshall Islands' Maritime Administrator to the Attorney General of Equatorial Guinea, 13 September 2022, **SA 11**, p. 122.

<sup>109</sup> Resolution from the Ministry of National Defence of Equatorial Guinea, 23 September 2022, **REG-039**.

<sup>110</sup> Equatoguinean fine (English translation), **SA 13**; Equatoguinean fine and translation, **MT 41**; Translation of Ministry of Defence of Equatorial Guinea fine, **EK 47**; Official English translation of the Equatoguinean Fine, **RMI 41**.

<sup>111</sup> Official English translation of the Equatoguinean Fine, **RMI 41**; **Memorial**, ¶ 56.

<sup>112</sup> Resolution from the Ministry of National Defence of Equatorial Guinea, 23 September 2022, **REG-039**.

<sup>113</sup> CEMAC Code, No. 03/01-UEAC-088-CM-06, 3 August 2001, **REG-029**, Article 18.

<sup>114</sup> CEMAC Code, No. 03/01-UEAC-088-CM-06, 3 August 2001, **REG-029**, Article 595.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

- d) Article 581 of the CEMAC Code provides that States have the discretionary power to establish offences, including the failure to fly a flag and navigation without title (which Equatorial Guinea did).<sup>115</sup>
64. Based on the above, representatives for the *Heroic Idun* paid the Equatoguinean Fine while Nigeria continued its investigation.<sup>116</sup>
65. As a result of its investigations, on 12 October 2022, the Nigerian Ministry of Defence concluded that the Vessel:
- a) had "*escaped from Nigerian waters after it attempted to illegally load crude oil from the Akpo Oil Field*";<sup>117</sup>
  - b) had "*communicated false information about [a] piracy attack against her by a Nigerian Navy ship within the Nigerian maritime environment*";<sup>118</sup> and
  - c) was "*subsequently arrested by the Equatorial Guinea Navy on 10 August 2022 at the request of Nigeria*".<sup>119</sup>
66. Nigeria provided its own detailed assessment and conclusions that the Vessel had breached a number of international conventions and Nigeria's laws and requested its repatriation to Nigeria for further investigation.<sup>120</sup>

### IV. The crew of the *Heroic Idun* was treated in accordance with applicable standards at all times

67. At all times during their stay in Equatorial Guinea, the crew of the *Heroic Idun* was treated in accordance with applicable standards, including with due regard for their human rights. The crew had access to food, communications and health services as often as needed and were provided with safe and sanitary accommodation.
68. From the moment the *Heroic Idun* arrived at Luba Freeport, Besora were involved.<sup>121</sup> The crew members received visits from Besora at all times and had their phones at their disposal to communicate with their families without interference from the Equatoguinean authorities.<sup>122</sup> The Equatoguinean authorities ensured that Besora representatives accompanied the crew members to act as liaison between the crew members and the Equatorial Guinea Ministry of National Defence at all times.<sup>123</sup> As the agent for the *Heroic Idun*, Equatoguinean authorities knew that Besora would meet all of the crew's needs.

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<sup>115</sup> CEMAC Code, No. 03/01-UEAC-088-CM-06, 3 August 2001, **REG-029**, Article 581.

<sup>116</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶¶ 24-25.

<sup>117</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, **REG-040**, p. 1.

<sup>118</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, **REG-040**, p. 1.

<sup>119</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, **REG-040**, p. 1.

<sup>120</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, **REG-040**, p. 2.

<sup>121</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶¶ 4-6.

<sup>122</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 8.

<sup>123</sup> See Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 21; Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 6.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

69. On 14 August 2022 and due to security protocols, a total of 15 members of the crew were asked to disembark.<sup>124</sup> This decision was taken by consensus, as reflected in the fact that Equatoguinean authorities initially requested 17 crew members to disembark.<sup>125</sup> The crew members who disembarked were driven from Luba Freeport to Malabo in a convoy.<sup>126</sup> Besora representatives were present with the convoy and continued to accompany the crew members.<sup>127</sup> Besora also brought the crew members several provisions they had requested, including food and water.<sup>128</sup> Besora also provided them with local SIM cards to contact their families.<sup>129</sup> Evidence of the Marshall Islands dated 15 August 2022 confirms that "[a]ll 15x crew members are currently resting and safe. We have been continuously taking care of them to bring in the comfort zone maximum possible [...]".<sup>130</sup>
70. On the same evening, the crew who had been brought onshore were moved to a new accommodation facility in Malabo (the "**Accommodation Facility**").<sup>131</sup> Again, Besora representatives accompanied the crew members to the Accommodation Facility.<sup>132</sup> As explained by Mr Hernández Martín:

*Once we arrived, I noticed that the building was brand new and, although unfurnished, it was comfortable. It had suitable bathrooms and air conditioning. My colleague and I made arrangements to get suitable bedding for the crew so they could sleep comfortably there. The authorities offered for the Master and Chief Engineer to be housed in a separate building to the other crew members, recognising their higher ranks.*

*The next morning, on 15 August 2022, my colleague and I purchased several provisions to ensure the crew would be comfortable and well looked after during their accommodation. This included mattresses, pillows, a fridge and a small cooker.*<sup>133</sup>

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<sup>124</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 21.

<sup>125</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 22: "As a security measure, the crew had been divided, with 11 individuals on board and 15 on shore. This division was agreed with the captain of the *Heroic Idun*"; Email, 14 August 2022, **EK 5**, p. 33: "At 10:30lt – 14/08/2022, the authority informed us to disembark another 7x crews from vessel, however after discussion with authority they eventually agree to disembark only 5x crew to bring them in Malabo police custody".

<sup>126</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 7.

<sup>127</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 7.

<sup>128</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 8. Cf Log, **EK 4**, 14 August 2022, p. 21, entry at 15h20: "Agent reports that they are on the way to police station with meals for the crew".

<sup>129</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 8: "my colleague and I brought them food, water and provisions – we were able to bring anything the crew requested. The crew had their mobile phones and we brought them local SIM cards to use". Cf Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 15; Witness statement of Fourth Engineer, 9 June 2023, **RMI 13**, ¶ 17; Witness statement of Engine Cadet, 8 June 2023, **RMI 15**, ¶ 17.

<sup>130</sup> Email, 15 August 2022, **EK 8**, p. 41. See also Log, **EK 4**, 14 August 2022, entry at 15h18: "Requesting update on the incident – 15 people ashore, no mistreatment reported", p. 21.

<sup>131</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 9.

<sup>132</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 9.

<sup>133</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶¶ 10–11. See also Photographs of the Accommodation Facility, 1 July 2024, **REG-041**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

71. Throughout their stay in the Accommodation Facility, Mr Hernández Martín confirms that:

*We had no issues in ensuring the crew remained well looked after and comfortable. We had complete access to them. At the accommodation facility, there were some security watchmen outside but the crew were free to move and walk around as they wanted. There was also cleaning personnel that cleaned the accommodation facility on a regular basis.*<sup>134</sup>

72. As for the crew members who remained on board the *Heroic Idun*, Besora was always able to call and interact with the Vessel as needed. As Mr Hernández Martín explains:

*I also had contact with the crew who stayed on the Heroic Idun in Luba through phone, WhatsApp messages and emails. The Chief Officer or the owner would communicate the needs of the crew who remained on the vessel. Besora would supply the crew on board with all the provisions they required and deliver these to the Heroic Idun. At one point, I recall the owners of the vessel arranged for some spare parts also to be delivered to them.*<sup>135</sup>

73. The port authorities at Luba Freeport could also have radio communications with the crew stationed on the *Heroic Idun*. As Mr McDowall, the general manager of Luba Freeport, explains:

*All vessels at anchorage at Luba bay are able to communicate freely with our offices via VHF radio on channel 16, including the Heroic Idun while it was stationed here. This channel is manned 24 hours a day. Therefore, vessels facing any threat to their safety will receive an immediate response. As director and general manager, I am kept immediately informed of any issues or concerns relating to vessel safety and maintenance, including those relayed over VHF radio. I am also present at Luba Freeport daily. Throughout the entire time that the Heroic Idun was stationed at Luba Freeport, there were no security or other concerns relating to the vessel, and none were raised by the crew of the Heroic Idun.*<sup>136</sup>

74. Indeed, the evidence provided by the Marshall Islands shows that there was "[g]ood atmosphere onboard, mixed team between guards and crew in daily basket game matches".<sup>137</sup>

75. The crew members would make requests for supplies through Besora to Captain Nsue Esono Nchama of the Ministry of National Defence. Following approval from the Ministry, Luba Freeport authorities would arrange for the necessary vessels and equipment that Besora needed to take the supplies to the crew.<sup>138</sup>

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<sup>134</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 18.

<sup>135</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 19.

<sup>136</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 10.

<sup>137</sup> Log, **EK 4**, 22 August 2022, p. 27, 7h.

<sup>138</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 11.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

76. Regardless of whether on land or aboard the *Heroic Idun*, Besora was allowed day-to-day carriage to meet the crew members' requests.<sup>139</sup> As shown in the evidence provided by the Marshall Islands, "[a]ll crew are quite comfortable".<sup>140</sup> The owners themselves also wrote to recognise that they were "*grateful that the crew have been allowed food and water and have been treated well by those tasked to guard them*".<sup>141</sup> This included psychological support as a request was made for a chaplain to visit the crew, which Equatoguinean authorities approved by 29 August 2022 at the latest.<sup>142</sup>
77. Besora's involvement also included dealing with any requests for medical treatment. As confirmed by Mr Hernández Martín, Besora selected and arranged the crew's medical visits with doctors and hospitals.<sup>143</sup>
78. For less serious ailments such as stomach aches or headaches, Besora chose to take crew members to the Loeri Comba Hospital, which was closer to the Accommodation Facility.<sup>144</sup> On multiple occasions, Besora decided to take the crew members for treatment to La Paz Hospital ("**La Paz**"). La Paz is considered the best hospital in Malabo, where high-level political figures and celebrities have visited for treatment.<sup>145</sup> La Paz has doctors and staff from all over the world, and they are always able to facilitate and provide treatment in English.<sup>146</sup> Dr Irvin Simbarashe, the medical director at La Paz, attests that the crew members who were treated at La Paz had common sailors' illnesses, which were easily treatable.<sup>147</sup> He also confirms that they all received appropriate medical care based on their ailments.<sup>148</sup>
79. Throughout the crew members' stay in Equatorial Guinea, Equatoguinean authorities never denied Besora permission to take any crew member to a hospital for appropriate treatment. The crew were always taken to the hospitals chosen by Besora as and when treatment was needed.<sup>149</sup>
80. From 25 October 2022 to 5 November 2022, Equatorial Guinea authorised Besora to move the crew members to Hotel Anda China ("**Hotel Anda**"),<sup>150</sup> a hotel ranked as 4 stars superior. As explained by Mr Jorge Gaona Reina, the general manager of Hotel Anda:

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<sup>139</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 21.

<sup>140</sup> Log, **EK 4**, 23 August 2022, p. 2821h: "*Spoke with Master, he was feeling a lot better. All crew are quite comfortable, but moral [sic] is dropping. He sounded very clam [sic] and composed*".

<sup>141</sup> Letter from OSM to the Equatoguinean Attorney General, 16 September 2022, **EK 36**.

<sup>142</sup> Email, 29 August 2022, **EK 18**: "*As advised, our colleagues have now obtained authorities' approval for the chaplain visit to the crew*". See also Email, 31 August 2022, **EK 19**: "*We confirm the chaplain visited the crew individually and also discussed with our colleagues*".

<sup>143</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶¶ 25-28.

<sup>144</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 27.

<sup>145</sup> See Witness statement of Dr Irvin Simbarashe, 10 July 2024, **REG-WS-004**, ¶¶ 5, 8; Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 27. See also Images of La Paz Hospital, **REG-015**.

<sup>146</sup> Witness statement of Dr Irvin Simbarashe, 10 July 2024, **REG-WS-004**, ¶¶ 6-7.

<sup>147</sup> Witness statement of Dr Irvin Simbarashe, 10 July 2024, **REG-WS-004**, ¶ 12.

<sup>148</sup> Witness statement of Dr Irvin Simbarashe, 10 July 2024, **REG-WS-004**, ¶ 12.

<sup>149</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 28: "*I confirm that the Equatoguinean authorities always approved the requests for medical assistance to the crew of the Heroic Idun. I am not aware of any crew members having any serious malady different from those that are frequent for sailors and travellers in the region*".

<sup>150</sup> Invoice, Hotel Anda China, 8 November 2022, **REG-016**. See also Witness statement of Chief Engineer, 8 June 2023, **RMI 7**, ¶ 10.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*Hotel Anda China is considered a "four-star superior" hotel by the Equatoguinean authorities, which is equivalent to four-star superior as per international standards. It is a large hotel with 62 rooms and suites. Each room or suite is fully furnished with modern appliances and furnishings, and has a full bathroom, an LCD television, a large desk, high-speed Wi-Fi, and a safe. Each morning, bottled water is provided to each guest alongside daily housekeeping services. Our guests also have access to laundry services.*

*The hotel has two restaurants: one serves traditional Mediterranean food while another caters for Chinese food. Guests are able to visit the restaurants or order room service from the restaurants directly to their rooms.*

*The hotel also has a ballroom for events which can accommodate up to 300 guests, meeting rooms, an outdoor swimming pool, a sauna, a large gym, a casino, and two bars.*

*The hotel is regarded as one of the best in Malabo and our guests include high-level visitors, tourists, and business travellers.<sup>151</sup>*

81. The crew members confirmed to Besora representatives that the hotel was very good and thanked them for taking them there.<sup>152</sup> This is also corroborated in the witness statement of the Engine Cadet presented by the Marshall Islands, who admits that the Hotel Anda was a good hotel.<sup>153</sup> Mr Gaona Reina also confirms that "[e]ach crew member stayed in their own room, which ranged from a single room to a superior room or junior suite"<sup>154</sup> and that "the crew members of the Heroic Idun did not have any issues during their stay at Hotel Anda China".<sup>155</sup>
82. Generally, during their stay in Equatorial Guinea, the receipts for provisions also show that the crew was provided with all types of supplies.<sup>156</sup> For example, Besora provided among other things bread, chicken, cured meats, cheese, tea, juice, coffee, biscuits, crisps, soft drinks, yoghurt, fish, vegetables, fruit, noodles, assorted nuts, condiments, spices and toiletries.<sup>157</sup>
83. The receipts also show that Besora additionally provided the crew with:

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<sup>151</sup> Witness statement of Jorge Gaona Reina, 1 July 2024, **REG-WS-005**, ¶¶ 5-8. See also Hotel Anda China brochure, **REG-014**.

<sup>152</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 22: "We decided on the Hotel Anda China [...]. In my opinion, it is one of the top three hotels in Malabo. It has a swimming pool, a buffet and very nice rooms. The crew were impressed by the Hotel Anda. I remember talking with the Master, who told me the hotel was very good and thanked us for taking them there". See also Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶¶ 20-21.

<sup>153</sup> Witness statement of Engine Cadet, 8 June 2023, **RMI 15**, ¶ 24.

<sup>154</sup> Witness statement of Jorge Gaona Reina, 1 July 2024, **REG-WS-005**, ¶ 9.

<sup>155</sup> Witness statement of Jorge Gaona Reina, 1 July 2024, **REG-WS-005**, ¶ 11.

<sup>156</sup> 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**.

<sup>157</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

- a) Whisky;<sup>158</sup>
  - b) Vodka;<sup>159</sup>
  - c) Beer;<sup>160</sup>
  - d) Cigarettes;<sup>161</sup>
  - e) Cake;<sup>162</sup>
  - f) Nike sports clothing;<sup>163</sup>
  - g) Ice cream;<sup>164</sup>
  - h) Energy drinks;<sup>165</sup>
  - i) Nutella;<sup>166</sup> and
  - j) Candy.<sup>167</sup>
84. In late October 2022, the Indian Ambassador visited the Indian national crew members at Hotel Anda and also on board the *Heroic Idun* for Diwali, an Indian national holiday. The Indian Ambassador brought Indian food and presents for the crew members.<sup>168</sup>
85. In conclusion, as Mr Hernández Martín of Besora attests, "[t]hroughout their time in Equatorial Guinea, I confirm that the crew members of the *Heroic Idun* were always treated properly and in a considerate manner by the authorities".<sup>169</sup>

### V. Equatorial Guinea transferred the *Heroic Idun* and crew to Nigeria

86. On 12 October 2022, the Minister of Defence of Nigeria formally requested the return of the Vessel and the crew, noting how Nigeria was:

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<sup>158</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, pp. 28, 43.

<sup>159</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, p. 27.

<sup>160</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, pp. 22-23, 28; Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, pp. 14, 18.

<sup>161</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, pp. 28, 50; Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, p. 17.

<sup>162</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, p. 14; Receipts showing provision of food, provisions and cleaning items to crew, 23 August 2022, **REG-042**, pp. 1, 7.

<sup>163</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, p. 15.

<sup>164</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, p. 36; Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, p. 19.

<sup>165</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, pp. 36, 38, 42, 43; Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, pp. 16, 26.

<sup>166</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-012**, p. 43; Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, p. 27.

<sup>167</sup> Receipts from Besora for provisions for the crew of the *Heroic Idun*, **REG-013**, p. 24.

<sup>168</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 23. This contradicts the Master's evidence: Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 148. See also Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 12; Daily reports of the *Heroic Idun* provided by Besora, 13 August 2022 - 10 November 2022, **REG-036**, p. 5.

<sup>169</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 24.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*sincerely appreciative of the invaluable support and cooperation it has received so far from the good people and Government of Equatorial Guinea in the case of MT HEROIC IDUN. It is also proud of the good neighbourliness and spirit of African brotherhood that exists between both nations. This further reinforces the ideals of the Yaoundé Code of Conduct to which both countries are signatories which allows States in the Gulf of Guinea to cooperate to arrest persons and vessels involved in illegalities at sea in addition to ensuring their prosecution. Accordingly, it is necessary at this stage for Nigeria to take custody and continue with the investigation of MT HEROIC IDUN.*<sup>170</sup>

87. Nigeria reiterated its request on 26 October 2022 and 31 October 2022.<sup>171</sup> This was followed by a note verbale for mutual assistance on 1 November 2022, which requested Equatorial Guinea's collaboration in line with agreed frameworks between both States for mutual legal assistance.<sup>172</sup>
88. In line with its international obligations and cooperation agreements with Nigeria,<sup>173</sup> Equatorial Guinea responded to this request via note verbale on 27 October 2022, approving the release of the *Heroic Idun* and its crew for their return to Nigeria, acknowledging this was specifically under the Yaoundé Code.<sup>174</sup> Following this approval, Nigerian authorities communicated the arrival of Nigerian officials and two Nigerian Navy escort ships, the *NNS Oji* and the *NNS Ikenne*, to Equatorial Guinea for the official handover and return of the vessel to Nigeria.<sup>175</sup>
89. On 4 November 2022, the Marshall Islands sent letters to Nigeria and Equatorial Guinea threatening to commence proceedings under UNCLOS unless the Vessel and the crew were released.<sup>176</sup> The letter was sent to Nigeria despite the Marshall Islands knowing that the crew were in Equatorial Guinea at the time, reflecting the Marshall Islands' awareness that the subject-matter nonetheless related to Nigeria.

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<sup>170</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Minister of National Defence of the Republic of Equatorial Guinea, 12 October 2022, **REG-043**, p. 2.

<sup>171</sup> Note No. 167/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 26 October 2022, **REG-044**; Note No. 168/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 31 October 2022, **REG-045**.

<sup>172</sup> Note No. 167A/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 1 November 2022, **REG-046**.

<sup>173</sup> Bilateral agreement between the Government of Federal Republic of Nigeria and the Government of Equatorial Guinea on the establishment of the combined maritime policing and security patrol committee, 15 March 2016, **REG-007**.

<sup>174</sup> Note No. 10247/022 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 27 October 2022, **REG-047**.

<sup>175</sup> Note No. 169/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 3 November 2022, **REG-048**; Letter from the Defence Section of the Embassy of the Federal Republic of Nigeria in Malabo to the Minister of National Defence of the Republic of Equatorial Guinea, 4 November 2022, **REG-049**.

<sup>176</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, p. 383.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

90. On 5 November 2022, the official handover of the *Heroic Idun* from Equatorial Guinea was effected.<sup>177</sup> As Captain Nsue Esono Nchama recalls, "*there were various matters that delayed the Heroic Idun's departure. For example, two crew members reportedly felt unwell and so they were sent to La Paz hospital*".<sup>178</sup> In this regard, the Marshall Islands makes a series of allegations concerning the behaviour of Nigerian authorities.<sup>179</sup>
91. Captain Nsue Esono Nchama states that "[t]he crew also said that the engine of the *Heroic Idun* had been demobilised via satellite and could not work, as it had been blocked from doing so by the vessel's manager".<sup>180</sup> The Master and Mr Kulblik admit that this was a ruse to avoid leaving Equatorial Guinea.<sup>181</sup> In light of these issues, although the handover had officially taken place on 5 November 2022, the Nigerian authorities, the Equatoguinean authorities and the crew of the *Heroic Idun* were involved in a series of discussions.
92. However, even when in transit, Equatoguinean authorities made sure the crew was safe and well-treated. For example, on 8 November 2022, the Chief Officer took a picture and exchanged telephone numbers with Captain Nazareth Nicul of the Equatoguinean Navy.<sup>182</sup> The Chief Officer also introduced Captain Nazareth Nicul to his wife over a video call, at which time Captain Nazareth Nicul explained the situation to her. The actions of the Chief Officer show that he considered Captain Nazareth Nicul as trustworthy and helpful.<sup>183</sup> Such actions of the Chief Officer towards Captain Nazareth Nicul are incompatible with accusations now made against the Equatoguinean authorities of ill-treatment towards the crew.
93. Due to the alleged inability of the *Heroic Idun* to undertake the voyage, on 9 November 2022, Nigeria offered to tow the vessel for its repatriation.<sup>184</sup> In its note verbale, the Nigerian authorities reiterated that the *Heroic Idun* "*has been in detention in Equatorial Guinea at the behest of former for certain infractions within the Nigerian maritime space*".<sup>185</sup> Nigeria also made clear that the delivery of the ship was part of the "*efforts of both governments at achieving the objectives of ensuring a crime-free Gulf of Guinea*".<sup>186</sup>
94. As part of the discussions leading to the handover and as explained by Captain Nazareth Nicul, who was assisting and translating during the meetings:

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<sup>177</sup> Official handing over of the tanker *MT Heroic Idun* between the governments of the Republic of Equatorial Guinea and the Federal Republic of Nigeria, 5 November 2022, **REG-050**.

<sup>178</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 29. See also Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶¶ 16-17.

<sup>179</sup> **Memorial**, ¶ 73; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 56.

<sup>180</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 30.

<sup>181</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶¶ 145, 156; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 64.

<sup>182</sup> Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶¶ 9-10.

<sup>183</sup> Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶¶ 9-10.

<sup>184</sup> Note No. 171/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 9 November 2022, **REG-051**.

<sup>185</sup> Note No. 171/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 9 November 2022, **REG-051**.

<sup>186</sup> Note No. 171/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 9 November 2022, **REG-051**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*I recall that the Nigerian representatives emphasised that cooperation between African States was necessary. They explained that there was evidence the Heroic Idun had been involved in criminal offences in Nigeria and had transmitted a false broadcast of piracy against the Nigerian Navy before fleeing the Nigerian Navy. They wanted the vessel returned so they could resolve the matter in Nigeria.*

[...]

*[...] the Nigerian Ambassador was requesting the transfer of the vessel as it was suspected of committing crimes in Nigeria, and the crew needed to be investigated and prosecuted in Nigeria. The Ambassador noted that the vessel had made a false claim of piracy against a Nigerian Navy ship and attempted to escape.<sup>187</sup>*

95. During these discussions, Equatorial Guinea requested that Nigeria sign an undertaking to treat the Vessel's crew "in accordance with the provisions of the International Convention of Civil and Political Rights" and "[t]o equally guarantee the safety of the vessel while under investigation in Nigeria".<sup>188</sup> Nigeria agreed to provide the undertaking and did so.<sup>189</sup>
96. The following day, on 11 November 2022, the *Heroic Idun* left the port safely and without incident, after it became clear that the engines were in perfect working order.<sup>190</sup> Accordingly, on 11 November 2022, Equatorial Guinea's involvement assisting Nigeria in the matter of the *Heroic Idun* ended.
97. The Marshall Islands makes a series of allegations concerning the attitude of Nigerian authorities aboard Nigerian vessels and the voyage to Nigeria.<sup>191</sup> Equatorial Guinea has no knowledge of and is not privy to these events.
98. On 15 November 2022, the Nigerian authorities communicated that the Vessel and the crew had arrived safely in Nigeria on 12 November 2022. The Nigerian authorities stated:

*The Embassy wishes to once again, assure the Government of Equatorial Guinea of the safety of MT HEROIC IDUN, while upholding the human rights of the Crewmembers in line with the International Human Rights Instruments as domesticated in Nigerian laws during their stay in Nigeria.<sup>192</sup>*

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<sup>187</sup> Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶¶ 7, 11. See also Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶ 14.

<sup>188</sup> Official handing over of the tanker *MT Heroic Idun* between the governments, Addendum, 10 November 2022, **REG-011**. Cf Witness statement of Captain Ireneo Nazareth Nicul, 10 July 2024, **REG-WS-002**, ¶ 11.

<sup>189</sup> Official handing over of the tanker *MT Heroic Idun* between the governments, Addendum, 10 November 2022, **REG-011**.

<sup>190</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 13.

<sup>191</sup> **Memorial**, ¶ 85; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 68.

<sup>192</sup> Note No. 172/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 15 November 2022, **REG-052**, p. 1.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

99. On 3 June 2023, the Equatoguinean Minister of External Affairs wrote to his Nigerian counterpart confirming Equatorial Guinea's understanding that it had acted:

*[w]ithin the framework of respect for international and subregional obligations, after being informed by the Nigerian maritime authorities that a Vessel was in Equatorial Guinean*

*waters, which had been pursued by the maritime authorities of Nigeria due to having carried out illicit acts of illegal purchase of fuel and piracy, among others, our navy intervened on the Vessel in accordance with the Yaoundé Code [...]. At the same time, [the Vessel] was sanctioned and returned to Nigeria with the entire crew, in compliance with your requirement.*<sup>193</sup>

### VI. Equatorial Guinea has no knowledge of and is not privy to the details of the stay of the *Heroic Idun* and its crew in Nigeria

100. In its Memorial, the Marshall Islands makes a series of allegations concerning the treatment of the crew during the voyage and during their stay in Nigeria after 11 November 2022.<sup>194</sup> For instance:
- a) The Master feared "*lethal action*" against himself and the crew.<sup>195</sup>
  - b) The crew remained on the Vessel under Nigerian armed guard.<sup>196</sup>
  - c) The crew was not allowed to access sunlight or fresh air for a month.<sup>197</sup>
  - d) Communication was severely restricted.<sup>198</sup> Indeed, "*communications were much more limited than they had been in EG*".<sup>199</sup>
  - e) The crew were denied access to local lawyers in Nigeria.<sup>200</sup>
  - f) The health of the crew deteriorated, including their mental health.<sup>201</sup>
  - g) The circumstances leading to the plea bargain, under which the Vessel accepted a charge under anti-piracy legislation.<sup>202</sup>

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<sup>193</sup> Note No. 6014/023 from the Ministry of Foreign Affairs, International Cooperation and Diaspora of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 3 June 2023, **REG-053**, p. 2.

