INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
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MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 6 TO 14 OCTOBER 2025

The M/T "Heroic Idun" (No. 2) Case
(Marshall Islands/Equatorial Guinea)

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 6 AU 14 OCTOBRE 2025

Affaire du navire « Heroic Idun » (No. 2)
(Îles Marshall/Guinée équatoriale)

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

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En vue de faciliter l’utilisation de l’ouvrage, le présent volume comporte, outre une pagination continue, l’indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux révisés.

Minutes of the Public Sittings
held from 6 to 14 October 2025

Procès-verbal des audiences publiques
tenues du 6 au 14 octobre 2025

PUBLIC SITTING HELD ON 6 OCTOBER 2025, 10 A.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

The Marshall Islands are represented by:

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

as Agent;

and

Mr Bernard J. Adiniwin,
Attorney-General,

as Representative;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel;

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

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

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

as Advisers.

Equatorial Guinea is represented by:

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

as Agent;

and

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

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

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

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

as Counsel and Advocates;

Mr Juan Olo Mba Nseng,

Vice-President of the Legal Commission of State Lawyers, Government of Equatorial Guinea,

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

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

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

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

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

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

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

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

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

as Counsel;

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

as Adviser.

AUDIENCE PUBLIQUE TENUE LE 6 OCTOBRE 2025, 10 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Les Îles Marshall sont représentées par :

Mme Meredith Kirby,
Commissaire adjointe aux affaires maritimes, Administrateur des affaires maritimes de la République des Îles Marshall,

comme agent ;

et

M. Bernard J. Adiniwin,
Attorney-General,

comme représentant ;

M. Daniel Bethlehem KC,
barrister, Twenty Essex, Londres (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles,

Mme Penelope Nevill,
barrister, Twenty Essex, Londres (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles, *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande,

M. Paolo Busco,
barrister, cabinet Twenty Essex, Londres, (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles, membre du barreau de Rome,

M. Manuel Casas Martínez,
barrister, cabinet Twenty Essex, Londres (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles, membre du barreau de New York, membre du barreau de Caracas,

Mme Courtney Grafton,
barrister, cabinet Twenty Essex, Londres (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles,

comme conseils et avocats ;

M. Richard M. Gunn,
associé, cabinet Reed Smith LLP, Londres (Royaume-Uni),

M. Jiahui Huang,

barrister, cabinet Twenty Essex, Londres (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles,

Mme Julia Z. Cyrson,
collaboratrice, cabinet Reed Smith LLP, Londres (Royaume-Uni),

comme conseils ;

M. James Myazoe,
Commissaire adjoint aux affaires maritimes, Administrateur des affaires maritimes de la République des Îles Marshall,

M. Joseph Bigler,
Commissaire adjoint aux affaires maritimes, Administrateur des affaires maritimes de la République des Îles Marshall,

M. Baron Bigler,
Commissaire adjoint aux affaires maritimes, Administrateur des affaires maritimes de la République des Îles Marshall,

comme conseillers.

La Guinée équatoriale est représentée par :

M. Carmelo Nvono-Ncá,
Ambassadeur de la République de Guinée équatoriale en France ; Représentant permanent auprès de l'UNESCO, Paris (France),

comme agent ;

et

M. Hussein Haeri KC,
associé, Withers LLP, Londres (Royaume-Uni) ; *solicitor-advocate* d'Angleterre et du Pays de Galles, *professor of Practice*, SOAS, Université de Londres, Londres (Royaume-Uni),

Mme Floriane Lavaud,
associée, Withers LLP, New York (États-Unis d'Amérique) ; membre des barreaux de New York et Paris ; *solicitor* d'Angleterre et du Pays de Galles,

M. Dapo Akande,
barrister, Essex Court Chambers ; professeur de droit international public (chaire *Chichele*), Université d'Oxford, Oxford (Royaume-Uni) ; membre des barreaux d'Angleterre et du Pays de Galles ; membre de la Commission du droit international,

M. Francisco Moro Nve Obono,
State Lawyer Office de la République de Guinée équatoriale,

comme conseils et avocats ;

M. Juan Olo Mba Nseng,
Vice-Président de la Commission juridique des *State Lawyers*, Gouvernement de la Guinée équatoriale,

M. Antonios Tzanakopoulos,
professeur de droit international public, Université d'Oxford, Oxford (Royaume-Uni),

Mme Clàudia Baró Huelmo,
collaboratrice principale, Withers LLP, Genève (Suisse) ; *solicitor-advocate* d'Angleterre et du Pays de Galles ; *abogada* au barreau de Barcelone,

Mme Maanya Tandon,
collaboratrice, Withers LLP, Londres (Royaume-Uni) ; *barrister* et *solicitor* près la *High Court* de Nouvelle-Zélande,

Mme Sudipta Purkayastha,
collaboratrice, Withers LLP, Londres (Royaume-Uni) ; *solicitor* d'Angleterre et du Pays de Galles, *advocate* près le *Bar Council of India*,

Mme Eva Keita,
collaboratrice, Withers LLP, New York (États-Unis d'Amérique) ; membre du barreau de New York,

M. Niccolò Dell'Alba,
assistant juridique, Withers LLP, Londres (Royaume-Uni),

M. Adalberto Acumu Ncogo Angono,
State Lawyer de la République de Guinée équatoriale,

Mme Gladys Delcourt Ncara Nzang,
State Lawyer de la République de Guinée équatoriale,

Mme Anouch Sedef,
conseillère au Ministère du transport, des télécommunications et des systèmes d'intelligence artificielle,

comme conseils;

Mme Carmen Matas Gallardo,
conseillère en communication auprès de l'agent, Paris (France),

comme conseillère.

Opening of the Oral Proceedings

[ITLOS/PV.25/C32/1/Rev.1, p. 1–8]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good morning. I wish to welcome you to this meeting. The Special Chamber of the Tribunal formed pursuant to article 15, paragraph 2, of the Statute of the Tribunal meets this morning to hear the Parties' arguments in *The M/T "Heroic Idun" (No. 2) Case* between the Republic of the Marshall Islands and the Republic of Equatorial Guinea.

Before we proceed, I note that, in addition to interpretation from and into the Tribunal's two official languages, English and French, interpretation from and into Spanish is also available in the present hearings, in line with specific arrangements made at the request of Equatorial Guinea.

I recall that, by Special Agreement concluded on 18 April 2023, the representatives of the Marshall Islands and Equatorial Guinea agreed to submit the dispute concerning the *M/T "Heroic Idun"* and her crew to a special chamber of the Tribunal to be formed pursuant to article 15, paragraph 2, of the Statute of the Tribunal. The Tribunal was notified of the Special Agreement on 18 April 2023 and the Special Chamber was constituted by an Order of the Tribunal of 27 April 2023. The case was entered into the List of Cases of the Tribunal as Case No. 32.

I now call on the Registrar to summarize the procedure in the case and to read out the submissions of the Parties.

THE REGISTRAR Thank you, Mr President.

By Order of 19 May 2023, the President of the Special Chamber fixed 20 November 2023 and 20 May 2024 as the time-limits for the filing, respectively, of the Memorial of the Marshall Islands and the Counter-Memorial of Equatorial Guinea. Further to a request by the Marshall Islands, by an Order of the President dated 16 November 2023, these time-limits were extended to 18 December 2023 for the filing of the Memorial, and to 15 July 2024 for the filing of the Counter-Memorial. The Memorial and the Counter-Memorial were filed within the extended time-limits.

By Order of 25 July 2024, the President of the Special Chamber authorized the submission of a Reply by the Marshall Islands and of a Rejoinder by Equatorial Guinea, and fixed 25 November 2024 and 24 March 2025, respectively, as the time-limits for the filing of these two pleadings. The Reply and the Rejoinder were filed within the prescribed time-limits.

I will now read out the submissions of the Parties.

In paragraph 333 of its Reply, the Marshall Islands makes the following submissions:

> The Marshall Islands requests the Chamber to dismiss all of Equatorial Guinea's defenses and to adjudge and declare that:
>
> a. By intercepting the *"Heroic Idun"* and her crew in the EEZ of São Tomé and Príncipe, forcing them to divert course, including under the threat of the use of force, and placing them under military escort to Equatorial Guinea, Equatorial Guinea breached Articles 87(1), 90 and 92 of UNCLOS.
>
> [b]. By the same conduct, Equatorial Guinea breached Article 87(2) of UNCLOS and/or Article 300, read alongside Articles 87(1) and 90, having failed to exercise its own freedom of navigation in the EEZ of São Tomé and Príncipe with due regard to the rights of the Marshall Islands to freedom

of navigation and/or abused its right to freedom of navigation and right to sail in the EEZ of São Tomé and Príncipe.

[c]. All measures adopted by Equatorial Guinea subsequent to the unlawful interception and diversion of the *"Heroic Idun"* and her crew in the EEZ of São Tomé and Príncipe are without basis in UNCLOS and international law.

[d]. By enacting and implementing its criminal laws (including by the imposition of lengthy periods of detention and hefty fines) in respect of activities of the *"Heroic Idun"* and her crew in the EEZ of Equatorial Guinea without any basis in UNCLOS, and/or by usurping the Marshall Islands' exclusive prescriptive jurisdiction in respect of those activities, and/or by exceeding the limits of prescriptive jurisdiction allowed by UNCLOS in respect of those activities, Equatorial Guinea breached Articles 56(1), 58, 87, 89 and 92 of the Convention or Article 300 read with Part V of UNCLOS.

[e]. Equatorial Guinea in any case adopted measures in respect of the *"Heroic Idun"* and her crew that were contrary to principle of reasonableness and considerations humanity and, in so far as those measures purportedly concerned the EEZ of Equatorial Guinea, it also failed to have due regard to the rights of the Marshall Islands in that maritime zone, in breach of Article 56(2) of UNCLOS.

[f]. By failing to respect and violating the human rights of the crew, including as set out in the ICCPR and the African Charter and in customary international law, and failing to observe the United Nations Standard Minimum Rules for the Treatment of Prisoners, Equatorial Guinea acted contrary to rules and principles of international law not incompatible with the Convention to which the Chamber may have recourse under Article 293 and breached:

> i. Article 87(1) of UNCLOS, in respect of its obligation to exercise its freedom of the high seas under conditions laid down by "other rules of international law;"
>
> ii. Article 87(2) of UNCLOS, in respect of its obligation to have due regard for the interests of the Marshall Islands;
>
> iii. Article 2(3) of UNCLOS, in respect of its obligation to exercise sovereignty in the territorial sea subject to other rules of international law;
>
> iv. Article 58(2), in respect of its obligation to comply with other pertinent rules of international law and its obligation under Article 56(2) to have due regard to the rights and duties of the Marshall Islands, insofar as the relevant conduct concerned alleged activities in its EEZ.

[g]. By preventing the *"Heroic Idun"* from being properly manned, and by refusing the Marshall Islands' repeated requests in this regard, Equatorial Guinea breached:

> i. Article 1(b) of SOLAS, in respect of its obligation to take all necessary steps to give SOLAS full and complete effect;
>
> ii. Article 1(2) of the STCW, in respect of its obligation to take all necessary steps to give the STCW full and complete effect;
>
> iii. Article 1 of the COLREGS, in respect of its obligation to give effect to the Rules contained therein;
>
> iv. Article 87(1) of UNCLOS, in respect of its obligation to exercise its freedom of the high seas under conditions laid down by "other rules of international law," in this instance Article 1(b) of SOLAS, Article 1(2) of the STCW, and Article 1 of the COLREGS;
>
> v. Article 87(2), in respect of its obligation to have due regard for the interests of the Marshall Islands, as flag State, to meet its duties under Articles 94 and 217 of the Convention;
>
> vi. Article 2(3) to exercise its sovereignty over the territorial sea subject to the Convention, including Article 87(1), and to other rules of international law, including Article 1(b) of SOLAS, Article 1(2) of the STCW, and Article 1 of the COLREGS.

[h]. By the unsafe manoeuvring of the naval vessel the *"Wele Nzas"* on 26 September 2022, Equatorial Guinea breached Rules 2, 6, 7 and 8 of the COLREGS.

[i]. By preventing the *"Heroic Idun"* from being properly manned, requesting the vessel to be moored in a location where it was at a significant risk of collision, and by the unsafe maneuvering of its naval vessel *"Wele Nzas"* on 26 September 2022 in respect of the *"Heroic Idun,"* Equatorial Guinea breached Article 225 of UNCLOS.

[j]. By failing to notify the Marshall Islands of, *inter alia*, (i) the interception, diversion and detention of the *"Heroic Idun"* and her crew, (ii) the imposition of a penalty on the Master of the Vessel, and (iii) the transfer of the Vessel to Nigeria, Equatorial Guinea breached its duty to notify the Marshall Islands as the flag State of enforcement measures adopted in respect of its Vessel, which duty has general application in law of the sea and/or Articles 87(1) and 87(2), read with Article 58(2), and Article 56(2) of the Convention.

[k]. By detaining the *"Heroic Idun"* and its crew for a period of 92 days, and by continuing the detention despite the payment of a penalty amounting to two million, one hundred and thirty-two Euros (€ 2,000,132), Equatorial Guinea breached its obligation to release vessels promptly, which has

general application in law of the sea and/or Articles 87(1) and 87(2), read with Article 58(2), and Article 56(2), and/or Article 294(2) of the Convention and/or Article 300 of the Convention read alongside these provisions.

[l]. By repeatedly failing to engage with the Marshall Islands in respect of the *“Heroic Idun”* and her crew, and by handing over control of the Vessel and crew to Nigeria on 11 November 2022, after having been notified of the Marshall Islands’ Prompt Release Application, Equatorial Guinea breached:

i. Article 283 of UNCLOS;

ii. Articles 286, 288, 292, 296 and/or 297(1) of the Convention, and Article 300 of the Convention read alongside these provisions; and

iii. the general obligation not to aggravate the dispute with the Marshall Islands.

The Marshall Islands further requests the Special Chamber, in paragraph 334 of its Reply, to:

i. pay compensation to the Marshall Islands:

1. for material damage in the amount of forty-three million, seventeen thousand, eight hundred thirty-seven dollars, with seventy-two cents ([USD] 43,017,837.72);

2. for non-material damage of fifteen million and twenty-eight hundred dollars ([USD] 15,028,000);

ii. insofar as not already paid as compensation, to pay two million, one hundred and thirty-two Euros (€ 2,000,132) in restitution;

b. Order that Equatorial Guinea pay interest in respect of the sums specified above calculated:

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 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 or (if awarded as compensation) the date of payment of compensation.

c. Award costs of the present proceedings to the Marshall Islands;

d. Order that Equatorial Guinea:

i. revoke the Fine imposed on the Master;

ii. acknowledge its wrongful conduct in respect of the Marshall Islands; and

iii. provide an assurance and guarantee of non-repetition.

These submissions correspond to the submissions made by the Marshall Islands in paragraphs 438 and 439 of its Memorial.

Equatorial Guinea, in paragraph 432 of its Rejoinder, makes the following submissions:

a) The claims brought by the Marshall Islands regarding the apprehension of the *Heroic Idun* fall outside the jurisdiction of the Chamber, or in the alternative are inadmissible, due to the *Monetary Gold* principle (…);
b) The Marshall Islands has failed to exhaust local remedies where this is required by international law (…);
c) The Chamber's jurisdiction is in any event limited to claims made under UNCLOS (…);
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 (…);
e) Equatorial Guinea acted pursuant to lawful prescriptive jurisdiction (…);
f) Equatorial Guinea acted in accordance with Article 225 UNCLOS and the principle of reasonableness (…);
g) Equatorial Guinea acted in accordance with the principle of humanity towards the crew members of the *Heroic Idun* at all times (…);
h) Equatorial Guinea acted in accordance with the principle of due regard under Article 56(2) UNCLOS (…)
i) There is no specific obligation to notify the flag State of enforcement measures (…);
j) UNCLOS' prompt release obligations were not applicable to the present circumstances and consequently, Equatorial Guinea has not violated these obligations (…); and
k) Equatorial Guinea did not breach any obligations under the "*gateway*" provisions (STCW, SOLAS and COLREGS) (…);
l) Equatorial Guinea did not breach its obligation to preserve the rights of the Marshall Islands, nor aggravate the dispute pending proceedings (…).

Equatorial Guinea further requests the Special Chamber, in paragraph 433 of its Rejoinder, to:

a) Dismiss all of the Marshall Islands' requests for payment of compensation for material and/or non-material damages (…);
b) Dismiss the Marshall Islands' requests for satisfaction (…);

c) Dismiss all of the Marshall Islands' requests for payment of interest (…); and
d) Direct that each party should bear its own costs (…).

These submissions correspond to the submissions made by Equatorial Guinea in paragraphs 399 and 400 of its Counter-Memorial.

By Order dated 13 May 2025, the President of the Special Chamber fixed 6 October 2025 – that is, today – as the date for the opening of the hearing.

Pursuant to the Rules of the Tribunal, copies of the written pleadings are being made accessible to the public as of today. They will be placed on the Tribunal's website. The hearing will also be broadcast on this website, except that some parts of the hearing will be held *in camera* pursuant to a decision of the Special Chamber of 1 October 2025.

Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Madam Registrar.

In accordance with the arrangements on the organization of the procedure decided by the Special Chamber, the hearings will comprise a first and second round of oral argument. The first round will begin today and will close on Saturday, 11 October 2025. The second round will take place on Monday, 13 October 2025 and on Tuesday, 14 October 2025.

As mentioned by the Registrar, parts of the hearing will not be open to the public. I will provide more information at the appropriate moment.

This morning's sitting, in the course of which Marshall Islands will present the first part of its oral statement, will last until one o'clock and, as usual, there will be a 30-minute break between 11:30 a.m. and midday.

I note the presence at the hearing of Agents, a Representative, Counsel and Advocates of the Parties.

I now call on the Agent of the Marshall Islands, Her Excellency Ms Meredith Kirby, to introduce the delegation of the Marshall Islands. You have the floor, Madam.

MS KIRBY: Good morning. Mr President, Members of the Special Chamber, we're happy to be here. My name is Meredith Kirby. I am Deputy Commissioner of Maritime Affairs of the Republic of the Marshall Islands' Maritime Administrator and Agent for the Republic of the Marshall Islands.

With me today I have Mr Bernard Adiniwin, Attorney General of the Marshall Islands, as representative. I also have Sir Daniel Bethlehem KC, Barrister, Twenty Essex, London, United Kingdom, member of the Bar of England and Wales; Ms Penelope Nevill, Barrister, Twenty Essex, London, United Kingdom, member of the Bar of England and Wales, Barrister and Solicitor of the High Court of New Zealand; Dr Paolo Busco, Barrister, Twenty Essex, London, United Kingdom, member of the Bar of England and Wales, member of the Rome Bar; Dr Manuel Casas Martinez, Barrister, 20 Essex, London, United Kingdom, member of the Bar of England and Wales, member of the Bar of New York, member of the Bar of Caracas; and Ms Courtney Grafton, Barrister, Twenty Essex, London, United Kingdom, member of the Bar of England and Wales, as counsel and advocates.

Additionally, we have Mr Richard M. Gunn, Partner, Reed Smith, LLP, London, United Kingdom, Mr Jiahui Huang, Barrister, Twenty Essex, London, United Kingdom, member of the Bar of England and Wales, and Ms Julia Z. Cyrson, Associate, Reed Smith LLP, London, United Kingdom, as counsel.

And Mr James N. Myazoe, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator; Mr Joseph Bigler, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator, and, later in the

week, Mr Baron Bigler, Deputy Commissioner of Maritime Affairs, Republic of the Marshall Islands Maritime Administrator, as advisers.

Thank you very much.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank the Agent of the Marshall Islands.

I now call on the Agent of Equatorial Guinea, His Excellency Mr Carmelo Nvono- Ncá, to introduce the delegation of Equatorial Guinea. You have the floor, sir.

MR. NVONO-NCÁ: Monsieur le Président, distingués Membres de la Chambre spéciale, Madame la Greffière, Membres de la Délégation des Îles Marshall, bonjour à tous.

I am Ambassador of Equatorial Guinea to France, Permanent Delegate to UNESCO and Agent of the Republic of Equatorial Guinea in these proceedings.

It is my honour to introduce the members of the delegation of the Republic of Equatorial Guinea in the *"Heroic Idun"* case. The members of the delegation are as follows: As Counsel and Advocates, I introduce: Professor Hussein Haeri KC of Withers LLP and SOAS, University of London; Ms Floriane Lavaud of Withers LLP; Professor Dapo Akande of the University of Oxford, Barrister at Essex Court Chambers and Member of the International Law Commission; and Mr Francisco Moro Nve Obono from the State Lawyers Office of the Republic of Equatorial Guinea.