<sup>194</sup> Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 79-87; Witness statement of Stephen Askins, 14 December 2023, **RMI 3**, ¶¶ 45-60; Witness statement of Able Seaman No. 1, 8 June 2023, **RMI 17**, ¶ 16.

<sup>195</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 158.

<sup>196</sup> **Memorial**, ¶ 89.

<sup>197</sup> Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 85(a).

<sup>198</sup> **Memorial**, ¶ 89.

<sup>199</sup> Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 84.

<sup>200</sup> **Memorial**, ¶ 89.

<sup>201</sup> **Memorial**, ¶ 90; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 86.

<sup>202</sup> **Memorial**, ¶¶ 91-93; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 88-92; Email, 15 January 2023, **EK 69**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

- h) The intention of Nigerian authorities to prosecute the Vessel and the crew, even though they allegedly "*expressly acknowledged that the ordeal all arose out of a misunderstanding*".<sup>203</sup>
101. Only Nigeria would be in a position to respond to such allegations and present the facts and evidence relevant to these events. Equatorial Guinea understands that the *Heroic Idun* accepted liability to an offence under Nigerian anti-piracy legislation and made a public apology to Nigeria for its actions.<sup>204</sup>

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<sup>203</sup> **Memorial**, ¶ 92.

<sup>204</sup> Apology, 12 May 2023, **SA 44**; Plea Bargain, 27 April 2023, **SA 38**.

CHAPTER 4

JURISDICTION AND ADMISSIBILITY

102. Article 288(1) UNCLOS provides that:

[a] *court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.*

103. Here, the Parties agreed by Special Agreement and Notification of 18 April 2023 to transfer to the present Special Chamber of the Tribunal, pursuant to Article 15(2) of the Statute, the dispute concerning the *Heroic Idun* and her crew.<sup>205</sup>

104. As set out below, the Chamber should declare that it does not have jurisdiction over several of the Marshall Islands' claims, or in the alternative that they are inadmissible, pursuant to the *Monetary Gold* doctrine (Section I). This Chapter also addresses that part of this dispute is inadmissible as the Marshall Islands has failed to exhaust local remedies (Section II). Finally, the claims of the Marshall Islands regarding alleged breaches of treaties other than UNCLOS necessarily fall outside the Chamber's jurisdiction (Section III).

**I. Several claims in the dispute fall outside the jurisdiction of the Chamber, or in the alternative are inadmissible, due to the *Monetary Gold* doctrine**

105. Equatorial Guinea respectfully submits that several of the claims in the present dispute are outside the jurisdiction of the Chamber, or in the alternative are inadmissible pursuant to the *Monetary Gold* (i.e., the "*indispensable third party*") doctrine. Under this general principle of international law, disputes which directly implicate the rights of third States whose legal interests "*would form the very subject-matter of the decision*" are inadmissible in inter-State proceedings.<sup>206</sup> Adjudicating such a case would violate the core principle that States cannot be made subject to adjudication without their consent.<sup>207</sup>

106. In the present case, the rights and interests of Nigeria, a third State not party to this dispute, form "*the very subject-matter of the decision*" of several of the Marshall Islands' claims and thereby render them outside the Chamber's jurisdiction or alternatively, inadmissible. As detailed below, and even on Marshall Islands' own account and evidence, Nigeria first interacted with the *Heroic Idun* regarding its activities in and around the Terminal in Nigeria, which included suspicions of piracy-related offences.<sup>208</sup> The *Heroic Idun* displayed a pattern of suspicious and unusual

<sup>205</sup> Order of the Tribunal of 27 April 2023. A qualifying dispute has arisen between the Parties, as there is plainly "*a disagreement on a point of law or fact*" and "*a conflict of legal views or interests*" regarding "*the interpretation of application*" of UNCLOS. See *Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2, 30 August 1924, p. 11.

<sup>206</sup> See *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th, 1954, I.C.J. Reports 1954, p. 19, pp. 16-18.

<sup>207</sup> Yuval Shany, "Jurisdiction and Admissibility", *The Oxford Handbook of International Adjudication*, eds. Cesare PR Romano, Karen J Alter and Yuval Shany (Oxford University Press, 2015), p. 798.

<sup>208</sup> For example, the revised charges against the crew of 14 November 2022 were that: "*the crew committed one charge under section 10 of the Suppression of Piracy and Other Maritime Offences Act 2019 ('conspiring amongst*

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

behaviour to which Nigeria responded. Nigerian authorities reportedly sought to engage with the *Heroic Idun* before the Vessel fled and broadcast a false alert of piracy attack. Nigeria then alerted Equatorial Guinea to the *Heroic Idun*'s journey and direction of travel – and requested Equatorial Guinea, pursuant to its commitments under the Yaoundé Code – to apprehend and transfer the suspected Vessel to Nigeria. Equatorial Guinea facilitated Nigeria's request, as it was obliged to do.

107. The Marshall Islands now asks the Chamber to consider whether Equatorial Guinea, by acting in response to Nigeria's request, and by facilitating the investigation and transfer of the Vessel in line with its commitments under the Yaoundé Code, breached various provisions of UNCLOS (and other rules of international law). However, in doing so the Chamber would necessarily be required to examine Nigeria's legal rights and interests, including, but not limited to, those relating to:
- a) Nigeria's rights and interests to counter piracy;
  - b) the exercise of Nigeria's jurisdiction over suspected maritime offences in its EEZ;
  - c) the actions of Nigerian authorities relating to the Vessel and crew – both in Nigerian waters and in Equatorial Guinea; and
  - d) the legality of Nigeria's request to Equatorial Guinea under the Yaoundé Code.
108. Additionally, many of the factual assertions that form the basis of Marshall Islands' claims relate to the actions of, and can only be confirmed or denied, by Nigeria. The Chamber cannot make findings about the lawfulness of Equatorial Guinea's conduct without first – as a matter of necessity – making findings on the rights and interests of Nigeria as a non-party to these proceedings.<sup>209</sup> Accordingly, it must render these claims outwith the jurisdiction of the Chamber, or in the alternative, inadmissible.
- A. The *Monetary Gold* principle represents a well-established principle of international law that a tribunal has no jurisdiction or a claim is inadmissible where the rights of another non-participating State would form the subject-matter of the decision
109. The *Monetary Gold* doctrine is a well-established general principle of international law. First articulated by the International Court of Justice (the "ICJ" or the "Court") in its 1954 decision in *Case of the monetary gold removed from Rome in 1943*, it has subsequently been applied and affirmed by the ICJ, as well as other international courts and tribunals as a general principle of international law.

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*yourselves to commit a maritime offence'), one charge under section 4(h) of the Suppression of Piracy and Other Maritime Offences Act 2019 ('falsely pretending to become victims of maritime offences in order to invade [sic] lawful interception by Nigerian Navy Ship GONGOLA'), and one charge under s1(17)(b) of the Miscellaneous Offences Act 2004 ('attempted to deal with crude oil within Nigeria Exclusive Economic Zone without lawful authority')". See Witness statement of Stephen Askins, 14 December 2023, **RMI 3**, ¶ 50 and Amended charge sheet from the Federal High Court of Nigeria, 14 November 2022, **SA 32**.*

<sup>209</sup> See *Certain Phosphate Lands in Nauru (Nauru v Australia)*, in which the ICJ, in rejecting Australia's arguments on the applicability of the doctrine in that case, contrasted the position of the alleged indispensable third parties (New Zealand and the United Kingdom) with that of Albania in *Monetary Gold*, where necessary findings regarding Albania's alleged responsibility and the decision requested of the Court regarding the allocation of the gold "was not purely temporal but also logical". See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, 26 June 1992, ¶ 55.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

110. In *Monetary Gold*, the ICJ was asked to determine the issue of distribution of a certain quantity of gold claimed by both the United Kingdom and Italy, recovered in Germany and found to belong to Albania, who was not a party to the proceedings. In order to determine whether Italy was entitled to receive the gold, it was necessary to determine whether Albania had committed an internationally wrongful act against Italy and was under an obligation to pay compensation.
111. The Court held that it could not, without the consent of Albania, deal with the dispute between the United Kingdom and Italy, finding:

*[t]he Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.*

*[...] In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.*

*[...] Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.*<sup>210</sup>

112. Subsequently, in the *Case Concerning East Timor (Portugal v. Australia)*, Portugal objected to the conclusion of a treaty between Australia and Indonesia which created a zone of cooperation in a maritime area between "the Indonesian Province of East Timor and Northern Australia". According to Portugal, Australia had failed to respect the duties and powers of Portugal as the administering power of East Timor and the right of the people of East Timor to self-determination.<sup>211</sup>
113. Australia contended that Portugal's claim would require the Court to determine the rights and obligations of Indonesia. Referring to the *Monetary Gold* principle, Australia argued that the Court could not act if, in order to do so, it were required to rule on the lawfulness of Indonesia's actions and obligations.<sup>212</sup> The ICJ agreed, holding that Australia's conduct could not be assessed without first examining why Indonesia could not lawfully have concluded the treaty. Therefore, the "subject-matter" of the Court's decision would necessarily require a determination of whether Indonesia could have acquired the power to enter into treaties on behalf of East Timor relating to the resources

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<sup>210</sup> *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th, 1954, I.C.J. Reports 1954, p. 19, pp. 16-18 (emphasis added).

<sup>211</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, 30 June 1995, ¶¶ 1, 18.

<sup>212</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, 30 June 1995, ¶ 23.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

of the continental shelf. It thereby could not make such a determination in the absence of Indonesia's consent.<sup>213</sup>

114. It is well accepted that the *Monetary Gold* doctrine represents a general rule of international law and is not limited in its applicability to ICJ proceedings.<sup>214</sup> Indeed, international courts and tribunals have considered the *Monetary Gold* doctrine in disputes under UNCLOS,<sup>215</sup> including the *M/V "Norstar" Case (Panama v. Italy)* ("*M/V Norstar*").
115. The situation of Equatorial Guinea – a State acting in response to a request by another State (Nigeria) to arrest a vessel for suspected criminal activities – is similar to that of Spain in *M/V "Norstar"*.
116. In *M/V "Norstar"*, a Panamanian-flagged oil tanker was engaged in supplying gasoil to yachts off the coasts of France, Italy and Spain. On 11 August 1998, an Italian public prosecutor issued a decree of seizure against the *M/V "Norstar"* in the context of criminal proceedings against eight individuals for the alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. Subsequently, Italian authorities made a request pursuant to, *inter alia*, the 1959 European Convention on Mutual Assistance in Criminal Matters (the "**Strasbourg Convention**").<sup>216</sup> Spanish authorities seized the *M/V "Norstar"* when it was anchored in Palma de Mallorca in September 1998.<sup>217</sup> Panama brought a dispute against Italy, alleging violation of, *inter alia*, freedom of the high seas in Article 87 UNCLOS.<sup>218</sup>
117. Italy objected to the Tribunal's jurisdiction on the grounds that, *inter alia*:

*Italy is the wrong respondent in the present case and, in any event, adjudication over the claim advanced by Panama would*

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<sup>213</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, 30 June 1995, ¶ 28. In addition, the Court also rejected Portugal's additional submission that the rights which Australia had breached were rights *erga omnes*, and that accordingly Portugal could require it, individually, to respect them. At ¶ 29, the Court held that regardless of the *erga omnes* nature of the obligations at issue (here, the right to self-determination), the Court "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of another State which is not a party to the case".

<sup>214</sup> In *Larsen v Hawaiian Kingdom*, a PCA tribunal (including as members Professors Christopher Greenwood and the late James Crawford) applied the *Monetary Gold* principle and rejected the argument that it was only applicable in ICJ proceedings. It held that "*the Tribunal is not persuaded that the Monetary Gold principle is inapplicable. On the contrary, it can see no reason either of principle or policy for applying any different rule. [...] That rule applies with at least as much force to the exercise of jurisdiction in international arbitral proceedings. While it is the consent of the parties which brings the arbitration tribunal into existence, such a tribunal, particularly one conducted under the auspices of the Permanent Court of Arbitration, operates within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings*". See *Larsen v Hawaiian Kingdom*, PCA Case No. 1999-01, Arbitral Award, 5 February 2001, ¶ 11.17.

<sup>215</sup> See, for example, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-09, Award on Jurisdiction and Admissibility, 29 October 2015, ¶¶ 180-181.

<sup>216</sup> Under the Strasbourg Convention, Contracting Parties undertook to afford each other the widest measure of mutual assistance in respect of offences which fell within the jurisdiction of the judicial authority of the requesting State. See *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 164.

<sup>217</sup> See *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶¶ 41-48.

<sup>218</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 37.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*require the Tribunal to ascertain rights and obligations pertaining to Spain, in its absence.*<sup>219</sup>

118. The Tribunal first examined whether Italy was the "*proper respondent*" to the dispute submitted by Panama. It took note that the arrest was made by Spain upon the decree of seizure issued in connection with criminal proceedings in Italy, in response to the letter rogatory sent by Italy to Spain under the Strasbourg Convention.<sup>220</sup> The Tribunal then observed that:

*[i]n the present case, Spain, the requested Party, executed the letter rogatory of Italy, the requesting Party, asking for the immediate enforcement of the Decree of Seizure in accordance with the provisions of the 1959 Strasbourg Convention. The Tribunal notes that Italy, referring to Spain's execution of its request, stated that 'this is an example of the most satisfactory treaty cooperation with Spain, of which Italy is most appreciative'.*<sup>221</sup>

119. In the Tribunal's view, the facts indicated that while the vessel's arrest took place as a result of judicial cooperation between Italy and Spain, "*the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest*".<sup>222</sup> It held that:

*the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy against the M/V "Norstar". It is Italy that adopted legal positions and pursued legal interests with respect to the detention of the M/V "Norstar" through the investigation and proceedings. Spain merely provided assistance in accordance with its obligations under the 1959 Strasbourg Convention. [...].*<sup>223</sup>

120. Accordingly, the Tribunal held that the dispute rightfully concerned the rights and obligations of Italy, and it was the proper respondent in the dispute.<sup>224</sup>
121. In assessing Italy's indispensable third-party objection, the Tribunal acknowledged that:

*the notion of indispensable party is a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ. Pursuant to this notion,*

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<sup>219</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶¶ 61(b), 135. See also ¶¶ 144-146.

<sup>220</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 163.

<sup>221</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 164.

<sup>222</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 165.

<sup>223</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 167.

<sup>224</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶¶ 167-168.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*where 'the vital issue to be settled concerns the international responsibility of a third State' or where the legal interests of a third State would form 'the very subject-matter' of the dispute, a court or tribunal cannot, without the consent of that third State, exercise jurisdiction over the dispute.*<sup>225</sup>

122. However, given the factual context of the dispute, the Tribunal concluded that:

*[...] the dispute before the Tribunal concerns the rights and obligations of Italy. The involvement of Spain in this dispute is limited to the execution of Italy's request for the seizure of the M/V "Norstar" in accordance with the 1959 Strasbourg Convention. Accordingly, it is the legal interests of Italy, not those of Spain, that form the subject matter of the decision to be rendered by the Tribunal on the merits of Panama's Application.*<sup>226</sup>

123. Indeed, Panama itself acknowledged in that case that "*it was not Spain as the executing State but Italy who decided and ordered the seizure of the M/V Norstar, [...] Italy is therefore responsible for the consequences of its wrongful order*".<sup>227</sup>

124. In the present case, the position of Equatorial Guinea is similar in this key respect to that of Spain in the M/V "Norstar" dispute. Specifically, in the M/V "Norstar", the apprehension was carried out by Spain in accordance with the Strasbourg Convention, which requires parties to:

*undertake to afford each other in accordance with its provisions, the widest measure of mutual assistance in proceedings in respect of offences, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State.*<sup>228</sup>

125. Similarly, Nigeria's request was made under the Yaoundé Code, to which both Nigeria and Equatorial Guinea are parties, and which contains similar commitments, including to:

*cooperate to the fullest possible extent in the repression of transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea with a view towards:*

*(a) sharing and reporting relevant information;*

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<sup>225</sup> M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 172.

<sup>226</sup> M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 173.

<sup>227</sup> M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 148.

<sup>228</sup> M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 164.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

(b) *interdicting ships and/or aircraft suspected of engaging in in [sic] transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea;*

(c) *ensuring that persons committing or attempting to commit in transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea are apprehended and prosecuted [...].*<sup>229</sup>

126. In turn, pursuant to its commitments under the Yaoundé Code, Equatorial Guinea granted Nigeria's request, which similarly related to suspected criminal infractions under the jurisdiction of Nigeria. Like Italy in *M/V "Norstar"*, Nigeria's request was the only reason for the initial arrest of the *Heroic Idun* – without Nigeria's request, no arrest of the *Heroic Idun* by the Equatoguinean Navy would have occurred. The *Heroic Idun*'s apprehension was pursuant solely to Nigeria's request. Equatorial Guinea provided assistance in accordance with its obligations under the Yaoundé Code in accordance with its international commitments of judicial and government cooperation. Its position in relation to the *Heroic Idun* was therefore secondary, and facilitative of the State (Nigeria) which ordered the apprehension of the Vessel, and whose rights to do so remain the "*subject-matter*" underlying this dispute. Yet, Marshall Islands has elected to bring these proceedings against Equatorial Guinea.

B. The rights and interests of Nigeria form the "*subject-matter*" of several claims in this dispute, rendering them outside the jurisdiction of the Chamber or in the alternative, inadmissible

127. Nigeria's rights and interests form the factual foundations of this dispute and the very "*subject-matter*" of the main dispute. The apprehension and investigation of the *Heroic Idun* and its crew occurred due to events that occurred in Nigerian jurisdiction, when the Vessel was first suspected and approached by Nigerian authorities around the Terminal. Pursuant to these events, the Vessel was ultimately escorted from Equatorial Guinea by Nigeria, before being subject to Nigerian enforcement jurisdiction, concluding in a plea agreement with Nigerian authorities in which the Vessel accepted liability to an offence under Nigeria's piracy-related legislation.<sup>230</sup> The facts underlying the *Heroic Idun*'s plea agreement under Nigeria's anti-piracy legislation are unknown to Equatorial Guinea and necessarily were an exercise of Nigerian sovereignty. The existence of the plea agreement demonstrates facts and conduct which occurred within Nigeria's knowledge and jurisdiction.

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<sup>229</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 2 (emphasis added).

<sup>230</sup> The Vessel agreed to plead guilty to an offence under section 16(5)(b) of the Suppression of Piracy and Other Maritime Offences Act, 2019, and to pay a statutory fine of five million Naira (approximately GBP 5,000) in respect of this offence. The Vessel also agreed to pay the sum of USD 15,000,000 as "*restitution*" and to make an apology in Lloyd's List and other local publications. See Witness statement of Stephen Askins, 14 December 2023, **RMI 3**, ¶ 57(h). See also Plea Bargain, 27 April 2023, **SA 38** and Judgment Order of the Federal High Court of Nigeria in Port Harcourt, 28 April 2023, **SA 39**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

128. For example, various claims by the Marshall Islands require the Chamber to necessarily rule upon the legal rights and interests of Nigeria. At various points, the Chamber is requested to examine:
- a) the rights of Nigeria as a State Party to UNCLOS regarding the exercise of its prescriptive and enforcement jurisdiction in its EEZ, and as a coastal State under Article 56(c) UNCLOS, including assessment by Nigeria's authorities of suspected maritime offences of the *Heroic Idun*, including the Vessel having no naval clearance, in the waters near the Terminal;
  - b) the acts of Nigerian authorities on 8 August 2022 in their interaction with the *Heroic Idun* in attempting to escort it to Bonny anchorage, the resulting confrontation between the *Heroic Idun* and the *NNS Gongola*, and the false piracy alert and distress calls issued by the *Heroic Idun*;
  - c) the assessment made by Nigeria that the *Heroic Idun* had been attempting to illegally load crude oil near the Terminal and had attempted to evade Nigeria's authorities by fleeing to the maritime waters of São Tomé and Príncipe;
  - d) the request made by Nigeria to Equatorial Guinea under the Yaoundé Code for cooperation and the apprehension of the *Heroic Idun*;
  - e) the exercise of Nigeria's prescriptive and enforcement jurisdiction, both in maritime areas where it encountered the *Heroic Idun* and on the territory of Equatorial Guinea where its officials investigated the *Heroic Idun*;
  - f) various acts of Nigerian officials in Equatorial Guinea, including in interviewing the crew of the *Heroic Idun* and conducting an investigation;
  - g) Nigeria transferring and escorting the *Heroic Idun* from Luba Freeport; and
  - h) the subsequent treatment of the crew and Vessel while they remained in Nigeria for the following six months.
129. The *Heroic Idun* and its crew spent the majority of their time in Nigeria, subject to a Nigerian judicial process.<sup>231</sup> However, the Marshall Islands' claims in the present dispute attempt to artificially sever the events in Equatorial Guinea from their broader context and paint for the Chamber an artificially narrow picture of the events concerning the *Heroic Idun*.
130. As set out in detail in Chapter 3 above, on the evening of 8 August 2022, the *Heroic Idun* was approached by the Nigerian Navy ship, *NNS Gongola*. The evidence displays a more complex and suspicious pattern of behaviour than that set out by the Marshall Islands' pleading regarding the lack of *Heroic Idun*'s conduct and (admitted) lack of Nigerian naval clearance at that time.<sup>232</sup> Equatorial Guinea was not present during these events. Suffice to say, these incidents between the *Heroic Idun* and the Nigerian authorities raised Nigerian suspicions around the Vessel, and triggered all subsequent events, including Nigeria's request for the Vessel's pursuit and apprehension.

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<sup>231</sup> The *Heroic Idun* and crew were in Equatorial Guinea from 13 August 2022 to 11 November 2022 (approximately three months) and in Nigeria from 12 November 2022 to 28 May 2023 (over six months).

<sup>232</sup> Email, 8 August 2022, **MT 20**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

131. These include, for instance, the following:

- a) At 20:09 that night, the *Heroic Idun* was informed by the Terminal that "*very soon, she's just 4 nm from you, the navy ship, the vessel navy ship is coming to investigate your ship [...]*".<sup>233</sup>
- b) Although the Master of the *Heroic Idun* appeared to be uncertain whether the vessel was a Navy vessel or not, the Chief Officer noted at 20:13:25 that "[a] *Nigerian boat is coming our way, man. Nigerian Navy*".<sup>234</sup>
- c) At 20:23:39, in communication with the *NNS Gongola*, the Master acknowledged that the *Heroic Idun* did not yet have the required clearance. He was then told by the *NNS Gongola* that "*you are supposed to [...] get your clearance, both the Nigerian National Petroleum Company clearance, and the naval clearance before you proceed here*".<sup>235</sup>
- d) The *Heroic Idun* was then instructed that "[y]ou can't remain here. You follow me and proceed to Bonnie Fairway Buoy. When your approval is given, you will be released to come and commence your loading".<sup>236</sup> Later, it was similarly told "*MT Heroic Idun this is a Nigerian navy patrol vessel and I please direct you to comply with my directive. You are to follow my wake and alter your course to Bonnie Fairway Buoy. Once your issue resolved, then you can proceed. However, you must comply with my directive*".<sup>237</sup>
- e) At 20:36:41, the *Heroic Idun* was informed that the identity of the *NNS Gongola* was verified by terminal security ("*Yes, this Nigerian navy boat, I have a chat with her. She confirmed that. She's Nigerian navy boat NNS Gongola*").<sup>238</sup>
- f) Shortly thereafter at 21:04:02, the *Heroic Idun* broadcast an alert that it had been subject to a pirate attack. In response, at 21:20:25, the *NNS Gongola* informed *Heroic Idun* that "[i]t is an offence to resist maritime arrest".<sup>239</sup>

132. In the early hours of 10 August 2022, Equatoguinean authorities received an urgent request from the Nigerian Navy to apprehend the *Heroic Idun*.<sup>240</sup> The Equatoguinean Navy made urgent arrangements to send the *Capitán David* in search of the *Heroic*

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<sup>233</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 270 (emphasis added).

<sup>234</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 270 (emphasis added).

<sup>235</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 271 (emphasis added). See also Email, 8 August 2022, **MT 20**, where the Master of the *Heroic Idun* on 8 August 2022 acknowledges that the Vessel had been instructed to move 10 nautical miles clear of the Terminal as it was still waiting for nomination and there was no naval clearance yet.

<sup>236</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 271.

<sup>237</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 271-272 (emphasis added).

<sup>238</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 272 (emphasis added).

<sup>239</sup> Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, **MT 26**, p. 275.

<sup>240</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 18; Request from Nigeria regarding *Heroic Idun* (WhatsApp messages), **REG-002**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*Idun*, whose location was also provided by Nigeria. Equatorial Guinea acted immediately in response to the threat and assessment made by Nigeria, relying entirely on the information provided.

133. On the same day, the Nigerian Minister of Defence transmitted a note verbale to his Equatoguinean counterpart containing a formal request to apprehend and transfer the *Heroic Idun* and its crew to Nigeria.<sup>241</sup> In this note verbale, Nigeria requested Equatorial Guinea to "*intervene in the tracking, arrest and repatriation of [the Heroic Idun], which was involved in the illegal entry into Nigerian's [sic] territorial waters to load crude oil without proper approval*" and noted that the Vessel had "*escaped into Equatoguinean maritime domain by raising a false piracy attack alarm to avoid collateral damage*".<sup>242</sup> Citing the subsisting defence cooperation protocols between the two countries, Nigeria requested Equatorial Guinea to "*track and arrest the vessel and hand them (both vessel and crew) over to the Nigerian Government for proper investigation*".<sup>243</sup> It nominated two Nigerian officials from its Embassy to work with Equatoguinean officials to this end.<sup>244</sup>
134. When the Vessel arrived at Luba Freeport, Equatoguinean authorities conducted preliminary factual investigations. However, Nigerian authorities immediately relayed a formal request to investigate the Vessel and its crew, which was granted.<sup>245</sup>
135. From this point, Nigeria conducted its own parallel and separate investigation – in which the Equatoguinean authorities remained substantively uninvolved.<sup>246</sup> As set out in the witness statement of Stephen Askins:

*[t]here were another two rounds of interviews of the Master and crew by Nigerian officials on 15 and 20 September, but again, while these caused us huge concern, they did not appear to impact the Equatoguinean investigations as the interviews were solely conducted by the Nigerian officials.*<sup>247</sup>

136. On completion of their inquiry, the Nigerian authorities requested the transfer of the *Heroic Idun* to Nigeria for prosecution in line with the Yaoundé Code.<sup>248</sup> This was

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<sup>241</sup> See Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>242</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>243</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>244</sup> Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 10 August 2022, **REG-019**.

<sup>245</sup> Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 24 August 2022, **REG-020**; Note No. 2022/1722/100 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 29 August 2022, **REG-038**.

<sup>246</sup> See, for example, Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 129, describing the Master's second interview "*The second time we were interviewed was on 31 August 2022, when we were visited by many people in uniforms at the detention facility [...] it was two Nigerian naval attaches, their secretary and an Equatorial Guinean naval lawyer. I was questioned again, but this time by the Nigerian delegation. The Equatorial Guinean naval lawyer dozed off a few times during the questioning and was largely uninvolved*".

<sup>247</sup> Witness statement of Stephen Askins, 14 December 2023, **RMI 3**, ¶ 23.

<sup>248</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 27; Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, **REG-040**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

agreed to on 27 October 2022.<sup>249</sup> The Nigerian authorities directly transported the Vessel and crew from Equatorial Guinea on 11 November 2022.<sup>250</sup>

137. Nigeria's own communications with Equatorial Guinea at this time evidence that it effectively controlled the circumstances in which the *Heroic Idun* was apprehended and held. They also demonstrate Nigeria's legal rights and interests relating to the apprehension, investigation and transfer of the *Heroic Idun* and her crew. For example:
- a) On 24 August 2022, Nigeria expressed via note verbale the "*profound gratitude of the Nigerian Government to the Government and authorities of Equatorial Guinea for the prompt arrest and progress made so far regarding the on-going investigation*" of the Vessel, and introduced a Navy Captain, and Defence Adviser and Embassy Consul to participate in the investigation of the Vessel.<sup>251</sup>
  - b) On 12 September 2022, Nigeria via note verbale set out various infractions that the *Heroic Idun* was understood to have committed in the Nigerian "*maritime space*", including attempting to conduct illegal loading operations at the Terminal, evading arrest by the Nigerian Navy and fleeing Nigeria's waters towards São Tomé and Príncipe, where it was subsequently arrested by Equatorial Guinea "*based on a request by Nigerian Government*".<sup>252</sup> Nigeria also recalled the Yaoundé Code, to which both States were parties, and confirmed its view that the Code was a legal basis for Equatorial Guinea to transfer the Vessel and her crew to Nigeria.<sup>253</sup>
  - c) On 12 October 2022, the Nigerian Ministry of Defence noted that the Vessel had "*escaped from Nigerian waters after it attempted to illegally load crude oil from the Akpo Oil Field*" and "*communicated false information about [a] piracy attack against her by a Nigerian Navy ship within the Nigerian maritime environment*".<sup>254</sup> Nigeria provided its own detailed assessment that the Vessel had breached a number of international conventions and Nigeria's laws, and requested its repatriation to Nigeria for investigations.<sup>255</sup>
  - d) On 26 October 2022, Nigeria transmitted an urgent letter to the Equatoguinean Minister of Defence, requesting the Equatoguinean Government to advise on a suitable date for the formal handover of the ship and its crew to Nigeria.<sup>256</sup>

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<sup>249</sup> Note No. 10247/022 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 27 October 2022, **REG-047**.

<sup>250</sup> Marshall Islands was also aware of and acknowledged the role of Nigeria in the transfer of the Vessel. See, for example, Letter from the Marshall Islands' Maritime Administrator to the Registrar of ITLOS, 14 November 2022, **RMI 34**.

<sup>251</sup> Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 24 August 2022, **REG-020**.

<sup>252</sup> Note No. 150/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 12 September 2022, **REG-021**, p. 1.

<sup>253</sup> Note No. 150/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 12 September 2022, **REG-021**, p. 3.

<sup>254</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Minister of National Defence of the Republic of Equatorial Guinea, 12 October 2022, **REG-043**.

<sup>255</sup> Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea, 12 October 2022, **REG-040**.

<sup>256</sup> Note No. 167/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 26 October 2022, **REG-044**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

- e) On 31 October 2022, Nigeria via note verbale referred to its previous request of 26 October 2022 for repatriation of the *Heroic Idun*.<sup>257</sup>
  - f) On 1 November 2022, the Nigerian Attorney-General and Minister of Justice via note verbale communicated a formal request for mutual legal assistance.<sup>258</sup>
  - g) On 4 November 2022, Nigeria via note verbale advised that it had nominated two Nigerian Navy vessels and several Nigerian officials for the official handover and repatriation of the Vessel to Nigeria, who were due to arrive in Equatorial Guinea on 7 November 2022 for the handover.<sup>259</sup>
  - h) On 9 November 2022, Nigeria via note verbale requested Equatorial Guinea for an extension until 13 November 2022 to enable the Government of Nigeria to send two tugboats from Nigeria to tow the *Heroic Idun*, which had been in detention in Equatorial Guinea "*at the behest of [Nigeria] for certain infractions within the Nigerian maritime space*".<sup>260</sup>
  - i) On 15 November 2022, Nigeria via note verbale informed Equatorial Guinea of the formal transfer of the Vessel and crew to Nigeria. It conveyed "*the profound gratitude of the Government of the Federal Republic of Nigeria to the Government of Republic of Equatorial Guinea*".<sup>261</sup>
138. On 3 June 2023, the Equatoguinean Minister of External Affairs wrote to his Nigerian counterpart on the commencement of this dispute by the Marshall Islands, confirming Equatorial Guinea's understanding that it had acted:
- within the framework of respect for international and subregional obligations, after being informed by the Nigerian maritime authorities that a Vessel was in Equatorial Guinean waters, which had been pursued by the maritime authorities of Nigeria due to having carried out illicit acts of illegal purchase of fuel and piracy, among others, our navy intervened on the Vessel in accordance with the Yaoundé Code [...] At the same time, [the Vessel] was sanctioned and returned to Nigeria with the entire crew, in compliance with your requirement.*<sup>262</sup>
139. Given that Equatorial Guinea was not present during the acts giving rise to the *Heroic Idun*'s alleged infractions and piracy offences in Nigerian waters, it was necessarily compelled to rely on the assessments and request made by Nigeria in this regard, acting

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<sup>257</sup> Note No. 168/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 31 October 2022, **REG-045**.

<sup>258</sup> Note No. 167A/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 1 November 2022, **REG-046**.

<sup>259</sup> Letter from the Defence Section of the Embassy of the Federal Republic of Nigeria in Malabo to the Minister of National Defence of the Republic of Equatorial Guinea, 4 November 2022, **REG-049**.

<sup>260</sup> Note No. 171/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 9 November 2022, **REG-051**.

<sup>261</sup> Note No. 172/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea, 15 November 2022, **REG-052**.

<sup>262</sup> Note No. 6014/023 from the Ministry of Foreign Affairs, International Cooperation and Diaspora of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 3 June 2023, **REG-053**, p. 2.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

in accordance with its international commitments under the Yaoundé Code. However, on what basis Nigeria made its factual and legal determinations in relation to the *Heroic Idun*'s conduct which prompted its request to Equatorial Guinea, and the basis of Nigeria's acts under international law, is an issue that would inevitably and intrinsically involve examination of Nigeria's sovereign rights and interests under international law.

140. In *M/V "Norstar"*, Panama acknowledged that "*Spain, as the State providing judicial assistance, was neither obligated nor expected to investigate whether an offence existed or whether the seizure was justified*"<sup>263</sup> and that "*Spain was merely responsible for the manner and methods of the seizure*".<sup>264</sup> The same logic necessarily applies to Equatorial Guinea's actions in the present case. For the Chamber to examine whether in apprehending the *Heroic Idun*, Equatorial Guinea breached various provisions of UNCLOS, would involve prior judgment – both as a logical and temporal matter – on the rights and interests of Nigeria which is a State not party to this dispute.
141. At numerous points in its pleading, it is clear that Marshall Islands takes issue with the treatment of the *Heroic Idun* and crew by Nigeria and its authorities, which Equatorial Guinea necessarily cannot make submissions on. For example, these include:
- a) the interaction between the *Heroic Idun* and the *NNS Gongola* on 8 August 2022;<sup>265</sup>
  - b) the questioning of the crew by Nigerian officials on 31 August, 9 September, 15 September and 20 September 2022;<sup>266</sup>
  - c) the alleged interaction with Nigerian officials and the Chief Engineer on 6 November 2022;<sup>267</sup>
  - d) the alleged treatment of the crew onboard the Nigerian Navy ship *NNS Oji* on 10 November 2022;<sup>268</sup>
  - e) the actions of the guards from the Nigerian Navy Special Boat Service on the *Heroic Idun* on 11 November 2022;<sup>269</sup>
  - f) the escort of the *Heroic Idun* by Nigerian naval ships on its journey to Nigeria from 11-12 November 2022;<sup>270</sup> and
  - g) the detention and treatment of the crew in Nigeria, including remaining under armed guard, deteriorating health conditions of the crew, depiction by the Nigerian media and treatment at the hands of Nigerian naval authorities.<sup>271</sup>

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<sup>263</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 150.

<sup>264</sup> *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 150.

<sup>265</sup> **Memorial**, ¶¶ 29-35.

<sup>266</sup> **Memorial**, ¶ 54. See also Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 28, 32, 38.

<sup>267</sup> **Memorial**, ¶ 73; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶ 56.

<sup>268</sup> **Memorial**, ¶ 82.

<sup>269</sup> **Memorial**, ¶ 83.

<sup>270</sup> **Memorial**, ¶ 85.

<sup>271</sup> See **Memorial**, ¶¶ 88-93; Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 79-87; Witness statement of Stephen Askins, 14 December 2023, **RMI 3**, ¶¶ 47-59.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

142. Various claims by the Marshall Islands require the Chamber to necessarily rule upon the legal rights and interests of Nigeria, as set out above. The legal rights and interests of Nigeria accordingly form an inextricable part of the "*subject-matter*" of several of the legal claims made by the Marshall Islands. At all times, Equatorial Guinea acted in furtherance of its obligations of cooperation with Nigeria and, in doing so, necessarily relied in good faith upon and acted pursuant to the legal, intelligence, and informational assessments made by Nigerian authorities. To examine Equatorial Guinea's conduct would be to rule upon the merits and nature of the assessments made by Nigeria, which would necessarily involve judging on Nigeria's exercise of its legal interests and rights under international law, in its absence.
143. Notably, the Marshall Islands could have sought legal recourse against Nigeria with respect to those claims that relate to Nigeria's rights and interests. Indeed, its evidence shows that it – at one point – was threatening taking "*action against Nigeria*"<sup>272</sup> and that the Marshall Islands would "*confront Nigeria about it's [sic] unlawful intended rendition by force [...] of the [Heroic Idun] from Equatorial Guinea*".<sup>273</sup>
144. Numerous communications demonstrate that, on Marshall Islands' own assessment at the time, the dispute involved the responsibilities (and rights) of Nigeria. For example:
- a) A letter from the Maritime Administrator of the Marshall Islands to the Nigerian Chief of Naval Staff on 18 August 2022 recognised that "*the incidents occurring on the 8th and 12th of August may be directly linked*" and requested an explanation by Nigeria of actions taken in violation of UNCLOS;<sup>274</sup>
  - b) A letter from the Marshall Islands Maritime Administrator to the Director General of the Nigerian Maritime Administration and Safety Agency on 30 August 2022 protested the prospective transfer of the Vessel to Nigeria "*in the strongest terms*" and raised concerns about interference with the vessel's rights of innocent passage under UNCLOS (i.e., the very same claim that Marshall Islands now seeks to bring against Equatorial Guinea, in relation to the same events);<sup>275</sup>
  - c) A letter from the Marshall Islands Maritime Administrator to the Director General of the Nigerian Maritime Administration and Safety Agency on 30 August 2022 requested Nigeria to "*facilitate the immediate release of the M/T HEROIC IDUN*";<sup>276</sup>
  - d) A letter from the Marshall Islands Maritime Administrator to the Director General of the Nigerian Maritime Administration and Safety Agency on 4 November 2022 raised the prospective transfer of the Vessel to Nigeria. It then demanded that the Vessel and crew be released immediately and that the Nigerian Navy refrain from arresting, detaining or moving the Vessel. Further, the Marshall Islands

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<sup>272</sup> An email from the owners to the Master and crew of the *Heroic Idun* of 15 January 2023 notes that "[w]e haven't had any reactions from EG on the ITLOS arbitration. The action against Nigeria is nearly ready but the feeling is that with things being so sensitive in terms of timing we will see what next week brings and re-consider this at the end of next week". See Email, 15 January 2023, **EK 69**.

<sup>273</sup> Email, 4 November 2022, **SA 20**. Indeed, it was Nigeria to whom statements about the *Heroic Idun* were made in meetings of the IMO. See Report of the Maritime Safety Committee on its 106th Session, **WG 9**, pp. 405-406.

<sup>274</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, p. 370 (emphasis added).

<sup>275</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, pp. 372-373.

<sup>276</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, pp. 385-386. See also pp. 387, 388, 389, 390.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

threatened to commence proceedings under UNCLOS.<sup>277</sup> It is notable that the Vessel and crew were in Equatorial Guinea at the time of the letter and yet release was demanded of Nigeria, under threat of UNCLOS dispute proceedings; and

- e) A note verbale from the Marshall Islands to Nigeria on 11 November 2022, which made clear that the Marshall Islands considered:

*the conduct of the Nigerian authorities in respect of the M/T HEROIC IDUN and its crew in blatant breach of fundamental provisions of UNCLOS, and other applicable rules of international law, including, but not limited to, the principles of freedom of navigation and exclusive flag State jurisdiction in accordance with Articles 58(1), 87, 92 and 97 of UNCLOS and customary international law. Accordingly, the Republic of the Marshall Islands requests again that the Republic of Nigeria immediately cease and desist from any conduct in violation of UNCLOS, and refrain from any action aimed at aggravating the dispute concerning the M/T HEROIC IDUN.*

*Failing a prompt diplomatic solution to the dispute, the Republic of the Marshall Islands reserves the right to resort to the judicial procedures available under UNCLOS to ensure Nigeria's compliance with international law, and to protect the rights of the flag State and the crew of the M/T HEROIC IDUN.*<sup>278</sup>

145. There was no impediment to the Marshall Islands seeking recourse in Nigerian courts, or bringing claims against Nigeria to those claims which relate to its rights and interests. However, the Marshall Islands has instead elected – improperly – to pursue these claims against Equatorial Guinea, despite Equatorial Guinea acting lawfully pursuant to the request for seizure executed by Nigeria, as the requesting State. The Chamber is respectfully urged to consider the manifest lack of good faith that this represents and dismiss Marshall Islands' claims accordingly.

### **II. The Marshall Islands has failed to exhaust local remedies where required by international law**

146. Article 295 UNCLOS provides:

*[a]ny dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section **only after local remedies have been exhausted where this is required by international law.***<sup>279</sup>

147. This article represents one of the oldest and most well-established principles of international law.<sup>280</sup> This rule is applicable to all disputes under UNCLOS, except

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<sup>277</sup> Letters from the Marshall Islands' Maritime Administrator to Nigeria, **WG 6**, pp. 383-384.

<sup>278</sup> Note verbale with covering letter from the Marshall Islands to Equatorial Guinea, 11 November 2022, **SA 27**.

<sup>279</sup> UNCLOS, Article 295 (emphasis added).

<sup>280</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), p. 1901, ¶ 4. See *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, 20 July

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

prompt release proceedings, as affirmed in *M/V "Saiga"*.<sup>281</sup> In that case, the Tribunal affirmed that the question of whether local remedies must be exhausted is answered by general international law. To this end, it relied on Article 22 of the International Law Commission ("ILC")'s (then draft) Articles on State Responsibility for Internationally Wrongful Acts ("ARSIWA") as a codification of custom,<sup>282</sup> which established that the exhaustion rule is applicable when "*the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens*". Therefore, it is clear that those claims of the Marshall Islands relating to the treatment of "*aliens*" (i.e., the crew of the *Heroic Idun*), including allegations that Equatorial Guinea breached the crew's human rights,<sup>283</sup> must have first exhausted local remedies. Having failed to do so, those claims are inadmissible before this Chamber.

148. In *M/V "Virginia G"*, the Tribunal found that the rights of which Panama had claimed breaches were largely those of itself as a State under UNCLOS.<sup>284</sup> Therefore, these "*rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama*".<sup>285</sup> However, in that case, the Tribunal also recognised that some of the claims of Panama referred to rights conferred under UNCLOS on either a ship or persons involved.<sup>286</sup> It determined that:

***when [a] claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.***<sup>287</sup>

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1989, which held at ¶ 59 that "*for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success*".

<sup>281</sup> *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶¶ 89-90.

<sup>282</sup> *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶ 98. See *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proeks (C.H. Beck, Hart, Nomos, 2017), pp. 1902-1903, noting that this article was subsequently moved to the draft articles on diplomatic protection, which states that the exhaustion rule is only applicable when a claim was "*preponderantly*" about injury to a national.

<sup>283</sup> See **Memorial**, Chapter 7, Section IV.

<sup>284</sup> These were: (1) the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the EEZ of the coastal State and (2) the right that the laws and regulations of the coastal State are enforced in conformity with Article 73 UNCLOS. See *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 157.

<sup>285</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 157.

<sup>286</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 157.

<sup>287</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 157 (emphasis added). In that case, the Tribunal held that, as the preponderance of the claim related to violations of the rights of Panama as a State, the claims were not subject to the exhaustion of local remedies rule (see ¶ 158). Closely related to the "*preponderant*" test is the *sine qua non* or "*but for*" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. See *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 7; International Law Commission, *Report of the Commission to the General Assembly on the work of its fifty eighth session*, 2006, Volume II, Part Two, A/CN.4/SER.A/2006/Add.1 (Part 2), p. 46, ¶ 11.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

149. Applying the above test to the present case, several of the claims brought by the Marshall Islands relate preponderantly to the treatment of the crew members of the Vessel. For example, Marshall Islands alleges that:
- a) Equatorial Guinea's enforcement measures failed to respect the principle of reasonableness and considerations of humanity, including in relation to the imposition of the Fine on the Master, depriving the crew of their liberty;<sup>288</sup> and
  - b) Equatorial Guinea allegedly violated the crew's human rights.<sup>289</sup>
150. In this regard, the Marshall Islands makes these submissions based on the International Covenant on Civil and Political Rights ("**ICCPR**") and other human rights instruments. These are plainly not related to the rights of the Marshall Islands under UNCLOS, as it separately pleads breaches of such rights under separate, and distinct, submissions.<sup>290</sup> However, even if *arguendo*, these claims are construed as relating in some way to the rights of Marshall Islands, plainly, such claims *preponderantly* relate to allegations concerning the treatment accorded by Equatorial Guinea to the foreign nationals of the *Heroic Idun* crew. It is well established that allegations of human rights violations of individuals cannot be brought before an international tribunal without the prior exhaustion of local remedies.
151. The Marshall Islands claims that when a claim for damage to the persons and entities with an interest in a ship or its cargo arise from injury to the State, these claims are not subject to the rule of exhaustion of local remedies, relying on the authorities of *M/V "Saiga"*, *M/V "Virginia G"* and *M/V "Norstar"*. However, it does so incorrectly.
152. In these cases, the Tribunal recognised that damage to the persons involved in the operation of the vessel in question arose as a result of the violations of the rights of the flag State (such as freedom of navigation).<sup>291</sup> However, in none of these cases had the flag State alleged breaches of the principles of humanity, or breaches of human rights of individual crew members, in the way that the Marshall Islands presently does. In those authorities, the treatment of the respective vessel's crew members was not the subject of an *independent* alleged breach of UNCLOS but rather flowed from the treatment of the vessel itself. However, in the present case, the Marshall Islands makes numerous standalone claims relating to alleged human rights breaches of crew members, well outside those claims that can be reasonably said to flow from, or follow naturally from, apprehension of the Vessel itself. Accordingly, such claims remain subject to the rule of exhaustion of remedies.

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<sup>288</sup> **Memorial**, ¶¶ 249(d), (e), and (i).

<sup>289</sup> **Memorial**, Chapter 7, Part IV.

<sup>290</sup> For example, the Marshall Islands alleges various breaches of its rights as a flag State at **Memorial**, Chapter 5, Section II ("*Breach of freedom of navigation and the right to sail on the high seas*"), Section III ("*Breach of exclusive flag State jurisdiction*"), Chapter 6 ("*Equatorial Guinea Breached UNCLOS by an Excessive Exercise of Prescriptive Jurisdiction*"); Chapter 7, Section VI ("*Breach of the obligation in Article 225 to avoid adverse consequences in the exercise of enforcement measures*"); Section VII ("*Equatorial Guinea breached its obligation to notify the flag State of enforcement measures*"); Section VIII ("*Breach of the obligation to release the 'Heroic Idun' and crew promptly without undue delay*"); and Section IX ("*Breach of the obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings*").

<sup>291</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶ 98; *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 158; *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, 4 November 2016, ¶ 271.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

153. In addition, the Marshall Islands further alleges that for the rule of exhaustion of local remedies to apply, there must be a jurisdictional connection between the State purporting to exercise jurisdiction, and the natural and juridical persons that are said to have suffered damage.<sup>292</sup> It then claims that no jurisdictional connection existed between those persons (i.e., the crew members of the *Heroic Idun*) and Equatorial Guinea.<sup>293</sup> This is plainly incorrect, as all claims related to alleged breaches of the crew's human rights relate to conduct occurring on the territory of Equatorial Guinea.
154. For these reasons, the rule on exhaustion of local remedies plainly apply to those claims of the Marshall Islands which relate to the treatment of crew members. There is no evidence that the Marshall Islands (or the individual crew members concerned) have taken any attempt to resolve any issues relating to the treatment of the *Heroic Idun*'s crew in Equatorial Guinea through local remedies, as required by this rule. Instead, Marshall Islands' Memorial devotes one line in a footnote to its broad and entirely unsupported claim that "*there were no reasonably available and effective domestic remedies or any that provided a reasonable prospect of redress*".<sup>294</sup> No evidence is provided for this bare assertion.
155. Therefore, the Chamber must hold these claims inadmissible pursuant to Article 295 UNCLOS.

### III. The Chamber does not have jurisdiction over claims relating to alleged breaches of treaties outside UNCLOS

156. The Marshall Islands attempts to import obligations from other treaties into its claims against Equatorial Guinea in the current case, through so-called "*gateway provisions*".<sup>295</sup>
157. Equatorial Guinea rejects the characterisation of the Chamber's jurisdiction as set out by the Marshall Islands, which purports to broaden the Chamber's jurisdiction to treaties and regulations external to UNCLOS through misrepresentations of applicable provisions of UNCLOS and the Tribunal's relevant jurisprudence.<sup>296</sup>
158. By its own admission, the Marshall Islands' "*claims concern Equatorial Guinea's obligations under other treaties*".<sup>297</sup> Its various allegations make clear that its claims against Equatorial Guinea include those relating to treaty obligations under:
- a) the ICCPR;
  - b) the 1981 African Charter on Human and Peoples' Rights;
  - c) the 1973 Convention for the Safety of Life at Sea and its 1978 and 1988 Protocols ("**SOLAS**");
  - d) the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers at Sea ("**STCW**"); and

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<sup>292</sup> See Memorial, ¶ 118(d).

<sup>293</sup> See Memorial, ¶ 119(c).

<sup>294</sup> See Memorial, p. 38, footnote 172.

<sup>295</sup> See Memorial, Chapter VII, Section V.

<sup>296</sup> See Memorial, ¶¶ 108-111, 124.

<sup>297</sup> Memorial, ¶ 109.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

e) the 1972 Convention on the International Regulations for Preventing Collisions at Sea ("**COLREGS**").<sup>298</sup>

159. Despite coming up with several claims referring to these external treaties, the Marshall Islands argues that this "*does not preclude the Chamber exercising its jurisdiction over these claims*".<sup>299</sup> The Marshall Islands claims that such obligations are relevant to assessing what it calls UNCLOS' "gateway" provisions, which are those provisions of the Convention which incorporate by reference generally accepted international rules, standards, procedure and practices.<sup>300</sup>
160. However, for the reasons set out in Chapter 4 on applicable law above, the Chamber's jurisdiction does not extend to determining alleged breaches of these external rules, standards or procedures. Article 293 UNCLOS provides for the application of other rules of international law not incompatible with UNCLOS as aids in interpretation and application of UNCLOS. However, the jurisdiction of the Chamber itself is limited to assessing breaches of UNCLOS.
161. As observed by the *Duzgit Integrity* tribunal:

*[t]he Tribunal is not competent to determine if fundamental human rights obligations were violated by São Tomé, or if São Tomé applied its own laws correctly; the Tribunal cannot act as an appeals court. The Tribunal can only determine if the measures actually taken by São Tomé on and subsequent to 15 March 2013 breached its international law obligations resulting from the principle of reasonableness as applied to law enforcement measures by a coastal State.*<sup>301</sup>

162. Similarly, as stated by the Tribunal in *M/V "Norstar"*:

*a distinction must be made between the question of [the Tribunal's] jurisdiction, on the one hand, and the applicable law, on the other. [...] [A]rticle 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal.*<sup>302</sup>

163. The *Arctic Sunrise* tribunal also made this relationship clear through its statement that:

*Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention.*<sup>303</sup>

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<sup>298</sup> Memorial, ¶ 108.

<sup>299</sup> Memorial, ¶ 108.

<sup>300</sup> Memorial, ¶ 124. For example, these include Articles 2(3), 58(2), 87(1), and 235(1) UNCLOS.

<sup>301</sup> *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, ¶ 210.

<sup>302</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 136 (emphasis added).

<sup>303</sup> *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, ¶ 192.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

164. With respect to the numerous international human rights treaties cited by the Marshall Islands,<sup>304</sup> the provision in Article 230(3) UNCLOS plainly does not apply to the circumstances of the current dispute, nor does it expand the Chamber's jurisdiction to general human rights law.<sup>305</sup> Neither does the judgment in *Arctic Sunrise* assist the Marshall Islands in the manner alleged in the Memorial, as it clearly held:

*The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. **This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime.***

*In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. **This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions.***<sup>306</sup>

165. Where the Tribunal is conferred with jurisdiction over another international agreement, this is provided for explicitly in Article 288(2) UNCLOS, which reads:

*[a] court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the*

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<sup>304</sup> The Marshall Islands claims that specific obligations under other human rights treaties such as the Universal Declaration of Human Rights, the ICCPR, the European Convention on Human Rights and the American Convention on Human Rights have been breached. See **Memorial**, ¶¶ 254, 265.

<sup>305</sup> Article 230 UNCLOS ("*Monetary penalties and the observance of recognized rights of the accused*") is found in Part XII on protection and preservation of the marine environment and deals with a situation where a foreign vessel faces monetary penalty proceedings for violating its obligations with regards to "*the prevention, reduction and control of pollution of the marine environment*". Article 230(3) UNCLOS therefore provides that the "*recognized rights of the accused*" will be observed during such proceedings. However, as is clear, the present proceedings do not concern any such proceedings concerning marine environment pollution and therefore Article 230(3) UNCLOS is clearly irrelevant to the present dispute.

<sup>306</sup> *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, ¶¶ 197-198 (emphasis added).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*purposes of this Convention, which is submitted to it in accordance with the agreement.*<sup>307</sup>

166. This clearly anticipates that where parties wish to confer jurisdiction on the Tribunal to determine disputes concerning the interpretation of application of other international agreements, such jurisdiction must be explicitly conferred on the Tribunal by the parties concerned. The Special Agreement of the Parties transferring this dispute to this Chamber makes no such mention of any other international agreements over which the Parties agree to confer jurisdiction to the Chamber.<sup>308</sup>
167. For this reason, the "gateway" provisions cited by the Marshall Islands do not allow the Chamber to apply and exercise jurisdiction over alleged breaches of those treaties or rules external to UNCLOS. The Chamber's jurisdiction is restricted to assessing claims under UNCLOS.

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<sup>307</sup> UNCLOS, Article 288(2) (emphasis added). See also Statute of the International Tribunal for the Law of the Sea, Article 22: "*If all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal*".

<sup>308</sup> In addition, the Marshall Islands' characterisation of and reliance on the Tribunal's judgment in *Chagos Marine Protected Area* is misguided in this regard. Both the *Chagos* award and the subsequent "*Enrica Lexie*" award assessed Article 297 UNCLOS as only allowing a limited *renvoi* to sources of law beyond the UNCLOS itself where such sources of law are necessary to interpret UNCLOS claims, i.e., the external law involves an "*incidental question in the application of the Convention*". See *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶¶ 807-809; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, ¶ 316.