As Counsel, I introduce: His Excellency Mr Juan Olo Mba Nseng, Vice-President of the Legal Commission of State Lawyers of the Republic of Equatorial Guinea; Professor Antonios Tzanakopoulos of the University of Oxford; Ms Clàudia Baró, Ms Maanya Tandon, Ms Sudipta Purkayastha, Ms Eva Keita and Niccolo Dell'Alba of Withers LLP; and Mr Adalberto Acumu Ncogo Angono and Ms Gladys Delcourt Ncara Nzang from the State Lawyers Office of the Republic of Equatorial Guinea.

As Adviser, I have the honour to introduce: Ms Anouch Sedef, Adviser to the Ministry of Transport, Telecommunications and Artificial Intelligence Systems of the Republic of Equatorial Guinea and, finally, Ms Carmen Matas Gallardo, Communications Adviser of the Republic of Equatorial Guinea.

Mr President, Members of the Special Chamber, Madam Registrar, I wish to conclude this introduction of the delegation of the Republic of Equatorial Guinea by assuring you and the delegation of the Marshall Islands of our full collaboration to ensure that the hearing proceeds smoothly. (*Interpretation from Spanish*) Mr President, Members of the Special Chamber, thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank the Agent of Equatorial Guinea.

I now give the floor to the Agent of the Marshall Islands, Her Excellency Ms Kirby, to make her opening statement.

First Round: Marshall Islands

STATEMENT OF MS KIRBY
AGENT OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/1/Rev.1, p. 8–10]

Mr President, Members of the Special Chamber, it is an honour and a privilege to be before you today as Agent of the Republic of the Marshall Islands in its claim against the Republic of Equatorial Guinea.

On 12 August 2022, shortly after midday, the *“Heroic Idun”*, a two-year-old very large crude carrier, VLCC, registered in the Marshall Islands, was drifting in the exclusive economic zone of São Tomé and Príncipe, awaiting confirmation of a laycan, when it was intercepted and detained by the Equatoguinean Navy, and forced at gunpoint to Luba Bay in Bioko Island.

What followed after that was an extraordinary series of events, of the utmost seriousness and concern to the Marshall Islands as the flag State. The vessel and its 26 crew members were detained for over three months, in extremely challenging conditions in Equatorial Guinea, never knowing from one day to the next what would happen to them.

Repeated attempts by the Marshall Islands to intervene on behalf of the vessel and its crew were ignored by the authorities. Although some officials agreed to meet with the flag’s regional representative, Captain Mustafa, in September, meetings were repeatedly cancelled, and the two that did take place came to nothing.

Despite indicating to the *“Heroic Idun”*’s owners that it would release the vessel on payment of an extortionate sum of over 2 million euros on 4 October, Equatorial Guinea did not release the vessel and crew.

Instead, we eventually learned that Equatorial Guinea intended to hand the vessel and crew over to Nigeria, but not because of any communication with the flag State. Equatorial Guinea continued to ignore letters and a note verbale from the Marshall Islands.

In the Marshall Islands’ experience as flag State, Equatorial Guinea’s actions were extraordinary and unprecedented. We concluded that Equatorial Guinea’s actions left us with no choice but to initiate Prompt Release Proceedings before this Tribunal, which we did on 9 November.

This was the first time the Marshall Islands had initiated proceedings under the Convention. Despite being the world’s third largest open Registry, with almost 6,000 vessels, in operation for over 30 years, the Marshall Islands had never before found it necessary to bring an action to protect a vessel and its crew and its rights and obligations as flag State.

But the story does not end there. In the face of the proceedings, and despite that you, Mr President, had set the application down for a hearing on 24 November, and with an extraordinary disregard for the Marshall Islands and its Convention obligations, Equatorial Guinea handed the vessel and crew over to Nigeria.

In all, the ordeal of the vessel, the crew, their families and others involved lasted for over ten months.

Equatorial Guinea will tell you that it did all of this because the vessel and crew were suspected of piracy. This is simply not borne out by the facts. Furthermore, I can say categorically that at no time, until its Counter-Memorial in these proceedings, did Equatorial Guinea ever communicate to the Marshall Islands, as flag State, that it was taking antipiracy measures against the vessel and crew, as would be expected if that were really the case.

Throughout, Equatorial Guinea failed to meet its most basic obligations to the Marshall Islands under the Convention and international law.

Mr President, Members of the Special Chamber, the Marshall Islands takes these matters extremely seriously. It has brought this case because of the fundamental importance of

the rules and principles of the laws at stake for flag States, for the humane and fair treatment of seafarers, for the treatment and safety of vessels in the marine environment, and for all engaged in international maritime trade. The system only works if all parties involved respect and abide by the rules and agreements in place; that is true for the vessels, true for the crews, and vitally important for both the flag State and coastal and port States.

The Marshall Islands takes these responsibilities very seriously. We endeavour and put a tremendous amount of resources behind fulfilling our obligations as flag State, as the Attorney General will underline later.

Equatorial Guinea utterly disregarded every rule and principle. This simply cannot happen, for the reasons I have given and for the good order of the seas and oceans.

Mr President, I now invite you to call on Mr Bernard Adiniwin, Attorney General for the Republic of the Marshall Islands.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Her Excellency, Ms Kirby.

I now invite Mr Bernard Adiniwin, Attorney General of the Marshall Islands, to make his statement. You have the floor, sir.

STATEMENT OF MR ADINIWIN
REPRSENTATIVE OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/1/Rev.1, p. 10–13]

Mr President, Members of the Special Chamber, I would like to convey warm greetings of IAKWE from the Marshall Islands. In our language IAKWE is a traditional greeting which translates to “you are a rainbow”. It is a great honour to appear before you today on behalf of the Republic of the Marshall Islands. As my country’s Attorney General, I will address you today on the importance of this case to the Marshall Islands and its Ship Registry, and the importance of key issues of substance beyond this case.

The interception and detention of the *“Heroic Idun”* and its crew in the EEZ of Sao Tomé and Príncipe by Equatorial Guinea on 12 August 2022, and its subsequent treatment of the vessel and crew over the following 92 days, were wholly exceptional and unprecedented in the Marshall Islands’ 30 plus years’ experience as a large flag State. It is for this reason that the Marshall Islands, for the first time, took the serious step to initiate prompt release proceedings before this Tribunal against Equatorial Guinea in November 2022, and why the Marshall Islands stands before you today.

The Marshall Islands may be one of the smallest countries in the world, but it is a large-ocean nation. My country is an archipelago of 29 atolls and five single islands, situated in the northern Pacific Ocean. More than 98 per cent of the territory of the Marshall Islands is water.

International law, international cooperation, and ocean governance have always been of the utmost importance to the Marshall Islands. As well as having a large open shipping registry, which I will return to, the Marshall Islands has extensive fisheries and, as a small island State, has faced and faces acute and daily challenges, including the nuclear weapons testing on our islands and in our lagoons from 1946 to 1958, to the current threat of climate change and sea level rise.

The Marshall Islands acceded to UNCLOS on 9 August 1991, even before it joined the United Nations in September that year, and is a party to the Fish Stocks Agreement. Most recently, in March this year, the Marshall Islands ratified the BBNJ Convention. We are an active member of the International Maritime Organization, having ratified and implemented all key IMO conventions and instruments. In 2009 we became a member of the International Labour Organization and a party to the Maritime Labour Convention. The Marshall Islands is an active participant in United Nations Oceans Conferences. Our President, Her Excellency Dr Hilda C. Heine, spoke at the plenary of the most recent Oceans Conference in June this year.

The Marshall Islands’ shipping registry is the third largest in the world. As of 30 September 2025, the Marshall Islands’ registry is responsible for 11.2 per cent of the global fleet, with 5,966 vessels totalling over 205 million in gross tonnage. With almost 1,500 RMI-flagged ships transporting energy, it makes up 16.04 of the global energy fleet, the largest of any flag administration. The Marshall Islands is, in addition, the legal domicile of many of the world’s largest shipping companies. The Registry is supported on a day-to-day basis by International Registries, “IRI”, with a staff of over 500 highly qualified and experienced maritime professionals. IRI provides administrative and technical support to the Registry and is located across 28 offices in major maritime centres around the world, offering around the clock assistance and ready to assist the Maritime Administrator in response to any issue arising concerning Marshall Islands’ flagged vessels.

The Marshall Islands maintains a comprehensive legislative and regulatory framework which fully implements and complies with internationally agreed upon rules and standards. It maintains exceptional safety and regulatory compliance standards, strong operational oversight, and enjoys a stellar reputation among shipowners, port authorities, and regulators worldwide. This is evidenced, for example, by the Marshall Islands’ inclusion on the “white

lists" of both the Paris and Tokyo Memoranda of Understanding on Port State Control, certification by the U.S. Coast Guard's Qualship 21 program for 21 consecutive years, and its status as a top-performing flag on the International Chamber of Shipping's Flag State Performance Assessment. All of this is to say that the Marshall Islands is not a flag State of convenience, but a flag State that takes pride in the safety and environmental compliance of its fleet, is actively engaged in maritime law issues, and is committed to standing behind its fleet. It is critical that every vessel that flies our flag should know that our country backs them.

As our Agent Ms Kirby, a Deputy Commissioner of Maritime Affairs, has set out, the safety and stability of global maritime transport depends on everyone following the rules of the road. Over the next two and a half days, Mr President, Members of the Special Chamber, you will hear in detail how Equatorial Guinea did not follow these rules. It failed in its most basic and fundamental obligations to the Marshall Islands as flag State, the vessel, the crew and their families in August 2022 and the months that followed.

Equatorial Guinea has defended its actions on the ground that it was meeting its international obligation to cooperate to combat piracy. As a large flag State, the Marshall Islands is acutely aware of the threat that piracy poses to shipping and the importance of international efforts and cooperation to meet that threat. Marshall Islands' Duty Officers are available 24 hours a day, seven days a week, to address calls from vessels in distress and regional piracy reporting centres such as Maritime Domain Awareness for Trade – Gulf of Guinea, the Inter Regional Coordination Center, the International Maritime Bureau Piracy Reporting Center, the Maritime Information Cooperation & Awareness Center, and United Kingdom Maritime Trade Operations.

The Marshall Islands has also been an active participant and presenter at the Gulf of Guinea Maritime Collaboration Forum / Shared Awareness and Deconfliction, and the G7++ Group of Friends of the Gulf of Guinea, along with the multilateral exercise, OBANGAME EXPRESS, to support the collective industry and military response to pirate activity in the Gulf of Guinea region.

As such, the Marshall Islands is appreciative of the steps the coastal States in the Gulf of Guinea have undertaken, with the technical support of the IMO, to combat piracy off West Africa under the Yaoundé framework. We are of course grateful for the assistance rendered by the Equatorial Guinea Navy to our flagged vessel the "*Sea Phantom"* in February 2021, which Equatorial Guinea has referred to in its written submissions.

It is precisely because of the importance of anti-piracy measures to the safety of shipping and the international community that these measures should not be abused or used as a pretext for action which breaches and undermines other fundamental rules of the law of the sea, such as freedom of navigation and exclusive flag State jurisdiction.

On 12 August 2022, when it was intercepted and detained by Equatorial Guinea, the *"Heroic Idun"* had not been, and was not, engaged in piracy. Nor was it overrun by pirates. Equatorial Guinea has produced no information in these proceedings that said or suggested that it was. There was no basis in international law which could have justified Equatorial Guinea's interception and detention of the vessel and crew in the EEZ of São Tomé and Príncipe. As you will hear in the course of our submissions over the next two and half days, Equatorial Guinea did not even raise anti-piracy cooperation until these proceedings were well under way. Allegations that a foreign-flagged vessel is engaged in piracy are a serious matter. Members of the Chamber, no Marshall Islands-flagged vessel has ever been accused of piracy before. If piracy was really the reason behind the apprehension and detention of the vessel and crew, Equatorial Guinea was obliged to inform the Marshall Islands as the flag State.

This is indicative of Equatorial Guinea's approach to the Marshall Islands as flag State throughout. Members of the Chamber, it is remarkable that Equatorial Guinea did not respond at all to the seven letters and notes verbales transmitted by the Marshall Islands concerning the

“*Heroic Idun*” and its crew. While the Equatorial Guinea Attorney General met with a regional flag representative sent by the Marshall Islands on 13 September 2022, piracy was not raised and nothing changed after that meeting. The Marshall Islands regards it of critical importance that coastal and other States properly engage with flag States when issues concerning their flagged vessels arise, or measures are taken against their vessels. This is the only way of ensuring proper protection and balancing of the rights and interests involved. It is, moreover, an expected norm of conduct, which is reflected in all maritime treaties and understandings.

For the same reason, the Marshall Islands also regards it as critical that the States Parties to UNCLOS observe and respect their dispute settlement obligations. Equatorial Guinea did not do that. Instead, it transferred the vessel and its crew to Nigeria on 11 November 2022 in the face of prompt release proceedings before this Tribunal which had already been set for a hearing less than two weeks later, on 24 November.

It is for these reasons that I stand before you in the current proceedings and invite you to safeguard the balance between the rights and obligations of the parties to the Convention, by affirming and upholding the rights of the Marshall Islands as a flag State.

Mr President, that concludes my remarks. I now invite you to recall Ms Kirby to outline the structure of the Marshall Islands’ submissions over the next two and a half days.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Adiniwin, and I give the floor again to the Agent of the Marshall Islands, Her Excellency Ms Kirby, to make a further statement.

STATEMENT OF MS KIRBY
AGENT OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/1/Rev.1, p. 13–14]

Thank you, Mr President. I shall now briefly reintroduce the members of the delegation representing the Marshall Islands before the Special Chamber and outline the scheme of the Marshall Islands' submissions over the next two and a half days. Sir Daniel Bethlehem KC appears as lead Counsel for the Marshall Islands, together with Ms Penelope Nevill, Dr Paolo Busco, Ms Courtney Grafton and Dr Manuel Casas as Counsel. The names and titles of the other members of the Marshallese delegation have already been duly communicated to the Special Chamber.

Sir Daniel Bethlehem will open with an overview of the facts and evidence in the case. He will also address you on jurisdiction, admissibility and applicable law. Following, Ms Courtney Grafton will address the Special Chamber on the facts, addressing the key evidence and facts in dispute. She will then invite you to call the first witness for direct examination, followed by cross-examination by Equatorial Guinea. We anticipate that this will take us up to the close of today's afternoon session.

Ms Grafton will call the second witness for examination tomorrow morning. Following the witness evidence tomorrow, Dr Busco will address the Marshall Islands' first claim, Equatorial Guinea's breach of the Marshall Islands' freedom of navigation and exclusive flag State jurisdiction by its interception and detention of the vessel, and why Equatorial Guinea's piracy defence is unfounded under the Convention. Ms Nevill will thereafter address the Yaoundé Code and why it does not provide Equatorial Guinea with a defence.

Dr Busco will address you on the second of the Marshall Islands' claims: Equatorial Guinea's excessive exercise of prescriptive jurisdiction, in breach of UNCLOS.

Ms Grafton, Dr Casas and Ms Nevill will address Equatorial Guinea's other alleged breaches of UNCLOS, breach of the principles of humanity, and the failure to respect the human rights of the crew, breach of the obligations of due regard, breaches of its obligations under IMO instruments, breaches of Article 225 of UNCLOS, and breaches of its obligations to notify the flag State of enforcement measures and release the vessel and crew promptly without undue delay.

On Wednesday morning, Sir Daniel will open with brief submissions on Equatorial Guinea's breaches of its duties not to aggravate the dispute and to preserve the Marshall Islands' rights pending proceedings. Ms Nevill and Dr Casas will thereafter address you on remedies.

Mr President, this concludes my opening. I now invite you to call Sir Daniel Bethlehem to the podium.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Her Excellency Ms Kirby.

I now call on Sir Daniel Bethlehem to make his statement.

I recall that this sitting will adjourn at approximately 11.30, Sir Daniel, so I would, thus, invite you to interrupt your statement at a convenient moment. With that understanding, I give you the floor.

STATEMENT OF SIR DANIEL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/1/Rev.1, p. 14–38]

Thank you very much, Mr President. I hope I won’t interrupt my statement, but just pause it very briefly. Mr President, as you have just raised the issue of timing, perhaps I could just put on the agenda, because we would seek your guidance in due course. I understand that we will have the introductory period that was taken by the Tribunal this morning added to our time allowance, and it would be helpful to know, perhaps, after the short mid-morning break, whether you would anticipate extending a little bit beyond 1 p.m., or perhaps starting a little bit before 3 p.m.

Thank you very much, Mr President.

Mr President, Members of the Special Chamber, it is an honour to appear before you in these proceedings representing the Republic of the Marshall Islands. As you have just heard from the Attorney General and from our Agent, this case is of immense importance to the Marshall Islands, a small island State with an outsized imprint on law of the sea and maritime matters. From the very moment of the beginnings of the incident that is at the heart of this dispute, the Marshallese authorities and the country’s Registry were actively engaged in efforts to secure the release of the crew and the vessel and to safeguard the Marshall Islands’ freedom of navigation rights and exclusive flag State jurisdiction. These efforts are addressed, *inter alia*, in the two Witness Statements of Mr William Gallagher, the Senior Deputy Commissioner of Maritime Affairs of the Marshall Islands.[1]

As Mr Gallagher’s evidence and the very fact of these proceedings attest, the Marshall Islands is acutely aware both of its rights and of its responsibilities under UNCLOS, and of its duties in respect of every ship that flies its flag, pursuant to Article 94 of UNCLOS, as well as other provisions of the Convention. Flag State jurisdiction, pursuant to Articles 91 and 92 of UNCLOS, is rooted in a close link between the flag State and the ship and its crew, manifest through the flag State’s responsibilities and duties in respect of the exercise of jurisdiction over such ships and their crew, exclusively so, when the ship is on the high seas. It is also manifest in respect of the exercise of flag State freedom of navigation rights, as well as other rights under UNCLOS and other relevant and applicable rules of international law.

Mr President, Members of the Chamber, I note here, simply as a matter of formality, as the point is not contested, that both the Marshall Islands and Equatorial Guinea are States Parties to UNCLOS. While Equatorial Guinea has raised a number of objections to the jurisdiction of the Special Chamber, to which I will come a little later, there is no dispute that both Parties are bound by UNCLOS.

In bringing these proceedings, the Marshall Islands has in sharp focus both its rights, as flag State of the “*Heroic Idun*” and of its attendant responsibilities in respect of the vessel and its crew.

Starting on 12 August 2022, as you have heard, through the interception and detention of the *“Heroic Idun”* by the Equatoguinean navy, the rights of the Marshall Islands under UNCLOS and under other relevant rules of international law, were violated. Its right of freedom of navigation. Its right, and indeed its duty, to exercise jurisdiction over the *“Heroic Idun”*, as the flag State of the vessel. From that date, 12 August 2022, until Equatorial Guinea rendered, unlawfully, the “*Heroic Idun*” and its crew to Nigeria on 11 November 2022, the vessel and the crew were under the jurisdiction and control of Equatorial Guinea, in manifest breach of the rights of the Marshall Islands under UNCLOS. The vessel and the crew were detained for 92 days in Equatorial Guinea. The 26 crew members were unlawfully deprived of their liberty.

[1] Annex RMI/-30 and Annex RMI/-53.

They were held hostage. They were thereafter rendered unlawfully by Equatorial Guinea to Nigeria, transferred under the guns of the Equatoguinean navy, while still in Equatorial Guinea waters.

Mr President, Members of the Chamber, the conduct that is in issue in these proceedings is that of Equatorial Guinea, and of Equatorial Guinea alone, in the period 12 August to 11 November 2022 – those 92 days. There were Nigerian bookends to Equatorial Guinea's conduct, before 12 August and after 11 November, but that is context. Nigeria's rights and duties are not in issue in these proceedings. This case concerns the 92 days, not the events that occurred on either side of them.

In these proceedings, Equatorial Guinea wishes to play a "get out of jail free" card. Given the wider context of these events that took place on those 92 days, Equatorial Guinea says that there is an absent defendant in this Chamber. That Nigeria should be here but isn't. And, accordingly, that the Special Chamber has no jurisdiction over Equatorial Guinea because you can't address the legality of Equatorial Guinea's conduct without first determining the legality of Nigeria's conduct.