CHAPTER 5

APPLICABLE LAW

168. This section briefly addresses the law applicable to the dispute before the Chamber.
169. The Statute of the Tribunal provides that "[t]he Tribunal shall decide all disputes and applications in accordance with article 293".<sup>309</sup> Article 293(1) UNCLOS provides that:

*[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.*

170. As Proelss notes in commentary to Article 293 UNCLOS:

*the law of the sea represents a 'special regime' in the sense that it collects the rules and principles that regulate the use of the oceans. By definition, its scope is narrower than that of general international law and it may frequently happen that a matter not regulated by UNCLOS will arise before the courts and tribunals. In that case, the relevant 'gap-filling' international law will apply since, in the words of the International Law Commission, 'none of the treaty-regimes in existence today is self-contained in the sense that the application of general international law would be generally excluded'.*<sup>310</sup>

171. Some articles of UNCLOS make reference to other international agreements and rules of law in their application,<sup>311</sup> or reference to generally accepted regulations, practices and procedures (or a variation thereof). In the application of such articles, a tribunal applying that article may necessarily apply and interpret, by reference, the international agreements and rules of law, or the generally accepted regulations, practices and procedures referred to. However, where an article does not explicitly refer to an international agreement or rule of law, a tribunal having jurisdiction is primarily concerned with applying the article itself.<sup>312</sup>
172. As further elaborated below in Chapter 5, the question of applicable law is distinct to the question of the Chamber's jurisdiction.
173. The Marshall Islands repeatedly invites the Chamber to find Equatorial Guinea's conduct incompatible with treaties external to UNCLOS,<sup>313</sup> such as by application of so-called "gateway" provisions. However, such provisions do not inherently allow a tribunal to apply and exercise jurisdiction over alleged breaches of those treaties or

<sup>309</sup> Statute of the International Tribunal for the Law of the Sea, Article 23.

<sup>310</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), p. 1894, ¶ 6.

<sup>311</sup> For example, Article 301 refers to "the principles of international law embodied in the Charter of the United Nations"; Articles 74(1) and 83(1) refer to Article 38 of the Statute of the ICJ; Article 108(1) refers to "international conventions" concerning illicit traffic in narcotic drugs or psychotropic substances; Article 303(4) refers to "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature"; and Article 237 refers to "special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment [...]".

<sup>312</sup> UNCLOS, Article 21(1).

<sup>313</sup> See, for example, **Memorial** ¶¶ 20, 254, 281-282, 308-316, 438(g)-(h).



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

rules of external to UNCLOS. Rather, they can at most allow a tribunal to refer to the externally referenced international agreement or rule of law to assess whether there has been a breach of UNCLOS itself. Any such external international agreement or rule must be read in its context, with regard to the precise nature of the obligation it is said to contain, and with reference to whom that obligation is applicable. For example, general practices and procedures that are applicable to flag States cannot be applied to assess the conduct of, for example, a coastal State.

174. The correct approach is not to categorise such articles as "*gateways*" to the wholesale application of external international rules and agreements. Rather, such provisions may at most allow a tribunal to have reference to other rules of international law to interpret or apply them, to the extent that such rules are not incompatible with UNCLOS under Article 293. Therefore, while the Chamber may have regard to general international law to determine issues under UNCLOS, this does not *per se* allow the Chamber to determine whether there has been a breach of external treaties, whether human rights or other treaties.
175. A tribunal having jurisdiction may make reference to rules of general international law or customary international law in assessing claims under UNCLOS relating to, for instance, humanity. However, this does not require, nor is this identical to, determining whether there has been a breach of claims that fall outwith UNCLOS.<sup>314</sup>
176. Accordingly, while the Chamber may consider "*other rules of international law not incompatible*" with UNCLOS where necessary, this is distinct from the scope of the Chamber's jurisdiction in this dispute, which is limited to those claims concerning alleged breaches of UNCLOS.
177. Article 293 UNCLOS also permits the Chamber to have recourse to, for the purpose of assessing claims under UNCLOS, agreements that give effect to UNCLOS obligations in particular regional and maritime contexts. As noted in Chapter 3.II above, the Yaoundé Code is one such agreement, which was inspired by UNCLOS and its Article 100 in the fight against piracy, armed robberies, and illicit activities at sea.<sup>315</sup>
178. The commitments set out by the Yaoundé Code represent the agreement and commitments of West and Central African States regarding how they will operationalise and implement various UNCLOS obligations within the context of the regional maritime security architecture. State practice pursuant to the Yaoundé Code must be seen as relevant State practice for the implementation of relevant provisions of UNCLOS.

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<sup>314</sup> See, for example, *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, ¶¶ 197-198. See also Anna Petrig and Marta Bo, "The International Tribunal for the Law of the Sea and Human Rights", *Human Rights Norms in 'Other' International Courts*, ed. Martin Scheinin (Cambridge University Press, 2019), p. 399: "Article 293 of the UNCLOS does not seem to allow for human rights law to form the basis of separate, stand-alone human rights claims before ITLOS; this provision deals with the applicable law and not with jurisdiction. Therefore [...] in reliance on Article 293 of the UNCLOS, human rights law can be instrumental to finding a violation of UNCLOS provisions. Article 293 does not grant jurisdiction over human rights claims – but, on this provision's basis, human rights law could inform the assessment of claims based on UNCLOS".

<sup>315</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble.

CHAPTER 6

STATEMENT OF LAW ON THE MERITS

**I. Equatorial Guinea acted in accordance with its duty to cooperate to suppress piracy and did not breach freedom of navigation or exclusivity of flag State jurisdiction**

179. International law has long recognised the scourge of piracy as a threat to freedom of navigation and maritime security – indeed, and as set out in further detail below, the prohibition on piracy is a well-recognised norm of international law. This is recognised in UNCLOS, which sets out rights and duties of States in the suppression of piracy, including the recognition of universal and extraterritorial enforcement jurisdiction against piracy. For example:
- a) Article 100 contains a duty of all States to cooperate to the fullest possible extent in the repression of piracy;
  - b) Article 105 provides every State the power to seize a pirate ship or aircraft and subject it to its adjudicative jurisdiction; and
  - c) Article 110 provides a right of visit for warships in respect of foreign ships where there is reasonable ground for suspecting that the ship is engaged in piracy.
180. Notably, UNCLOS does not preclude States taking measures against piracy in the EEZ of a third State, as the Marshall Islands alleges. While UNCLOS' provisions on piracy are contained in Part VII (on the high seas), they apply equally in the EEZ. This is because Article 58(2) provides that Articles 88 to 115 (which include UNCLOS' provisions on piracy) and other pertinent rules of international law apply to the EEZ (in so far as they are not incompatible with the provision of UNCLOS relating to the EEZ).<sup>316</sup>
181. Multiple academic authorities confirm that the absence of mention of the EEZ in the definition of piracy in Article 101 does not entail that piracy cannot occur in the EEZ, and that acts committed in the EEZ may also qualify as piracy owing to the cross-reference provided in Article 58(2) UNCLOS.<sup>317</sup> As Proelss notes, "*the provisions of the high seas regime, including all provisions on piracy, have application to the EEZ and therefore the law of piracy applies to all such attacks outside territorial waters*".<sup>318</sup> Indeed, States now generally accept that:

*law enforcement action taken by a foreign state's law-enforcement vessels within an EEZ but outside territorial waters*

<sup>316</sup> Nothing in Article 56 UNCLOS regarding a coastal State's sovereign rights in the EEZ is incompatible with UNCLOS' provisions on piracy, which apply to all seas outside any State's territorial waters. See Anna Petrig, "Piracy", *The Oxford Handbook of the Law of the Sea*, eds. Donald R Rothwell et al (Oxford University Press, 2015), pp. 847-848.

<sup>317</sup> Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition (Cambridge University Press, 2019), p. 455; *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 750; Anna Petrig, "Piracy", *The Oxford Handbook of the Law of the Sea*, eds. Donald R Rothwell et al (Oxford University Press, 2015), p. 847.

<sup>318</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 100, pp. 734-735.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*is permissible so long as it does not interfere with the subject matters reserved to the coastal State's jurisdiction.*<sup>319</sup>

182. Thus, States are permitted to take measures to address piracy occurring in the EEZ of another coastal State, while respecting and having due regard for that coastal State's rights and matters under its exclusive jurisdiction. Therefore, it is clear that UNCLOS recognises that piracy can occur – and be actioned against – in any area outside the territorial sea of any State.
183. Neither freedom of navigation nor exclusivity of flag State jurisdiction are absolute rules under UNCLOS or customary international law – they are subject to multiple exceptions. As noted by Professor Crawford, "[p]iracy is the *principal exception to the freedom of the high seas, and one that has attained a new significance*".<sup>320</sup> Thus, where States take lawful action to repress suspected piracy under UNCLOS, no breach of freedom of navigation nor exclusive flag State jurisdiction can be said to have occurred. This remains so even where a State takes action against piracy in the EEZ of a third State, as is clear from Article 58(2) UNCLOS.
184. The Yaoundé Code, as detailed above in Chapter 3, embodies the collective and shared agreement of West African and Gulf of Guinea States that piracy requires combined efforts and inter-State cooperation. The Yaoundé Code is inspired by Article 100 UNCLOS in the fight against piracy, armed robberies, and illicit activities at sea.<sup>321</sup> The Yaoundé Code aims to address a range of threats to maritime security, including transnational organised crime committed at sea, piracy, armed robbery at sea, and smuggling, recognising "*the deploring loss of life and adverse impact on international trade, energy security, and the global economy resulting from such activities*".<sup>322</sup> It mandates action against, *inter alia*, "[t]ransnational organized crime [...] at sea", including piracy and armed robbery at sea, illegal oil bunkering, and crude oil theft.<sup>323</sup> As such, it represents the agreed consensus of its signatories on the nature and course of cooperation in response to piracy and maritime crime in the Gulf of Guinea, and must be read alongside Article 100 UNCLOS in examining State conduct in response to suspected piracy in the region.
185. The Yaoundé Code is an example of the State cooperation necessary – and *mandated* – by Article 100 UNCLOS. Equatorial Guinea acted in lawful furtherance of its duties of cooperation under the Yaoundé Code. To hold that such actions breach freedom of navigation or exclusivity of flag State jurisdiction would be to risk lawful and vital cooperation in curbing piracy and maritime crime. As noted above, this would have

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<sup>319</sup> Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), p. 45. See also Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law" (available on the ITLOS website), p. 3, recognising that "*acts on the high seas and in the exclusive economic zones may be qualified as pirate acts but not those committed in the coastal waters of a State*".

<sup>320</sup> James Crawford, "Part IV Law of the Sea, 13: Maritime transit and the regime of the high seas", *Brownlie's Principles of Public International Law*, 9th Edition, ed. James Crawford (Oxford University Press, 2019), p. 286 (emphasis added).

<sup>321</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble, p. 3.

<sup>322</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble, p. 1.

<sup>323</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 1(5).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

severe implications for international cooperation to counter the global scourge of piracy and other maritime crimes, in contradiction to numerous recent decisions of the UNSC and the Yaoundé Code itself, which has had a notable and positive impact on reducing maritime crime in the Gulf of Guinea region.

A. The prohibition on piracy is a norm of international law over which States have universal jurisdiction

186. The origins of piracy trace back to ancient times – when pirates were first described as enemies of all peoples (*hostis humani generis*).<sup>324</sup> Gentili viewed pirates as the "common enemies of humankind", who placed themselves outside the legal order, and thus did not enjoy any right under the law of nations.<sup>325</sup> The writings of Grotius – foundational to the concept of freedom of navigation – similarly, viewed pirates as enemies of all humanity and a risk to reciprocal trade relationships of humankind on the seas.<sup>326</sup>
187. Customary international law prohibited piracy and pirates were considered to wage war not just against any one State, but all States. Piracy, for this reason, was the first crime to be recognised as being subject to universal jurisdiction.<sup>327</sup>
188. As set out by the oft-cited opinion of Judge Moore in *The "Lotus" (France v. Turkey)*:

*in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say 'piracy by law of nations' because the municipal laws of many States denominate and punish as 'piracy' numerous acts which do not constitute piracy by law of nations [...]. Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas [...] he is [...] treated as an outlaw, as the enemy of all mankind – hostis humani generis – whom any nation may in the interest of all capture and punish.*<sup>328</sup>

<sup>324</sup> *The Case of the SS "Lotus"*, PCIJ, Series A No. 10, Dissenting Opinion by M. Moore, 7 September 1927, p. 70 (emphasis added).

<sup>325</sup> Valentina Vadi, "Gentili and the Law of the Sea", *War and Peace - Alberico Gentili and the Early Modern Law of Nations* (Brill, 2020), available at: <https://brill.com/display/book/9789004426030/BP000006.xml>, p. 282.

<sup>326</sup> Yukio Shimada, "The Discovery of Islands and Pirates", OPRI Center of Island Studies, 17 September 2021, available at: <https://www.spf.org/islandstudies/readings/b00015r.html>, 17 September 2024, p. 8.

<sup>327</sup> Markiyan Z Kulyk, "Part II Maritime Security Law, 11 Piracy, Hijacking, and Armed Robbery Against Ships", *The IMLI Manual on International Maritime Law: Volume III: Marine Environmental Law and International Maritime Security Law*, eds. David Joseph Attard et al (Oxford University Press, 2016), p. 387.

<sup>328</sup> *The Case of the SS "Lotus"*, PCIJ, Series A No. 10, Dissenting Opinion by M. Moore, 7 September 1927, p. 70 (emphasis added).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

189. The absolute prohibition on piracy has been recognised by some authorities as a *jus cogens* norm of international law.<sup>329</sup> Further, as recognised by Article 100 UNCLOS – every State has a duty to cooperate in the suppression of piracy under international law.
190. It is also well recognised that extraterritorial and universal enforcement (and its corollary, prescriptive and adjudicative) jurisdiction exists over piracy.<sup>330</sup>
191. Despite a plethora of international and regional arrangements aimed at tackling piracy in the last two decades, the threat of piracy has not abated. As set out in Chapter 3 and in the witness statement of Captain Nsue Esono Nchama,<sup>331</sup> the scourge of piracy remains a critical, urgent and ongoing threat in the Gulf of Guinea.<sup>332</sup>
192. In relation to the Gulf of Guinea, the UNSC has:
- a) emphasised the importance of finding a comprehensive solution to the problem of piracy and armed robbery at sea in the Gulf of Guinea;
  - b) condemned threats of piracy and armed robbery;
  - c) called for strengthened regional cooperation;
  - d) stressed that the coordination of regional efforts was necessary in this regard; and
  - e) called on States to cooperate in the prosecution of alleged perpetrators.<sup>333</sup>
193. Recently in May 2022, the UNSC:

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<sup>329</sup> The ILC has recognised the prohibition on piracy as a norm possessing *jus cogens* character, alongside the prohibition on aggression, the prohibition of genocide, the prohibition of torture, crimes against humanity, the prohibition of slavery and the slave trade, the prohibition of racial discrimination and apartheid, and the prohibition of hostilities directed at civilian population. International Law Commission, Seventy-first session, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, 31 January 2019, A/CN.4/714, ¶¶ 56, 58.

<sup>330</sup> Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), pp. 40–41, noting, for example, that the United States' Navy has arrested Somali pirates in international waters who were subsequently delivered to and prosecuted by Kenyan authorities. See also *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 750; Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), p. 31. The 1961 *Eichmann* case confirmed that the legal basis for exercising universal jurisdiction over acts of piracy was justified by "the agreed vital interest of the international community". See *Attorney General of the Government of Israel v. Adolf Eichmann*, Criminal Appeal 336/61, 29 May 1962, ¶ 12.

<sup>331</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶¶ 5–17.

<sup>332</sup> The Tribunal itself is no stranger to the issue of the proliferation of piracy in the Gulf of Guinea – the issue has come before the Tribunal in previous cases. For example, in the *M/T "San Padre Pio" (Switzerland v. Nigeria)* case, the Tribunal recognised the armed attack that took place against the *M/T "San Padre Pio"* while stationed in Nigerian waters. In that case, even where the vessel was stationed in a Nigerian port, and despite the measures to strengthen the security of the vessel taken by the Nigerian authorities following the armed attack, the Tribunal there took the view that the vessel and the crew and other persons on board appeared to remain vulnerable to such attacks. See *M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019, p. 375, 6 July 2019, ¶ 128. See also the recognition by Judge Gao that the West African coast has been plagued by maritime crime and piracy, which poses a threat to the region's peace, security and development (*M/T "San Padre Pio" (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, Dissenting Opinion of Judge Gao, ITLOS Reports 2018–2019, p. 375, ¶¶ 89–91).

<sup>333</sup> United Nations Security Council, Resolution 2018, S/RES/2018 (2011), 31 October 2011, **REG-054**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

- a) continued to express "*deep concern about the grave and persistent threat that piracy [...] in the Gulf of Guinea pose[d] to international navigation, security and sustainable development of States in the region*";
  - b) reiterated that States in the region had a leadership role to play in countering the threat of piracy;
  - c) expressed serious concern over the cost of piracy to States in the region through economic impacts on trade, investments, development, and growth.<sup>334</sup>
194. In particular, the UNSC encouraged the "*full and effective implementation of the [Yaoundé] Code of Conduct with a view to eradicating illegal activities off the coast of West and Central Africa*".<sup>335</sup> To that end, the UNSC:
- a) called upon Member States in the region to investigate, and to prosecute or extradite piracy and armed robbery at sea, in accordance with applicable international law;<sup>336</sup>
  - b) called upon Member States to cooperate on the prosecution of suspected pirates while respecting fair trial guarantees, including through the drafting of agreements, as needed, for the transfer of arrested piracy suspects between States in and outside the region;<sup>337</sup> and
  - c) encouraged the States of the Gulf of Guinea to structure their operations to address illicit maritime activities and develop their capacities to protect their maritime domains, and to ensure cooperation in this regard.<sup>338</sup>
195. Equatorial Guinea remains extremely cognisant of its role in acting and cooperating to repress piracy in the region.<sup>339</sup> It is against this context – the authoritative status of the prohibition on piracy, the ongoing persistence of the threat of piracy in the Gulf of Guinea and the obligations in the Yaoundé Code – that UNCLOS provides for, and indeed mandates action by States in response to piracy, even where this may impact on other rights that would otherwise apply, such as freedom of navigation.
- B. Freedom of navigation and the exclusivity of flag State jurisdiction are subject to rules concerning the suppression of piracy
196. Article 87 UNCLOS outlines the principle of the freedom of the high seas, including freedom of navigation. However, the freedoms contained therein are restricted and conditioned by other legal rules. For example, certain freedoms must be exercised with due regard to other States' interests.<sup>340</sup> As the ILC set out:

*[a]ny freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules [...] which are designed not to limit or*

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<sup>334</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**.

<sup>335</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**.

<sup>336</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, ¶ 3.

<sup>337</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, ¶ 4.

<sup>338</sup> United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, **REG-031**, ¶ 5.

<sup>339</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶¶ 5-11.

<sup>340</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 87, p. 679.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community.*<sup>341</sup>

197. In UNCLOS, the right to freedom of navigation is subject to a number of limitations in respect of authorised policing of activities regarding piracy, the slave trade, narcotics, trafficking, and hot pursuit.<sup>342</sup> These exceptions are recognised and provided for in UNCLOS itself,<sup>343</sup> and as such, cannot be deemed to be unlawful interference with freedom of navigation. As recognised by the Tribunal in *M/V "Norstar"*, where an act of interference is justified by UNCLOS itself, it cannot be a breach of freedom of navigation:

*any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties.*

[...]

*any act which subjects activities of a foreign ship on the high seas to the jurisdiction of States other than the flag State constitutes a breach of the freedom of navigation, save in exceptional cases expressly provided for in the Convention or in other international treaties.*<sup>344</sup>

198. Similarly, neither is the exclusivity of flag State jurisdiction absolute – it is subject to the right of every State to engage in the repression of piracy.<sup>345</sup> It is well recognised that piracy "*constitutes an automatic exception to the rule of exclusive flag-state jurisdiction allowing boarding and seizure regardless of flag-state consent or whether the boarding state is affected by the vessel's activities*".<sup>346</sup> As noted above, all States have extraterritorial powers to act to suppress and punish piracy in areas outside the territory and territorial sea of any State. This enforcement jurisdiction is recognised as an exception to the ordinarily exclusive jurisdiction of the flag State, the rationale being

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<sup>341</sup> International Law Commission, "Articles concerning the Law of the Sea with commentaries", Report to the General Assembly, *Yearbook of the International Law Commission*, 1956, Vol. II.

<sup>342</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 87, pp. 681–682. See also Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), pp. 375–380.

<sup>343</sup> Article 105 UNCLOS codifies the power of any warship or other government vessel meeting the criteria in Article 107 to exercise law enforcement jurisdiction over a pirate ship, in places beyond the territorial jurisdiction of any State; Article 110(1) UNCLOS provides that where there are "*reasonable ground[s] for suspecting*" that a ship is engaged in piracy, it would be justified for a warship belonging to a third State to board such ship. A leading commentary notes that most of the articles dealing with piracy in UNCLOS were adopted with very little dissent or debate. See *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 100, p. 735.

<sup>344</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶¶ 222–224 (emphasis added).

<sup>345</sup> See, for example, Tullio Treves, "Piracy and the international law of the sea", *Modern Piracy*, ed. Douglas Guilfoyle (Edward Edgar Publishing Limited, 2013), p. 121.

<sup>346</sup> Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), p. 27. See also Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 383: "*The first exception [to exclusiveness of flag State's enforcement jurisdiction] is the long-established right – and, indeed, duty (UNCLOS art 100; HSC art. 14) – of every State to act against piracy*".

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

that piracy endangers common interests of all States in the high seas such as the freedoms of navigation and trade.<sup>347</sup>

199. The obvious corollary of all States being endowed with the right to take enforcement measures for the suppression of piracy necessarily restricts the exclusivity of flag State jurisdiction.<sup>348</sup> As set out by leading commentators:

*[t]he exclusiveness of the flag State's enforcement jurisdiction is not absolute. It admits many exceptions, principally aimed at combatting criminal activity on the high seas which is recognised to be an acute and current threat to international peace and security.*<sup>349</sup>

200. To be clear, the right to take enforcement measures against pirates is vested in all States and not only in States which have suffered the particular act of violence.<sup>350</sup> It is also generally accepted that customary international law grants universal jurisdiction to all States to prosecute piracy suspects, irrespective of whether a warship of their nationality captured them, and that UNCLOS has not abrogated this power.<sup>351</sup> As Guilfoyle writes:

*[p]iracy and the slave trade are the only instances of universal rights to board vessels suspected of involvement in an offence defined at international law. That is, any duly authorised public vessel of any state, irrespective of whether it is directly affected by the vessel's conduct, may interdict upon suspicion of piracy or slaving.*<sup>352</sup>

201. This is because, as the author notes:

*as piracy endangers a common interest of all states (high-seas freedom of navigation), the exclusive jurisdiction of flag states does not obtain. [...] Piracy may be thought of as a case where states, through a customary or conventional rule, have given comprehensive permission in advance to foreign states' assertion of law enforcement jurisdiction over their vessels*

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<sup>347</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 100, p. 734.

<sup>348</sup> Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law" (available on the ITLOS website), p. 2.

<sup>349</sup> Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 383 (emphasis added).

<sup>350</sup> Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law" (available on the ITLOS website), p. 3.

<sup>351</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 100, p. 736. See also Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 389: "As a matter of international law, pirates may be tried by any State before whose courts they are brought, that is before the courts of the State effecting the arrest, or by a State to which the pirate is transferred. The permissibility of such a transfer is supported by state practice".

<sup>352</sup> Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), p. 77 (emphasis added).



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*resulting in the absence of any flag state immunity from boarding.*<sup>353</sup>

C. Article 100 UNCLOS contains an explicit duty on States to cooperate in the repression of piracy

202. As noted above, it is well settled and accepted that acts committed in the EEZ (including the EEZ of a third State) may qualify as piracy owing to the cross-reference provided in Article 58(2) UNCLOS,<sup>354</sup> and be acted upon in response.<sup>355</sup> It is also "*beyond serious argument that international cooperation is a prerequisite to effectively suppress piratical activity*".<sup>356</sup> In recognition of the seriousness of the threat of piracy to maritime order, Article 100 UNCLOS contains a duty on all States to cooperate in the repression of piracy. It provides a binding obligation that:

*[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.*

203. The Tribunal in *The "Enrica Lexie" Incident (Italy v. India)*, endorsed the writings of the ILC in its commentary to what would be the forerunner to Article 100 UNCLOS, namely that:

*[a]ny State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a **certain latitude as to the measures** it should take to this end in any individual case.*<sup>357</sup>

204. In order to be effective, including to prompt States to cooperate to address threats before acts of piracy take place, Article 100 UNCLOS cannot be read as conditional upon a State waiting on confirmation that an act of piracy has – in fact – already occurred. This would render redundant international legal obligations and commitments made by States in relation to piracy. For example, as argued by Italy in *"Enrica Lexie"*, such an interpretation would render the obligation "*meaningless and inoperable*".<sup>358</sup>

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<sup>353</sup> Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), pp. 28-29 (emphasis added).

<sup>354</sup> Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition (Cambridge University Press, 2019), p. 455; *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 750; Anna Petrig, "Piracy", *The Oxford Handbook of the Law of the Sea*, eds. Donald R Rothwell et al (Oxford University Press, 2015), p. 847.

<sup>355</sup> Douglas Guilfoyle, "Piracy and the slave trade", *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), p. 44, notes that the residual application of the high seas regime of law enforcement to the EEZ and contiguous zone should not be controversial.

<sup>356</sup> Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition (Cambridge University Press, 2019), p. 458.

<sup>357</sup> International Law Commission, "Articles Concerning the Law of the Sea with Commentaries", Yearbook of the International Law Commission, Eighth session, 1956, Vol. II, at p. 282, as cited in *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶ 722 (emphasis added). See also *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 100, p. 734.

<sup>358</sup> *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶ 712.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

205. Instead, Article 100 UNCLOS must be read to permit (even mandate) acts of cooperation in the repression of piracy before or regardless of whether an act meeting all the definitional aspects in Article 101 UNCLOS is deemed to have occurred.<sup>359</sup> Action under Article 100 requires only reasonable suspicion, made in the relevant context with the information available at the time, that piracy may have occurred – as was clearly present in this case. The obligation would, otherwise, be perfunctory.
206. Former President of this Tribunal Rüdiger Wolfrum notes that when reading Article 100 and Article 107 together, UNCLOS provides that:

*States may not lightly decline to intervene against acts of piracy. This is particularly important in respect of coastal States. Piracy relies for its logistical basis and for the sale of goods on cooperation with coastal States or at least the relevant local authorities. Such cooperation between a coastal State and pirates is in violation of article 100 of the Convention. Similarly, a ship entitled to intervene in cases of piracy may not, without good justification, turn a blind eye to such acts.*<sup>360</sup>

207. Former President Wolfrum goes so far as to note that:

*[i]t is evident that the effectiveness of measures for the suppression of piracy relies on efficient cooperation with those States on whose coast pirates are operating. [...] Turning a blind eye to the activities of pirates is in itself an act of piracy.*<sup>361</sup>

208. State practice supports the transfer of suspected vessels and individuals in furtherance of this obligation. For example, State practice – particularly with respect to piracy off the coast of Somalia – contains multiple instances of States transferring suspected pirate vessels to other States in the region for prosecution.<sup>362</sup> As Proelss notes:

*[w]here a pirate is subsequently found within a State's territory, the power of its courts to try him or her are generally accepted. The transfer of pirates from a capturing warship to other jurisdictions for trial is also well-attested in State practice.*<sup>363</sup>

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<sup>359</sup> Indeed, if an authorised vessel encounters a suspected pirate vessel in international waters, Article 105 UNCLOS remains applicable so that the authorised vessel may still seize that vessel as a suspected pirate vessel "even though it has not actually observed or found any other evidence of that vessel committing an act of piracy under article 101(a)". See United Nations Office on Drugs and Crime, *Maritime Crime: a Manual for Criminal Justice Practitioners*, Second Edition (United Nations, 2019), p. 118.