Mr President, Members of the Chamber, this case is not about the lawfulness or otherwise of Nigeria's conduct. It is about, and only about, the illegality of Equatorial Guinea's conduct. The Marshall Islands does not come before you seeking any award against Nigeria, for anything. You are neither asked nor are you required to reach any conclusions about the lawfulness of Nigeria's conduct. The only conduct that is in issue in these proceedings that requires your legal assessment is that of Equatorial Guinea, and of Equatorial Guinea alone – its conduct in those 92 days. It cannot, in these proceedings, hide behind an assertion of an absent defendant. I will address these issues more fully later on in my statement.

Mr President, Members of the Chamber, let me step back a little to give you a roadmap of my submissions before I get to the meat of them.

You should each have in front of you a Judges' Folder of core documents looking like that. We will update this bundle in advance of each session as the hearing progresses. Given the time constraints of the hearing, we do not propose to ask you to turn up individual documents in the bundle as we proceed. The Folder is intended to assist your deliberations in due course by drawing together the key documents, or extracts from them, to which we will refer you in the course of our submissions. We will also be using slides to exhibit particular extracts we would like to highlight. And I note that the slides for this session, in case you want to annotate them, are already in the Folder. You will find these at Tab 19 of the Folder.

Mr President, Members of the Chamber, as Ms Kirby has anticipated, I expect to be on my feet for the rest of this morning session and for a brief while afterwards, after the lunch break. My purpose is to give you an overview of the facts and the evidence of the Marshallese case. In doing so, I will be anticipating the submissions of those who will follow me, covering the ground more fully than I will do. My object is to give you a sense of the topography of the case, before we take you to the detail and contours of the landscape. And I appreciate that the metaphor of topography and the details of the landscape perhaps do not sit quite so easily with a maritime matter, but nonetheless that is the case. I appreciate that you will all be familiar with the issues from the written pleadings, but what I would like to do is to pick up key elements of the argument and elements of the evidence and put that before you.

In addition to a high-level overview of the facts and the evidence of our case, I will also address issues of jurisdiction, admissibility and applicable law. In this context, I will return to Equatorial Guinea's absent defendant argument, amongst other contentions going to jurisdiction and admissibility. There is, as I've already noted, a wider context to what took place at the hands of Equatorial Guinea during those 92 days. You need to know something of that wider context, both because Equatorial Guinea seeks to use it as distraction, but also because, when it comes to the issue of damages, you will have to consider whether Equatorial

Guinea can properly be held liable for loss, damage and injury that occurred after 11 November in consequence of its unlawful action before 11 November. It is our contention that Equatorial Guinea is liable not only for the loss, damage and injury that it caused during those 92 days but also for wider consequential loss. But we will return to these issues.

Following my submissions, you will hear this afternoon from Ms Grafton who will pick up the baton on our factual case.

With Ms Grafton's submissions, and our witness evidence, you will have heard our facts on the case. After these submissions and testimony, we will turn to our allegations of breach and submissions of law, and on remedies. Our Agent has already given you a roadmap of those, and I don't propose to say anything more about them.

Mr President, Members of the Chamber, I turn now to give you an overview of the facts and evidence. This review will necessarily be abbreviated. I will, though, endeavour to point you to key elements of the evidence as I go along. Mr President, Members of the Chamber, in keeping with the established practice of the Tribunal with respect to transcripts of its proceedings, my colleagues and I have included bare-bones references in the footnotes of our scripts that you have, which are strictly limited to footnote references that identify where the evidence and supporting documents can be found. We hope that will be helpful to you. There is no argument, needless to say, that is included in the footnotes.

So I turn to the "*Heroic Idun*" and its crew. As you have already heard, the "*Heroic Idun*" is a Very Large Crude Carrier registered in the Marshall Islands. It is owned by Idun Maritime Limited, which is an Isle of Man company, and I will return to this point a little bit later. The company is also registered in the Marshall Islands as a "Foreign Maritime Entity". For ease of expression I am going to refer to the "*Heroic Idun*" as the vessel, although, on occasion, I will also refer to it as "the tanker", just to differentiate it from other vessels that are engaged. And you will see a picture of the "*Heroic Idun*" on the screen. I note that it is named here the "*Hunter Idun*" but as you will see in the annotation at the bottom of the picture, it was renamed the "*Heroic Idun*". Mr President, Members of the Chamber, you will appreciate the enormous size of the vessel from this picture. It is a very large ship indeed, almost of the dimensions of the Empire State building. It is slow to manoeuvre, with a maximum speed in ballast of 15 knots per hour. And, as this goes to a key aspect of Equatorial Guinea's case, to any seafarer, or to anyone with any knowledge of ships and of the threat of piracy, it is utterly absurd to suggest that a tanker of this size, and speed and manoeuvrability constraints, could ever be a pirate mothership.

I note in this regard that the "*Heroic Idun*" operated two mandatory electronic tracking systems, which are required under Regulations 19 and 19-1 of Chapter V of the Safety of Life at Sea Convention (SOLAS), mandatory for ships of this size, and the requirements of which are tightly prescribed and regulated by the International Maritime Organization, the IMO,[2] and the fitting and operation of which are fundamental elements of flag State jurisdiction and responsibility, to which the Marshall Islands is assiduously attentive.

The first of these mandatory electronic tracking systems is the Automated Identification System, or AIS.[3] You will hear something more of this from my colleagues as well, as we go on. The AIS is a VHF (Very High Frequency) transceiver that transmits a unique ship identification, its position, its course and its speed, both to other ships and to shore authorities. And indeed, I believe that there is an app that can be downloaded and we can all track the AIS of ships around the world. While the AIS can be turned off, there are very limited circumstances

[2] IMO Chapter V, Safety of Navigation, Regulation 19 (Carriage requirements for shipborne navigational systems and equipment) and Regulation 19-1 (Long-range identification and tracking of ships) (**Core Bundle, Tab 2)**. *Guidance on the Implementation of the LRIT System,* IMO MSC.1/Circ.1298, 8 December 2008 **(Core Bundle, Tab 3)**.

[3] IMO "AIS transponders": https://www.imo.org/en/ourwork/safety/pages/ais.aspx.

in which it is permitted to do so – and doing so would immediately raise suspicions about control of the ship and about why it was seeking to hide its identity and coordinates from other ships and authorities.

The second electronic identification system is the Long-Range Identification system, or LRIT.[4] This was introduced largely after 9/11 as a mandatory requirement to enhance security of shipping for safety and marine environmental protection. Under SOLAS Chapter V, Regulation 19-1, the LRIT System must automatically transmit the identity of the ship, the exact position of the ship, and the date and time that the position is provided. It is the responsibility of the flag State to regulate compliance with the LRIT regulations.

The "*Heroic Idun*"'s AIS and LRIT systems were operating throughout the period with which we are concerned. There was no attempt by anyone on board the vessel to turn these systems off, as might have been the case had the vessel been overrun by pirates. The AIS and LRIT transmissions would have been readily accessible to the Equatoguinean navy and port authorities, enabling the authorities to know the exact position of the "*Heroic Idun*" at all times.

Mr President, Members of the Chamber, this case is not just about States and not just about vessels, it is about crew as well. The vessel had a crew of 26, of whom 15 were Indian, including the Master and the Chief Officer, 9 were Sri Lankan, 1 was Filipino, and 1 was Polish. With 24 members of the crew from the Indian sub-continent, as you can imagine, the detention of the crew was felt particularly heavily in that part of the world.

In August 2022, the vessel was sub-chartered to BP with orders to load crude oil at Akpo Offshore Terminal which was located 71 miles off the Nigerian coast in Nigeria's exclusive economic zone.

Mr President, Members of the Chamber, I turn to the events of 7 and 8 August 2022 and I note, in doing so, that the events with which we are concerned in these proceedings began on Friday, 12 August 2022, on a Friday afternoon. Some wider context to these events is warranted, however, taking us back five days, to 7 August. This context gives perspective about what happened subsequently, but it is not ultimately relevant to any question of responsibility and liability of Equatorial Guinea for its conduct during the 92 days.

Given its loading orders, the "*Heroic Idun*" arrived off Akpo Terminal in Nigeria's EEZ on the evening of 7 August 2022 where it awaited loading instructions. The area off Akpo is within a designated High-Risk Area for piracy. The area in proximity to the Terminal benefits from the Terminal's security cover.

You will see now on the screen slide 4 – the chart, which is taken from Figure 1 of the Marshallese Memorial, showing the track of the "*Heroic Idun"*. The red line, in the direction of the arrows, shows the track of the vessel in the period from 7 to 13 August.

And we can keep this slide on the screen, as I take you through the facts. Having arrived off the Akpo Terminal on the evening of 7 August, the following day, on 8 August 2022, the Terminal notified the Master that there was as yet no cargo nomination and requested the Master to move the vessel clear of the Terminal. Given the piracy risks, the Master was wary about moving the vessel to an area where it would not have any security cover from the Terminal. After exchanges between the Master and the Terminal, therefore, the Master moved the vessel to just outside 10 nautical miles of the Terminal to await further instructions. In doing so, he posted a further lookout on the bridge and kept the engines at the ready in case of pirate attack. And I should note, and you will see later on in one of the slides projected by my colleagues, a different picture of the "*Heroic Idun*" in ballast, so you will see quite how high in the water it is riding. But at this stage, the vessel was in ballast, sitting very high in the water, not having yet loaded any cargo. This is all addressed in the Master's first Witness Statement.[5]

[4] IMO "Long-range identification and tracking (LRIT)": https://www.imo.org/en/ourwork/safety/pages/lrit.aspx.
[5] Annex RMI/-1 (Memorial, Volume II).

You can see on slide 4 on the screen the track of the vessel on 8 August in the vicinity of the Akpo Terminal. And it is a very tight track if you look around Akpo – you can see the trajectory of the vessel.

There followed an incident on the date in question, on 8 August, which lasted about 90 minutes, that was followed, four days later, by the unlawful interception of the "*Heroic Idun*" by the Equatoguinean navy and the incarceration of its crew in Equatorial Guinea until 11 November, the 92 days.

At 20.16 UTC – 21.16 Local Time – on Monday, 8 August, an unidentified boat approached the "*Heroic Idun*". Visibility was poor that night; the night was overcast, and there was no moon. The approaching vessel had its AIS, its Automatic Identification System, turned off, which was both highly unusual and highly suspect, given the piracy threat. Given the poor conditions, the approaching vessel could not be visually identified by the Master and the crew of the tanker. Making contact with the "*Heroic Idun*" over the VHF radio, the unidentified boat asserted that it was a Nigerian navy boat and asked the Master to follow it to Bonny Fairway Buoy in Nigeria's territorial sea for investigation regarding its clearances. As he was unable to identify the approaching boat, the Master of the "*Heroic Idun*" was concerned that it was a pirate boat. And, Mr President, Members of the Chamber, I very much invite you to have a look at paragraph 79 of the Master's first Witness Statement, where this particular issue is addressed in some detail.[6]

The exchanges that ensued are recounted in the Marshallese Memorial at paragraphs 30 to 33, as well as in the Witness Statements of the Master and the Chief Officer and of other members of the crew attached to the Marshallese Memorial and Reply. Mr President, Members of the Chamber, I commend all of these Witness Statements to you for close attention. They bring to the fore the acute human dimension of the events that took place, both that night and over the 92 days that followed. Slide 5 on the screen references each of these 26 Witness Statements by members of the crew along with a brief notation of what each statement addresses. Before we move on from this slide, we have set this out, Mr President and Members of the Chamber, for your convenience as a quick and easy guide of both where to find these witness statements and also the key issues they address. And as I say, Mr President and Members of the Chamber, we very much commend the details of those statements to you. We are here in Hamburg, but there are real lives at the heart of this narrative.

We go back to slide 6, the next slide. For completeness, for your ease of reference, we also have Slide 6, now on the screen – an additional slide which gives you a similar overview of the other Witness Statements and of the Expert Reports annexed to our Memorial and Reply.

Mr President, Members of the Chamber, the Witness Statements apart, the most compelling evidence addressing what transpired on the night of 8 August is the transcript of the Voice Data Recording of the VHF exchanges and those on the bridge that took place that night. The Voice Data Recorder, or VDR, is an automated audio and data recording system on the bridge. In this case, the VDR captured the entirety of the exchanges that took place on the bridge of the "*Heroic Idun*" on the night of 8 August, including the VHF exchanges with the unidentified boat. Now I interpolate here, briefly, noting that it subsequently transpired, although only sometime later – my understanding is that it was about 12 hours later, perhaps a little further – that the boat was in fact a small Nigerian navy patrol boat, the "*Gongola*", but this was not known by those on board the "*Heroic Idun*" at the time, and it is evident from the VDR recording that the conduct of the "*Gongola*" that night was highly erratic throughout the course of the incident. This highly erratic conduct, coupled with poor visibility of a small, highly manoeuvrable and fast-moving boat approaching the "*Heroic Idun*", bolstered the appreciation by those on the bridge of the "*Heroic Idun*" that they were under pirate attack.

[6] Annex RMI/-1 (Memorial, Volume II).

The VDR transcript runs from just before 7.00 p.m. UTC, 8.00 p.m. Local Time, to just before 11.00 p.m. UTC, midnight Local Time, on 8 August, a period of four hours. Amongst the exchanges that the VDR captured are the following – and I'll just list a number of them but the detailed evidential references are in the footnotes:

- First of all, it records the repeated threats by the unidentified ship to "use maximum force against" and "open fire" on the "*Heroic Idun*";[7]
- It records the Master's instruction to the crew to go to the citadel, the safe room in the vessel that provided a secure place of refuge for the crew in the case of a pirate attack;[8]
- It recorded the crew taking refuge in the citadel;[9]
- It recorded the Master's statement to the unidentified vessel that the "*Heroic Idun*" was in international waters;[10]
- It recorded the Chief Officer's repeated, repeated, May Day calls;[11]
- And it recorded requests both from the "*Heroic Idun*" and also from other vessels in the vicinity to the unidentified ship to please, please, please turn on its AIS to enable it to be identified;[12]
- And it finally records an all clear at 22.46 local time after the unidentified ship gave up its pursuit of the "*Heroic Idun*" which, by that point, had significantly increased speed in an attempt to evade the unidentified boat.[13] As the tanker was high in the water in ballast, it posed challenges to potential boarders, but the risks to an oil tanker attendant from heavy gun fire were high.

While Equatorial Guinea puts its own spin on the events that took place that night, there can be no serious contention whatsoever about the facts and the genuine sense of risk on the part of those on board the "*Heroic Idun*".

Mr President, Members of the Chamber, I turn to address Equatorial Guinea's responsibility which is engaged by the events of 12-13 August 2022, four days later.

In the days that followed the incident, the "*Heroic Idun*" sailed out of the High-Risk Area through the EEZs of Nigeria, of São Tomé and Príncipe, and of Equatorial Guinea while awaiting instructions to return to Akpo to load cargo. This was eventually due to take place on 17 August.

While they were waiting for the 17 August, the "*Heroic Idun*" was drifting in the EEZ of São Tomé and Príncipe on Friday, 12 August when it was approached by the Equatoguinean warship, the "*Capitan David*". The relevance of the location of the "*Heroic Idun*" in the EEZ of São Tomé at this point is twofold. First, it excludes any basis for a claim by Equatorial Guinea that it was purporting to investigate or enforce its own regulations applicable in its own EEZ. This was not the Equatoguinean EEZ. Second, it underlines that the relevant UNCLOS legal regime applicable between the Marshall Islands and Equatorial Guinea were the UNCLOS provisions applicable to the high seas, in other words, those in Part VII of the Convention.

Mr President, Members of the Chamber, let me pause for just a moment at this point to emphasize that at this point – at the point of the interdiction of the "*Heroic Idun*" by the "*Capitan David*" on 12 August 2022 – at this point, the responsibility of Equatorial Guinea is engaged as a matter of international law, both under UNCLOS and under customary

[7] MT/-26 (Memorial, Volume II), *inter alia*, at page 273: 20:49:48, 20:50:05, 20:51:00.
[8] MT/-26 (Memorial, Volume II), *inter alia*, at page 273–274: 20:49:03, 20:50:42, 20:51:32, 20:53:10, 20:57:30.
[9] MT/-26 (Memorial, Volume II), *inter alia*, page 273: 20:52:52, 20:53:24, 20:54:16.
[10] MT/-26 (Memorial, Volume II), *inter alia*, page 274: 20:58:24.
[11] MT/-26 (Memorial, Volume II), *inter alia*, page 274 - 276: 21:04:02, 21:05:19, 21:06:17, 21:09:43, 21:10:57, 21:16:14, 21:32:34, 21:35:58.
[12] MT/-26 (Memorial, Volume II), *inter alia*, page 274: 21:05:52, 21:08:34, 21:08:48, 21:09:23, 21:12:06.
[13] MT/-26 (Memorial, Volume II), page 277: 21:46:12.

international law. Until this point, Equatorial Guinea had not been part of the narrative. All of this changes from 12.37 UTC on 12 August 2022. This is the start of the 92 days. This case is about 92 days. It is from this moment, until the "*Heroic Idun*" and its crew were unlawfully rendered by Equatorial Guinea to Nigeria on 11 November 2022, that you will be called upon to assess the lawfulness of Equatorial Guinea's conduct and responsibility for what the Marshall Islands says are a manifest breach of UNCLOS, of other relevant and applicable conventions, and of relevant and applicable rules of customary international law by Equatorial Guinea.

Mr President, Members of the Chamber, if we go back to slide 4, you can see where the vessel was on 12 August, if you look in the left-hand quadrant, at the midpoint, you will see the date 12/8/2022, firmly within the EEZ of São Tomé and Príncipe. This is not disputed.

As I have just noted, pursuant to Article 58 of UNCLOS, high seas freedom of navigation rights under Article 87 apply in the exclusive economic zone of a State. And there is no credible suggestion that the "*Heroic Idun*" was not within its rights in the EEZ of São Tomé and Príncipe on 12 August when it was intercepted by the "*Capitan David*". For all relevant purposes, São Tomé not being in any way involved, the relevant legal regime that is applicable is the legal regime of the high seas. I note in this regard that the exclusive jurisdiction of the Marshall Islands, as flag State, applied pursuant to Article 58(2) and Article 92(1) of UNCLOS. Dr Paolo Busco will return to this issue in his submissions tomorrow.

Amongst the additional documents submitted by the Marshall Islands, under cover of the Agent's letter to the Special Chamber of 10 September 2025, was the VDR transcript of the VHF exchanges between the "*Capitan David*" and the "*Heroic Idun*" on 12 and 13 August. Mr President, Members of the Chamber, once again, this makes interesting reading as it is unimpeachable evidence that corroborates the accounts given of those events in the witness statements of the Master, of the Chief Officer and of other members of the crew, which are appended to the Marshall Islands' Memorial and Reply.[14] And if we go back to the slide detailing witness evidence, in addition to those of the Master and the Chief Officer, amongst the other Witness Statements that have a particular bearing on this issue, I note those from the Second Officer,[15] from the Junior Third Officer,[16] from the Third Engineer,[17] and from the Fourth Engineer.[18]

The events that unfolded on 12 and 13 August are addressed in paragraph 58 of the Marshall Islands' Memorial. I note simply at this stage that the "*Heroic Idun*" was intercepted by the "*Capitan David*" under threat of force. That interception, we say, was in breach of UNCLOS. No reason was given for the interception other than that it was "for investigation" and that the "*Capitan David*" stated that it had orders to escort the "*Heroic Idun*" to Malabo, the capital of Equatorial Guinea. To this effect, the "*Capitan David*" was joined by another Equatoguinean navy ship, the "*Wele Nzas*", with the two naval vessels positioning themselves to port and starboard of the "*Heroic Idun*", with guns trained on it, while escorting the tanker to what in fact was Luba anchorage, to the south-west of Malabo on Bioko Island. You will hear more about what took place at this point from Ms Grafton and from the testimony of the Master and the Chief Officer.

Mr President, Members of the Chamber, at no time during this period – from the interception of the "*Heroic Idun*" to its movement to Luba anchorage – at no time during this period, did the Equatoguinean authorities inform the Marshall Islands, in its capacity as flag

[14] Annex MT/-46 (Memorial, Volume III-A).
[15] Annex RMI/-6 (Memorial, Volume II).
[16] Annex RMI/-8 (Memorial, Volume II).
[17] Annex RMI/-12 (Memorial, Volume II).
[18] Annex RMI/-13 (Memorial, Volume II).