<sup>360</sup> Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law" (available on the ITLOS website), pp. 3-4 (emphasis added).

<sup>361</sup> Rüdiger Wolfrum, "Fighting Terrorism at Sea: Options and Limitations under International Law" (available on the ITLOS website), p. 5 (emphasis added).

<sup>362</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 750.

<sup>363</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 752. For example, the navies of both the United Kingdom and the United States as well as the European Union Naval Force Operation Atalanta had by January 2012 alone transferred some 143 Somali piracy suspects to Kenya and 70 to Seychelles for prosecution. See also Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 389: "As a matter

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

209. As noted above in Chapter 4, and subject to Equatorial Guinea's objections on jurisdiction and admissibility, any interpretation of Article 100 must consider regional contexts. In this case, the preamble to the Yaoundé Code makes clear that it is inspired by Article 100 UNCLOS in the fight against piracy, armed robberies and illicit activities at sea.<sup>364</sup> The Yaoundé Code is a well-recognised part of the maritime practices in the Gulf of Guinea region, and was indeed referenced in the best management guidance document being followed by the *Heroic Idun* at the time.<sup>365</sup>
210. The Yaoundé Code includes, *inter alia*, commitments by national authorities to cooperate to the fullest possible extent in the repression of transnational organised crime in the maritime domain. Under the Yaoundé Code, a signatory State may request any other signatory State to cooperate in detecting, *inter alia*, ships where there are reasonable grounds to suspect that they have engaged in transnational organised crime and other illegal activities at sea.<sup>366</sup> Signatories undertake to cooperate in arresting, investigating and prosecuting persons who have committed or are reasonably suspected of committing piracy, and in seizing pirate ships.<sup>367</sup>
- D. Equatorial Guinea acted lawfully under its obligation of cooperation in the suppression of piracy and with due regard for the rights of other States
211. As set out above, on 10 August 2022, Equatorial Guinea's Director General of Military Cooperation received an urgent request from Nigeria to pursue and arrest the *Heroic Idun* under the Yaoundé Code. The request included the suspected – and serious – infractions of the Vessel regarding oil theft and the broadcast of a false piracy attack, the known coordinates of the Vessel and its location.<sup>368</sup> In line with its obligations under UNCLOS and the Yaoundé Code, the Equatoguinean Navy responded rapidly by sending the *Capitán David* in search of the Vessel.<sup>369</sup> Captain Nsue Esono Nchama notes in this regard that "*I gave orders to the Capitán David to apprehend the Heroic Idun and bring it to Equatorial Guinea*".<sup>370</sup> Indeed, had Equatorial Guinea not acted in response to Nigeria's request, it would have likely been in breach of its commitments under the Yaoundé Code.
212. As the *Capitán David* pursued the *Heroic Idun*, it did so using reasonable measures, particularly in light of the gravity of the offences of which the Vessel was suspected – and reasonably understood by Equatorial Guinea – to have committed. Here, Equatorial Guinea acted in response to Nigeria's request, on a reasonable suspicion of piracy. It

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*of international law, pirates may be tried by any State before whose courts they are brought, that is before the courts of the State effecting the arrest, or by a State to which the pirate is transferred. The permissibility of such a transfer is supported by state practice"; Yoshifumi Tanaka, The International Law of the Sea, Third Edition (Cambridge University Press, 2019), p. 457: "State practice shows that piracy suspects are being transferred for trial to relevant States".*

<sup>364</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, preamble, p. 3.

<sup>365</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 17, citing Best management practices to deter piracy and enhance maritime security off the coast of West Africa including the Gulf of Guinea, **MT 6**.

<sup>366</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 13(1)(c).

<sup>367</sup> Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 25 June 2013, **REG-001**, Article 6(1).

<sup>368</sup> Request from Nigeria regarding *Heroic Idun* (WhatsApp messages), **REG-002**.

<sup>369</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶¶ 18-20.

<sup>370</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 19.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

was not then – and is not now – in a position to submit on all the factual circumstances surrounding Nigeria's request.

213. There was no way of knowing if the Vessel was armed, or what level of force or unlawful measures it could have used to evade apprehension – particularly as it was understood to have deliberately fled from Nigeria's authorities in order to evade justice, and had issued a false piracy alert in doing so against Nigeria's authorities. As set out in further detail below, the *Capitán David* was tasked with apprehending the Vessel and proceeded to do so in line with standard practice in maritime interdiction and apprehension.
214. For similar reasons, neither did the events that occurred after the Vessel's interdiction breach exclusivity of flag State jurisdiction.
215. Numerous authorities confirm that universal jurisdiction exists over piracy, which necessarily disappplies any exclusive flag State jurisdiction over this offence. By acting to allow and facilitate Nigeria's investigation of the Vessel and crew while the Vessel was stationed in Luba – an exercise of Nigerian jurisdiction (rather than Equatorial Guinea's) – Equatorial Guinea cannot have breached this principle.
216. As set out above, lawful apprehension measures in response to suspected piracy are a recognised exception to freedom of the high seas and exclusive flag State jurisdiction. By taking these measures pursuant to Articles 100 and 105 UNCLOS, and its obligations under the Yaoundé Code where it had a "*reasonable ground for suspecting*" piracy on the part of the *Heroic Idun*,<sup>371</sup> Equatorial Guinea acted under recognised limits to freedom of the high seas and exclusive flag State jurisdiction. Therefore, Equatorial Guinea cannot be understood to have breached these principles.<sup>372</sup> Equatorial Guinea's agreement to transfer the Vessel to Nigeria was also acknowledged as being specifically made under the Yaoundé Code.<sup>373</sup>
217. Additionally, the Marshall Islands alleges that Equatorial Guinea breached obligations of due regard under Articles 56(2) and 87(2) UNCLOS.<sup>374</sup> However, by responding lawfully to a suspicion of piracy – both a right and a duty under UNCLOS – Equatorial Guinea's conduct cannot amount to a failure to exercise "*due regard*" to the rights of other States under Article 56(2) nor a failure to exercise its own freedom of navigation with due regard for the rights of other States under Article 87(2).
218. Article 56 UNCLOS concerns the rights, jurisdiction and duties of the coastal State in the EEZ. It provides that in exercising its rights and performing its duties under UNCLOS in the EEZ, that "*the coastal State shall have due regard to the rights and duties of other States*".<sup>375</sup>
219. Article 87 UNCLOS, on the other hand, concerns freedom of the high seas, including freedom of navigation of all States.<sup>376</sup> It, in turn, provides that these freedoms "*shall be*

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<sup>371</sup> UNCLOS, Article 110.

<sup>372</sup> UNCLOS, Article 107 provides that "*A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect*". The *Capitán David* and *Wele Nzas* both clearly meet these criteria.

<sup>373</sup> Note No. 10247/022 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 27 October 2022, **REG-047**.

<sup>374</sup> See **Memorial**, ¶¶ 150-157, 164-178, 250-252.

<sup>375</sup> UNCLOS, Article 56(2).

<sup>376</sup> UNCLOS, Article 87(1)(a).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area".*<sup>377</sup>

220. While occurring in different contexts, the obligations of due regard contained in both articles underline the commonality that neither rights nor freedoms contained in UNCLOS are absolute, and that each must be exercised with due regard to the interests of other States.
221. On the meaning of "*due regard*" in the context of Article 56(2) UNCLOS, the tribunal in *Chagos Marine Protected Area* held:

*the ordinary meaning of 'due regard' calls for the [first State] to have such regard for the rights of [the second State] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of [the second State's] rights; nor does it uniformly permit the [first State] to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by [the second State], their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the [first State], and the availability of alternative approaches.*<sup>378</sup>

222. This test was considered and applied by the Annex VII tribunal in the *South China Sea Arbitration (Philippines v. China)* case. The tribunal held that vessels under Chinese control escorted and protected Chinese fishing vessels engaged in fishing unlawfully in the Philippines' EEZ. In tolerating and failing to exercise due diligence to prevent fishing by Chinese flagged vessels, China had failed to exhibit due regard for the Philippines' sovereign rights with respect to fisheries in its EEZ.<sup>379</sup>
223. The "*Enrica Lexie*" tribunal also held that ordinarily, "*due regard*" would mean "*with the proper care or concern for*" and signifies "[a]ttention, care, or consideration given to a thing or person; concern for, heed of".<sup>380</sup> However, the ordinary meaning of "*due regard*" did not contemplate priority for one activity over another, nor any particular hierarchy.<sup>381</sup> Nor is the obligation of "*due regard*" only one owed by coastal States – for example, Article 58(3) also requires that other States have due regard to the rights of the coastal State in its EEZ.<sup>382</sup>
224. The tribunal noted that the extent of "*regard*":

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<sup>377</sup> UNCLOS, Article 87(2).

<sup>378</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, ¶ 519.

<sup>379</sup> *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, ¶¶ 756-757.

<sup>380</sup> *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶ 973.

<sup>381</sup> *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶¶ 973-974.

<sup>382</sup> *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶ 975.

*required by the Convention depends, among others, upon the nature of the rights enjoyed by a State. [...] For instance, it has been observed that '[the] reciprocal 'due regard' rule does not grant priority to the rights of the coastal State or to the freedoms of other States. It is an obligation for both States to exercise their rights respecting those of the other States and to endeavour in good faith to find accommodations permitting the exercise of the rights of both'. The obligation requires [...] that other States 'refrain from activities that unreasonably interfere with the exercise of the rights of the coastal State'.<sup>383</sup>*

225. As noted above, the regime of UNCLOS applicable to the EEZ includes those provisions of Articles 88-115, including those provisions on piracy.<sup>384</sup> Where a State thereby takes otherwise lawful – indeed, prescribed – measures to suppress a suspected act of piracy on reasonable grounds pursuant to obligations of international cooperation in a reasonable manner, it cannot be said to have violated obligations of "due regard". As the "Enrica Lexie" tribunal held:

*[...] Article 58, paragraph 2, of the Convention provides that Articles 88 to 115 'apply to the exclusive economic zone'. **That reference extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone. The repression of piracy by States in the exclusive economic zone is thus not only sanctioned by the Convention but also, pursuant to Article 100 of the Convention as incorporated into Article 58, paragraph 2, a duty incumbent on all States.***

*It follows that, if protection from and repression of piracy comprise a right and a duty of India and Italy alike, including within India's exclusive economic zone, the conduct of the Marines on board the "Enrica Lexie" in **responding to a perceived piracy threat cannot have 'unreasonably interfere[d]' with, and thus have failed to show 'due regard' to, India's rights as the coastal State.** [...]*

*In light of the foregoing, the Arbitral Tribunal determines that the actions taken by the Marines, as Italian State officials, to protect the "Enrica Lexie" against an alleged pirate attack did not result in a breach of Italy's obligation of 'due regard' for the sovereign rights of India over natural resources in its exclusive*

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<sup>383</sup> *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶ 978. See also *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3, 25 July 1974, ¶ 71: "Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation".

<sup>384</sup> UNCLOS, Article 58(1). See also *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶ 979.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*economic zone. Consequently, the Arbitral Tribunal concludes that Italy has not violated Article 58, paragraph 3, of the Convention.*<sup>385</sup>

226. Equatorial Guinea submits that the same reasoning applies, *mutatis mutandis*, to both (i) the apprehension of vessels suspected of piracy on the high seas or in an area outside a State's territorial waters, and (ii) freedom of navigation exercised by a State on the high seas. That is, when responding lawfully to piracy – both a right and a duty under UNCLOS – a State's conduct cannot amount to a failure to exercise "*due regard*" to the rights of other States under Article 56(2), nor a failure to exercise its own freedom of navigation with due regard for the rights of other States under Article 87(2). This is because, as encapsulated by leading commentators, due regard is:

*based upon the premise that the activity in question is one in which the State concerned has a right to engage, and the due regard 'requirement' cannot be properly applied so as to nullify or unreasonably limit that right.*<sup>386</sup>

227. Nothing in Article 56 UNCLOS on the coastal State's sovereign rights in the EEZ is incompatible with UNCLOS' provisions on piracy, which apply to all seas outside any State's territorial waters.<sup>387</sup> Further, the duty to suppress piracy and interests in countering it applies to *all States*, including São Tomé and Príncipe as the coastal State. The reasonableness of Equatorial Guinea's actions in apprehending the *Heroic Idun* in the EEZ of São Tomé and Príncipe is further underscored by the framework providing that States in Zone D of the Yaoundé Code (which Zone includes both Equatorial Guinea and São Tomé and Príncipe) conduct joint maritime patrols.<sup>388</sup>
228. The Marshall Islands also alleges that Equatorial Guinea breached Article 87(2) UNCLOS by exercising its own freedom of navigation without due regard for the rights of other States.<sup>389</sup> However, and for the avoidance of doubt, the *Heroic Idun* could not have been subject to any ongoing violation of Article 87 while it remained in Luba Freeport. As the Tribunal set out in *M/V "Louisa"*, freedom of navigation is a freedom that applies on the high seas, and through Article 58(2), to the EEZ. It is not the case however that a vessel lawfully detained in a State's port can be subject to an ongoing violation of Article 87. There, the Tribunal held that:

*Article 87 cannot be interpreted in such a way as to grant the M/V "Louisa" a right to leave the port and gain access to the*

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<sup>385</sup> *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, ¶¶ 979-981 (emphasis added).

<sup>386</sup> Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 378 (emphasis added). The authors note that the principle of due regard: "*seems to require that where there is a potential conflict between two uses of the high seas, there should be a case-by-case weighing of the actual interests involved in the circumstances in question, in order to determine which use (and to what extent) is the more reasonable in that particular case*".

<sup>387</sup> Anna Petrig, "Piracy", *The Oxford Handbook of the Law of the Sea*, eds. Donald R Rothwell et al (Oxford University Press, 2015), pp. 847-848.

<sup>388</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶ 9; Technical agreement between the Economic Community of Central African States and the States of Cameroon, Gabon, Equatorial Guinea and São Tomé and Príncipe on the setting up of a surveillance plan for maritime security in Zone D of the Gulf of Guinea, 6 May 2009, **REG-008**.

<sup>389</sup> **Memorial**, ¶¶ 164, 172-179.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*high seas notwithstanding its detention in the context of legal proceedings against it.*<sup>390</sup>

229. As noted above, "*due regard*" does not preclude lawful intervention. By exercising universal jurisdiction over piracy and acting reasonably at the behest of another State to arrest a suspected vessel, Equatorial Guinea could not have failed to have "*due regard*" for the Marshall Islands' rights and interests under UNCLOS.
230. Indeed, to hold that States will, *ipso facto*, be in breach of UNCLOS' core provisions when they take law enforcement measures against suspected piracy, including when formally requested by other States in their region, would chill the very cooperation that Article 100 was intended to incentivise and mandate, and that the UNSC has – on multiple occasions – called on States to enact.
231. Therefore, Equatorial Guinea did not breach the principles of freedom of navigation or exclusive flag State jurisdiction, as set out in Articles 87, 90 and 92 UNCLOS. Lawful measures pursuant to UNCLOS' anti-piracy provisions (and consistent with obligations of cooperation under regional arrangements such as the Yaoundé Code) are recognised exceptions to these two principles, and acting under them, where exercising reasonableness and due regard, cannot breach these principles. In light of these principles, Equatorial Guinea acted in accordance with its duty to cooperate to suppress piracy and consequently did not breach freedom of navigation or exclusivity of flag State jurisdiction. At all times, it acted with "*due regard*" for the rights of other States and in compliance with the obligation of good faith in Article 300 UNCLOS.

### **II. Equatorial Guinea acted in accordance with the principle of reasonableness in exercising its enforcement jurisdiction**

232. The Marshall Islands claims that Equatorial Guinea breached its obligation under Article 225 UNCLOS to avoid adverse consequences in the exercise of enforcement measures.<sup>391</sup>

#### **A. Interpretation of Article 225 UNCLOS**

233. Article 225 UNCLOS provides:

*[i]n the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.*

234. The purpose of the provision is to ensure that, in the exercise of their powers of enforcement against foreign ships, port and coastal States act with due regard by adopting the necessary measures to avoid endangering the safety of navigation or

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<sup>390</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, 28 May 2013, ¶ 109.

<sup>391</sup> See **Memorial**, Chapter 7, Section VI.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

creating any hazard to a vessel, as well as refraining from an action that may have that result.<sup>392</sup>

235. However, the Marshall Islands goes further to argue that the "*SOLAS, the COLREGS and the STCW* [...] *are incorporated by reference into the Convention in, inter alia, Article 94 which in turn forms part of the relevant context for the interpretation of Article 225*".<sup>393</sup> The presumed implication is that the SOLAS, COLREGS and STCW form part of the interpretation of Article 225. However, such a broad and sweeping assertion is plainly incorrect in this context.
236. As set out in Chapter 4 above, the Chamber may apply other rules of international law not incompatible with UNCLOS as applicable law under Article 293. However, Article 94 UNCLOS sets out the duties of a flag State. It ensures that flag States conform to generally accepted international regulations, procedures and practices in doing so. In contrast, Article 225 UNCLOS concerns duties of a coastal State. Therefore, it is not clear on what legal or logical basis the Marshall Islands asserts that Article 94 "*forms part of the relevant context*" for interpreting Article 225.
237. In support of this assertion, Marshall Islands cites both the judgment in *M/V "Norstar"* and the chapeau of Article 31(3) of the Vienna Convention on the Law of Treaties ("**VCLT**"). However, neither of these authorities suggest that Article 94 forms part of the relevant context for interpreting Article 225. In *M/V "Norstar"*, the Tribunal recognised that while its jurisdiction was limited to Articles 87 and 300, it could apply other provisions of UNCLOS or rules of international law, not incompatible with UNCLOS, pursuant to Article 293.<sup>394</sup> When interpreting Panama's freedom of navigation on the high seas under Article 87, the Tribunal held that it may have recourse to Article 92, regarding the principle of exclusive flag State jurisdiction over its vessels on the high seas, as applicable law.<sup>395</sup> The logical legal link between these two provisions – on freedom of navigation and exclusivity of flag State jurisdiction – is clear. Any analogous link between Articles 94 (duties of a flag State) and 225 (duty to avoid adverse consequences in the exercise of the powers of enforcement) does not exist and Article 94 plainly does not form part of the relevant context for interpreting Article 225. It is unclear, nor does the Marshall Islands substantiate, how Article 31(3) VCLT could lead to a different conclusion.
238. The Chamber is therefore urged to read Article 225 UNCLOS in light of the correct approach to applicable law, as set out in Chapter 4 above.

### B. Reasonableness in enforcement measures

239. Reasonableness must apply to all enforcement measures taken by a coastal State under UNCLOS. The tribunal in *Duzgit Integrity* affirmed that the exercise of enforcement powers by a coastal State where the State derives these powers from UNCLOS is

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<sup>392</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 225, p. 1536.

<sup>393</sup> **Memorial**, ¶ 321 (emphasis added).

<sup>394</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 137.

<sup>395</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 138.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

governed by certain rules and principles of international law, in particular, the principle of reasonableness.<sup>396</sup>

240. The exercise of lawful enforcement measures are, inherently, an exercise of sovereign powers. As recognised by this Tribunal, a tribunal should not stand as a *de novo* review authority of a sovereign State's authorities. A degree of deference and sovereign margin of appreciation apply.
241. This was recognised by several of the Tribunal's judges in *M/V "Virginia"*, who emphasised that it was not the task of the Tribunal to take the place of the competent national authorities, but rather to review the decisions they delivered in the exercise of their power of appreciation.<sup>397</sup> In this way, the Tribunal's role was "*not akin to adjudication on merit by re-appreciating the evidence as an appellate authority*".<sup>398</sup>
242. The Judges, in the context of examining a coastal State's sovereign rights to manage living resources in its EEZ under Article 73(1) UNCLOS, held:

*[t]he term 'sovereign rights' ought to carry with it a degree of deference to the coastal State in its exercise of those rights, unless such deference is denied by the Convention itself.*

*It cannot be denied that the national courts or authorities are better placed to appreciate all the relevant considerations of law and fact in the State concerned. Hence, they should be given a broad 'margin of appreciation', i.e., a wide discretion in the operation of law. This concept is widely recognized in municipal jurisdictions as also in transnational contexts. [...] In view of this also, international tribunals should exercise judicial restraint in dealing with the coastal State's discretionary powers under article 73, paragraph 1, of the Convention".<sup>399</sup>*

243. The Judges cite, as further support for this reasoning, the opinions of Judges Cot, Wolfrum and Anderson in the same case, where Judge Cot observed:

*[t]he concept of sovereign rights is central to our discussion. Stopping short of full sovereignty, it implies an unfettered power of the coastal State to manage resources and establish rules and regulations accordingly. Member States do accept important obligations in that respect, but they have a free hand in*

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<sup>396</sup> *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, ¶ 209. The tribunal held that reasonableness may include consideration of a range of factors, including the type of legal penalty imposed on a vessel, whether a State's authorities provide reasons for a fine, whether a fine is unreasonable or disproportionate, whether cargo is confiscated, and the length of a vessels detention in the enforcing State. See ¶¶ 255-261.

<sup>397</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 53.

<sup>398</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 54.

<sup>399</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, ¶¶ 49-50 (emphasis added).

*deciding how to discharge these obligations [...] Sovereign rights carry a degree of deference to the State in its exercise of those rights [...] Coastal States may in particular specify monetary penalties they consider appropriate. **The Convention does not put a limit upon the amount of fines against violations a coastal State may consider appropriate.***<sup>400</sup>

244. Similarly, Judge Wolfrum in the *Camouco* case opined that:

*the Convention does not put a limit on the amount of fines against violators a coastal State may consider appropriate [...] coastal States enjoy considerable discretion in laying down the content of laws concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement [...] These discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. **It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question.***<sup>401</sup>

245. Equatorial Guinea submits that the same reasoning applies, *mutatis mutandis*, to the exercise of a coastal State's enforcement jurisdiction generally, including in assessing the reasonableness of such measures.

C. Equatorial Guinea acted in accordance with Article 225 UNCLOS and the principle of reasonableness in the exercise of enforcement measures

246. The Marshall Islands alleges that Equatorial Guinea breached its obligation to act in accordance with the principle of reasonableness when undertaking enforcement measures, *inter alia*, by:

- a) Failing to notify the Marshall Islands of enforcement action;
- b) Imposing the Fine on the Captain of the *Heroic Idun* on 23 September 2022 for various infringements of legal provisions;
- c) Depriving the crew of their liberty and detaining the Vessel;
- d) Transferring control and custody of the Vessel and crew to Nigeria in the face of Marshall Islands' prompt release proceedings; and
- e) Failing to show considerations of humanity in exercising its jurisdiction.<sup>402</sup>

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<sup>400</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 52 (emphasis added).

<sup>401</sup> *"Camouco" (Panama v. France)*, Prompt Release, Judgment, Dissenting Opinion of Judge Wolfrum, ITLOS Reports 2000, p. 10, 7 February 2000, ¶¶ 6, 11 (emphasis added).

<sup>402</sup> See **Memorial**, ¶ 249.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

247. Many of these acts, such as the non-notification of the Marshall Islands as the flag State, the imposition of the Fine by Equatorial Guinea, the charging of the Vessel's owners for expenses related to the Vessel, the treatment of the crew and the principle of humanity are addressed in other subsections of this Counter-Memorial, and are therefore not repeated here. These acts complied with the relevant rules of UNCLOS and international law, and therefore cannot be considered a breach of the principle of reasonableness.
248. In any event, it is evident that Equatorial Guinea acted in accordance with Article 225 and the principle of reasonableness, from the moment of the Vessel's apprehension to its transfer to Nigeria on 11 November 2022.
249. As it approached the *Heroic Idun* on 12 August 2022, the Equatoguinean naval vessel *Capitán David*'s AIS was on and it was visible to the *Heroic Idun*'s Master.<sup>403</sup> Further, as acknowledged by the Marshall Islands, the *Capitán David* used no physical force in apprehending the *Heroic Idun*.<sup>404</sup> The *Capitán David* made reasonable enquiries (in English, spoken by a member of the *Capitán David*'s crew), including where the *Heroic Idun* was going or coming from, and requested the *Heroic Idun* to stop its engines. At no point did the *Capitán David* board the *Heroic Idun*.
250. The *Capitán David* cautioned against doing "*anything suspicious*" and requested the *Heroic Idun* to accompany it for investigations. The *Heroic Idun* was then given points of coordination in order to ensure it could safely navigate its route into the port of Luba. This ensured the safe navigation and arrival of the *Heroic Idun* into the port.
251. The *Capitán David* remained 200 metres from the *Heroic Idun*. The Equatoguinean frigate *Wele Nzas* subsequently joined the escort of the *Heroic Idun*. This continued until the *Heroic Idun* arrived at Luba late on the night of 13 August 2022 with both Vessel and crew unharmed, and in safe and suitable location for its anchoring.<sup>405</sup>
252. Similarly, once it had arrived, Equatoguinean authorities ensured that the Vessel was kept in a safe port, surrounded by a half-mile radius, and where it was guarded by the frigate *Wele Nzas*.<sup>406</sup> The Marshall Islands' own evidence, as contained in the condition survey report of the *Heroic Idun* conducted after its departure from Nigeria indicates that "*the vessel was found to be in good condition*"<sup>407</sup> and that the "*vessel, machinery*

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<sup>403</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 89.

<sup>404</sup> This Tribunal has recognised that the "*grant of law-enforcement jurisdiction carries with it the right to use reasonable force for purposes of seizure and arrest*". See *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 751. See also *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶ 156: "[t]he normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered". See also *Guyana v. Suriname*, PCA Case No. 2004-04, Award of the Arbitral Tribunal, 17 September 2007, ¶ 445, "*in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary*". The only information known by Equatoguinean authorities at the time was that this was a potential criminal Vessel prepared to take action to evade national authorities (as it had done in Nigerian maritime waters).

<sup>405</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶¶ 7-9.

<sup>406</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 8.

<sup>407</sup> Condition Survey Report, **EK 78**, p. 280. Further, at p. 283 "*all bridge navigation and communication equipment was in good operational condition at the time of our attendance. A superficial inspection of the equipment did not exhibit any anomalies and all equipment appeared functional and well maintained*".

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*and outfitting were found in a good condition which can be expected for a similar vessel with a similar age".*<sup>408</sup>

253. Equatoguinean authorities ensured that the Vessel did not come to any harm while stationed in Luba. As noted in the expert report of Voirrey Blount submitted by the Marshall Islands, "[t]he '*HEROIC IDUN*' was not in imminent peril during her detention".<sup>409</sup> While this report refers to the frigate *Wele Nzas* allegedly dragging its anchor in proximity to the *Heroic Idun* on 26 September 2022, it admits that the *Wele Nzas* only came within 463 metres of the *Heroic Idun* – a distance of almost half a kilometre and which caused no damage to the *Heroic Idun*.<sup>410</sup> Furthermore, the subsequent manoeuvre by the *Wele Nzas* saw it come no closer than two cables' length from the *Heroic Idun*'s stern – a distance of about 370 metres.<sup>411</sup> Again, there was no alleged, let alone actual, damage to the Vessel.
254. While the Vessel was stationed at Luba Freeport, it was surrounded by a half-mile radius. Ms Blount's report notes that other vessels from Universal Africa Lines passed between the *Wele Nzas* and *Heroic Idun* "at a range of around 0.5 nautical miles, **which is not unsafe and is also not something that would be unexpected whilst waiting at anchor outside a port in a normal situation**".<sup>412</sup>
255. Further, the transfer of the Vessel to Nigeria was also in line with widespread State practice in this area and pursuant to Equatorial Guinea's commitments of cooperation under the Yaoundé Code.<sup>413</sup> Nothing indicates that such a transfer, in line with Equatorial Guinea's commitments and international obligations, would be unlawful – let alone unreasonable. Such a transfer therefore cannot be seen as unlawful under Article 225 UNCLOS.
256. For the reasons above, Equatorial Guinea acted at all times in accordance with its obligation under Article 225 UNCLOS and in accordance with the principle of reasonableness in the exercise of enforcement measures. At all times, all reasonable care and diligence was shown towards the *Heroic Idun* and its crew, and no breach of these obligations can be said to have occurred.