State, of these developments, as it was required to do under UNCLOS. Ms Penelope Nevill will address this issue in greater detail in her submissions.

Mr President, Members of the Chamber, although it is not applicable in the circumstances of this case, I note in passing that Article 97(3) of UNCLOS precludes the arrest or detention of a ship on the high seas, even as a measure of investigation, by any authorities other than those of the flag State. This provision is not engaged in this case, as it addresses the exercise of penal jurisdiction in matters of collision or any other incident of navigation, but I nonetheless reference it in passing as it reflects a fundamental principle that underpins the law of the sea, namely, that of flag State jurisdiction even in the most egregious of circumstances, such as may warrant the exercise of penal jurisdiction. No State may arrest or detain a ship on the high seas other than the flag State, even as a measure of investigation.

Dr Busco and Ms Nevill will address different elements of Equatorial Guinea's claim that it was exercising enforcement jurisdiction with respect to the repression of piracy. Ms Nevill will also address Equatorial Guinea's argument that it acted within the reasonable bounds of its right with respect to the protection and preservation of the marine environment.

Mr President, I note that we are coming up to the mid-morning break, perhaps I might continue just for another few minutes and break at 11.30.

I turn to address the detention of the vessel and the incarceration and mistreatment of the crew by Equatorial Guinea. On arrival at Luba anchorage, 15 of the 26 crew members, including the Master, were disembarked from the vessel and taken on shore under naval armed guard. The remaining 11 crew, including the Chief Officer, were detained on board, with armed guards stationed on the vessel. The treatment of the crew, both detained onshore and detained onboard, is addressed in paragraphs 46-55 and 63-65 of the Memorial as well as in the Witness Statements given by each of the 26 members of the crew members. And again, you can see these identified on slide 5. The poor conditions of the crew's detention onshore is documented in these Statements. You will hear more on this from Ms Grafton and from the testimony of our witnesses. This incarceration of the crew by Equatorial Guinea, both onshore and onboard, extended over 92 days, despite diplomatic efforts by the Marshall Islands to secure their release, as well as extensive efforts of others on the ground. The efforts are, once again, attested to in the Witness Statements by Mr Gallagher, which I mentioned in opening, also by Mr Stephen Askins, a London-based lawyer who was acting for the Owners and was in constant contact with the crew and others in Malabo,[19] and Mr Eivind Kulblik, a Fleet Director of OSM Maritime Group, the managers of the "*Heroic Idun*".[20]

In addition to the Witness Statements from the Master and the Chief Officer, amongst the other Witness Statements that have a particular bearing on the issue of the treatment of the crew, I note, for the record, those given by the Second Officer,[21] by the Deck Cadet,[22] by the Third Officer,[23] by the Fourth Engineer,[24] by the Electrician,[25] by the Pumpman,[26] by Able Seaman No. 1,[27] by Able Seaman No. 2,[28] by Ordinary Seaman No. 2,[29] and by Motorman No. 3.[30] I also draw your attention – we have this in your Core Bundle, I will come back to it

[19] Annex RMI/-3 (Memorial, Volume II); Annex RMI/-52 (Reply, Volume II).
[20] Annex RMI/-2 (Memorial, Volume II).
[21] Annex RMI/-6 (Memorial, Volume II).
[22] Annex RMI/-9 (Memorial, Volume II).
[23] Annex RMI/-10 (Memorial, Volume II).
[24] Annex RMI/-13 (Memorial, Volume II).
[25] Annex RMI/-14 (Memorial, Volume II).
[26] Annex RMI/-16 (Memorial, Volume II).
[27] Annex RMI/-17 (Memorial, Volume II).
[28] Annex RMI/-18 (Memorial, Volume II).
[29] Annex RMI/-21 (Memorial, Volume II).
[30] Annex RMI/-26 (Memorial, Volume II).

– to the Psychological Report of Dr Lesley Perman-Kerr, a highly experienced Consultant Counselling Psychologist, who attested to the severely traumatizing effects of the crew's detention and treatment.[31] I will come on to mention, amongst the traumatizing events identified by Dr Perman-Kerr, that one of the particularly traumatizing elements was the Equatoguinean decision not to release the crew at a point at which they had been led to believe that they would be released, but rather to render them to Nigeria. The treatment of the crew and the conditions of their detention in Equatorial Guinea is also addressed at length in the First Witness Statement of Mr Kulblik, which includes, amongst the annexes to his Witness Statement, contemporaneous correspondence about the treatment of the crew.[32]

The increasing risks to the vessel from unsafe manning are addressed in paragraphs 49, 66 and 67 of the Memorial, in the First Witness Statement of the Master,[33] in the Witness Statement from the Electrician,[34] in the First Witness Statement of Mr Kulblik,[35] and in the Expert Report of Mrs Voirrey Blount.[36]

Mr President, if this is convenient for the Special Chamber, that may be a convenient point to pause.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Sir Daniel.

I believe that this is indeed an appropriate time for the Special Chamber to withdraw for a break of 30 minutes. We will continue the hearing at 12 noon, 12 p.m.

SIR DANIEL: Mr President, I note that it is not just the Special Chamber that needs a break, it is also Counsel.

THE PRESIDENT OF THE SPECIAL CHAMBER: So the Chamber will now withdraw.

(Break)

THE PRESIDENT OF THE SPECIAL CHAMBER: I now invite Sir Daniel Bethlehem to continue his statement, but before you do, according to our calculations, you have about 25 minutes' additional time because of the time we took up this morning for the introductory part. So I think it would be a good idea for you to continue until 1.15 p.m. and if you need some further time, to continue after 3 p.m. this afternoon. Would that be in order?

SIR DANIEL: Thank you very much, Mr President. I suspect that I'm making reasonably good time, but I'm very grateful for the latitude to go a little bit beyond 1.00 p.m. We will try not to intrude too much into the lunch break, but I'm very grateful for your latitude. Thank you very much.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you. Please go ahead.

SIR DANIEL: Thank you. Mr President, Members of the Chamber, just before the break, I was in the midst of the narrative of the detention and incarceration of the crew and the detention of the vessel. Amongst the many egregious developments that occurred while the vessel and the crew were detained by Equatorial Guinea, the Memorial recounts the details, with

[31] Annex RMI/-38 (Memorial, Volume II). **(Core Bundle, Tab 4).**
[32] Annex RMI/-2 (Memorial, Volume II).
[33] Annex RMI/-2, paras. 99-101.
[34] Annex RMI/-14.
[35] Annex RMI/-2.
[36] Annex RMI/-37.

considerable supporting evidence, of the approximately EUR 2 million fine that was levied on or about 28 September by the Equatoguinean authorities, purportedly for the vessel's illegal entry into the jurisdictional waters of Equatorial Guinea, for sailing without flying any flag, and for sailing and remaining in the Equatoguinean EEZ without authorization. As you will see from the witness evidence, this fine was regarded by the Marshall Islands and all on our side as an extortion, a demand for a ransom payment by Equatorial Guinea on a promise to release the vessel and the crew. And you will hear more about this from the Master. It is also addressed in unambiguous terms in the witness evidence of Mr Askins,[37] as well as the witness evidence of Mr Kulblik.[38] There is, additionally, a great deal of contemporaneous correspondence referring to the promise of release to which Ms Grafton will refer you this afternoon. And Mr President, Members of the Chamber, I very much encourage you to review this evidence closely. The fact and extent of this EUR 2 million fine is a key component of the Marshallese reparations claim.

Although the fine was regarded as unjustified and as an extortion, given the increasingly precarious situation of both the crew and the vessel, the Owners of the vessel paid the EUR 2 million fine on 4 October. They received – I don't know whether the slides are working – a signed proof of payment the following day and the receipt of payment of this EUR 2 million is on the screen. Notwithstanding this payment, and the assurances that the vessel and the crew would be promptly released, this did not happen and they remained in detention in Equatorial Guinea.

Mr President, Members of the Chamber, around 4 November, when the crew and the vessel had already been in detention in Equatorial Guinea for 84 days, and a month after the EUR 2 million ransom payment had been made, the Marshall Islands, along with the crew and the Owner of the vessel, became aware that Equatorial Guinea decided that it was going to hand over the vessel and the crew to Nigeria after 84 days. Once again, no official communication was sent to the flag State. The vessel and the crew were at this point under armed restraint of Equatorial Guinea, they were either in Equatoguinean waters or on land, in Equatorial Guinea, they were unquestionably within Equatorial Guinea's jurisdiction and under its control.

Mr President, Members of the Chamber, I referred you, just before the break, to the Expert Psychological Report by Dr Lesley Perman-Kerr, which addressed the trauma suffered by the crew. We have on the screen – this is the first of two pages – we have on the screen now an extract of her conclusions. I would like to take a moment to read her assessment for you. And I read as follows, and there are four paragraphs, two here and two on the following slide. She says the following:

> Swift transition from "a normal routine trip" to hostile detention in EG was a shocking experience for the crew. They described their period of detention in EG, where 15 were held for a period in an on-shore detention facility with 11 remaining on board the vessel, as being extremely traumatic. They described being in constant fear regarding their physical safety at the hands of aggressive guards who, as the crew reported, were regularly intoxicated while in charge of weapons. Those of the crew on-shore in EG suffered further anxieties being in close proximity to the authorities with the threat of interrogation or worse and were forced to witness the torture of another detainee at the Malabo police station with the threat that they could be next. Additional traumatisation was caused by the insanitary conditions, harassment during the night and the negligent delay in attending to some significant health needs.

[37] Annex RMI/-3, paras. 24-29; Annex RMI/-52, para. 5.
[38] Annex RMI/-2, para. 42.

> For the men taken on-shore in EG, the reported poor and dangerous conditions and the intentional infliction of mental anguish, in my professional opinion meets the criteria for psychological torture defined by Hong et al (2023), [that’s an academic reference] as “the intentional infliction of suffering without resorting to direct physical violence, in what is known as ‘no touch’ torture.” The crew still on-board the vessel reported aggressive intimidation from the EG guards and were fearful regarding the fate of their fellow crew and whether they may too be taken to the on-shore detention facility.

Moving to the next slide:

> Once it was possible to speak to the crew, they reported the events experienced in EG and their symptoms, which clearly met APA [that’s the American Psychiatric Association] defining criteria for a post-trauma mental health condition. In my professional opinion, it is likely that most, if not all, of the crew could receive a formal diagnosis of PTSD [Post Traumatic Stress Disorder]. Furthermore, if it was triggered by events they experienced in EG as I believe to be the case, by the time their detention ended at the end of May 2023 their PTSD would be a chronic condition which is a longer lasting form of the disorder diagnosed when symptoms continue in excess of 3 months. The difference between the chronic and the acute condition is that sufferers are likely to have more severe ingrained core symptoms and experience depressive states and interpersonal difficulties.

And then the final paragraph 37:

> The overall length of time in detention (EG and Nigeria), the levels of fear and uncertainty when EG decided to hand over the vessel to Nigeria [that period from 4 November 2022, after the 84 days in detention, a month after there had been assurances of release, from that period – this is what she is addressing – “the levels of fear and uncertainty when EG decided to hand over the vessel to Nigeria”], the fear of a long prison sentence should the court decide to convict them, the lack of information regarding actions of OSM and their lawyers and their families’ wellbeing due to the severe restrictions on communication and the lack of psychological and pastoral care, all compounded the initial traumatic experience in EG and resulted from the vessel being handed over to Nigeria. In my professional opinion, these experiences have had extremely damaging psychological consequences for the men, and by implication for their families, the ramifications of which are likely to impact them in varying degrees for the rest of their lives in terms of personality changes and depression linked to loss of status, stigma, employment and relationship difficulties. In support, as concluded by Brooks and Greenberg (2021), “The psychological impact on those wrongfully accused appears to be vast, severe and long-lasting.”

Mr President, Members of the Chamber, this is chilling in its analysis and assessment.

Now, I turn briefly to Equatorial Guinea’s rendition of the vessel and crew to Nigeria. I will come on to address this only very briefly. Before doing so, I draw Dr Perman-Kerr’s assessment to your attention at this point in some detail because it addresses this critical moment of transition in the events with which we are concerned. As I said just a moment ago, after 84 days of detention and incarceration in Equatorial Guinea, the Equatoguinean authorities decided that they would render the vessel and the crew to Nigeria. Mr President, Members of the Chamber, I have been using the terms “rendition” and “render” as they signify an extra-judicial transfer from the jurisdiction of one State to the jurisdiction of another State

that engages the international legal responsibility of the transferring State, in other words, of Equatorial Guinea. It does not *per se* address the legal responsibility of the receiving State, here Nigeria. As I have said, the Marshall Islands makes no claim against Nigeria in these proceedings, and you are not called upon to assess the lawfulness of Nigeria's conduct.

Mr President, Members of the Chamber, I recall the recitation, Mr President, that you made, and the prayer for relief that was read by the Registrar at the start of this hearing, and your recollection that these proceedings were commenced in April 2023. When these proceedings were commenced in April 2023, the period of detention in Nigeria was not over. There is no claim against Nigeria in these proceedings. We are concerned with the 92 days. This is the 92-day case. At the point at which Equatorial Guinea came to decide to render the "*Heroic Idun*" and its crew to Nigeria, the vessel and its crew were within the jurisdiction and under the sovereign control of Equatorial Guinea. The decision to render the vessel and the crew was a sovereign Equatoguinean decision. And that sovereign decision has consequences. It must have consequences.

One of those consequences, though, was in respect of the escalated trauma of the crew. As Dr Perman-Kerr notes, the decision to render the vessel and crew to Nigeria elevated the levels of fear and uncertainty of the crew. The decision to hand over the vessel and the crew, and its subsequent implementation, especially against the backdrop of the payment of the fine and the assurances of release, compounded the crew's trauma. In Dr Perman-Kerr's assessment, what had been an acute traumatic experience, by early November 2022, became a chronic trauma. As she describes it, a chronic trauma is "a longer lasting form of the disorder diagnosed when symptoms continue in excess of 3 months [in which the] sufferers are likely to have more severe ingrained core symptoms and experience depressive states and interpersonal difficulties […] the ramifications of which are likely to impact them in varying degrees for the rest of their lives".

Mr President, Members of the Chamber, UNCLOS reflects and incorporates an acute sensitivity to the plight of detained ships and crew. Provisions addressing the release of detained vessels and crew are found in multiple places in the Convention. A detaining State may in certain circumstances require the payment of a bond. Other conditions may also apply. The principle, though, is that the holding hostage of a vessel and its crew is an anathema against which there must be safeguards. Whether it is Article 73(2) or Article 292 or some other provision of UNCLOS, the prompt release of a detained vessel and crew is expected, and, in the case of detained crew, a matter of humanitarian necessity.

Mr President, Members of the Chamber, let me hasten to add that I am not, by these observations, fighting the *Heroic Idun (No. 1)* case, the Prompt Release Application. I am simply completing the narrative of this case, of which you are now seized. As soon as humanly possible after it became apparent that Equatorial Guinea was intent on rendering the vessel and its crew to Nigeria, the Marshall Islands filed an Application for Prompt Release of the "*Heroic Idun*" and the crew. This was submitted on 9 November 2022.[39] And these dates now assume significant importance. It was submitted on 9 November 2022. At 16.07 p.m. local time on 10 November, the ITLOS Registrar informed the Marshall Islands that a certified copy of the Prompt Release Application had been transmitted to Equatorial Guinea. By an Order, Mr President, above your signature dated 11 November 2022, ITLOS fixed 24 November 2022 as the date for the opening of the hearing on the Marshall Islands' Prompt Release Application.[40]

Equatorial Guinea continued its rendition regardless. That same day – the same day, Mr President, that you signed that Order – on 11 November, in the face of the Prompt Release Application a few days earlier and the ITLOS Order, the vessel was forced to set sail for

[39] https://www.itlos.org/fileadmin/itlos/documents/cases/30/RMI_PromptRelease_09112022_Redacted.pdf.
[40] https://www.itlos.org/fileadmin/itlos/documents/cases/30/C30_Order_2022-2_11.11.2022.pdf.

Nigeria, with the Equatoguinean navy alongside, in Equatoguinean waters. The vessel and the crew having been transferred by Equatorial Guinea from its jurisdiction and control to the jurisdiction and control of Nigeria, Equatorial Guinea steps away from the narrative. On 12 November, the vessel and crew arrived at Bonny anchorage, off the Nigerian coast. They remained there for a further 197 days.

Mr President, Members of the Chamber, Equatorial Guinea seeks to wash its hands of any responsibility for the events from 12 August to 11 November 2022. It seeks to wash its hands of its responsibility for those 92 days. All it did, it says, was to cooperate with Nigeria. It says in these proceedings that the Special Chamber has no jurisdiction as Nigeria is an essential party but is absent from this Chamber. We are not, though, concerned in this case with Nigeria's conduct. But for some consequential issues to which we will come in due course, I conclude our narrative of the 92 days here, 92 days from the point Equatorial Guinea, through the "*Capitan David*", detained the "*Heroic Idun*" and its crew in the exclusive economic zone of São Tomé and Príncipe and escorted them to Luba anchorage. Equatorial Guinea is responsible for its conduct during these 92 days – for its breaches of UNCLOS and other relevant and applicable conventions; for its breaches of relevant and applicable customary international law. Equatorial Guinea, and Equatorial Guinea alone, is liable for the loss, damage and injury that occurred during those 92 days. Beyond that, we say that Equatorial Guinea is also liable for the loss, damage and injury that occurred thereafter that is directly traceable to Equatorial Guinea's unlawful actions. These aspects will be addressed by Ms Nevill and Dr Casas in their submissions on reparations on Wednesday morning.

Mr President, Members of the Chamber, I have taken you through the Marshall Islands' appreciation of the facts. It is an appreciation that is anchored in the evidence, firmly anchored in the evidence, both documentary and witness evidence. For its part, Equatorial Guinea seeks to explain its conduct by putting a spin on the facts, by saying, for example, that the 8 August incident with the "*Gongola*" is central and that it was all the fault of the "*Heroic Idun*" and by pleading that everything else that took place was at the request of or in support of Nigeria, for legitimate purposes and using reasonable means. Mr President, Members of the Chamber, Equatorial Guinea cannot, however, so readily slip the surly bonds of its own international responsibility. Insofar as Equatorial Guinea may have been acting in support and at the request of Nigeria, it did so in exercise of its own sovereign powers. It acted through its own State apparatus and organs of State. Apart from the interdiction on 12 August in the EEZ of São Tomé and Príncipe, Equatorial Guinea acted at all times within its own sovereign territory and in exercise of its own jurisdiction. It asserted control through its naval and other armed forces, as well as through other State agents and officials. And its violations of law are its violations of law alone.

The spin and the excuses and the explanations apart, it is significant that Equatorial Guinea does not contest the key facts that stand at the heart of the narrative that I have just recounted – of the interception and detention of the "*Heroic Idun*" on 12 and 13 August; of the separation of the crew into onshore and onboard detainees; of its detention of the vessel; of its incarceration of the crew under armed guard for 92 days. Equatorial Guinea does not contest the fact of the EUR 2 million payment. It does not contest the fact of the rendition of the vessel and crew to Nigeria on 11 November. While Equatorial Guinea takes issue with certain allegations of poor conditions and mistreatment, its evidence on this front is paltry, and you are well placed to form an assessment of where the balance of truth is to be found. But on the essence and sweep of the facts and the evidence, there is not and there cannot be any effective rebuttal.

Mr President, Members of the Chamber, that is all that I propose to say about the facts and the evidence. Ms Grafton will pick up the baton on these issues this afternoon. In the time that remains to me, I would like to turn to address issues of jurisdiction, admissibility and

applicable law. The issues and the arguments on these points have been fully canvassed in our Memorial and, in particular in our Reply in response to Equatorial Guinea's objections. And I commend, for your attention, Chapters 3 and 4 of our Memorial and Chapter 3 of our Reply.

So I turn to Equatorial Guinea's objections to jurisdiction and admissibility and its narrow reading of applicable law, which might be characterized as an applicable law objection.

Mr President, Members of the Chamber, your jurisdiction in this case is rooted in Article 288(1) of UNCLOS. The basis of jurisdiction under this provision is addressed in paragraphs 104-116 of the Marshall Island's Memorial and they do not require further elaboration from me at this point. But for three objections to jurisdiction and admissibility advanced by Equatorial Guinea, to which I will come momentarily, there is no wider contestation of this Chamber's jurisdiction.