### III. There is no general obligation to notify the flag State of enforcement measures

257. The Marshall Islands alleges that Equatorial Guinea has breached its obligation to notify the Marshall Islands, as flag State, of the enforcement measures it took in respect of the *Heroic Idun*. However, as the *Duzgit Integrity* tribunal confirmed, "there is no

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<sup>408</sup> Condition Survey Report, **EK 78**, p. 299.

<sup>409</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, **RMI 37**, ¶ 36.

<sup>410</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, **RMI 37**, ¶ 22.

<sup>411</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, **RMI 37**, ¶ 24.

<sup>412</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, **RMI 37**, ¶ 27 (emphasis added).

<sup>413</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 105, p. 750. See also Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 389: "As a matter of international law, pirates may be tried by any State before whose courts they are brought, that is before the courts of the State effecting the arrest, or by a State to which the pirate is transferred. The permissibility of such a transfer is supported by state practice"; Yoshifumi Tanaka, *The International Law of the Sea*, Third Edition (Cambridge University Press, 2019), p. 457: "State practice shows that piracy suspects are being transferred for trial to relevant States".

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*relevant explicit provision in the Convention requiring that the flag State be notified".*<sup>414</sup>

258. Therefore, as no such obligation exists under UNCLOS, Equatorial Guinea cannot be understood to have breached it.
259. As the Marshall Islands itself accepts, "[t]here is no express provision in the Convention requiring notification where enforcement measures have been exercised over a foreign vessel in the high seas or the EEZ of a third State".<sup>415</sup> Indeed, where UNCLOS contains obligations requiring notification to a flag State or other affected State, such obligations are provided clearly in relevant provisions.
260. In his Declaration in *M/V "Norstar"*, Judge Kittichaisaree noted that two provisions of UNCLOS address the duty to promptly notify the flag State of the exercise of jurisdiction over a vessel flying its flag.<sup>416</sup> The first, Article 27(3) UNCLOS, under the heading "*Criminal jurisdiction on board a foreign ship*" relating to innocent passage in the territorial sea (which clearly does not apply here), provides:

*[i]n the cases [where the coastal State exercises criminal jurisdiction on board a foreign ship passing through the territorial sea of that coastal State], the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.*

261. The second, Article 73(4) UNCLOS, on the enforcement of laws and regulations of the coastal State in the EEZ (which again, does not apply here), provides:

*[i]n cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.*<sup>417</sup>

262. In *M/V "Norstar"*, which the Marshall Islands relies upon as support for its claim, neither of these two articles were applicable to that situation as the vessel was already in a Spanish port at the time of its being subject to enforcement measures. The Judge noted that "[a] question may be raised" regarding whether, besides the obligations imposed by Articles 27 and 73(4) UNCLOS, the State taking enforcement measures against a foreign vessel has a general obligation to promptly notify the flag State of the

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<sup>414</sup> *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, ¶ 268.

<sup>415</sup> **Memorial**, ¶ 329 (emphasis added).

<sup>416</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, Declaration of Judge Kittichaisaree, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶¶ 20–21.

<sup>417</sup> Note, the Tribunal has repeatedly confirmed that claims of non-compliance with Articles 73(3) and 73(4) are inadmissible in prompt release proceedings. See "*Camouco*" (*Panama v. France*), Prompt Release, Judgment, ITLOS Reports 2000, p. 10, 7 February 2000, ¶ 59; "*Monte Confurco*" (*Seychelles v. France*), Prompt Release, Judgment, ITLOS Reports 2000, p. 86, 18 December 2000, ¶ 63; "*Juno Trader*" (*Saint Vincent and the Grenadines v. Guinea-Bissau*), Prompt Release, Judgment, Separate Opinion of Judge Treves, ITLOS Reports 2004, p. 17, 18 December 2004, ¶ 4.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

vessel,<sup>418</sup> though made no definitive finding to this effect. This question was not before the Tribunal, nor was it addressed by the Tribunal's majority in that instance.<sup>419</sup>

263. Nonetheless, the Marshall Islands contends that this obligation is one of customary international law or a general principle of international law to which the Chamber may have recourse under Article 293 UNCLOS. However, the various specific notification provisions found in the International Convention for the Prevention of Pollution from Ships ("MARPOL"), SOLAS, STCW, and other treaties, or in IMO Resolutions cited by the Marshall Islands are specific to the regimes or procedures provided for in those instruments, and cannot suggest the formation of any customary rule of international law generally applicable to all enforcement measures taken by a State.<sup>420</sup>
264. While the various bilateral and consular treaties cited by the Marshall Islands contain variations of an obligation to notify between those States party to them *inter se*,<sup>421</sup> this is insufficient to prove evidence that a rule of custom has emerged to this effect. The emergence of such a rule requires both a finding of widespread State practice and *opinio juris* – i.e., the understanding that the act is one required by law. The Marshall Islands provides neither. Indeed, it is notable that UNCLOS – considered to codify the most important rules governing the law of the sea, including enforcement powers of coastal States – omits any such rule.
265. Neither is Marshall Islands' reference to commentary to Article 231 UNCLOS helpful or conclusive in this regard.<sup>422</sup> This article is located in Section 7 (Safeguards) of Part XII (Protection and Preservation of the Marine Environment) and explicitly limits its operation to the enforcement of measures set out in Part 6 of that Section.<sup>423</sup>
266. For these reasons, Equatorial Guinea submits UNCLOS contains no general obligation of flag State notification, nor has the Marshall Islands demonstrated the existence of any rule of custom to this effect. Equatorial Guinea cannot be held to have violated any such rule.
267. In any event, the Marshall Islands is unable to claim that, as the flag State, it had no knowledge about the acts of the *Heroic Idun* and its interception by Equatoguinean authorities. Indeed, it was informed at all relevant points in time.<sup>424</sup> The *Heroic Idun* was first approached by Equatoguinean authorities on *Capitán David* on 12 August 2022. As the Marshall Islands' own evidence discloses, it was:

*notified about the Equatorial Guinea Navy's interception, diversion, and detention of the HEROIC IDUN by its*

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<sup>418</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, Declaration of Judge Kittichaisaree, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 22.

<sup>419</sup> See *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶¶ 266–271.

<sup>420</sup> **Memorial**, ¶¶ 333–339.

<sup>421</sup> See **Memorial**, ¶¶ 333–340.

<sup>422</sup> See **Memorial**, ¶ 341.

<sup>423</sup> UNCLOS, Article 231 provides that: "States shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures. However, with respect to violations committed in the territorial sea, the foregoing obligations of the coastal State apply only to such measures as are taken in proceedings. The diplomatic agents or consular officers and where possible the maritime authority of the flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels".

<sup>424</sup> See, for example, Witness statement of Master, 15 December 2023, **RMI 1**, ¶¶ 68–70.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*management, OSM Ship Management AS, on 12 August 2022, shortly after the Vessel was intercepted and diverted by the Navy to Malabo and then Luba.*<sup>425</sup>

268. Therefore, the Marshall Islands' authorities were aware of the circumstances almost immediately after the event happened, and were at all times informed about the Vessel and crew through close communication with ship management, the Vessel's owner, and insurer representatives.<sup>426</sup>
269. The Marshall Islands was on its own account aware of the situation concerning the *Heroic Idun*, including through direct discussions.<sup>427</sup>
270. Tribunals have noted that the purpose of notification requirements in UNCLOS (such as in Article 73(4), noted above, which does not apply in this case) is to enable the flag State to have knowledge of the event in order to intervene at the initial stages of action taken against the Vessel.<sup>428</sup> In this case, the Marshall Islands had knowledge of the Vessel's interdiction from the outset, and therefore was caused no prejudice in its ability to intervene or communicate on the Vessel's behalf to Equatorial Guinea.

### IV. Equatorial Guinea acted pursuant to lawful prescriptive jurisdiction

271. Exclusivity of flag State jurisdiction does not preclude the lawful exercise of prescriptive jurisdiction by another State where provided for by treaty and pursuant to the relevant customary international law bases.<sup>429</sup> For example, Article 56 UNCLOS sets out the rights, jurisdiction and duties of the coastal State in the EEZ.
272. For the avoidance of doubt, the *Heroic Idun* was not apprehended for commission of offences under Equatorial Guinea's legislation, which were the subject of the Fine imposed on the Captain of the *Heroic Idun* on 23 September 2022.<sup>430</sup> As set out above, the Vessel's apprehension occurred in response to the request by Nigeria under the Yaoundé Code. It was only after the Vessel had been brought to Luba that it was investigated by Equatoguinean authorities and thereafter subject to a fine for infractions under Equatoguinean and regional legislation.
273. The Fine had a legal basis in the CEMAC Code and was imposed following an investigative process in Equatorial Guinea by governmental authorities following interview of the crew and inspection of the Vessel. The Fine was accompanied by reasons and was reasonable in relation to the offences charged and maintenance claimed. The Fine, which included expenses for the investigation of the Vessel and its crew while in Equatorial Guinea, cannot be seen as inherently unreasonable, and the Tribunal has previously accepted that similar expenses imposed on a vessel were not unreasonable or disproportionate.<sup>431</sup>

<sup>425</sup> Witness statement of William Gallagher, 17 December 2023, **RMI 30**, ¶ 27 (emphasis added).

<sup>426</sup> See, for example, Witness statement of William Gallagher, 17 December 2023, **RMI 30**, ¶ 27.

<sup>427</sup> See **Memorial**, ¶ 55.

<sup>428</sup> "*Camouco*" (*Panama v. France*), Prompt Release, Judgment, ITLOS Reports 2000, p. 10, 7 February 2000, ¶ 59; *M/V "Virginia G"* (*Panama/Guinea-Bissau*), Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 328.

<sup>429</sup> Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, Fourth Edition (Manchester University Press, 2022), p. 381.

<sup>430</sup> Equatoguinean Fine, **RMI 40**.

<sup>431</sup> *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, ¶¶ 255, where the Tribunal held that the "IMAP fine" imposed by São Tomé and Príncipe in that



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

274. As noted above, the Marshall Islands provides an inaccurate picture of the offences set out in the Fine.<sup>432</sup> For the avoidance of doubt, the Fine was imposed for:

*illegal entry into the jurisdictional waters of the Republic of Equatorial Guinea, sailing without flying any flag as well as sailing and remaining in the Exclusive Economic Zone of Annobón Island, from August 9, 2022 around 2: 58 p.m. and leaving on the 10th of the same month around 10: 53 a.m., without having been given authorization by the National Maritime Authority.*<sup>433</sup>

275. This makes clear that the Fine was not imposed for illegal entry into the "territorial waters" of Equatorial Guinea, but rather into its "jurisdictional waters", which is understood under the CEMAC Code to include the EEZ.<sup>434</sup>

276. The relevant Equatoguinean legislation, found in Article 12 of the Merchant Marine Law, notes that:

*[a]ll ships, vessels and naval craft shall request authorization from the National Maritime Authority for entry, stay and dispatch in the jurisdictional waters and ports of the Republic of Equatorial Guinea.*<sup>435</sup>

277. It is also recognised that:

*[c]oastal States have jurisdiction to adopt laws and regulations relating to navigational safety and vessel-source pollution from foreign ships in their exclusive economic zone (legislative jurisdiction) – where vessels enjoy the freedom of navigation – and they have far-reaching enforcement jurisdiction.*<sup>436</sup>

278. The requirement contained in Article 12 of the Equatoguinean Merchant Marine Law seeks to provide for, *inter alia*, the navigational safety of vessels traversing through the EEZ. State practice, for instance, supports the existence of a new norm of customary international law that allows coastal States to regulate navigation through their EEZ based on the nature of the ship and its cargo,<sup>437</sup> with some noting that it is:

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case was not unreasonable or disproportionate, noting that the fine also included operational and administrative expenses.

<sup>432</sup> The Marshall Islands claims that the Fine was imposed for, *inter alia*, "illegal entry into the **territorial waters** of the Republic of Equatorial Guinea" (emphasis added). See Official English translation of the Equatoguinean Fine, **RMI 41**.

<sup>433</sup> Resolution from the Ministry of National Defence of Equatorial Guinea, 23 September 2022, **REG-039**.

<sup>434</sup> As provided under Article 18 of the CEMAC Code, the EEZ of a Member State is part of the "waters under national jurisdiction beyond the territorial sea". See CEMAC Code, No. 03/01-UEAC-088-CM-06, 3 August 2001, **REG-029**, Chapter II.

<sup>435</sup> English translations of the provisions of Equatoguinean Law, **RMI 42**.

<sup>436</sup> Statement by 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.

<sup>437</sup> Jon M. Van Dyke, "The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone" *Marine Policy* 29 (2005) 107-121, p. 107.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*no longer accurate to say that freedom of navigation exists in the [EEZ] of other countries to the same extent that it exists on the high seas.*<sup>438</sup>

279. Secondly, it is not disputed that the *Heroic Idun* was not flying any physical flag at the time. The CEMAC Code, as cited in the Fine, recognises at Article 581 the power of competent national authorities to impose offences regarding the failure to display a flag.<sup>439</sup> For this reason, the Vessel was found in breach of this requirement and fined accordingly.
280. Representatives for the *Heroic Idun* paid the Fine while Nigeria continued its investigation.<sup>440</sup>
281. For the reasons above, Equatorial Guinea did not breach Articles 56, 58, 87, 89 or 92 UNCLOS as alleged by the Marshall Islands.

### V. Equatorial Guinea did not breach any other international obligations alleged by the Marshall Islands

282. Without prejudice to its non-acceptance of the Chamber's jurisdiction over treaties external to UNCLOS in Marshall Islands' claim (as set out in Chapter 5 above), Equatorial Guinea notes that, in any event, it did not breach any of these obligations in fact.
283. First, the Marshall Islands alleges that "[b]y taking 15 crew off the Vessel [...] Equatorial Guinea placed the Vessel below the minimum number of crew required (15) and without crew with the required STCW certifications".<sup>441</sup>
284. The STCW, as its title suggests and as its Article III clarifies, applies to "seafarers serving on board seagoing ships",<sup>442</sup> making clear that the STCW is focused on the training and qualifications required of crew aboard a seafaring vessel.<sup>443</sup>
285. The Marshall Islands alludes to a general violation of Article 1(2) of the STCW i.e., the general duty to "give the [STCW] full and complete effect" by ensuring that "seafarers on board ships are qualified and fit for their duties", without clarifying which obligation under the STCW was not given effect to.<sup>444</sup>
286. It is clear why the Marshall Islands does not discuss or allege a violation of any substantive provision of the STCW – that is, the STCW (including its regulations annexed) does not contain any provisions on manning requirements on board a seafaring vessel.

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<sup>438</sup> Jon M. Van Dyke, "The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone" *Marine Policy* 29 (2005) 107-121, p. 107. See also Natalie Klein, "Law Enforcement Activities", *Maritime Security and the Law of the Sea* (Oxford University Press, 2012), p. 89: "[...] the practice of states tends to indicate that coastal state powers in the EEZ have expanded [...]".

<sup>439</sup> See CEMAC Code, No. 03/01-UEAC-088-CM-06, 3 August 2001, **REG-029**, Article 581.

<sup>440</sup> Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, **REG-WS-001**, ¶¶ 24-25.

<sup>441</sup> **Memorial**, ¶ 308.

<sup>442</sup> International Convention on standards of training, certification and watchkeeping for Seafarers (STCW) (Extracts), **RMI 49**, Article III.

<sup>443</sup> See International Convention on standards of training, certification and watchkeeping for Seafarers (STCW) (Extracts), **RMI 49**, Article I(2).

<sup>444</sup> See **Memorial**, ¶¶ 312(a)-(d).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

287. The Marshall Islands has failed to establish how any act or omission by Equatorial Guinea may have amounted to a breach of the STCW. Equatorial Guinea did not affect (nor, sensibly, could it have affected) the standards and certifications held by the *Heroic Idun*'s crew. Therefore, the Chamber must reject this claim as plainly unfounded and inapplicable to the present dispute.

288. Secondly, the Marshall Islands alleges a breach by Equatorial Guinea of Article 1(b) of SOLAS. This provision requires contracting parties:

*to promulgate all laws, decrees, orders and regulations and to take all other steps which may be necessary to give the present Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended.*<sup>445</sup>

289. The Marshall Islands does so, with reference to the SOLAS safe manning requirement, set out in regulation 14 of Chapter V ("**Regulation V/14**"), which provides that:

*1. Contracting Governments undertake, each for its national ships, to maintain, or, if it is necessary, to adopt, measures for the purpose of ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned.*

*2 For every ship to which chapter I applies, the Administration shall:*

*1 establish appropriate minimum safe manning following a transparent procedure, taking into account the relevant guidance adopted by the Organization; and*

*2 issue an appropriate minimum safe manning document or equivalent as evidence of the minimum safe manning considered necessary to comply with the provisions of paragraph 1.*<sup>446</sup>

290. As the Marshall Islands itself notes, the "Administration" referred to in Regulation V/14 is defined in the SOLAS as the "Government of the State whose flag the ship is entitled to fly".<sup>447</sup> Regulation V/14 therefore applies to each Contracting Government only in respect of its own national ships.<sup>448</sup> The *Heroic Idun* was plainly not a national ship of Equatorial Guinea, meaning that the obligation contained in Regulation V/14 could not apply to Equatorial Guinea in respect of the *Heroic Idun*. Further, the Marshall Islands has failed to substantiate how the acts of Equatorial Guinea could in any way have amounted to a breach of Article 1(b) of SOLAS, to give SOLAS full and complete effect. The Chamber must therefore reject this claim.

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<sup>445</sup> International Convention for the safety of life at sea protocols (SOLAS) (Extracts), **RMI 48**, p. 701.

<sup>446</sup> International Convention for the safety of life at sea protocols (SOLAS) (Extracts), **RMI 48**, p. 709 (emphasis added).

<sup>447</sup> See International Convention for the safety of life at sea protocols (SOLAS) (Extracts), **RMI 48**, Chapter 1, Regulation 2(b).

<sup>448</sup> See International Convention for the safety of life at sea protocols (SOLAS) (Extracts), **RMI 48**, Chapter V, Regulation 14(1); **Memorial**, ¶ 296.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

291. Similarly, the Marshall Islands also makes reference to IMO Resolution A.1047(27), titled "*Principles of Minimum Safe Manning*".<sup>449</sup> This resolution only recommends that "*Governments [establish] the minimum safe manning levels for ships flying their country's flag*".<sup>450</sup> This applies to the obligations under "*Principles of Safe Manning*" and "*Guidelines for the Application of the Principles of Safe Manning*" (annexes 1 and 2 of the resolution), which the Marshall Islands specifically alludes to.<sup>451</sup> Accordingly, Equatorial Guinea is under no obligation to ensure safe manning standards for a ship flying another State's flag.
292. Lastly, the safe manning requirements were inapplicable to the *Heroic Idun* while it was anchored at Luba, as it did not require the same number of crew to run the ship as it would otherwise require while undertaking a journey in the seas. The minimum safe manning certificate of the *Heroic Idun* only applies when the Vessel "*proceeds at sea*", and makes no mention of manning requirements while the Vessel is anchored at a port:

*The vessel named in this document is considered to be safely manned, if when it proceeds to sea, it carries not less than the number and grades/capacities of personnel specified [...].*<sup>452</sup>

293. Further, it appears from the Marshall Islands' own laws that a ship may be anchored in an unmanned condition:

*The issuing of [a minimum safe manning certificate] does not mean that a vessel may not be towed, or where appropriate for safety reasons, moored or anchored in an unmanned condition.*<sup>453</sup>

294. As the flag State responsible for creating guidelines for its ships on safe manning under the SOLAS and IMO Resolution A.1047(27), the Marshall Islands itself does not consider that the requirements of a minimum safe manning certificate preclude the mooring or anchoring of a vessel in an unmanned condition.
295. Similarly, IMO Resolution A.890(21) on principles of safe manning require only that minimum safe manning of a ship must ensure its "*capability*" to "*moor and unmoor the ship safely*", not that such minimum safe manning must be maintained while the ship is moored.<sup>454</sup> Both at the time that the *Heroic Idun* first moored at Luba Freeport on 13 August 2022, and at the time that the *Heroic Idun* unmoored from the Luba Freeport on 11 November 2022, the number of crew required to fulfil the safe manning requirements were present on board the Vessel; 15 crew members were disembarked from the Vessel and taken ashore after the Vessel had been anchored safely at the port.

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<sup>449</sup> **Memorial**, ¶ 299; International Maritime Organization, 27th session, Resolution A.1047(27), "Principles of Safe Manning", 30 November 2011, A 27/Res. 1047, ¶ 2.

<sup>450</sup> International Maritime Organization, 27th session, Resolution A.1047(27), "Principles of Safe Manning", 30 November 2011, A 27/Res. 1047, ¶ 2 (emphasis added).

<sup>451</sup> See **Memorial**, ¶ 299.

<sup>452</sup> Republic of Marshall Islands minimum safe manning certificate for the vessel, **WG 8**, p. 400.

<sup>453</sup> Republic of the Marshall Islands, Minimum Safe Manning Requirements for Vessels, Maritime Administrator, September 2021, **REG-055**, p. 5, s. 1.1.4.

<sup>454</sup> See International Maritime Organization, 21st session, Resolution A.890(21), "Principles of Safe Manning", 4 February 2000, Annex 1, S. 1.1.2.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

The safe manning requirements that are usually applicable to a vessel undertaking a voyage would not be applicable to such a situation.

296. Finally, the Marshall Islands claims that Equatorial Guinea violated Article 1 and rules 2, 6, 7 and 8 COLREGS.<sup>455</sup> These rules relate to the obligation to ensure safe speed of vessels and to avoid collisions. To this end, the Marshall Islands claims that the frigate *Wele Nzas*, while dragging anchor, came close to the *Heroic Idun* when the latter was anchored at Luba Freeport, and that another vessel also passed by very close to the *Heroic Idun*.<sup>456</sup>
297. However, as noted above, the *Wele Nzas* only came within 463 metres of the *Heroic Idun* – a distance of almost half a kilometre and which caused no damage to the *Heroic Idun*.<sup>457</sup> Furthermore, the subsequent manoeuvre by the *Wele Nzas* saw it come no closer than two cables length from the *Heroic Idun*'s stern – a distance of about 370 metres.<sup>458</sup> Again, no actual resulting damage to the Vessel is alleged to have occurred, or actually occurred in fact.
298. The expert report of Voirrey Blount ultimately concludes that "[t]he '*HEROIC IDUN*' was not in imminent peril during her detention".<sup>459</sup> Similarly, the report notes that "*multiple small craft [were] going in and out of the port of Luba and they passed reasonably close to the 'HEROIC IDUN'*". However, there was no concern for the safety of the *Heroic Idun*.<sup>460</sup> The report does not suggest at any point that the actions of Equatorial Guinea breached the COLREGS.
299. Marshall Islands also alleges that by violating the COLREGS, Equatorial Guinea also breached the obligation in Article 87(1) UNCLOS to exercise its freedom of the high seas "*under [the] conditions laid down by [this Convention and by] other rules of international law*".<sup>461</sup> However, none of the acts of Equatorial Guinea referenced by Marshall Islands occurred on the high seas, and so they could not have been exercised in the course of Equatorial Guinea exercising its freedom of the high seas. Therefore there is no violation of Article 87 UNCLOS.
300. For the avoidance of doubt, nor did this conduct breach the obligation in Article 2(3) UNCLOS to exercise sovereignty over the territorial sea subject to UNCLOS and other rules of international law.

### VI. Equatorial Guinea acted in accordance with the principle of humanity and did not violate the human rights of crew members

301. The Chamber's jurisdiction does not extend to external human rights treaties cited by the Marshall Islands.
302. The Marshall Islands alleges that Equatorial Guinea breached, *inter alia*, rights including the right not to be unlawfully and arbitrarily detained, the right not to be subject to cruel, inhuman and degrading treatment, and a failure to provide medical

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<sup>455</sup> Memorial, ¶¶ 312-313.

<sup>456</sup> Memorial, ¶ 315.

<sup>457</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, RMI 37, ¶ 22.

<sup>458</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, RMI 37, ¶ 24.

<sup>459</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, RMI 37, ¶ 36.

<sup>460</sup> First Expert Report of Voirrey Blount including annexes, 24 November 2023, RMI 37, ¶¶ 30-31.

<sup>461</sup> Memorial, ¶ 312(b).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

treatment. It further claims that such conduct breached Equatorial Guinea's obligations under Article 87 UNCLOS.<sup>462</sup> However, the *Heroic Idun* crew were at all times treated in accordance with the principle of humanity by Equatoguinean authorities.

303. The Marshall Islands' allegations are irreconcilable with the reality of the treatment of the crew, both those housed in the Accommodation Facility in Malabo and those stationed on the *Heroic Idun*. As detailed above in Chapter 3, Equatoguinean authorities at all times treated the *Heroic Idun* crew members in accordance with the principles of humanity, including with respect to providing their housing, food, water, high-quality medical care, and retaining communication through their mobile phones. Crew members could make requests for provisions at any time to their maritime agent, Besora, which was permitted by Equatoguinean authorities to provide every request made by the crew members.
304. The Accommodation Facility was new and had running water, air conditioning, and adequate space to house the crew members comfortably. The crew were free to walk around at all times. As is made clear by the witness statement of Mr Hernández Martín in relation to those crew housed in the Accommodation Facility from 14 August 2022:

*Once we arrived, I noticed that the building was brand new and, although unfurnished, it was comfortable. It had suitable bathrooms and air conditioning. My colleague and I made arrangements to get suitable bedding for the crew so they could sleep comfortably there. [...]*

*The next morning, on 15 August 2022, my colleague and I purchased several provisions to ensure the crew would be comfortable and well looked after during their accommodation. This included mattresses, pillows, a fridge and a small cooker.*<sup>463</sup>

305. Throughout their stay in the Accommodation Facility, Mr Hernández Martín confirms that:

*We had no issues in ensuring the crew remained well looked after and comfortable. We had complete access to them. At the accommodation facility, there were some security watchmen outside but the crew were free to move and walk around as they wanted. There was also cleaning personnel that cleaned the accommodation facility on a regular basis.*<sup>464</sup>

306. The crew members who remained on board the *Heroic Idun* were similarly always able to contact Besora to seek necessary supplies and provisions. Receipts show the crew was provided with a range of provisions, including food, beverages, toiletries, and

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<sup>462</sup> The Marshall Islands also appears to rely on Article 230(3) UNCLOS, which provides for the "[observance of the] rights of the accused" in the context of conduct of proceedings relating to "violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea". While not in dispute, this provision is plainly inapplicable in this dispute.

<sup>463</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶¶ 10-11 (emphasis added). See also Photographs of the Accommodation Facility, 1 July 2024, **REG-041**.

<sup>464</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 18.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

restaurant meals.<sup>465</sup> As noted above, the crew members would make requests for supplies through Besora to Captain Nsue Esono Nchama of the Ministry of National Defence. Following approval from the ministry, Luba Freeport authorities would arrange for the necessary vessels and equipment that Besora needed for taking the supplies to the crew.<sup>466</sup> As Mr Hernández Martín explains:

*I also had contact with the crew who stayed on the Heroic Idun in Luba through phone, WhatsApp messages and emails. The Chief Officer or the owner would communicate the needs of the crew who remained on the vessel. Besora would supply the crew on board with all the provisions they required and deliver these to the Heroic Idun. At one point, I recall the owners of the vessel arranged for some spare parts also to be delivered to them.*<sup>467</sup>

307. As attested by the OSM Group to the Equatoguinean authorities on 16 September 2022, the owners themselves were "**grateful that the crew [had] been allowed food and water and [had] been treated well by those tasked to guard them**".<sup>468</sup>
308. The crew retained their mobiles, with local SIM cards provided by Besora, in order to remain in contact with their families.
309. Furthermore, the crew at all times had access to high-quality medical care. As noted in the witness statement of Mr Hernández Martín, the crew members would either be taken to the Loeri Comba Hospital, which was closer to the Accommodation Facility,<sup>469</sup> or to the premier medical facility in Equatorial Guinea, La Paz. The witness statement of Dr Irvin Simbarashe, the medical director of La Paz, attests that most of the crew members presented with illnesses common in sailors, which are common and easily treatable, and that the crew were treated with the highest standard of medical care.<sup>470</sup> At no time were the crew ever denied access to medical treatment when it was needed or requested.
310. Similarly, the crew's stay at Hotel Anda, a luxury hotel, is entirely inconsistent with the allegations of mistreatment alleged by the Marshall Islands.
311. In light of the above, it is plainly inconceivable that Equatorial Guinea's treatment of the *Heroic Idun* crew members could be characterised as "*psychological torture*" or any comparable standard of mistreatment.<sup>471</sup> The factual circumstances of the crew members' stay and treatment in Equatorial Guinea do not in any way support this conclusion.
312. In this regard, the report of Dr Perman-Kerr is based predominantly on extensive online interviews with crew members conducted from 21-22 April 2023 and in-person sessions conducted on 7-8 June 2023, i.e., following the crew's release from Nigeria.<sup>472</sup>

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<sup>465</sup> 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**.

<sup>466</sup> Witness statement of Howard James McDowall, 2 July 2024, **REG-WS-006**, ¶ 11.

<sup>467</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 19.

<sup>468</sup> Letter from OSM to the Equatoguinean Attorney General, 16 September 2022, **EK 36**, p. 115 (emphasis added).

<sup>469</sup> Witness statement of Alberto Hernández Martín, 11 July 2024, **REG-WS-003**, ¶ 27.

<sup>470</sup> Witness statement of Dr Irvin Simbarashe, 10 July 2024, **REG-WS-004**, ¶¶ 10-12.

<sup>471</sup> First Psychological Report of Dr Lesley Perman Kerr, 20 November 2023, **RMI 38**, ¶ 29.

<sup>472</sup> First Psychological Report of Dr Lesley Perman Kerr, 20 November 2023, **RMI 38**, ¶¶ 9-10, 17-27.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Dr Perman-Kerr notes that she previously consulted OSM from 20 October 2022 "*and was involved in their Crisis Management Team meetings and later meetings with the crew's families*", and also engaged "*with two members of the crew whilst the vessel was in EG between 26th-29th October 2022*".<sup>473</sup>

313. Notably, the report makes no specific assessment regarding the treatment or mental health of the crew members in October 2022 while in Equatorial Guinea. The report only purports to assess the mental health of the crew members at the time of the interviews in April and June 2023, i.e., after the crew members had spent some 198 days in Nigeria.<sup>474</sup>
314. Further, Dr Perman-Kerr acknowledges that there was no communication with the crew while the crew members remained in Nigeria. Instead, it was only much later in 2023 "[o]nce it was possible to speak to the crew, [that] they reported the events experienced in EG and their symptoms, which clearly met APA defining criteria for a post-trauma mental health condition".<sup>475</sup> Therefore, at the time of Dr Perman-Kerr's post-release interviews with the crew members, it cannot be discerned whether the mental conditions reported by the crew members (if any) were due to their stay in Equatorial Guinea or in Nigeria.
315. Indeed, Dr Perman-Kerr's report notes:

*For much of the Nigerian period of detention, the crew was unable to communicate freely with outside parties due to severe restrictions enforced by the Nigerian authorities, which had a significant negative impact. This meant that they were unable to receive an accurate understanding of what was happening in terms of efforts to end their detention, and they received scant information on how their families were faring, or comfort from family support or professional psychological and pastoral support. Clinical experience and the experience of the charity Hostage International (1) speaks to the distress that such isolation causes and the negative speculation that it can trigger concerning the well-being of their families (particularly where there existed prior reason for concern like an illness or a difficult pregnancy) and whether enough efforts are being made towards their release.*

*Isolation from meaningful contact with the outside world is especially impactful in the context of wrongful accusations as shown by Brooks and Greenburg (2021) (2) in their review article where they identify 8 main themes: loss of identity; stigma; psychological and physical health; relationships with others; attitudes towards the justice system; impact on finances and employment; traumatic experiences in custody; and adjustment difficulties. They conclude that the psychological consequences of wrongful accusations appear to affect the lives*

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<sup>473</sup> First Psychological Report of Dr Lesley Perman Kerr, 20 November 2023, **RMI 38**, ¶ 8.

<sup>474</sup> See Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 172: "*In total we were detained for 289 days (92 days by Equatorial Guinea and 198 by Nigeria)*".

<sup>475</sup> See First Psychological Report of Dr Lesley Perman Kerr, 20 November 2023, **RMI 38**, ¶ 36. See also ¶ 15.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*of those accused seriously, even after exoneration or overturning of convictions. These experiences are likely to exacerbate existing mental and physical health conditions and increase the likelihood of the onset of new mental health conditions such as clinical depression and traumatic stress.*<sup>476</sup>

316. Regarding the crew's time in Nigeria, the Master of the *Heroic Idun* also notes that:

*[c]ommunication was severely restricted, and we were not allowed access to our phones other than to call home under the supervision of the guards for a short period of time. During this period, we could only speak to our families for five to 10 minutes once every 2-3 weeks. All of our phones and computers were put in a box on the Vessel and locked in a drawer. I was given the key, but it [sic] always guarded by Navy personnel, so I could not open it without their permission. The Navy also made me disconnect the Vessel's computers from the network. The only communication allowed was emails from my PC on the bridge. However, all our emails were monitored.*<sup>477</sup>

317. In light of the above, the Marshall Islands has failed to demonstrate that the stay of the crew members of the *Heroic Idun* in Equatorial Guinea (for 92 days) caused the crew members to suffer from the various mental conditions alleged. Equatorial Guinea is unable to comment on any such mental health issues developed while in Nigeria.
318. For the entirety of the time that the *Heroic Idun* crew were in Equatorial Guinea, they were given the best possible treatment that could reasonably be expected given the resources and facilities available, and treated with humanity, dignity and respect by the Equatoguinean authorities, who also sought an undertaking from Nigeria to this effect, seeking to ensure the crew's human rights would be respected there as well.<sup>478</sup>
319. Equatorial Guinea therefore acted at all times in accordance with the principles of humanity in its treatment of the *Heroic Idun*'s crew members.<sup>479</sup>

### **VII. UNCLOS' prompt release obligations were not applicable to the *Heroic Idun*, consequently Equatorial Guinea has not violated these obligations**

320. The Marshall Islands claims that "*there is a general obligation under the Convention and international law to release detained foreign-flagged vessels and their crews promptly without undue delay*".<sup>480</sup> It connects this type of "general obligation" to its

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<sup>476</sup> First Psychological Report of Dr Lesley Perman Kerr, 20 November 2023, **RMI 38**, ¶¶ 15-16 (emphasis added).

<sup>477</sup> Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 165 (emphasis added). See also Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 85-86; Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 168.

<sup>478</sup> Official handing over of the tanker *MT Heroic Idun* between the governments, Addendum, 10 November 2022, **REG-011**.

<sup>479</sup> For the avoidance of doubt, since the conduct in respect of the crew did not occur on the high seas, Equatorial Guinea could not have breached Article 87 UNCLOS.

<sup>480</sup> **Memorial**, ¶ 356.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

previous claims of the existence of an "*obligation to notify the flag State of enforcement measures*".<sup>481</sup>

321. Equatorial Guinea has detailed in Chapter 6.III why such a general obligation to notify the flag State does not exist under international law. Similarly, neither does a general obligation to release vessels and their crew without undue delay exist under international law.
322. As the Marshall Islands itself accepts:

*[t]here is no express provision in the Convention requiring release promptly and without undue delay where enforcement action and control have been exercised over a foreign vessel in the high seas or the EEZ of a third State, or elsewhere, otherwise than in accordance with the provisions of the Convention. The Convention assumes lawful enforcement action.*<sup>482</sup>

323. The Marshall Islands itself notes that UNCLOS only requires prompt release of a vessel under these three specific circumstances:
- a) in the arrest of a vessel by a coastal State in exercise of its rights to explore, exploit, conserve and manage the living resources in its EEZ (Article 73(2));
  - b) in the arrest of a vessel for a violation of international obligations to protect and preserve the marine environment (Article 226(1)); and
  - c) in the arrest of a vessel for marine pollution in a coastal State's EEZ (Article 220(6)).<sup>483</sup>
324. It is clear that none of the above circumstances apply to the present case.
325. Article 292 UNCLOS describes the prompt release application procedure under UNCLOS, which only allows such application where "*the detaining State has not complied with the provisions of this Convention*". It does not provide for an application for prompt release of a vessel for non-compliance with any other obligations in UNCLOS or international law applicable to the dispute.
326. While the Marshall Islands lists various IMO treaties which allegedly provide for "*obligations [on a port State] to release vessels which have been detained without undue delay*",<sup>484</sup> such an approach is misguided. None of the IMO treaties cited by the Marshall Islands provide for a general obligation of prompt release on a port State with control over a vessel. Rather, each of the IMO treaties specifies the precise factual circumstances where such release obligations will apply. As is clear, none of the aforementioned circumstances apply in the present case.
327. For example, MARPOL is focused on a member State's obligation "*to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention*".<sup>485</sup> Article 7 of

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<sup>481</sup> See Memorial, ¶¶ 357-358.

<sup>482</sup> Memorial, ¶ 358 (emphasis added).

<sup>483</sup> Memorial, ¶ 360.

<sup>484</sup> Memorial, ¶ 362.

<sup>485</sup> International Convention for the Prevention of Pollution from Ships 1973, as amended by 1978 Protocol (MARPOL), Article 1(1).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

MARPOL, cited by Marshall Islands,<sup>486</sup> refers to detaining or delaying ships for the purposes of inspecting the ships for violation of the prevention of marine pollution obligations under MARPOL.<sup>487</sup> However, this convention is plainly not applicable to the present case.

328. Similarly, SOLAS Regulation 19 of Chapter I highlighted by the Marshall Islands applies solely to situations where control over a ship "*is directed towards verifying that the certificates issued under regulation 12 or regulation 13 are valid*",<sup>488</sup> i.e., certifications complying with various ship safety regulations.<sup>489</sup> Again, this Regulation has no applicability to the present situation relating to the seizure of the *Heroic Idun*.
329. The Marshall Islands also cites Article X(4) STCW, which provides that:

*When exercising control under this article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.*

330. However, the "control" of a ship under Article X STCW is restricted to control "*to verify that all seafarers serving on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation*".<sup>490</sup> This provision is plainly not applicable to the circumstances of the apprehension of the *Heroic Idun* by Equatorial Guinea in the present case.
331. Lastly, the Marshall Islands cites Article 12 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments ("**BWMC**"). The purpose of this instrument is "*to prevent, minimize and ultimately eliminate [...] the transfer of Harmful Aquatic Organisms and Pathogens through the control and management of ships' Ballast Water and Sediments*".<sup>491</sup> Article 12 relates specifically to the release of ships without undue delay where they have been detained for the purposes of surveying certifications and other requirements under the BWMC or ensuring there are no violations of the BWMC through harmful transfer of harmful aquatic organisms and pathogens.<sup>492</sup> Again, this convention is not applicable to the present case.
332. The Marshall Islands also lists a few provisions from a series of port State memoranda of understanding, the IMO Procedures for Port State Control, the Fish Stocks Agreement and the 2009 Agreement on Port State Measures to Prevent, Deter and

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<sup>486</sup> **Memorial**, ¶ 362(a).

<sup>487</sup> International Convention for the prevention of pollution from ships (MARPOL) (Extracts), **RMI 46**, Article 7, with reference to Articles 4-6.

<sup>488</sup> International Convention for the safety of life at sea protocols (SOLAS) (Extracts), **RMI 48**, Regulation 19(f) read with Regulation 19(a) of Chapter I as referenced in **Memorial**, ¶ 362(b).

<sup>489</sup> See International Convention for the Safety of Life and Sea 1974 (SOLAS), Regulation 12 of Chapter I, making reference to the issuing of a passenger ship safety certificate, cargo ship safety construction certificate, cargo ship safety equipment certificate and cargo ship safety radio certificate; Regulation 13 of Chapter I makes reference to similar certifications granted by the flag State of the ship.

<sup>490</sup> International Convention on standards of training, certification and watchkeeping for Seafarers (STCW) (Extracts), **RMI 49**, Article X(1) read with Article X(4).

<sup>491</sup> International Convention for the control and management of ships' ballast water and sediments (extracts), **RMI 45**, p. 684.

<sup>492</sup> International Convention for the control and management of ships' ballast water and sediments (extracts), **RMI 45**, Article 12 read with Articles 7.2, 8, 9 and 10.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Eliminate Illegal, Unreported and Unregulated Fishing in an attempt to establish a "*general obligation*" to promptly release vessels under international law.<sup>493</sup> Again, however none of these provisions were formulated in the context of the apprehension of a vessel for suspected illegal activities or piracy.

333. The Marshall Islands finally also cites the awards of *Juno Trader*, *M/V "Louisa"*, and "*Enrica Lexie*" Incident, as well as Judge Laing's declaration in the *Camouco* case in support of its arguments on a general obligation to promptly release.<sup>494</sup>
334. However, the *Juno Trader* and *Camouco* prompt release applications both dealt with violations of Article 73, which is not applicable in the present case. Further, nor did the Tribunal in those cases purport to be ruling on the extent of any general prompt release obligation outside the circumstances of Article 73. As to the "*Enrica Lexie*" case, it was a provisional measures decision dealing with claims of immunity for crew members from criminal proceedings in a third State, and the tribunal merely noted the lengthy restriction on their liberty while imprisoned as a humanitarian consideration while deciding to order a suspension of the criminal proceedings. None of these cases indicated a general obligation to promptly release a vessel.
335. Notably, in *M/V "Louisa"*, Saint Vincent and the Grenadines requested the release of a vessel which had been detained by Spain in the context of criminal proceedings relating to the alleged violations of Spanish laws on "*the protection of the underwater cultural heritage and the possession and handling of weapons of war in Spanish territory*".<sup>495</sup> The Tribunal considered that Articles 73 and 226 UNCLOS, used by Saint Vincent and the Grenadines to forward its claims on prompt release of the vessel, were not applicable to the case owing to the inapplicability of the specific regimes covered by those provisions and ultimately declined jurisdiction over the case. Had a general obligation to promptly release a detained vessel existed under UNCLOS, the Tribunal's finding would have reflected the same.
336. The Tribunal must therefore dismiss the Marshall Islands' claims based on a "*general obligation*" to ensure a prompt release of vessels as unfounded under UNCLOS, and under the various UNCLOS Articles it has pleaded.

### VIII. Equatorial Guinea did not breach its obligations to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings

337. The Marshall Islands alleges that Equatorial Guinea breached its obligation under Article 283 UNCLOS to expeditiously exchange views regarding the settlement of the dispute.<sup>496</sup> However, Equatorial Guinea at all times respected its obligation to preserve the rights of the Marshall Islands and not aggravate the dispute pending proceedings.
338. The scope of the obligation requires that, when a dispute arises, the parties exchange views regarding its settlement by negotiation or by other peaceful means. It does not, however, create an obligation for States to negotiate as a procedure to settle their disputes before there can be resort to the compulsory mechanisms of Part XV(2) of

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<sup>493</sup> Memorial, ¶¶ 363-366.

<sup>494</sup> Memorial, ¶ 369.

<sup>495</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, 28 May 2013, ¶ 113.

<sup>496</sup> Memorial, ¶ 397(b).

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

UNCLOS.<sup>497</sup> A prior exhaustion of a negotiation process is a prerequisite to institution of proceedings only if a specific obligation to that effect has been undertaken.<sup>498</sup>

339. After the Special Agreement between the parties, Equatorial Guinea wrote to the Marshall Islands on 12 June 2023 noting that "*the Government of the Republic of Equatorial Guinea has kindly requested your Government for an amicable settlement of the dispute between [the Marshall Islands] and the Government of the Republic of Equatorial Guinea concerning the said Vessel*". It requested initial negotiations to find a peaceful agreement to the dispute.<sup>499</sup>
340. In addition, Equatorial Guinea sent a letter on 22 May 2023 to the Tribunal requesting a moratorium in the understanding that the parties could meet and find an amicable solution.<sup>500</sup>
341. The Marshall Islands made clear by response in July 2023 that it would not "*consider any request for consultation or engagement until a concrete and meaningful settlement offer is advanced by Equatorial Guinea*".<sup>501</sup>
342. As shown above, Equatorial Guinea acted with respect for the judicial process and peaceful settlement of disputes. It sought and obtained agreement with the Marshall Islands on the submittal of this dispute to a special chamber of the Tribunal under Article 15(2) of the Statute, and additionally sought negotiations with the Marshall Islands in an attempt to peacefully resolve the dispute. It plainly did not act contrary to Article 283 UNCLOS.
343. Further, Equatorial Guinea has taken no act which has threatened the integrity of the proceedings or the ability of the Marshall Islands to present the claims it now brings in this case. It has therefore not taken any act to prejudice the rights of the Marshall Islands.
344. In this regard, it is misleading and incorrect to suggest that the transfer of the *Heroic Idun* and crew to Nigeria breached the obligation of non-aggravation, as the Marshall Islands contends.<sup>502</sup> Actions that a party may disagree with or oppose do not, *per se*, amount to breaches of the duty of non-aggravation. As Equatorial Guinea has made clear, it acted at all times pursuant to its duty of cooperation with Nigeria, under relevant international and regional obligations and commitments, including the Yaoundé Code. The transfer of the Vessel and crew to Nigeria was in line with, and responsive to, Nigeria's request under the Yaoundé Code.<sup>503</sup> The transfer – apart from being well in line with state practice in this regard – was not prohibited at the time by any particular international obligation. Nor was Equatorial Guinea under any general or specific duty to not cooperate in relation to Nigeria's investigation and request – quite the contrary.

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<sup>497</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 283, p. 1831.

<sup>498</sup> *United Nations Convention on the Law of the Sea - A Commentary*, ed. Alexander Proelss (C.H. Beck, Hart, Nomos, 2017), Article 283, p. 1831.

<sup>499</sup> Note No. 098/MPGE-NY/023/IAG from the Permanent Mission of the Republic of Equatorial Guinea to the United Nations to the Permanent Mission of the Republic of the Marshall Islands to the United Nations, 14 June 2023, **REG-056**, p. 3.

<sup>500</sup> Letter from Agent of Equatorial Guinea to President of the Special Chamber, 22 May 2023, **REG-057**.

<sup>501</sup> Letter from Marshall Islands to Equatorial Guinea, 10 July 2023, **REG-058**.

<sup>502</sup> **Memorial**, ¶ 396(b).

<sup>503</sup> Note No. 10247/022 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo, 27 October 2022, **REG-047**.

## **COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA**

For this reason, it cannot be characterised as an act of aggravation of the dispute pending proceedings.

345. For the reasons above, neither can such conduct be characterised as a breach of any of UNCLOS Articles pleaded by the Marshall Islands.

CHAPTER 7

THE MARSHALL ISLANDS IS NOT ENTITLED TO COMPENSATION OR SATISFACTION

346. The Marshall Islands demands reparation in the form of "*restitution, compensation (including interest and costs) and satisfaction in the form of an acknowledgement of wrongdoing, together with an assurance and guarantee of non-repetition*".<sup>504</sup> However, the Marshall Islands' claim for these remedies is contingent upon a finding of both liability and causation between an internationally wrongful act and the alleged damage said to have been incurred. On both analyses, its case fails.

**I. There is no causal link between the losses allegedly suffered by the Marshall Islands and any internationally wrongful act attributable to Equatorial Guinea**

347. The Marshall Islands argues in its Memorial that:

*a State which is responsible for breaches of the Convention must provide reparation not only in respect of the damage suffered by the injured State but also for damage or other loss suffered by the Vessel, including all persons involved or interested in its operation.*<sup>505</sup>

348. However, this is incorrect. A State is not responsible for any and all damages suffered by an injured State and/or its vessels.

349. As provided under Article 31(1) ARSIWA, "[t]he responsible State is under an obligation to make full reparation for the injury **caused by** the internationally wrongful act".<sup>506</sup> The commentary to Article 31(1) ARSIWA clarifies that the phrase "*make full reparation for the injury caused by the internationally wrongful act*":

*is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.*<sup>507</sup>

350. International law requires establishing the existence of a "*sufficiently direct*", "*certain*", and "*clear and unbroken*" causal link between an internationally wrongful act complained of and the injury suffered.<sup>508</sup>

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<sup>504</sup> Memorial, ¶ 407.

<sup>505</sup> Memorial, ¶ 404.

<sup>506</sup> International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, A/CN.4/SER.a/2001/Add.1 (Part 2), Article 31(1) (emphasis added).

<sup>507</sup> International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, A/CN.4/SER.a/2001/Add.1 (Part 2), Commentary on Article 31, p. 92, ¶ 9; *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, ¶ 91.

<sup>508</sup> See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324, 19 June 2012, ¶ 14; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022, p. 13, 9 February

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

351. The ILC makes clear that the damage suffered must be "*proximate*", "*foreseeable*" and "*consequential*". On the other hand, it must not be too "*indirect*", "*remote*", "*speculative*" or "*uncertain*".<sup>509</sup>
352. This was confirmed by the *M/V "Virginia G"* and *M/V "Norstar"* cases, where the Tribunal refused to grant compensation for damages which were not the "*direct consequences of*", not "*directly caused by*", or did not have a "*direct nexus*" to the conduct in breach of UNCLOS.<sup>510</sup>
353. In this regard, as the ICJ held in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case, "*it falls to the party seeking compensation to prove the existence of the causal nexus*".<sup>511</sup>
354. The Marshall Islands' submissions fail to establish a causal link between the various heads of damages claimed and Equatorial Guinea's alleged violations of UNCLOS.<sup>512</sup> Instead, the Marshall Islands alleges that:

*none of the damage, including that which occurred in Nigeria, would be [sic] suffered or incurred if Equatorial Guinea had not breached its obligations to the Marshall Islands and had not unlawfully detained the Vessel and crew on 12 August 2022. Further, the damage would have been less extensive if Equatorial Guinea, having unlawfully detained the Vessel and crew, had released them as it was obliged to do, rather than handing them over into the control and custody of Nigeria in breach of its obligations under the Convention.*<sup>513</sup>

355. Such a sweeping statement attempts to broaden the strict requirements of the causal link required under the international law of responsibility and reparation. In fact, by making this statement, Marshall Islands admits that much of the damage claimed by it was a result of actions which occurred in Nigeria. They were not direct, proximate or clearly consequential to the actions of Equatorial Guinea. Indeed, the Marshall Islands is notably seeking to attribute responsibility to Equatorial Guinea for the actions of another sovereign State – Nigeria – contrary to basic principles of international law.

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2022, ¶ 93; International Law Commission, Second report on State responsibility of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, A/CN.4/425 & Corr.1 and Add.1 & Corr.1, 1989, Extract from the *Yearbook of the International Law Commission*, 1989, vol. II(1), ¶ 37.

<sup>509</sup> International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, A/CN.4/SER.a/2001/Add.1 (Part 2), Commentary on Article 31, pp. 92-93, ¶ 10, and p. 104, ¶ 27, fn. 566; International Law Commission, Second report on State responsibility of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, A/CN.4/425 & Corr.1 and Add.1 & Corr.1, 1989, Extract from the *Yearbook of the International Law Commission*, 1989, vol. II(1), ¶ 66.

<sup>510</sup> *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶¶ 435-436; *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 370.

<sup>511</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, I.C.J. Reports 2022, p. 13, 9 February 2022, ¶ 93.

<sup>512</sup> See **Memorial**, Chapter 8.

<sup>513</sup> **Memorial**, ¶ 414.



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

### II. The Marshall Islands' characterisation of Equatorial Guinea's responsibility to make reparations is misleading

356. The Marshall Islands also claims that:

*to the extent that the Marshall Islands is seeking compensation in respect of the detention of the Vessel and crew in Nigeria and the payments made to Nigeria, it is not necessary for this Chamber to assess the lawfulness of Nigeria's conduct under the Convention or international law.*<sup>514</sup>

357. This assertion is impermissible under international law. There can be no compensation unless the Chamber finds that a State has committed an internationally wrongful act. As explained in Chapter 5.I, Nigeria's acts form the "*very subject matter*" of several of the claims in the dispute at hand under the *Monetary Gold* doctrine. It is impossible for the Chamber to make such findings without assessing Nigeria's international responsibility under UNCLOS and international law.

358. Moreover, as discussed above in Chapter 7.I, international law is clear that the causal link between the internationally wrongful act of the State and the damage must be "*clear*", "*direct*", and "*unbroken*". It is inconceivable that such a link can be established between the actions of Equatorial Guinea and any damage caused "*in respect of the detention of the Vessel and crew in Nigeria and the payments made to Nigeria*".<sup>515</sup>

359. As the ILC has made clear:

*Innumerable elements, of which actions of third parties and economic, political and natural factors are just a few, may contribute to a damage as concomitant causes. In such cases [...] to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of damages in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded being determined on the basis of the criteria of normality and predictability.*<sup>516</sup>

360. As also noted in the *M/V "Norstar"* case, "*only damage directly caused by the wrongful act of Italy is the subject of compensation*".<sup>517</sup> Since Italy had ordered the arrest and detention of the vessel (although given effect to by Spain), the Tribunal determined that Italy's obligation to provide compensation covered any direct damage caused by both events (mainly, the loss of the vessel).<sup>518</sup>

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<sup>514</sup> Memorial, ¶ 414.

<sup>515</sup> Memorial, ¶ 414.

<sup>516</sup> International Law Commission, *Report of the Commission to the General Assembly on the work of its forty-fifth session*, 1993, Volume II, Part Two, A/CN.4/SER.A/1993/Add.1 (Part 2), ¶ 13 (emphasis added). See also International Law Commission, Documents of the fifty-second session, Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, A/CN.4/507 and Add. 1–4, 2000, ¶ 32.

<sup>517</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 334.

<sup>518</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶¶ 335, 406.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

361. Accordingly, the Chamber cannot simply ignore the initial and intervening actions of Nigeria which both commenced and broke any causal link between Equatorial Guinea and the damages claimed by the Marshall Islands, and which are the real cause of the damages claimed.