Equatorial Guinea does, however, advance three objections going to jurisdiction and admissibility and, in this context, also contends for a narrow reading of the law applicable to these proceedings. Its arguments on applicable law overlap with the third of its objections to jurisdiction, and I will for this reason make some observations on the issue of applicable law as part of my submissions on jurisdiction. In doing so, I emphasize – I emphasize – that it is no part of my purpose to erode the distinction between jurisdiction and applicable law. On the contrary, it is Equatorial Guinea that is somewhat loose in its contentions. Issues arising in respect of the scope of the applicable law arise only once jurisdiction is established. But, just as Article 293(1) of UNCLOS cannot be used as a lever to widen jurisdiction, so too it cannot be used as a pre-emptive limitation on jurisdiction, as Equatorial Guinea appears to be intimating.

Equatorial Guinea's objections to jurisdiction are the following. It says, first, that, as Nigeria's rights and interests would form the essential subject-matter of the issues you are called upon to decide, Nigeria is an indispensable third party in the proceedings. As Nigeria is not before you in this case, however, Equatorial Guinea says that you are precluded from addressing the legality of Equatorial Guinea's conduct that is said to be contingent on Nigeria's conduct and on Nigeria's exercise of rights. This is the so-called *Monetary Gold* objection. In Equatorial Guinea's words and I quote from the Counter-Memorial:

> 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.[41]

Mr President, Members of the Chamber, I note that this objection is said to arise in respect of "several of the Marshall Islands' claims"[42]. It is not directed to the entirety of the Marshallese case.

I note also that this objection is made as an objection to jurisdiction and that, in the alternative, it is also made as an objection to admissibility, but on essentially identical grounds. In other words, Equatorial Guinea says that, if you, the Special Chamber, are not with Equatorial Guinea on its objection to *jurisdiction* on *Monetary Gold* grounds – in other words, that the Marshallese claims are not cognizable as a matter of law – you, the Special Chamber, should nonetheless, in exercise of your discretion, throw them out on *admissibility* grounds. The short response is that, while we acknowledge that you have the power to exclude claims on admissibility grounds that otherwise fall within your jurisdiction, there is no basis whatsoever for doing so in this case. Equatorial Guinea's case under this head must stand or fall as an objection to jurisdiction. It cannot survive as an objection to admissibility.

[41] Counter-Memorial, para. 106.
[42] Counter-Memorial, paras. 104 and 105 *et seq*.

The second objection is characterized as one of admissibility, formally so, namely, that "the Marshall Islands failed to exhaust local remedies"[43]. This objection is also addressed to "several of the claims brought by the Marshall Islands", not to the entirety of the Marshallese case. The objection relates, in Equatorial Guinea's words, to "preponderantly to the treatment of the crew members of the Vessel"[44]. Mr President, Members of the Chamber, in advancing this objection, Equatorial Guinea also implies an applicable law objection, although it does not state this in quite these terms, and its applicable law objection is to the effect that the Marshall Islands' contentions on considerations of humanity and reasonableness are based on international human rights instruments that are, in Equatorial Guinea's words, "plainly not related to the rights of the Marshall Islands under UNCLOS". In the alternative, Equatorial Guinea says the claims in question concerning the treatment of the crew "plainly … *preponderantly* relate to allegations concerning treatment accorded by Equatorial Guinea to the foreign nationals of the *Heroic Idun* crew", and that 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."[45]

Mr President, Members of the Chamber, the third objection by Equatorial Guinea is that "the claims of the Marshall Islands regarding alleged breaches of treaties other than UNCLOS necessarily fall outside the Chamber's jurisdiction".[46] This objection as well relates to "several claims" by the Marshall Islands, not to the entirety of its case. The objection is focused on the Marshallese claims under SOLAS and its Protocols, under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers at Sea (the STCW Convention), under the Convention on the International Regulations for Preventing Collisions at Sea (the COLREGS), and on the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights (the ICCPR).[47]

With regard to this objection, it warrants comment that, while Equatorial Guinea objects to the Chamber's jurisdiction in respect of these "other rules of international law", Equatorial Guinea itself seeks to rely heavily on the Yaoundé Code, an instrument that plainly falls outside the scope of the "other rules" *renvoi* in UNCLOS. This issue is addressed in paragraphs 93-97 of the Marshall Islands' Reply and Ms Nevill will address this more fully in her submissions tomorrow.

Mr President, Members of the Chamber, before I get to the detail of our response, let me give you the Marshall Islands' response in overview to these three objections to jurisdiction and admissibility.

Our response, in overview, can be broadly stated as follows.

On the *Monetary Gold* objection, our case is simple – the indispensable third-party principle does not apply. There is nothing in the Marshallese case that calls for you to address and assess the lawfulness or otherwise of Nigeria's conduct. No claim is made in these proceedings, either directly or indirectly, expressly or impliedly, against Nigeria. What is characterized by Equatorial Guinea as an objection to jurisdiction is in fact simply a proxy for its defence on the merits to the Marshall Islands' claims, that Equatorial Guinea acted lawfully, they say, under UNCLOS because it acted purportedly in support of Nigeria. Mr President, Members of the Chamber, this is a merits defence, it is not an objection to jurisdiction or admissibility, and it needs to be addressed as a merits defence.[48] If a person purports to act in assistance of another, but does so manifestly unlawfully, it cannot escape the accusations

[43] Counter-Memorial, para. 104.
[44] Counter-Memorial, para. 149.
[45] Counter-Memorial, para. 150.
[46] Counter-Memorial, paras. 104 and 156 *et seq.*
[47] Counter-Memorial, para. 158.
[48] Reply, para. 70.

levelled against it by the plea that the person who had requested assistance is not before the court. Equatorial Guinea is responsible for its own conduct during the 92 days.

On the exhaustion of local remedies objection, our response is twofold, in broad overview. First, there was no requirement to exhaust local remedies. The claims in issue, and the rights that require vindication in these proceedings, are the claims and the rights of the Marshall Islands. This is not a claim of diplomatic protection. I will come onto this in more detail momentarily. The Marshall Islands is not asserting the claims of the crew or of the Owners of the vessel. It is asserting is own claims, rooted in its rights and duties as flag State. It is those rights, the Marshallese rights, that were violated by Equatorial Guinea. There were, of course, serious repercussions for the crew from Equatorial Guinea's conduct. But the rights in issue, and the reparations due, are the rights of the Marshall Islands and the reparations warranted in respect of the breach of the Marshallese rights. Insofar as the Marshall Islands has advanced its reparation claim, in part by reference to quantifiable loss, damage and injury suffered by members of the crew, this is an exercise of good faith and of discipline, to give this Chamber assurance that the Marshall Islands is not simply plucking figures from the air. But it is the rights of the Marshall Islands – based on damage suffered by the *unit of the vessel*, a phrase that is long recognized by ITLOS – it is the rights of the Marshall Islands based on damage suffered by the unit of the vessel that are being pursued in this case, not damages claims by individual members of the crew through claims in respect of which the Marshall Islands is simply a litigation proxy. You have before you the Attorney General of the Marshall Islands and its senior officials from the Registry. This is a claim that is put before you by the Marshall Islands.

The second element of our response is that the claims to which Equatorial Guinea objects are rooted in UNCLOS and in its express *renvoi* to other rules of international law. Ms Grafton will address this aspect more fully tomorrow. The short point is that Equatorial Guinea is in reality advancing an applicable law objection under the guise of an objection to admissibility. I will come to the applicable law shortly. For the moment, the point is straightforward. Article 295 of UNCLOS, which will be very familiar to you, addressing exhaustion of local remedies, does not apply on its terms. There was no requirement under international law, in the circumstances of this case, to exhaust local remedies. And the claims that are advanced in these proceedings are claims that rest squarely on UNCLOS and on its express *renvoi* to other rules of international law not incompatible with the Convention.

Turning to the third objection, the non-UNCLOS Rules objection, to give you our broad overview response, the Marshall Islands, in response, relies on the express terms of, amongst other provisions, Article 2(3), Article 56(2), Article 58(2), Article 87(1), Article 87(2) and Article 297(1)(c) of UNCLOS. By reference to SOLAS, the STCW Convention, the COLREGS, the African Charter and the ICCPR, the Marshall Islands is not purporting to enlarge the Chamber's jurisdiction beyond UNCLOS. It is simply relying on instruments to which UNCLOS contains a *renvoi* and permits recourse.

Moreover, Mr President, Members of the Chamber, the Marshall Islands is not requesting from the Chamber any finding that Equatorial Guinea is in breach of the African Charter or the ICCPR. I'll take you to this in just a moment. What the Marshall Islands is requesting is findings in respect of the alleged breaches of UNCLOS. The same applies to the Marshall Islands' claims under SOLAS, the STCW Convention and the COLREGS, although, with respect to these rules, these three conventions – SOLAS, STCW and the COLREGS – with respect to these rules alone, the Marshall Islands is additionally requesting a finding of a breach of those rules directly, and we do so having regard to the terms of Article 297(1)(c) of UNCLOS, as interpreted in the jurisprudence, and I will come back to this.

Mr President, Members of the Chamber, I come to some observations on the Marshall Islands' requests for relief, before I elaborate on our response to the objections a little more

fully. The Registrar this morning read the very lengthy paragraphs 333 and 334 of the Marshallese Reply, and I am grateful to the Special Chamber that these were read into the record as is appropriate. The requests therein are many and detailed. I do not propose to take you through them line by line, although you will of course have to come to the detail in due course for purposes of your judgment. I would, though, like to familiarize you with the sweep of what is set out therein and to use the brief review of what is said there to address a number of broader issues. The detail of each element of what the Marshall Islands is requesting will be addressed over the coming two days in the submissions by my colleagues.

We have on the screen and on two following pages – there are three slides altogether, slides 10 through to 12. We have on the screen now the first of three pages that reproduce the Marshall Islands' final submissions from its Reply, paragraphs 333 and 334. Mr President, Members of the Chamber, and to the honourable Registrar, as we look over this text, I note – as no doubt the Registrar will have identified when she came to read out the final submissions – that a typographical gremlin crept into the printed text of the Reply in the paragraphs as originally transmitted, with the sub-paragraph numbering having gone awry. What we have endeavoured to do on the slides that follow is to correct the sub-paragraph numbering but otherwise this is a completely faithful reproduction of the text of the Final Submissions at the close of the Marshallese Reply.

So if we have a look at this, paragraph 333(a) addresses Equatorial Guinea's interception and diversion of the "*Heroic Idun*", in breach of UNCLOS Articles 87(1), 90 and 92. That is sub-paragraph (a) of paragraph 333. If you then move on to sub-paragraphs (b) and (c) of paragraph 333, these address consequential breaches arising from the same conduct. So paragraphs (a), (b) and (c) are all linked. These are the headline claims that have been advanced by the Marshall Islands, and they concern the breach of the Marshall Islands' freedom of navigation rights under UNCLOS.

If we then move to paragraph 333(d), this addresses Equatoguinean law and what the Marshall Islands contends is an exercise of prescriptive jurisdiction by Equatorial Guinea, in a manner that is contrary to UNCLOS. And we refer here to Article 56(1), 58, 87, 89, 92 and 300 of UNCLOS. The allegation here is that Equatorial Guinea, through its legislation, established a legislative foundation for the breach of the Marshall Islands' exclusive flag State jurisdiction. So we have there 333(a), (b) and (c), and then paragraph (d), which address the Marshallese rights by reference to exclusive prescriptive jurisdiction and freedom of navigation.

We then come to the requests for relief that address Equatorial Guinea's detention of the vessel and treatment of the crew. That is on the right-hand side of the page. Paragraph 333(e) alleges a failure by Equatorial Guinea to have due regard – that is language to which we will return and language with which you are familiar – to the Marshall Islands' rights, contrary to Article 56(2) of UNCLOS. There follows thereafter, in Paragraph 333(f), the rather lengthy *chapeau* and then the four sub-paragraphs that follow. We have there a request for a finding that Equatorial Guinea, by failing to respect and by violating the human rights of the crew by reference to the African Charter, the ICCPR, customary international law, and UN Standard Minimum Rules for the Treatment of Prisoners "acted contrary to rules and principles of international law not incompatible with the Convention to which the Chamber may have recourse under Article 293". The request that is made of the Chamber is for findings of a breach of Article 87(1), 87(2), 2(3) 58(2) and 56(2) of UNCLOS.

Mr President, Members of the Chamber, I will come back, very briefly, to some other aspects of the prayer for relief, the Final Submissions, in just a moment, but I would like to interpolate here with some brief submissions going to Equatorial Guinea's non-UNCLOS Rules and applicable law argument. So I pause in my review of the Final Submissions. What is dubbed as the "gateway" provisions jurisdictional argument advanced by Equatorial Guinea, and perhaps it is more appropriately described, on our side as well, as the "other rules of

international law" jurisdictional argument, these will be addressed by Dr Casas, Ms Grafton and Ms Nevill in their submissions going to the application of specific provisions of UNCLOS that contain an express *renvoi* to "other rules of international law", and how these operate for jurisdictional purposes. And I don't purport to tread onto their turf. This issue, however, has been bound up in Equatorial Guinea's pleadings with an implied applicable law objection, namely, that the rules and standards relied upon by the Marshall Islands "are plainly not related to the rights of the Marshall Islands under UNCLOS"[49]. Citing Article 293(1) of the Convention, with which you will be very familiar but we will put it on the screen in just a moment, which addresses applicable law, Equatorial Guinea goes on to say that the Marshall Islands "repeatedly invites the Chamber to find Equatorial Guinea's conduct incompatible with treaties external to UNCLOS, such as by application of so-called '*gateway'* provisions". It continues, and I quote from Equatorial Guinea's Counter-Memorial, Paragraph 174. They say:

> 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.[50]

Mr President, Members of the Chamber, Equatorial Guinea here cites to the Award on the Merits in *Arctic Sunrise* in which the Annex VII tribunal held that it could have regard, and I am quoting here from the *Arctic Sunrise* award, "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." That is the language from the *Arctic Sunrise* tribunal: whether it was reasonable and proportionate. This, the *Arctic Sunrise* tribunal held "would be to interpret the relevant Convention provisions by reference to relevant context". The *Arctic Sunrise* tribunal went on to distinguish this approach from one which required a determination of whether there has been a breach of the ICCPR as such, noting that the ICCPR has its own enforcement regime and that it was not for the *Arctic Sunrise* tribunal to act as a substitute for that enforcement regime.[51]

Mr President, Members of the Chamber, the Marshall Islands is entirely content to stand on this formulation by the *Arctic Sunrise* tribunal. We do not come before you asking you to determine a breach of the African Charter or of the ICCPR or of any other international instrument that safeguards minimal human rights. What the Marshall Islands is requesting is that you have regard to general international law in order to determine whether Equatorial Guinea's actions in detaining the crew of the "*Heroic Idun*", in incarcerating them for 92 days, in mistreating them, all in what Equatorial Guinea contends was *bona fide* assistance in response to Nigeria, whether this was, in the words of the *Arctic Sunrise* tribunal, "reasonable and proportionate", having regard to the rights and duties of other States and basic human rights norms. You are not asked to find a breach of any instrument other than UNCLOS with respect to these human rights concerns. You are only asked to determine whether, by reference to the conduct in question and to general international law, including rules of customary international

[49] Counter-Memorial, para. 150.
[50] Counter-Memorial, para. 174.
[51] *Arctic Sunrise Arbitration*, Award of 14 August 2015 (Merits), para. 197. **(Core Bundle, Tab 5)** (https://pcacases.com/web/sendAttach/1438).

law and general principles relating to human rights, Equatorial Guinea acted in breach of the Marshall Islands' rights under international law and under UNCLOS, including Article 87(1), 87(2) and 2(3) of UNCLOS. Dr Casas and Ms Grafton will address these issues in greater detail in their submissions tomorrow.

Mr President, Members of the Chamber, I make one further point on Article 293 in the event that this Chamber, as a Chamber of ITLOS, rather than as an *ad hoc* Annex VII tribunal, considers that it wishes to revisit the *Arctic Sunrise* formulation, either to lend its imprimatur to it or to vary it. And we have here on the screen, just so that the language is absolutely precisely clear, the text of Article 293(1).

And I of course emphasize that Article 293(1) is not a jurisdictional provision. It is an applicable law provision. It states the applicable law in circumstances in which a court or tribunal is seized of a matter, once jurisdiction is established. And this is clear from the opening words, "A court or tribunal having jurisdiction under this section", in other words, jurisdiction having already been established. Article 293(1) is both injunctive in its terms and goes wider than stating simply a rule of interpretation. And it is, for example, to be contrasted with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, with which we will all be very familiar and I don't propose to put it on the screen, which mandates, for purposes of interpretation, reference to "relevant rules of international law applicable in the relations between the parties."

In contrast, leaving this slide on the screen, Article 293(1) of UNCLOS says in express terms that a court or tribunal having jurisdiction "shall apply this Convention and other rules of international law not incompatible with this Convention." The formulation is mandatory, and it requires the *application* of the other rules of international law that are not incompatible with the Convention. Application goes beyond interpretation. It requires the other rules of international law to be applied. The Marshall Islands does not need more than was given by the *Arctic Sunrise* Annex VII tribunal, but that tribunal's formulation does not fully comport with the express terms of Article 293(1) and their express injunction to apply other relevant and compatible rules of international law.

To be clear, Mr President, Members of the Chamber, the Marshall Islands is not saying that, through the medium of an applicable law provision, the jurisdiction of this Chamber to address breaches of other instruments of international law widens. We are not saying that, and I underline that point. The limits on your jurisdiction remain, but you are required to, you are mandated to, you shall apply, alongside the Convention, other rules of international law not incompatible with the Convention.

Mr President, Members of the Chamber, before we adjourn for the lunch break, I have just got some brief further submissions. I will not detain us much beyond the latitude, Mr President, that you have given. But I would like just to return briefly to the Marshall Islands' request for relief, and go back to slide 11 here. We come here – at the top of the page on the left-hand side, in paragraph 333(g) of the Marshall Islands' Reply – to the Marshall Islands' requests in respect of SOLAS – you can see there – the STCW Convention and the COLREGS, as well as in respect of the *renvoi* provisions of UNCLOS that let these instruments in. Here, there is a request by the Marshall Islands that you find a breach of what is described in Article 297(1)(c) of UNCLOS as "international rules and standards" for the protection and preservation of the marine environment which are applicable to the coastal State. Mr President, Members of the Chamber, I do not need to take you to the express terms of Article 297(1)(c) but I simply note that it has been accepted, notably by the *Chagos Marine Protected Area* tribunal, and in referencing the *Chagos* tribunal, let me say on this point that it has been accepted by the tribunal unanimously. There were of course two dissents in respective aspects of the *Chagos* tribunal's findings but on this particular point, on 297(1)(c), it was accepted unanimously that, in the words of the *Chagos* tribunal, and I am quoting here:

> Article 297(1) expands the jurisdiction of a Tribunal over the enumerated cases beyond that which would follow from the application of Article 288(1) alone. In addition to describing disputes relating to the interpretation and application of the Convention itself, each of the three specified cases in Article 297(1) includes a *renvoi* to sources of law beyond the Convention itself. [And the *Chagos* tribunal then goes on to say:]
> Article 297(1) thus expressly expands the Tribunal's jurisdiction to certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself and ensures that such disputes will not be dismissed as being insufficiently related to the interpretation and application of the Convention.[52]

That is from the *Chagos* tribunal. And the *Chagos* tribunal goes on to note that "Article 297(1)(c) also expressly refers to 'rules and standards … established by this Convention", and that it is not limited in this *renvoi*.

Mr President, Members of the Chamber, and I should say, Mr President, I have just got another five minutes or so before the break, Article 297(1)(c) goes to Equatorial Guinea's non-UNCLOS Rules objection to jurisdiction. Pursuant to this provision, you are afforded jurisdiction in respect of the Marshall Islands' claims in respect of SOLAS, the STCW Convention, and the COLREGS. And, beyond issues of jurisdiction, by reference to Article 293(1), and its injunctive prescription about applying "other rules of international law" that are not incompatible with the Convention, as well as other provisions to similar effect, in exercise of your jurisdiction you are mandated to "apply" such other rules. Ms Nevill will develop this argument further in her submissions tomorrow.