### III. The Marshall Islands is not entitled to compensation for material damages

362. The Marshall Islands demands first that Equatorial Guinea revoke the Fine and return the amount of EUR 2,000,132 paid pursuant to the Fine.<sup>519</sup> However, the Marshall Islands has not established that the imposition of the Fine is an internationally wrongful act under UNCLOS for which compensation should be paid.
363. Second, the Marshall Islands demands that Equatorial Guinea compensate "*the Marshall Islands and the Vessel (including all persons involved or interested in its operation) for the damage caused by its internationally wrongful acts*".<sup>520</sup> The total amount claimed is USD 39,767,979.<sup>521</sup>
364. The damages claimed by the Marshall Islands suffer from speculation, a lack of clarity, and a lack of causal link to Equatorial Guinea's alleged UNCLOS violations.

#### A. Costs and expenses of the *Heroic Idun* and its crew

365. The Marshall Islands demands compensation for the costs and expenses incurred in relation to the *Heroic Idun* and its crew.<sup>522</sup> This claim purports to include medical costs, fuel, and port charges. However, the Marshall Islands has not submitted a single piece of evidence to support the amounts claimed as costs and expenses. Nor does the Marshall Islands clarify whether these costs and expenses relate only to the *Heroic Idun* and its crew's stay in Equatorial Guinea or also its subsequent detention in Nigeria.
366. The ICJ's judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* is notable, where the Court rejected Guinea's compensation claim since it had offered "*no details and no evidence to support its claim*" that "*the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets*".<sup>523</sup> The same circumstances are applicable here.
367. Moreover, to the extent that part of the costs and expenses claimed include payment of wages to the crew members, these are ineligible for compensation. The tribunal in *M/V "Norstar"* previously rejected Panama's claim for costs incurred through payment of crew wages during detention, making clear that:

*Concerning payment of the crew wages, the Tribunal notes that the obligation of the owner of the M/V "Norstar" in this regard is the subject of the labour contracts and is not contingent on whether or not a ship is arrested. Thus, it is not damage caused by the arrest of the M/V "Norstar". The Tribunal, therefore, finds*

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<sup>519</sup> Memorial, ¶ 412.

<sup>520</sup> Memorial, ¶ 413.

<sup>521</sup> Memorial, ¶ 439(a)(i)(1).

<sup>522</sup> Memorial, ¶ 413(a) and (b).

<sup>523</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324, 19 June 2012, ¶ 35.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*Panama's claim for compensation under this category unfounded.*<sup>524</sup>

368. Further, in the present case, Mr Kulblik admits that the owners of the *Heroic Idun* decided to grant additional remuneration to the crew members. This choice cannot therefore be characterised as any sort of loss as it was a voluntary expense.<sup>525</sup>
369. In conclusion, the Chamber must dismiss these claims for damages on the basis of them being speculative, unclear, and lacking a causal link.

### B. Payments and costs incurred after the release of the *Heroic Idun* and its crew

370. The Marshall Islands also demands compensation for the payments and costs incurred after the release of the *Heroic Idun* and its crew.<sup>526</sup>
371. First, the Marshall Islands demands "*the sum of fifteen million dollars (USD\$15,000,000), and five million Nigerian Naira (5,000,000)*"<sup>527</sup> paid to the Nigerian authorities. These sums were paid as a result of the *Heroic Idun*'s own plea bargain agreement with the Nigerian authorities.<sup>528</sup> There was no involvement from Equatorial Guinea, let alone any internationally wrongful act on its part. It was the decision of the Nigerian authorities to decide the amounts to be paid under the agreement, and thereafter the decision of the owners of the *Heroic Idun* to accept this sum. The Marshall Islands fails to demonstrate any causal link between any alleged violation of UNCLOS by Equatorial Guinea and the sums paid under the plea bargain agreement. All the Marshall Islands' claim shows is that Nigeria is an indispensable party to this claim, which is therefore outside the Chamber's jurisdiction, or alternatively inadmissible, under the principle established in the case of *Monetary Gold*.
372. Second, the Marshall Islands claims "*costs and expenses to repatriate the crew following their release and put in place replacement crew*".<sup>529</sup> Again, the Marshall Islands fails to either provide particulars and documents in support of these damages, or to clarify which particular breach of UNCLOS by Equatorial Guinea has a causal link to these damages claimed.
373. Moreover, the replacement of a crew and repatriation are part of the regular crew changes obligations on vessel owners and charterers to comply with international maritime regulations for safety, crew health and welfare, and employment. Following the completion of its trip, the *Heroic Idun* would have had to change its crew in any case.
374. As noted above, the Tribunal in *M/V "Norstar"* previously rejected Panama's claim relating to costs associated with usual labour contract obligations, which were "*not contingent on whether or not a ship is arrested*" and therefore did not constitute "*damage caused by the arrest of the M/V "Norstar"*".<sup>530</sup> Similarly, the costs related to

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<sup>524</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 438.

<sup>525</sup> Witness statement of Eivind Kulblik, 13 December 2023, **RMI 2**, ¶¶ 97-98.

<sup>526</sup> **Memorial**, ¶¶ 413(c) and (d).

<sup>527</sup> **Memorial**, ¶ 413(c).

<sup>528</sup> Plea Bargain, 27 April 2023, **SA 38**, ¶¶ 12-13.

<sup>529</sup> **Memorial**, ¶ 413(d).

<sup>530</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶ 438.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

such standard maritime and labour practices of crew change and repatriation should not be imputed to Equatorial Guinea.

375. The Chamber should dismiss these claims for damages on the basis of them being speculative and lacking a causal link to Equatorial Guinea's actions.

### C. Costs related to the repair and future operation of the *Heroic Idun*

376. The Marshall Islands also demands compensation for the costs and expenses in relation to the repair of the *Heroic Idun* and to resume its operation, as well as the increased war risk premium for the Vessel.<sup>531</sup> In the absence of any calculations or supporting documents to elaborate on the sums claimed and the particulars of damage, these claims are again speculative and unsupported.
377. In any event, the Marshall Islands' own evidence shows that, upon examination after leaving Nigeria, "[t]he vessel, machinery and outfitting were found in a good condition which can be expected for a similar vessel with a similar age. The overall rating is good".<sup>532</sup> Some minor repairs were made at that point, with a total invoice of USD 205,000 being provided by the Marshall Islands (despite its claim being more than double that amount at USD 480,000). This invoice shows that the minor repairs the Vessel required were undertaken in a mere five days.<sup>533</sup> However, there is no evidence to prove which repairs (if any) were allegedly needed after the *Heroic Idun*'s stay in Equatorial Guinea, let alone as a consequence of an internationally wrongful act. Failing such clarity, the costs indicated in this invoice are speculative.
378. With regards to the costs relating to the increased war risk premium, no documentation has been provided to substantiate this claim. The Marshall Islands has also failed to explain how this item could constitute a loss rather than an everyday cost of the *Heroic Idun*'s normal course of business.
379. The Chamber must therefore dismiss these claims for damages on the basis of them being speculative, unclear, remote, and lacking a causal link.

### D. Loss of hire profits

380. The Marshall Islands also demands payment for the loss of hire profits of the *Heroic Idun*.<sup>534</sup>
381. The ILC has noted that international adjudicative bodies have been cautious in approaching compensation for loss of profits owing to their "*inherently speculative*" nature.<sup>535</sup>
382. To support this claim, the Marshall Islands submits the expert report of Tim Horne.<sup>536</sup> Mr Horne has assessed total losses over a period of 11 months, i.e., from 12 August

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<sup>531</sup> **Memorial**, ¶¶ 413(e) and (g).

<sup>532</sup> Condition Survey Report, **EK 78**, p. 299.

<sup>533</sup> Invoice No. DDDC100053423, **EK 79**, p. 311.

<sup>534</sup> **Memorial**, ¶ 414(f).

<sup>535</sup> International Law Commission, "Responsibility of States for Internationally Wrongful Acts", *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, A/CN.4/SER.a/2001/Add.1 (Part 2), Commentary on Article 36, p. 104, ¶ 27.

<sup>536</sup> First Expert Report of Tim Horne including annexes, 14 December 2023, **RMI 39**.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

2022 to 24 July 2023.<sup>537</sup> The total loss of hire profits calculated in the report for these 11 months, and as consequently demanded by the Marshall Islands, is USD 19,948,559.46.<sup>538</sup> However, Mr Horne's report presents several crucial flaws.

383. For example, Mr Horne makes no mention of the total loss of profits allegedly claimed specifically during the *Heroic Idun*'s stay in Equatorial Guinea. Instead, the Marshall Islands have submitted a damages claim for loss of hire profits calculated across 11 months, i.e., eight months of additional alleged lost profits which occurred following the *Heroic Idun*'s departure from Equatorial Guinea and which cannot be causally linked to the Vessel's stay in Equatorial Guinea.
384. There are also unexplained leaps of logic in Mr Horne's report. For instance, despite having the owner's assessment of the alleged loss as per the terms of the time charter in force during the time of the *Heroic Idun*'s stay in Equatorial Guinea, he uses an industry average for very large crude carriers. He then applies a so-called bunker adjustment to account for the *Heroic Idun*'s alleged "*higher efficiency*". He provides no evidence to support this approach. However, he then reverts to the amounts owed to the owner under the time charter, deducts the amounts paid by the charterer and claims the rest as an alleged loss of profit.
385. Mr Horne's report also does not account for any expenses that would have naturally arisen in the course of operating the *Heroic Idun*, including expenses relating to the crew, provisions for operation, communication expenses, costs to ensure safety of the Vessel, and various taxes and duties. In *M/V "Norstar"*, the Tribunal had similarly noted the absence of information or documents to demonstrate the possible expenses related to the operation of the Vessel, leading the Tribunal to reject the claim for loss of profits.<sup>539</sup>
386. Accordingly, the Chamber should also dismiss this head of claim.

### IV. The Marshall Islands is not entitled to compensation for moral damages

387. The Marshall Islands argues that an "*award of damages for non-material injury for unlawful detention of a vessel's crew is well-established in international practice*".<sup>540</sup> It claims a total of USD 15,028,000 for non-material damages.<sup>541</sup> Additionally, the Marshall Islands vaguely asserts that "*a higher daily rate than in Diallo or the Arctic Sunrise is appropriate on the facts of this case*".<sup>542</sup> However, this claim is factually unfounded as well as inconsistent with the owner's own contemporaneous assessment.
388. As demonstrated above in Chapter 6.VI, Equatorial Guinea always treated the crew members with the highest possible and reasonable standards of care. Equatorial Guinea abided by the principle of humanity at all times. The crew members were always accompanied by Besora, which acted as the intermediary between the crew members and the Equatoguinean authorities. Equatorial Guinea allowed Besora to fulfil all the requests of the crew members, including food, water, communication facilities, and other amenities. In fact, the Equatoguinean authorities also authorised the crew

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<sup>537</sup> First Expert Report of Tim Horne including annexes, 14 December 2023, **RMI 39**, ¶ 16.

<sup>538</sup> First Expert Report of Tim Horne including annexes, 14 December 2023, **RMI 39**, ¶ 4.

<sup>539</sup> *M/V "Norstar" (Panama v. Italy)*, Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, ¶¶ 432–433.

<sup>540</sup> **Memorial**, ¶ 416.

<sup>541</sup> **Memorial**, ¶ 439(a)(i)(2).

<sup>542</sup> **Memorial**, ¶ 421.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

members to be treated at the premier hospital in the country, and to be accommodated at a premier hotel. Any accusations of ill-treatment are therefore strictly denied. Any claim regarding the treatment of the crew must therefore be dismissed.

389. Second, the Marshall Islands has failed to demonstrate that the mental injury allegedly suffered by the crew members is linked to a specific UNCLOS violation by Equatorial Guinea. Moreover, as discussed above in Chapter 6.VI, the Marshall Islands' sole evidence on the mental conditions of the crew members is Dr Perman-Kerr's expert report. This report only assesses the state of the mental health of the crew members in April and June 2023, i.e., after they had spent 198 days in Nigeria in conditions unknown to Equatorial Guinea.<sup>543</sup>
390. Under this head of claim, the Marshall Islands requests payment of USD 2,000 per day per crew member. This is four times the amount awarded by the tribunal in the *Arctic Sunrise* case and almost double the amount awarded by the ICJ in the *Diallo* case.<sup>544</sup> The Marshall Islands disregards that the tribunal in *Arctic Sunrise* considered "*compensation awarded in the Diallo case as an upper limit*".<sup>545</sup> It also overlooks that, in that case, the crew was:

*generally confined to cold and unsanitary cells for 23 hours per day, the remaining hour consisting of solitary exercise in a small concrete box. Most [were] unable to speak to their families. Requests for telephone calls [were] not granted until several weeks later. The members of the [Arctic 30 were] held separately from one another.*<sup>546</sup>

391. In any event, the Marshall Islands' claim for moral damages is unfounded for the reasons provided above.

### V. The Marshall Islands is not entitled to interest

392. The Marshall Islands demands that Equatorial Guinea pay interest in respect of the damages claimed, calculated at:

*i. on sums awarded in US dollars, the US prime rate plus 1% (one per cent), compounded at quarterly intervals;*

*ii. on sums awarded in Euros, the EURIBOR six month rate plus 5% (five per cent), compounded at six monthly intervals;*

*to run (as relevant) from the date of the commission of the wrongful act or the date the date [sic] the costs/expenses were incurred (in respect of the sums awarded in compensation) and from the date of payment of the Fine until the date of restitution*

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<sup>543</sup> See Witness statement of Master, 15 December 2023, **RMI 1**, ¶ 172: "*In total we were detained for 289 days (92 days by Equatorial Guinea and 198 by Nigeria)*".

<sup>544</sup> **Memorial**, ¶¶ 419-420.

<sup>545</sup> *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, ¶ 77.

<sup>546</sup> *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, ¶ 76.

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

*or (if awarded as compensation) the date of payment of compensation.*<sup>547</sup>

393. The Marshall Islands has failed to elaborate on which basis its claim for interest is founded, in particular why the use of US Prime + 1% and EURIBOR + 5% are appropriate metrics to achieve full reparation in the present case. This also includes the unexplained claim for compounding every six months. The Marshall Islands has also failed to provide any legal authorities to support its case for the application of these particular types of interest and for the application of the same type of interest for material and non-material damages.<sup>548</sup>
394. The result is that the Marshall Islands' claim for interest is speculative and unsubstantiated and should therefore be dismissed.

### **VI. It is not appropriate to allocate the costs of the proceedings to the Marshall Islands**

395. The Marshall Islands claims that the circumstances of the case "*make it appropriate for the Court to allocate costs to the Marshall Islands*".<sup>549</sup> However, Article 34 of the ITLOS Statute provides that "*unless otherwise decided by the Tribunal, each party shall bear its own costs*".
396. To date, ITLOS has not awarded costs of prompt release, provisional measures or merits proceedings to a party. There is no reason in the present case to depart from this general rule.<sup>550</sup> This also includes the Marshall Islands' claim for compensation concerning wasted costs from the prompt release proceedings.<sup>551</sup>

### **VII. The Marshall Islands is not entitled to satisfaction**

397. The Marshall Islands also requests assurances and guarantees of non-repetition as well as an acknowledgement that Equatorial Guinea breached UNCLOS as satisfaction.<sup>552</sup>
398. As Equatorial Guinea has acted in compliance with UNCLOS, the Marshall Islands' request for satisfaction should be dismissed. In the alternative, as per ITLOS' consistent jurisprudence, a judicial declaration would amount to adequate satisfaction.<sup>553</sup>

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<sup>547</sup> **Memorial**, ¶ 439(b).

<sup>548</sup> See, for example, *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶ 173.

<sup>549</sup> **Memorial**, ¶ 431.

<sup>550</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶ 182.

<sup>551</sup> **Memorial**, ¶ 413(h).

<sup>552</sup> **Memorial**, ¶ 432.

<sup>553</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, ¶ 176; *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, ¶ 448. See also *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, ¶ 380.

# COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

## CHAPTER 8

### SUBMISSIONS

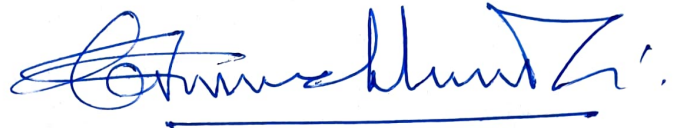
399. Equatorial Guinea requests the Chamber to adjudge and declare that:
- a) The claims brought by the Marshall Islands fall outside the jurisdiction of the Chamber, or in the alternative are inadmissible, due to the *Monetary Gold* principle (paragraphs 105 - 145);
  - b) The Marshall Islands has failed to exhaust local remedies for those claims where this is required by international law (paragraphs 146 - 155);
  - c) The Chamber's jurisdiction is in any event limited to claims made under UNCLOS (paragraphs 156-167);
  - d) Equatorial Guinea acted in accordance with its duty to cooperate to suppress piracy and did not breach the principles of freedom of navigation or exclusivity of flag State jurisdiction (paragraphs 179-231);
  - e) Equatorial Guinea acted in accordance with the principles of due regard and reasonableness (paragraphs 232-256);
  - f) There is no general obligation to notify the flag State of enforcement measures (paragraphs 257-270);
  - g) Equatorial Guinea acted pursuant to lawful prescriptive jurisdiction (paragraphs 271-281);
  - h) Equatorial Guinea did not breach any other international obligations alleged by the Marshall Islands (paragraphs 282-300);
  - i) Equatorial Guinea acted in accordance with the principle of humanity towards the crew members of the *Heroic Idun* at all times (paragraphs 301-319);
  - j) UNCLOS' prompt release obligations were not applicable to the present circumstances and consequently, Equatorial Guinea has not violated these obligations (paragraphs 320-336); and
  - k) Equatorial Guinea did not breach its obligation to preserve the rights of the Marshall Islands, nor aggravate the dispute pending proceedings (paragraphs 337-345).
400. Having regard to this, Equatorial Guinea further requests the Chamber to:
- a) Dismiss all of the Marshall Islands' requests for payment of compensation for material and/or moral damages (paragraphs 347-391);
  - b) Dismiss the Marshall Islands' requests for satisfaction (paragraphs 397-398);
  - c) Dismiss all of the Marshall Islands' requests for payment of interest (paragraphs 392-394); and
  - d) Direct that each party should bear its own costs (paragraphs 395-396).



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

401. Equatorial Guinea reserves the right to supplement and/or amend its pleading and the relief sought as necessary, and to make such other requests to the Chamber as may be necessary to preserve its rights under UNCLOS.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Carmelo Nvono-Ncá', with a horizontal line drawn underneath it.

H. E. Mr Carmelo Nvono-Ncá  
Agent for the Republic of Equatorial Guinea

Paris, 15 July 2024

**COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA**

**PART II - LIST OF DOCUMENTS IN SUPPORT**

# COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

## INDEX TO VOLUME II

### Annexes REG-WS-001 to REG-WS-006

Annex No.	Document	Date	Bates No.
<b>REG-WS-001</b>	Witness statement of Captain Juan Nsue Esono Nchama	10 July 2024	1
<b>REG-WS-002</b>	Witness statement of Captain Ireneo Nazareth Nicul	10 July 2024	18
<b>REG-WS-003</b>	Witness statement of Alberto Hernández Martín	11 July 2024	24
<b>REG-WS-004</b>	Witness statement of Dr Irvin Simbarashe	10 July 2024	31
<b>REG-WS-005</b>	Witness statement of Jorge Gaona Reina	1 July 2024	36
<b>REG-WS-006</b>	Witness statement of Howard James McDowall	2 July 2024	45

# COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

## INDEX TO VOLUME III

### Annexes REG-001 to REG-058

Annex No.	Document	Date	Bates No.
<b>REG-001</b>	Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa	25 June 2013	1
<b>REG-002</b>	Request from Nigeria regarding <i>Heroic Idun</i> (WhatsApp messages)	Undated	34
<b>REG-003</b>	United Nations Security Council, " <i>Situation of piracy and armed robbery at sea in the Gulf of Guinea and its underlying causes, Report of the Secretary-General</i> ", S/2022/818	1 November 2022	48
<b>REG-004</b>	Minutes of the first technical meeting between Equatorial Guinea and Nigeria on the implementation of the bilateral agreement on joint maritime surveillance and security	6 October 2020	74
<b>REG-005</b>	Letter from Captain Juan Nsue Esono Nchama	29 March 2021	90
<b>REG-006</b>	Letter from Captain Juan Nsue Esono Nchama	11 February 2021	98
<b>REG-007</b>	Bilateral agreement between the Government of Federal Republic of Nigeria and the Government of Equatorial Guinea on the establishment of the combined maritime policing and security patrol committee	15 March 2016	104
<b>REG-008</b>	Technical agreement between the Economic Community of Central African States and the States of Cameroon, Gabon, Equatorial Guinea and São Tomé and Príncipe on the setting up of a surveillance plan for maritime security in Zone D of the Gulf of Guinea	6 May 2009	122

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Annex No.	Document	Date	Bates No.
<b>REG-009</b>	INTERPOL Maritime Security Sub-Directorate, " <i>Multiple attacks against merchant vessels in the Gulf of Guinea between 6-9 February 2021</i> "	9 February 2021	141
<b>REG-010</b>	defenceWeb, " <i>Tanker attack in Gulf of Guinea</i> "	10 February 2021	150
<b>REG-011</b>	Official handing over of the tanker <i>MT Heroic Idun</i> between the governments, Addendum	10 November 2022	152
<b>REG-012</b>	Receipts from Besora for provisions for the crew of the <i>Heroic Idun</i>	Various dates	155
<b>REG-013</b>	Receipts from Besora for provisions for the crew of the <i>Heroic Idun</i>	Various dates	279
<b>REG-014</b>	Hotel Anda China brochure	Undated	333
<b>REG-015</b>	Images of La Paz Hospital	Undated	338
<b>REG-016</b>	Invoice, Hotel Anda China	8 November 2022	345
<b>REG-017</b>	Website of Luba Freeport Ltd, Home section	Undated	387
<b>REG-018</b>	Website of Luba Freeport Ltd, Facilities section	Undated	392
<b>REG-019</b>	Note No. 138/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	10 August 2022	394
<b>REG-020</b>	Note No. 142/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	24 August 2022	396
<b>REG-021</b>	Note No. 150/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	12 September 2022	399
<b>REG-022</b>	Decree No. 9/2.011 creating the Naval Military School in Equatorial Guinea (Excerpt)	20 January 2011	403

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Annex No.	Document	Date	Bates No.
<b>REG-023</b>	United Nations Secretary General, " <i>Remarks to Security Council Debate on Maritime Piracy as a Threat to International Peace and Security</i> "	19 November 2012	408
<b>REG-024</b>	Neptune P2P Group, " <i>Maritime Crime - Is South America the latest hotspot?</i> ", Intelligence Report	25 January 2022	413
<b>REG-025</b>	United Nations Security Council, Resolution 1816, S/RES/1816 (2008)	2 June 2008	423
<b>REG-026</b>	ICC, " <i>Gulf of Guinea remains world's piracy hotspot in 2021, according to IMB's latest figures</i> "	14 April 2021	428
<b>REG-027</b>	International Maritime Organization, Resolution A.1069(28)	29 November 2013	431
<b>REG-028</b>	CEMAC website, " <i>CEMAC in brief</i> "	Undated	438
<b>REG-029</b>	CEMAC Code, No. 03/01-UEAC-088-CM-06	3 August 2001	440
<b>REG-030</b>	ICC International Maritime Bureau, " <i>Piracy and Armed Robbery Against Ships - Report for the 1 January - 31 December 2023 period</i> "	January 2024	553
<b>REG-031</b>	United Nations Security Council, Resolution 2634, S/RES/2634 (2022)	31 May 2022	609
<b>REG-032</b>	United Nations Security Council, 9355th meeting, S/PV.9355	21 June 2023	615
<b>REG-033</b>	ICC International Maritime Bureau, " <i>Piracy and Armed Robbery Against Ships - Report for the 1 January - 31 March 2021 period</i> "	April 2021	637
<b>REG-034</b>	New Telegraph, " <i>IMB records lowest piracy in Nigeria, others in decades</i> "	19 October 2022	673
<b>REG-035</b>	ICC International Maritime Bureau, " <i>Piracy and Armed Robbery Against Ships - Report for the 1 January - 31 March 2024 period</i> "	April 2024	677
<b>REG-036</b>	Daily reports of the <i>Heroic Idun</i> provided by Besora, 13 August 2022 - 10 November 2022	Undated	714

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Annex No.	Document	Date	Bates No.
<b>REG-037</b>	Technical report of the <i>Heroic Idun</i> conducted by Equatoguinean customs agents Mr Nve Edu and Mr Nguema Nkisogo	15-16 August 2022	746
<b>REG-038</b>	Note No. 2022/1722/100 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo	29 August 2022	774
<b>REG-039</b>	Resolution from the Ministry of National Defence of Equatorial Guinea	23 September 2022	778
<b>REG-040</b>	Request from the Ministry of Defence of the Federal Republic of Nigeria to the Ministry of Foreign Affairs of the Republic of Equatorial Guinea	12 October 2022	781
<b>REG-041</b>	Photographs of the Accommodation Facility	1 July 2024	784
<b>REG-042</b>	Receipts showing provision of food, provisions and cleaning items to crew	23 August 2022	790
<b>REG-043</b>	Request from the Ministry of Defence of the Federal Republic of Nigeria to the Minister of National Defence of the Republic of Equatorial Guinea	12 October 2022	803
<b>REG-044</b>	Note No. 167/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	26 October 2022	806
<b>REG-045</b>	Note No. 168/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	31 October 2022	808
<b>REG-046</b>	Note No. 167A/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	1 November 2022	810

## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Annex No.	Document	Date	Bates No.
<b>REG-047</b>	Note No. 10247/022 from the Ministry of Foreign Affairs and Cooperation of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo	27 October 2022	812
<b>REG-048</b>	Note No. 169/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	3 November 2022	815
<b>REG-049</b>	Letter from the Defence Section of the Embassy of the Federal Republic of Nigeria in Malabo to the Minister of National Defence of the Republic of Equatorial Guinea	4 November 2022	817
<b>REG-050</b>	Official handing over of the tanker <i>MT Heroic Idun</i> between the governments of the Republic of Equatorial Guinea and the Federal Republic of Nigeria	5 November 2022	822
<b>REG-051</b>	Note No. 171/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	9 November 2022	825
<b>REG-052</b>	Note No. 172/2022 from the Embassy of the Federal Republic of Nigeria in Malabo to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea	15 November 2022	828
<b>REG-053</b>	Note No. 6014/023 from the Ministry of Foreign Affairs, International Cooperation and Diaspora of the Republic of Equatorial Guinea to the Embassy of the Federal Republic of Nigeria in Malabo	3 June 2023	831
<b>REG-054</b>	United Nations Security Council, Resolution 2018, S/RES/2018 (2011)	31 October 2011	837
<b>REG-055</b>	Republic of the Marshall Islands, Minimum Safe Manning Requirements for Vessels, Maritime Administrator	September 2021	841



## COUNTER-MEMORIAL OF THE REPUBLIC OF EQUATORIAL GUINEA

Annex No.	Document	Date	Bates No.
<b>REG-056</b>	Note No. 098/MPGE-NY/023/IAG from the Permanent Mission of the Republic of Equatorial Guinea to the United Nations to the Permanent Mission of the Republic of the Marshall Islands to the United Nations	14 June 2023	869
<b>REG-057</b>	Letter from Agent of Equatorial Guinea to President of the Special Chamber	22 May 2023	875
<b>REG-058</b>	Letter from Marshall Islands to Equatorial Guinea	10 July 2023	877