Mr President, Members of the Chamber, in the interests of time, I do not propose to take you through the remaining paragraphs of the request for relief – they are on the slides and they are of course in the pleadings. I note simply that each of those requests addresses conduct by Equatorial Guinea, and by Equatorial Guinea alone, that took place in the 92 days in the period 12 August to 11 November 2022. Nigeria is nowhere referred to other than in the context of Equatorial Guinea's transfer of the "*Heroic Idun*" and the crew on 11 November. The *petita* of the Marshall Islands' claim seeks no finding, no declaration, no award against Nigeria. And it is clear that the breaches by Equatorial Guinea that are alleged in the *petita* are breaches arising from the individual sovereign conduct of Equatorial Guinea, through its State apparatus, through its officials, and through its agents, all carried out within the 92 days from 12 August to 11 November 2022.

Mr President, Members of the Chamber, and this is the point, Mr President, at which I will stop. It is just a brief bridge to what is to come in the afternoon. This brings me to the meat of our response to Equatorial Guinea's objections to jurisdiction and admissibility, and I will get to these immediately after the break. Mr President, Members of the Chamber, just to indicate how we propose to proceed after the break. I will come back immediately after the break at 3 p.m.– I have some succinct submissions, so it is not going to take me terribly long – and address you on the objections to jurisdiction and admissibility. Ms Grafton will then make some initial submissions on fact, and she will then call the Chief Officer to give his testimony. We expect and hope that his testimony, based on the estimates that have been given, and allowing for some latitude, will be concluded by the end of the day today. Ms Grafton may then have – depending on time availability – some further brief submissions to make and we propose to call the Master first thing tomorrow morning so that there can be an uninterrupted

[52] *Chagos Marine Protected Area Arbitration*, Award of 18 March 2015, para. 316; also para. 321. **(Core Bundle, Tab 6)**. (https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf).

session of evidence on the part of the Master without any issues of sequestration overnight. So, Mr President, with gratitude to you for allowing, I think, two of our 25 minutes to be used up, now just going beyond 1 p.m. That would be a very suitable place to adjourn if that is convenient to the Special Chamber and we will be ready to resume again at 3 p.m.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Sir Daniel.

So we will then continue at 3.00 p.m. You will continue with your own statement, followed by that of Ms Grafton and then the witness examination thereafter. This brings us to the end of this morning’s session. The hearing will be resumed at 3 p.m. The sitting is now closed.

(The sitting closed at 1 p.m.)

PUBLIC SITTING HELD ON 6 OCTOBER 2025, 3 P.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 6 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 6 OCTOBRE 2025, 15 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l'audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l'audience du 6 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber will now continue its hearing in *The M/T "Heroic Idun" (No. 2) Case*.

I give the floor to Sir Daniel Bethlehem to continue his statement.

First round: Marshall Islands (continued)

STATEMENT OF SIR DANIEL (continued)
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/2/Rev.1, p. 1–7]

Thank you, Mr President, Members of the Chamber. Just before the adjournment, I had taken you through some key aspects of the prayer for relief, and also addressed some aspects of the Marshall Islands’ response to the objections raised by Equatorial Guinea, both the broad overarching response in respect to the three objections and also our response on the issue of applicable law.

Mr President, Members of the Chamber, I have just two elements that I would like to address now, and I am going to be relatively succinct. The first is to speak a little bit more about the *Monetary Gold* objection and the second is to speak a little bit about the exhaustion of local remedies objection.

So the first objection to both jurisdiction and admissibility, but on the basis of the same allegations, that Equatorial Guinea advances is the *Monetary Gold* indispensable third-party objection.

The Parties largely agree on the content of the principle and the jurisprudence that addresses it. We disagree, though, quite fundamentally, on the application of the principle. Equatorial Guinea seeks to elevate an almost invariably rejected, fringe principle of jurisdiction to centre stage for purposes of evading having to answer for its conduct.

The Marshall Islands says that you must see the principle, the *Monetary Gold* principle, for what it is – a tightly constrained limitation on the exercise of a jurisdiction that would otherwise be manifest – because the issues of which the court or tribunal is seized cannot be addressed without passing on the legality of the conduct of a party that is not before the court or tribunal.

The *Monetary Gold* principle is a principle that has as its sole purpose the protection of the rights of the absent party. Its purpose is not to shield from scrutiny the conduct of the respondent’s stake that is present in the proceedings, and this is a fundamental point that needs to be borne in mind.

Its purpose is to protect the rights of the absent party, not to shield from scrutiny the conduct of a respondent that is present in the proceedings.

It is an acknowledgment of the reach of jurisdiction based on consent. It is an objection, Members of the Chamber, it is an objection that has never before been upheld by ITLOS or by an Annex VII tribunal. It is not a “get out of jail free” card that can be played to evade scrutiny and responsibility for acts undertaken in the exercise of sovereign authority.

Mr President, Members of the Chamber, I will come on to Equatorial Guinea’s arguments in just a moment. Before I get there, let me identify the largely agreed-upon core of the *Monetary Gold* principle.

This was succinctly stated by ITLOS in its 2016 Preliminary Objections judgment in the *“Norstar”* case between Panama and Italy. Rejecting Italy’s argument that Spain, which was not before the Tribunal, was an indispensable third party, ITLOS described the *Monetary Gold* principle as follows, and I quote:

> … 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.[1]

Mr President, Members of the Chamber, to this statement of the principle expressed in *"Norstar"*, I add that of the International Court of Justice in its Judgment in *Certain Phosphate Lands in Nauru*, between Nauru and Australia, in which the ICJ rejected Australia's *Monetary Gold* contention by reference to the interests of New Zealand and the United Kingdom, who were not before the court.

And in rejecting Australia's claim, the court observed that, and I quote from the ICJ judgment, that

> the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, [which was] the only object of Nauru's claim.[2]

Mr President, Members of the Chamber, I pause to draw the threads of these elements together. Based on settled jurisprudence, including of this Tribunal, the *Monetary Gold* principle operates in circumstances, and only in circumstances, in which the vital issue in contention in the case comprising the legal interest of a third State that forms the very subject matter of the dispute must be decided by the court or tribunal as a prerequisite for the determination in that case. These are the only circumstances in which the principle would conceivably apply.

And I use the word "conceivably", "conceivably apply", as there is jurisprudential support for a narrowing of the principle still further, and I will come to this momentarily.

Mr President, Members of the Chamber, Equatorial Guinea cannot show any vital issue comprising a legal interest of Nigeria that forms the very subject matter of the dispute of which you are seized that you would be called upon to decide as a prerequisite to your determination of the issues between the Marshall Islands and Equatorial Guinea.

The Nigerian context of this case, before and after the 92 days of Equatoguinean violations of the Marshall Islands' UNCLOS rights, is just that: it is context.

Nigeria's international responsibility is not in issue in these proceedings. Its legal rights do not stand as the very subject matter of the dispute. You are not asked to, nor need to, address the lawfulness of Nigeria's conduct.

Nigeria's actions, however they may be characterized, do not, and cannot, excuse Equatorial Guinea's violations of the law.

In its written submissions, Equatorial Guinea, with block quotes from the ICJ's 1954 *Monetary Gold* judgment, endeavours to create an impression that the *Monetary Gold* principle has a long and illustrious pedigree of success. It does not.

While it is much advanced by respondents, it is virtually never upheld. Indeed, for all the detailed footnoted references in Equatorial Guinea's pleadings, it identifies only three cases in which the principle has been applied; and let me address those three cases briefly.

The first of these is the *Monetary Gold* case of 1954, a case which, in proceedings between the United Kingdom and Italy, was concerned with a question of whether Albania could be deprived of its national holding of gold, which had been looted by the Nazis, on the

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[1] *M/V "Norstar"*, Judgment of 4 November 2016 (Preliminary Objections), para. 172. (Core Bundle, Tab 7) (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/published/C25_PO_Judgment_20161104.pdf)

[2] *Case Concerning Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Judgment of 26 June 1992 (Preliminary Objections), para. 55. **(Core Bundle, Tab 8)** (https://icj-cij.org/sites/default/files/case-related/80/080-19920626-JUD-01-00-EN.pdf)

alleged ground that Albania had committed an internationally wrongful act. Italy sought the gold on the basis that Albania had committed an internationally wrongful act.

Unsurprisingly, the Court took the view that, to proceed with the case would require it to pass on the legality of Albania’s alleged conduct in its absence. Albania’s rights were at the very core of the case.

The second case in which the principle was applied was the 1995 case between Portugal and Australia concerning the legality of a maritime zone of cooperation that had been agreed between Australia and Indonesia, in what Portugal said was a violation of its administering power status in respect of what was then pre-independence East Timor, now Timor-Leste.

Indonesia was not before the court in the proceedings. The legality of Indonesia’s conduct was expressly and directly and centrally an issue in the proceedings. Unsurprisingly, the Court declined jurisdiction.

Mr President, Members of the Chamber, we then come to the third case to uphold the *Monetary Gold* principle, which Equatorial Guinea references in a footnote, but studiously does not expressly rely upon, and this is the 2001 arbitral award in the case of *Larsen* v. *The Hawaiian Kingdom*.

This was a claim that alleged that the Government of the Hawaiian Kingdom was in violation of an 1849 Treaty of Friendship, Commerce and Navigation with the United States, by allowing the unlawful imposition of U.S. municipal law over the claimant, a Hawaiian subject.

The case, in other words, was a challenge to U.S. sovereignty over Hawaii through the device of a claim against a respondent whose status was, at the very least, uncertain and was certainly contestable: the Hawaiian Kingdom.

In the circumstances of the case, the tribunal raised the question *proprio motu* of whether the United States was a necessary party to the dispute.

In its Award, applying the *Monetary Gold* principle, the tribunal records that the respondent – in other words, the Hawaiian Kingdom – the respondent endeavoured to persuade the tribunal that the *Monetary Gold* test was unsatisfactory and that it ought to be reformulated to enable the case to go ahead.

So we had the bizarre circumstance of the respondent, usually the party advancing the *Monetary Gold* principle, here trying to urge on the tribunal to enlarge the *Monetary Gold* principle to enable the case to go ahead.

The case was, in other words, a collusive action in which both parties wanted the tribunal to opine on the merits in terms that they hoped would be to the detriment of the absent third party, the United States. The Tribunal, composed of James Crawford, Christopher Greenwood and Gavin Griffiths, declined to do so, dismissing the case, *inter alia*, on *Monetary Gold* grounds.

Interestingly, Mr President, Members of the Chamber, and this is perhaps the reason why Equatorial Guinea buries reference to the case in a footnote, which elides relevant detail, interestingly, the tribunal in that case noted that, even in the face of an absent third party whose interests constituted the very subject matter of the dispute, the *Monetary Gold* principle would likely not apply in circumstances in which the anticipated findings involving the absent third party would be “merely a finding of fact, not entailing or requiring any legal assessment or qualification of that party’s conduct or legal position.”[3]

So the tribunal in *Larsen*, in fact, identified a further limitation on the application of a *Monetary Gold* principle.

Mr President, Members of the Chamber, even were you to be persuaded of Equatorial Guinea’s *Monetary Gold* argument, *quod non*, which we say you should not be so persuaded,

[3] *Larsen v. Hawaiian Kingdom*, para. 11.24. (https://pca-cpa.org/en/cases/35/)

the exception to it identified by this pre-eminent *Larsen* tribunal would sink Equatorial Guinea's case.

Not only does the case before you not put Nigeria's responsibility in issue, not only do Nigeria's legal rights not stand as the very subject matter of the dispute, not only are you not asked to address the lawfulness of Nigeria's conduct, nor need to do so, but, even were you to consider that you may be required in some manner to address the events involving Nigeria, and even beyond this, to make certain findings, the *Monetary Gold* principle would not preclude you from making findings of fact that do not entail or require any legal assessment or qualification of Nigeria's conduct or legal position.

Mr President, Members of the Chamber, I come to the last part of my submissions, which is Equatorial Guinea's exhaustion of local remedies objection, and I note, in doing so, that the applicable law component of this has already been addressed.

The objection rests on Article 295 of UNCLOS. This provision does not, however, require local remedies to be exhausted. It says simply that local remedies must be exhausted "where this is required by international law".

Citing the *Virginia G* judgment, Equatorial Guinea says 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.[4] What is now referred to as the "preponderant test" is widely accepted, including I note, Mr President, by the six joint dissenters in their Joint Dissenting Decision on this issue in the *Virginia G* case. I think the word used was that it was "unremarkable" or "unexceptional".

Applying the preponderant test, the *Virginia G* tribunal undertook a holistic review of the rights said to have been violated and concluded that "the principal rights" said to have been violated were rights that belonged to Panama, the applicant State, and thus amounts to a direct injury to Panama. As such, there was no requirement to exhaust local remedies.[5]

Mr President, Members of the Chamber, the *Virginia G* judgment was split on this issue by 14 votes to 9. The joint dissent by six of the nine who voted against the decision accepted the majority statement of the preponderant test as, and the word used in the joint dissent was "unexceptionable", but took issue with the majority's application of the test to the facts.

Whereas the majority had looked to what they described as the "principal rights" said to have been violated, the minority, citing the International Court of Justice in the *Electtronica Sicula* case, concluded that the matter which coloured and pervaded the Panamanian claim as a whole, was the alleged damage to the owner of the *M/V Virginia G*; the alleged damage to the owner of the *M/V Virginia G*. Applying what the minority described as the "but for" test, which asks whether the claim would have been brought were it not for the claim on behalf of the owner – and I pause here to emphasize – the owner was a Panamanian company. So asking whether the claim would have been brought were it not for the claim on behalf of the owner, the Panamanian company, the minority concluded that it would not have been brought. They concluded, therefore, that the claim was, thus, preponderantly a claim for diplomatic protection.

Mr President, Members of the Chamber, although the majority and the minority diverged in the application of the test of the facts, there was agreement that the claim as a whole had to be assessed, and that this required an evaluation of where the preponderance lay vis-à-vis the claims of direct injury to the claimant State and the claims "on behalf of the injured national". The majority adopted a "principal rights" claimed test. The minority adopted a "but for" test.

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[4] Counter-Memorial, para. 148, footnote.

[5] *M/V "Virginia G"*, Judgment of 14 April 2014, ¶¶ 157–158. (Core Bundle, Tab 9) (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment_published/C19_judgment_140414.pdf)

Mr President, Members of the Chamber, in the present case, the Marshall Islands is content to rest on either test. A review of the claims advanced by the Marshall Islands in this case will certainly show an acute concern for the loss, damage and injury to the crew of the *"Heroic Idun*".

It will also show a concern for the loss, damage and injury to the vessel.

But the overwhelming preponderance of the rights that the Marshall Islands claims to have been violated, whether preponderance is assessed in numerical terms or in terms of importance, the overwhelming preponderance of the rights that the Marshall Islands claims to have been violated are the rights of the Marshall Islands as the flag State.

Mr President, Members of the Chamber, making my submissions in these proceedings in the name of the Marshall Islands, I do so under the control of the Attorney General of the Marshall Islands in these proceedings and of the Agent in these proceedings. In response to the question of whether the Marshall Islands would have brought a claim "but for" the loss, damage and injury to the vessel and the crew, I can say here, formally and unambiguously and on instructions, absolutely; a case would certainly have been brought. As a responsible flag State, highly attentive to both its rights and its duties, the assertion and vindication of the Marshall Islands' flag State rights are paramount.

Mr President, Members of the Chamber, I note also, as this appeared to weigh heavily on the minority in the *Virginia G* case, that the owner of the *"Heroic Idun"* is not Marshallese. It is a company incorporated in the Isle of Man, a British Crown Dependency.

While the company is registered in the Marshall Islands as a Foreign Maritime Entity, the Marshall Islands could not bring a claim of diplomatic protection on behalf of the company, the owner of the *"Heroic Idun"*. Nor could it bring a claim of diplomatic protection on behalf of any member of the crew, none of whom were Marshallese nationals. The rights that the Marshall Islands can assert, and does assert, in respect of the conduct of Equatorial Guinea are its own rights.

Mr President, Members of the Chamber, I conclude on this point, and my submissions, with the following additional observation. The *"Heroic Idun"* and its crew were intercepted outside the territorial jurisdiction of Equatorial Guinea, while lawfully in the EEZ of São Tomé and Príncipe, the relevant rules being the UNCLOS rules on the high seas.

They were brought within the jurisdiction of Equatorial Guinea unlawfully, under the guns of the Equatoguinean Navy.

As ITLOS made plain in the *M/V "SAIGA" (No. 2)*, and as was addressed by Judge Rüdiger Wolfrum, then the Vice-President of the Tribunal, in his Separate Opinion in that case, the rule on the exhaustion of local remedies is contingent on the existence of a prior voluntary jurisdictional connection between the State in question and the putative claimant. Where, however, there is no such prior voluntary jurisdictional connection, the local remedies rule does not apply.[6] As Judge Wolfrum put it, and I quote from his Separate Opinion, he says,

> … the local remedies rule ... is only applicable if a prior voluntary link exists between the individual and the Respondent State .... In consequence, it does not apply ... in cases where the State, having taken measures, acted outside the scope of its jurisdiction. In particular when a State had no jurisdiction concerning the measures taken, ... the requirement to exhaust local remedies would amount to a recognition of the jurisdiction of that State. This is certainly not the objective of the concept of the exhaustion of local remedies.[7]

[6] *M/V "SAIGA" (No. 2)*, Judgment of 1 July 1999, para. 100. (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf).

[7] *M/V "SAIGA" (No. 2)*, Judgment of 1 July 1999, Separate Opinion of Judge Wolfrum, para. 55 (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99-SO_W.pdf).

That's from Judge Wolfrum's Separate Opinion, and, in doing so, he references the *M/V "SAIGA" (No. 2)* judgment at paragraph 100 of that judgment.

In this case, to require the exhaustion of local remedies, even were there any effective remedies to be exhausted, which is denied, would be to accept Equatorial Guinea's assertion of jurisdiction, which is precisely the point in dispute.

Mr President, Members of the Chamber, Equatorial Guinea's objections to jurisdiction, to admissibility, and its narrow construction of Article 293(1) have no merit. They are an attempt to evade having to answer for what was utterly egregious conduct, violative of UNCLOS, violative of other relevant and applicable rules of international law, and brutally violative of principles of humanity that lie at the heart of the law of the sea.

Mr President, Members of the Chamber, that concludes my submissions, for today at least. Mr President, may I ask you to call upon Ms Courtney Grafton to continue the Marshall Islands' submissions.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Sir Daniel.

I now give the floor to Ms Grafton to make her statement.

STATEMENT OF MS GRAFTON
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/2/Rev.1, p. 7–14]

Mr President, Members of the Chamber, it is an honour to appear before you on behalf of the Republic of the Marshall Islands.

My aim, in the next 30 minutes or so, is to outline the contours of the factual case, before I call two of the Marshall Islands’ witnesses: Mr Tanuj Mehta, the Master, and Mr Sanu Jose, the Chief Officer.

Before I embark on my submissions, I’d like to make two overarching points.

First, as Sir Daniel has noted, although Equatorial Guinea’s conduct often belies belief, almost none of its conduct is in dispute. Equatorial Guinea accepts – as it must, based on the witness evidence and the extensive documentary record – that it committed almost all of the alleged conduct. Accordingly, as I take you through the relevant facts today, I will endeavour to identify the considerable common ground.

Second, where the parties do disagree, I note that there is a dearth of documentary evidence to support Equatorial Guinea’s account. For instance, Equatorial Guinea has not evidenced the legal basis on which it detained the crew for 92 days, nor has it provided any contemporaneous documentation from its interviews of the crew.

Similarly, there is a lack of witness evidence: none of the guards or police officers who detained the crew have provided evidence, nor have many of the key decision-makers on the ground, such as the Port Captain of Malabo, Mr Genaro Ngueme Ndong, or the Navy lawyer who was present in all of the crew’s interviews. If Equatorial Guinea’s arguments on the facts were credible, it should have provided evidence to support them.

Turning then, to the relevant facts. As Sir Daniel noted, none of the facts surrounding the interception and diversion of the vessel on 12 August are in dispute. In short, the *“Heroic Idun”* turned off its engines at the request of the *“Capitan David”*, and when the *“Capitan David”* was safely within shooting range, it demanded that the *“Heroic Idun”* follow it to Malabo, and it threatened to open fire if it did not. The Master immediately complied with this demand and sailed to Equatorial Guinea.

The journey there took more than 24 hours, and, at all times, the guns on the *“Capitan David”*, and the *“Wele Nzes”*, when it joined the escort, were trained on the *“Heroic Idun*”. The convoy arrived in Luba on 13 August just before midnight.

As will become a constant refrain for me: Equatorial Guinea did not notify the Marshall Islands of any of these events.

Immediately after the vessel arrived in Luba, 10 members of the crew, including the Master, were disembarked under armed guard. Five additional crew were disembarked later that day, leaving the vessel with 11 crew and severely undermanned.

The safe manning certificate of the vessel is displayed on the screen. You’ll see that it requires 16 crew on board at a minimum, and it stipulates the necessary grade and capacity of those crew members.[1]

On the same day the crew were disembarked, eight Equatoguinean armed guards came aboard with two camera crews, two customs officers and five inspectors. Inspections were then carried out of the vessel’s cargo tanks, and customs officers inspected the vessel, including the crew’s bags.

The authorities concluded that the tanks were not carrying any cargo and they declared the vessel “innocent”.[2] Equatorial Guinea has provided a report, which you can see on the

[1] Annex RMI/-37 (Volume II) [Judges’ Folder, Tab 18].
[2] Annex EK/-5, p. 34 (Memorial, Volume V).

screen, prepared by the officers which confirmed that the vessel was, I quote, "without any customs violations being noted."[3]

Back onshore, the crew members who were disembarked were taken by convoy to Malabo.

First, they were taken to a local police station. There, they were not provided with food, water or access to toilets, and the police beat other prisoners in front of the crew, in an attempt to intimidate them. None of this has been disputed.

Later that night, the crew was transferred to a government-owned facility on the edge of the city. I will refer to this as the "detention facility" in my submissions.

For the avoidance of doubt, at no time on 14 August, or at any time thereafter, were the crew formally arrested or informed of any legal charges against them. Notwithstanding, the crew's passports were taken on arrival, and they were detained 24 hours a day under armed guard.

In short, for the entirety of their stay in Equatorial Guinea, all 26 crew members were deprived of their liberty, without any charge or legal basis. This, too, appears to be undisputed.

Equatorial Guinea did not notify the Marshall Islands of any of these events.

When the 15 crew members arrived at the detention facility late that night, it had no furniture, so they slept on the floor their first night. However, because both the managers of the vessel and the protection and indemnity insurers paid for the services of local agents, there was someone on hand to provide for the crew when Equatorial Guinea failed to do so. It was the local agent who provided the crew with mattresses, albeit they were on the floor. A picture is on the screen.

And it was the local agents who provided the crew with clean drinking water, food and clothing, all of which was paid for by the owners.

Indeed it's not disputed that Equatorial Guinea never, not once, provided the crew with any provisions during their time in detention in Equatorial Guinea. Everything was provided by the local agents and paid for by the owners.

In fact, because of this, Equatorial Guinea argues that "there can be no case of ill-treatment against [it]"[4] – 'take it up with the local agents', it appears to suggest. This is a remarkable submission. The owners stepped in because Equatorial Guinea was failing to provide for its own prisoners. The financial generosity of the owners and the work of the local agents cannot absolve Equatorial Guinea of its responsibility.

Returning to events on the ground, by 16 August, the owners had made the Marshall Islands aware of unfolding events in Equatorial Guinea. It therefore wrote on that day to the Governor of Luba expressing concern regarding the detention of the *"Heroic Idun"* and noting that the actions of Equatorial Guinea were in violation of UNCLOS.[5] The Governor of Luba did not respond.

On 17 August, the Master was interrogated for approximately 11 hours without legal representation by the Equatoguinean authorities. The Second Officer and the Chief Engineer were also questioned for hours.

In its Rejoinder, Equatorial Guinea makes two points regarding these interviews, neither of which withstands scrutiny.

First, Equatorial Guinea states that there is no evidence that it was Equatorial Guinea who refused the crew access to lawyers.[6] This is wrong. The three crew members state multiple

[3] Annex REG-037 (Counter-Memorial, Volume III).
[4] Rejoinder, para. 70 (Volume I).
[5] Annex SA/-6 (Memorial, Volume IV) [Judges' Folder, Tab 12].
[6] Rejoinder, para. 60 (Volume I).

times in their witness statements that Equatorial Guinea denied them access to lawyers. I have provided the references in the footnotes to my speech.[7]

Perhaps cognizant that this submission is not a good one, Equatorial Guinea secondly attempts to recharacterize these interviews. It asserts that the crew was not, I quote, "subject to a criminal investigation requiring legal counsel".[8] Instead, it refers to the interviews as nothing more than "routine fact-finding discussion[s]",[9] as part of, I quote, "a purely administrative process which does not require legal representation".[10]

This, too, is wrong. Not only does Equatorial Guinea not refer to any law – Equatoguinean or otherwise – to support its submission, but its bald submission is contradicted by its own evidence. In particular, the translation of the fine that Equatorial Guinea levied in this case, which you can see on the screen, unequivocally states that the Master is, I quote, "criminally liable as perpetrator".[11] The Spanish original states the same. In short, it is plain that Equatorial Guinea was conducting a criminal investigation, and it resulted in criminal charges against the Master.

In any event, it is fantastical to suggest that an individual can be detained for 92 days without legal charge but is not entitled to legal representation in interviews pertaining to that detention. I will return to the implications of this conduct in my submissions tomorrow.

The Marshall Islands was not notified of these interviews by Equatorial Guinea, but it learned of them via the crew and the owners. Having learned of the interviews, the Marshall Islands wrote to the Attorney-General of Equatorial Guinea on 26 August expressing concern about the questioning of the crew without legal representation or formal charge. It also alerted the Attorney-General to the threat to the vessel posed by its failure to meet safe manning requirements.[12] The Attorney-General of Equatorial Guinea did not respond.

Instead, the Equatoguinean authorities facilitated the repeated questioning of various members of the crew by Nigerian officials. On each occasion, an Equatoguinean lawyer was present in the interviews – but is conspicuously absent from the present proceedings – and the crew's requests for lawyers were denied.

Given the increasingly precarious situation on the ground, the Marshall Islands sent a flag State representative to Equatorial Guinea. On 8 September, he met with the Director-General of Ports of Equatorial Guinea and with the Attorney-General of Equatorial Guinea a few days later. He also tried to access the vessel to speak with the crew, but his request was refused.

In light of this, the Marshall Islands wrote again to the Attorney-General. It requested that its representative be allowed to board the vessel. It also repeated its concerns about the denial of legal representation and the unsafe manning of the vessel.[13] Again, the Attorney-General of Equatorial Guinea did not respond.

Finally, on about 28 September, more than six weeks after the crew was detained, the Ministry of Defence criminally charged the Master and issued an exorbitant fine of approximately €2,000,132.

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[7] Annex RMI/-1 (Memorial, Volume II), paras. 122-127 ("we were expressly told that no lawyers were allowed to be present during the interviews"; "no lawyer was permitted"; "our requests for lawyers were refused"); Annex RMI/-6 (Memorial, Volume II), para. 18 ("I was not allowed access to a lawyer"); Annex RMI/-7 (Memorial, Volume II), para. 11 ("I was questioned by E.G. Officials on 17th August 2022 without any lawyer"). See also RMI/-2 (Memorial, Volume II), para. 18.

[8] Rejoinder, p. 79.

[9] Rejoinder, para. 61 (Volume I).

[10] Rejoinder, para. 61 (Volume I).

[11] REG-039 (Counter-Memorial, Volume III) [Judges' Folder, Tab 12].

[12] Annex SA/-9 (Memorial, Volume IV) [Judges' Folder, Tab 13].

[13] Annex SA/-11 (Memorial, Volume IV) [Judges' Folder, Tab 14].

Dr Busco will address the charges and the fine in more detail in his submissions, but I do wish to make one passing remark to demonstrate the unlawful nature of the fine, and that is that one of the laws which provided the foundation for the fine had, in fact, been repealed when the fine was issued and the Master was charged. It is for this reason, among others, that Mr Askins, a London-based lawyer acting for the owners, describes the fine as, I quote, "a contrived afterthought which was, in effect, extortion or a demand for a payment akin to a ransom, rather than a legitimate demand founded in local law".[14] For the avoidance of doubt, Equatorial Guinea accepts in its Rejoinder that the relevant law had been repealed, so this, too, is not in dispute.[15]

Mr Askins also explains that, notwithstanding the baseless nature of the fine, the owners were prepared to pay it because Equatorial Guinea had assured the Master and the local agents and the local lawyers on multiple occasions that payment of the fine would see the *"Heroic Idun"* and her crew promptly released. The owners saw it as the only way to get the crew and the vessel out of an increasingly precarious, insecure and uncertain situation.

Captain Esono Nchama says that he did not give any such assurance. My colleague will discuss this issue with the witness in due course. But in any event, I note, and you can see some of the excerpts on the slide, that there is overwhelming contemporaneous evidence which shows that this assurance was given. I refer you to Annexes SA-47 and EK-49, 55, 56, 57, 58, 80, 81 and 82. Again, the extracts are on the screen, but I don't propose that we read them all now. There is, however, a voice note from Mr Hernández Martin, a witness in these proceedings for Equatorial Guinea, and I would like to play that now for the Chamber.

(Audio recording played: "I have talked now to the Colonel, and he have told me that this morning the the lawyers went there and informed him that they will go with him today with the bank transfer confirmation and afterwards he have told me once he receive this bank transfer confirmation they will start all the procedures to to let them free. Everybody.")

Again, my colleagues will return to this in due course.

Given the assurances, the owners paid the fine on 4 October, but Equatorial Guinea continued to detain the crew.

On 18 October, the Marshall Islands wrote to the Attorney-General of Equatorial Guinea again, repeating its request and noting that the crew's ongoing detention was having a serious impact on their physical and mental well-being.[16] Again, the Attorney- General did not respond.

Finally, in late October, there appeared to be a glimmer of hope. The local agents were informed by the Equatoguinean authorities that the *"Heroic Idun"* and her crew were to be formally released after the necessary paperwork was completed. The 15 crew at the detention facility were accordingly moved to a hotel, albeit still under armed guard, to await formal release.

Equatorial Guinea places much emphasis on the crew's short stay at the Hotel Anda. This emphasis is odd. It has never been disputed that the hotel was an improvement on the detention facility, but the crew only spent 10 of the 92 nights that they were detained in Equatorial Guinea in the hotel. Nor has it ever been disputed that the crew were particularly grateful to be transferred to the hotel. But they were grateful because they were made to understand (wrongly, as it turned out) that it meant they were about to be released.

The Marshall Islands has repeatedly queried in this case why Equatorial Guinea transferred the crew to a hotel and granted them additional privileges, only to render them to Nigeria days later. Equatorial Guinea still has not provided an explanation. The only logical conclusion is that either Equatorial Guinea was going to release the crew – as it had promised

[14] RMI/-52 (Reply, Volume II), para. 5.
[15] Rejoinder, footnote 397 (Volume I).
[16] Annex SA/-15 (Memorial, Volume IV) [Judges' Folder, Tab 15].

to do in exchange for more than €2 million – but it changed its mind. Or Equatorial Guinea wanted to give the crew a false sense of comfort before unlawfully rendering them to Nigeria.

By the end of October, the crew had still not been released, so the Ministry of Foreign Affairs of the Marshall Islands sent a note verbale to Equatorial Guinea. It stated that if no diplomatic resolution could be reached, the Marshall Islands would have to submit the matter to the dispute settlement procedures under UNCLOS.[17] For the fifth time, Equatorial Guinea did not respond.

As Sir Daniel explained, matters took a turn for the worst around 4 November, when the crew learned that Equatorial Guinea planned to render them to Nigeria. The crew were distraught. By way of example only, I highlight a few of their statements.

The Second Officer wrote:

> We were very emotional, crying and stressing, as we did not know what would happen to us or who would take care of our families. I would not wish this experience on my worst enemy.[18]

The Third Officer states:

> It was the worst experience of my life. I thought I was going to die because of the way we were being treated. I thought I would never see my family again.[19]

And the Pumpman states:

> My wife, who was eight months pregnant at the time, also fell and had to be taken to the hospital for treatment. It was an extremely difficult time for both of us.[20]

A detailed description of what occurred on the ground between 4 and 11 November is set out in our Memorial at paragraphs 68 to 87. I will not repeat these events, but I do wish to emphasize that these events are not disputed. All that Equatorial Guinea does in its pleadings is attempt to paint one event – taking the Chief Officer off the vessel and holding him hostage separately to try and force the vessel to sail – as a positive experience. It plainly was not, but I will leave that to the Chief Officer to address later today.

As to the Marshall Islands' conduct from 4 November: when the Marshall Islands learned of Equatorial Guinea's intention to transfer the vessel to Nigeria, it immediately wrote to the Attorney-General of Equatorial Guinea and protested in strong terms.

The Marshall Islands stated that, in the absence of any positive response, it would be forced to commence proceedings under UNCLOS.[21] For the sixth time, Equatorial Guinea did not respond.

On 7 November, while the Chief Officer was being held hostage separately, the Marshall Islands issued a detention order, which you can see on the screen. The Master presented this to the Equatoguinean officers to try and convince them to release the Chief Officer.

The final straw for the crew was on 11 November. That morning, the Equatoguinean guards left the vessel and were replaced by heavily armed guards from the Nigerian Navy Special Boat Service.

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[17] Annex SA/-16 (Memorial, Volume IV) [Judges' Folder, Tab 16].
[18] Annex RMI/-6 (Memorial, Volume II), para. 22.
[19] Annex RMI/-10 (Memorial, Volume II), para. 19.
[20] Annex RMI/-16 (Memorial, Volume II), para. 23.
[21] Annex SA/-18 (Memorial, Volume IV) [Judges' Folder, Tab 17].

At gunpoint, they demanded that the crew start the engines, failing which they threatened to take them to Nigeria on a Nigerian naval vessel and tow the vessel to Nigeria.

In fear, and to avoid the vessel being damaged by being improperly towed to Nigeria, the crew started the engine. The vessel left Luba at around 2 p.m. local time on 11 November and arrived at Bonny anchorage in Nigeria around 1 p.m. local time on 12 November.

I emphasize that this is only a snapshot of events over 92 days. The detail is in the Memorial and Reply, in the witness statements of the crew, and in the overwhelming documentary evidence annexed to the witness statements which supports their accounts.

That, Mr President, Members of the Chamber, concludes my overview of the relevant facts; and, with that, I would like to call the Chief Officer of the vessel, Mr Sanu Jose.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Grafton.

Before proceeding with the witness examination, as you requested, I wish to inform the public that, further to a request from the Marshall Islands, to which Equatorial Guinea did not object, the Special Chamber has decided, in accordance with Article 74, paragraph 1 of the Rules of the Tribunal, that the parts of the hearing during which witnesses will be examined will be conducted *in camera*. Thus, the next part of this sitting will be held *in camera*. Only the Special Chamber, the parties' representatives and teams, the witness under examination, and the Registry staff will be able to attend this sitting.

The general public is requested to leave the courtroom.

This part of the hearing will not be broadcast on the internet. It is estimated that this will apply to the remainder of this afternoon's sitting.

I therefore now request the Registry staff to ensure that the public has left the courtroom and that the online broadcast has been interrupted. This might take a couple of minutes.

(The hearing went in camera*.)*

(Resumed in open session at 5:27 p.m.)

MS GRAFTON: Mr President, if I could make one more point before I commence.

THE PRESIDENT OF THE SPECIAL CHAMBER: Please, Ms Grafton.

MS GRAFTON: And that is that, because we had not planned to do these ten minutes of submissions today, you don't have the – my submissions in front of you.

What we can do is, we can send it to you this minute, this second, so that you could pull it up on the screen, if you'd like; but you won't, of course, have it in paper copy.

Is that acceptable to you?

THE PRESIDENT OF THE SPECIAL CHAMBER: That would be – that would be, yes.

MS GRAFTON: Thank you, Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: So we now resume the public part of today's sitting, and I give the floor to Ms Grafton to make your statement.

STATEMENT OF MS GRAFTON
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/2/Rev.1, p. 39–41]

Thank you, Mr President.

As I mentioned, before I call the Master tomorrow, I would like to make a few brief points about the conditions at the detention facility. You will recall that this is where 15 members of the crew were detained onshore for approximately three months in Equatorial Guinea.

Equatorial Guinea goes to great lengths to defend the cleanliness of this facility, and I’ll ask the Master about the facility tomorrow, but I would say that his written evidence to date is clear: yes, the building appeared new, but the conditions were very bad.

All of the crew detained there attest that there was poor sanitation, dirty water, which regularly ran out, common toilets, poor-quality mattresses on the floor, and many mosquitoes, rats and cockroaches.

The evidence of the crew is also that those detained in the detention facility contracted malaria and typhoid, in contrast to the crew detained on the vessel. The crew is confident that they contracted typhoid because the water at the detention facility was not clean, and the communal toilet facilities meant that the typhoid spread quite quickly amongst them.

As I discussed with the Chief Officer earlier today, Equatorial Guinea notes that one member of the crew who was detained on board, the Third Ordinary Seaman, allegedly did contract typhoid, and, as I said, this is based on a note by the local agent.

However, if we look at the witness statement of the Third Ordinary Seaman, he doesn’t mention any diagnosis of typhoid. He does refer to a trip to the hospital, but he doesn’t mention typhoid.

Instead, he says, I quote: “I was not provided with proper treatment or medication.” And he suffered from “high blood pressure and obesity”.

So what this means is either the Third Ordinary Seaman was diagnosed with typhoid, but he wasn’t made aware of this diagnosis, and so the crew wouldn’t have been aware either, or he was not diagnosed with typhoid, and the local agent’s note is not accurate.

In any event, even if he did contract typhoid, he was the exception. The reality is that 7 of the 15 crew members in the detention facility contracted typhoid and/or malaria, whereas, at most, one member – the Third Ordinary Seaman – on board contracted typhoid, and none contracted malaria.

In any event, Equatorial Guinea’s hyper-focus on typhoid attempts to distract from the long list of other illnesses that the crew suffered. By way of example only: the Pumpman had a seizure and was diagnosed with a suspected cyst in his head; another crew member was diagnosed with acute gastroenteritis, another with depressive anxiety disorder, and another with lumbago; moreover, many crew members expressed suicidal thoughts.

In addition, Equatorial Guinea ignores the many important life events that the crew were forced to miss during their detention. The list is long.

By way of example only: The Third Engineer’s grandmother, who had raised him since he was 1, died in September 2022, and he could not travel home for her funeral; the brother of the Third Ordinary Seaman and the brother of the Third Motorman both died while they were detained; the electrician missed the birth of his first child, and the Pumpman missed the birth of his daughter; and the First Ordinary Seaman missed his own wedding.

And the crew, of course, lost valuable time with their families. The cook, perhaps, said it best. I quote:

> I lost precious time […] that I could have instead spent with my family. No one can give me back this time. I am disappointed and I want justice to be served.

Finally, before we close today, I'd like to play a video that the Master recorded in that critical period between 4 and 11 November, when the 15 crew members, who had been detained on land, were being moved back and forth between various places of detention.

His video was played on Indian national news, and so there will be some commentary around it. You can find the video at Annex MT-44, but I will play it now. *(Video played)*

MS GRAFTON: Mr President, Members of the Special Chamber, with that background, I'd like to conclude my submissions today, and call the Master tomorrow morning.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Grafton.

I think this brings us to the end of today's proceedings, so we will – the Chamber will then resume in session tomorrow morning at 10 o'clock. The meeting is adjourned.

(The hearing adjourned at 5.25 p.m.)

PUBLIC SITTING HELD ON 7 OCTOBER 2025, 10 A.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 6 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 7 OCTOBRE 2025, 10 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l’audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l’audience du 6 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good morning. The Special Chamber will now continue its hearing in *The M/T “Heroic Idun” (No. 2) Case*, and my understanding is that the Marshall Islands now wishes to call the second witness.

Might I ask the Agent of the Marshall Islands to confirm this.

MS KIRBY: Yes, Mr President, I confirm.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Madam.

In this case, pursuant to the decision by the Special Chamber, to which I referred to yesterday, the next part of this sitting shall be held *in camera*. It is estimated that this will apply until the mid-morning break, and possibly after that.

I therefore now request the Registry staff to ensure that the public has left the courtroom, and that the online broadcast has been interrupted.

(The hearing went in camera*.)*

(Resumed in public)

So we now resume the public part of today’s sitting. The sitting may be extended until approximately 1.20 p.m.; 20 minutes past one o’clock.

I now give the floor to, I believe, Mr Busco to make his statement. Excuse me, Mr Busco, may I ask the Agent to address the Court please.

MS KIRBY: Yes, thank you, Mr President. The Marshall Islands would like to request that you call Sir Daniel Bethlehem to the podium.

THE PRESIDENT OF THE SPECIAL CHAMBER: Can you just repeat that. I didn't get your –

MS KIRBY: We would like – Sir Daniel Bethlehem is going to appear right now, just for a minute, before Dr Busco.

THE PRESIDENT OF THE SPECIAL CHAMBER: Good. Thank you very much.

SIR DANIEL: Thank you, Mr President. Sorry, I just wanted to come to you with a housekeeping matter. We note that there are five minutes before the normal break and we wondered whether we might have the mid-morning break now and then Dr Busco will be able to commence his presentation immediately after the mid-morning break.

THE PRESIDENT OF THE SPECIAL CHAMBER: Very well, we can do that.

SIR DANIEL: Thank you very much.

THE PRESIDENT OF THE SPECIAL CHAMBER: We will now break for 30 minutes. So we will resume again at five minutes to 12.00 p.m.

SIR DANIEL: Thank you very much, Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: The session is adjourned.

(Adjourned at 11.22 a.m.)

THE PRESIDENT OF THE SPECIAL CHAMBER: I now give the floor to Dr Busco to make his statement.

Dr Busco.

STATEMENT OF MR BUSCO
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/3/Rev.1, p. 32–49]

Thank you, Mr President. Mr President, Members of the Special Chamber, it is an honour to appear before you today and to do so on behalf of the Republic of the Marshall Islands.

In this presentation, I will address what lies at the very heart of the Marshall Islands' case: that, by taking enforcement action against the *"Heroic Idun"* in the EEZ of São Tomé, Equatorial Guinea violated two fundamental rights of the Marshall Islands under UNCLOS. These are freedom of navigation and exclusive flag State jurisdiction.

I will also address why Equatorial Guinea's belated invocation of piracy as a defence is misplaced and does not absolve Equatorial Guinea from its violations of international law.

Mr President, Members of the Chamber, Equatorial Guinea does not appear to dispute that what it did to the *"Heroic Idun"* is, on its face, inconsistent with freedom of navigation and exclusive flag State jurisdiction. Equatorial Guinea's case is, instead, that its actions were justified under the guise of an anti-piracy operation. The core of this argument is that enforcement powers exercised to repress piracy are an exception to freedom of navigation and exclusive flag State jurisdiction.

For brevity, I will refer to this argument by Equatorial Guinea as "the piracy defence".

In essence, therefore, if one sets aside, for a moment, the piracy defence, there seems to be no disagreement between the Parties that the apprehension and diversion of the *"Heroic Idun"* on the high seas would have been in breach of the Marshall Islands' rights under UNCLOS. The only issue that needs to be resolved is whether there is any merit in Equatorial Guinea's piracy defence.

Mr President, Members of the Chamber, having clarified this, let me start with the law on freedom of navigation and exclusive flag State jurisdiction.

Freedom of navigation is one of the pillars of the law of the sea. UNCLOS recognizes it at Article 87(1)(a), listing it among the freedoms of the high seas available to all States. In fact, we could say that freedom of navigation is the quintessential freedom of the seas. The oldest. The most well-established one. Article 90 of UNCLOS, and I quote here from the words of the *Enrica Lexie* tribunal, "reinforce[s] the freedom of navigation provided for in Article 87."[1] It does so by setting out that all States have "the right to sail ships flying [their] flag on the high seas."

Article 92, you see it here on the slides, on its part, sets out the principle of exclusive flag State jurisdiction. It provides that all "ships shall sail under the flag of one State only … and shall be subject to its exclusive jurisdiction on the high seas."

ITLOS in *"Norstar"* called exclusive flag State jurisdiction, and I quote "a corollary of the open and free status of the high seas", and drew a connection between freedom of navigation under Article 87, on the one hand, and exclusive flag State jurisdiction under Article 92, on the other. It said, and I quote, that "freedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation – could be subject to the jurisdiction of other States on the high seas."[2]

The connection between Articles 87 and 92 is crucial and means that considerations that I will make in respect of freedom of navigation also apply to exclusive flag State jurisdiction.

Mr President, Members of the Chamber, before addressing these three provisions further, I would like to make an important preliminary point. Articles 87(1)(a), 90 and 92 apply not

[1] *The Enrica Lexie Incident (Italy* v. *India)*, Award on the Merits (Permanent Court of Arbitration, 21 May 2020), para. 1037.
[2] *The M/V "Norstar" (Panama* v. *Italy)*, Judgment (International Tribunal for the Law of the Sea, 10 April 2019), para. 216.

only on the high seas *strictu sensu*, that is to say, beyond the 200 nautical miles mark; rather, as you heard from Sir Daniel yesterday, they also apply, by virtue of Article 58(2) of the Convention, in the Exclusive Economic Zone of a coastal State.

As you also heard yesterday, in the relationship between Equatorial Guinea and the Marshall Islands, the EEZ of São Tomé is subject to the rules applicable to the high seas "proper". This is because Equatorial Guinea is not the coastal State in respect of the Exclusive Economic Zone of São Tomé.

Accordingly, Articles 87(1)(a), 90 and 92 apply there, just as they would apply on the high seas, beyond the 200 nautical miles. Equatorial Guinea, therefore, cannot invoke in the EEZ of São Tomé even the limited enforcement rights that a coastal State would be ordinarily able to invoke within its own EEZ.

Mr President, Members of the Chamber, I now turn to the question of what forms of State conduct amount to a violation of flag States' freedom of navigation and exclusive flag State jurisdiction.

The answer to this question is that a very low threshold is necessary to establish a breach of Articles 87(1)(a), 90 and 92. In the *Enrica Lexie* case, the tribunal said that freedom of navigation "provides ships of any State with the right to traverse the high seas with no or minimal interference from any other State."[3] I would like to emphasize this expression "no or minimal interference".

A number of law of the sea tribunals have given substance to this test of "no or minimal interference". I will start from the lowest level of interference and move up to the highest levels of interference.

So, starting from the lowest level. In *"Norstar"*, this Tribunal held that "even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of freedom of navigation."[4]

In that case, the Tribunal found that the mere exercise of prescriptive jurisdiction – specifically, the adoption of a decree targeting activities of a vessel on the high seas – was sufficient to breach freedom of navigation under Article 87 of the Convention.

Now, moving up a notch in the ladder of prohibited interference. In *Enrica Lexie*, the tribunal said that interference with freedom of navigation, in breach of Article 87, can result from "non-physical forms of interference whose effect is that of instilling fear in, or causing hindrance to, the exercise of freedom of navigation."[5] Again, no physical interference required to breach Article 87.

Physical interference, however, represents the typical form of conduct that is incompatible with freedom of navigation; so much so, in fact, that this Tribunal in *"Norstar"* stated that "it goes without saying," and I emphasize it, "it goes without saying that physical or material interference with navigation of foreign ships on the high seas violates freedom of navigation."[6]

And physical interference includes, as the tribunal put it in the arbitration between Croatia and Slovenia, "boarding, arrest, detention or diversion"[7] of a vessel.

The use of force, or the threat of the use of force, is, of course, also a form of physical interference, and one of the gravest ones.

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[3] *The Enrica Lexie Incident (Italy* v. *India)*, Award on the Merits (Permanent Court of Arbitration, 21 May 2020), para. 468.

[4] M*/V "Norstar" (Panama* v. *Italy)*, Judgment (International Tribunal for the Law of the Sea, 10 April 2019), para. 223.

[5] *The Enrica Lexie Incident (Italy* v. *India)*, Award on the Merits (Permanent Court of Arbitration, 21 May 2020), para. 472.

[6] *M/V "Norstar" (Panama* v. *Italy)*, Judgment (International Tribunal for the Law of the Sea, 10 April 2019), para. 222.

[7] *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Award of 29 June 2017, para. 1129.

In *Enrica Lexie*, the tribunal said that "a breach of freedom of navigation may result from acts including ... the threat of force against a foreign vessel, or non-physical forms of interference ...."[8]

The adversative conjunction here – or – underscores that a threat of the use of force is, itself, a form of physical interference.

Now, Mr President, Members of the Chamber, as I said, these considerations apply both in respect of Article 87(1)(a) of the Convention and also with regard to Articles 90 and 92.

With respect to Article 90, the tribunal in *"Enrica Lexie"* expressly applied the "no or minimal interference" test and concluded that, and I quote, "prevent[ing] [a vessel] from navigates its intended course" and "caus[ing] [it] to change direction" constituted a breach not only of Article 87(1)(a), but also of Article 90 of the Convention.[9]

As regards Article 92, in the *Arctic Sunrise* case, the Annex VII tribunal held that the boarding and diversion of a Dutch-flagged vessel by Russian authorities breached Article 92, as it stated, because "[a] Coastal State may only exercise jurisdiction, including law enforcement measures, over a ship with the prior consent of the flag State."[10]

The tribunal tells us that law enforcement measures are, therefore, capable of infringing Article 92.

But other measures constituting an exercise of jurisdiction, yet falling short of enforcement, may also breach Article 92. The tribunal in *"Enrica Lexie"* observed in this regard, that "the principal of exclusive flag State jurisdiction ... is violated when a State other than the flag State seeks to prescribe laws, rules or regulations over a ship of the flag State."[11]

The *"Enrica Lexie"* tribunal evidently was not referring to physical interference. It was speaking of interference through the prescription of rules.

Mr President, Members of the Special Chamber, one more point on the law, which also appears not to be contested between the Parties. Measures that are adopted in consequence of an unlawful apprehension on the high seas are *ipso jure* unlawful. The *Arctic Sunrise* tribunal, for example, found that Russia's boarding, seizure and detention of the Dutch-flagged vessel *Arctic Sunrise* on the high seas breached several provisions of UNCLOS, including those that concern us here, namely, Articles 87 and 92.

It then went on to conclude that, "given this conclusion," namely, the unlawfulness of the apprehension, "all enforcement measures taken by Russia vis-à-vis the *Arctic Sunrise* subsequent to its unlawful boarding, seizures and detention of the vessel have no basis in international law."[12]

All these measures were declared, therefore, to be unlawful.

In the present case, Mr President, Members of the Special Chamber, this means that the investigations undertaken by Equatorial Guinea and the detention of the vessel and crew, subsequent to the unlawful apprehension of the vessel, were, likewise, all unlawful enforcement measures.

Critically, this also means that the fine imposed on the *"Heroic Idun"* was unlawful. This measure, too, was an enforcement measure adopted pursuant to an unlawful apprehension on the high seas.

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[8] *The Enrica Lexie Incident (Italy* v. *India)*, Award on the Merits (Permanent Court of Arbitration, 21 May 2020), para. 472.

[9] *The Enrica Lexie Incident (Italy* v. *India)*, Award on the Merits (Permanent Court of Arbitration, 21 May 2020), para. 1041.

[10] *Arctic Sunrise (Netherlands* v. *Russia)*, Award on the Merits (Permanent Court of Arbitration, 14 August 2015), para. 231.

[11] *The Enrica Lexie Incident (Italy* v. *India)*, Award on the Merits (Permanent Court of Arbitration, 21 May 2020), para. 527.

[12] *Arctic Sunrise (Netherlands* v. *Russia)*, Award on the Merits (Permanent Court of Arbitration, 14 August 2015), para. 333.

To paraphrase the *Arctic Sunrise* tribunal, the fine therefore had no basis in international law.

Mr President, Members of the Chamber, having looked at the law on Articles 87(1)(a), 90 and 92, let me briefly recall that it is uncontested that Equatorial Guinea undertook enforcement action against the "*Heroic Idun*". Equatorial Guinea, itself, in its pleading, states that it "deployed enforcement powers." It expressly admits that it "apprehended the *"Heroic Idun"*[13] and it "instructed"[14] the vessel to proceed to Luba. It is also uncontested that this conduct occurred in the EEZ of São Tomé.

The only thing that Equatorial Guinea disputes in this regard is that "no force was used at any stage of the apprehension."[15] While, however, it may be that no shots were fired, force was undoubtedly threatened. I don't need to go over this again, but I refer you to our evidence given by the Master and the Chief Officer here.[16]

What I want to note, though, is that it is irrelevant, for purposes of assessing a breach of Articles 87, 90 and 92, that force be used or threatened. Minimal interference is sufficient to breach these provisions. There is no need whatsoever to prove that force was used or threatened, for purposes of a breach of exclusive flag State jurisdiction and freedom of navigation.

Mr President, Members of the Special Chamber, in the light of these facts, let me wrap up the analysis up to this point. Equatorial Guinea, by its express admission, exercised enforcement powers against the *"Heroic Idun"* in the Exclusive Economic Zone of São Tomé and forced the *"Heroic Idun"* to Luba at gunpoint.

Mr President, Members of the Chamber, there is no question that, on its face, this conduct is incompatible with Articles 87(1)(a), 90 and 92 of the Convention.

Now, Mr President, Members of the Chamber, before addressing Equatorial Guinea's piracy defence, I draw your attention to another breach that Equatorial Guinea has committed by the same conduct that I have discussed in my submission so far.

This breach is ancillary to the core breaches of Article 87(1)(a), 90 and 92. It is ancillary because it does not concern freedom of navigation of the Marshall Islands. It concerns, rather, the manner in which Equatorial Guinea itself exercised its own freedom of navigation.

Article 87(2) of the Convention, and you can see it on the slide in front of you, provides, in the relevant part, that

> these freedoms [and this includes, of course, the freedom of navigation] shall be exercised by all States with due regard for the interests of the other States in their exercise of the freedom of the high seas ....

Equatorial Guinea had freedom of navigation rights in the Exclusive Economic Zone of São Tomé. In exercising these rights in the Exclusive Economic Zone of São Tomé, it had to have due regard to the freedom of navigation rights of the Marshall Islands in that same area.

The Marshall Islands' freedom of navigation, however, was unlawfully and unjustifiably impaired by Equatorial Guinea. This is because Equatorial Guinea unlawfully intercepted the *"Heroic Idun"* in the EEZ of São Tomé.

What follows, having regard to Article 87(2), is that Equatorial Guinea did not exercise its freedom of navigation having due regard to the interests of the Marshall Islands. In fact, it did so unlawfully to impair the interests and the rights of the Marshall Islands in its own

[13] Rejoinder, para. 28.
[14] Rejoinder, paras. 43, 45.
[15] Rejoinder, para. 43.
[16] Memorial, para. 167. Annex RMI-1; Memorial, para. 168.

exercise of freedom of the high seas. This conduct, Mr President, Members of the Special Chamber, is in breach of Article 87(2) of the Convention.

Mr President, Members of the Special Chamber, I now turn to Equatorial Guinea's piracy defence.

Before I address this defence on its merits, I would like to make one observation. Equatorial Guinea engages in a fair degree of scaremongering. Running through its Counter-Memorial and Rejoinder is a very subtle leitmotif: that the Special Chamber should be careful not to undermine the laudable anti-piracy efforts in the Gulf of Guinea. This is why Equatorial Guinea devotes several pages of its pleadings to addressing what is actually beyond contention: the importance of international anti-piracy efforts and of the regional security architecture against piracy.[17] There is no question about this.

And I would like to reassure Equatorial Guinea. The Marshall Islands, which, as you have heard from the Attorney General and the Agent, hosts the world's third-largest ship registry, cares very deeply about serious and effective anti-piracy efforts.

But anti-piracy cannot serve as a smokescreen to justify abuse. As I will show you shortly, there is no trace whatsoever of piracy in this case. And invoking the fight against piracy in a wholly unjustified manner, as Equatorial Guinea does, is harmful, because it risks undermining and delegitimizing the international anti-piracy efforts that genuinely deserve protection.

For Equatorial Guinea to invoke piracy as a defence, when piracy is entirely out of the picture, diminishes the credibility of the global fight against piracy.

This, with respect, we believe is what should concern the Special Chamber in this case.

Mr President, Members of the Chamber, having made this preliminary observation, I will now turn to the core of the Marshall Islands' response to Equatorial Guinea's piracy defence.

The Marshall Islands has two propositions here: first, that Equatorial Guinea had no basis whatsoever to conclude that the *"Heroic Idun"* was a vessel suspected of piracy. In fact, all the information that Equatorial Guinea possessed indicated the exact opposite. That's our first proposition.

The second proposition, which we make in the alternative, is that, even if Equatorial Guinea had any reason to suspect piracy, the apprehension of the vessel was nonetheless inconsistent with UNCLOS and international law.

Mr President, Members of the Chamber, at tab 1 of your Judges' folder you have various provisions of UNCLOS concerning piracy. I will discuss several of these provisions in the following minutes. These, as you know, cover various issues: Article 100 concerns anti-piracy cooperation; Article 101 provides the legal definition of "piracy"; Article 103 defines the notion of a pirate vessel; Article 105 sets out the circumstances in which a vessel can be seized on grounds of piracy; Article 106 sets out the duty to compensate a vessel that was seized pursuant to Article 105, but without adequate grounds; Article 110 sets out the right to visit a vessel suspected of being engaged in piracy.

I will not address these provisions in the order that UNCLOS presents them, but, rather, as necessary to substantiate my arguments. In any case, I think it is good that you have all of them in front of you.

In order to address the first of the Marshall Islands' argument, I need to start from the definition of "piracy". The definition of "piracy" is in Article 101 of UNCLOS. Article 101 reads:

> Piracy consists of any of the following facts: (a) any illegal act of violence or detention, or any act of the depredation, committed for the private ends by the crew

[17] Rejoinder, pp. 47-53.

> or the passengers of the private ship ... and directed (i) on the high seas, against any other ship ... or against the person or property on board such ships ... or (ii) against a ship ... in a place outside the jurisdiction of any State.

I don't propose to address the last part of the definition as this is irrelevant for our purposes.

The point is that, Mr President, Members of the Chamber, the definition of piracy is a matter of law. For an act to constitute piracy, there has to be violence, detention or depredation; these acts must occur on the high seas, and they must be directed against another ship or property or persons on board that ship.

Now, I would like to consider the information on which Equatorial Guinea claims that it based its conclusion that the *"Heroic Idun"* was suspected of being a pirate vessel. These are two WhatsApp pages and a note verbale from Nigeria dated 10 August 2022. I anticipate the conclusion of the analysis that will follow: there is no trace whatsoever of allegations of piracy in respect of the *"Heroic Idun"* in these documents. Nigeria did not once raise allegations of piracy against the "*Heroic Idun*".

In its pleadings, Equatorial Guinea asserts that it cannot make submissions on the wording used by Nigeria in these documents and that, actually, only Nigeria could do so.[18] Yet, Mr President, Members of the Special Chamber, Equatorial Guinea acted on these documents because these documents constitute the only basis on which Equatorial Guinea claims to have formed its appreciation of piracy in relation to the *"Heroic Idun"* and to have seized the "*Heroic Idun*". These documents are, therefore, central. They are crucial to our analysis.

I will take you through them in turn. First, a WhatsApp message here on the left of your slide, from Nigeria, that Equatorial Guinea claims was received on 10 August 2022 by Equatorial Guinea's Director-General of Military Cooperation, reads, in the official translation provided by Equatorial Guinea as follows:

> Current intelligence indicates that a large crude carrier of oil, Heroic Idun [...] a 336-meter super tanker, came to load crude without approval and is suspected of being involved in an illegal fuel supply operation.

I emphasize "an illegal fuel supply operation."

> When NNS Gongola contacted them for interrogation, it raised a false alarm of piracy attack" – and I stress it, a false alarm of piracy attack – "and to avoid collateral damage, it left Nigerian waters [...] and therefore it is necessary to stop the vessel so that it can explain its activities in waters of Nigeria. It is kindly requested that, for example, the Navy tracks and stops the vessel.[19]

Then there is a second WhatsApp message. This one is on the right of your slide. This is from Nigeria, same recipient Equatorial Guinea, and Equatorial Guinea claims it received it again on 10 August 2022. This second WhatsApp message reads:

> The Nigerian CNS requests your help to stop the MV HEROIC IDUN involved in the theft of crude oil in Nigeria.[20]

Last, there is a note verbale, dated also 10 August 202. Tthis is the last one out of the three documents that Equatorial Guinea relies on. This reads:

[18] Rejoinder, para. 211.
[19] REG-002.
[20] REG-002.

> The Embassy of the Federal Republic of Nigeria in Malabo, Equatorial Guinea, presents its compliments to the Ministry of External Affairs and Cooperation of the Republic of Equatorial Guinea and has the honour to kindly request the latter to intervene in the tracking, arrest and repatriation of an illegal Crude Carrier [...] HEROIC IDUN [...], a 336-meter super tanker which was involved in the illegal entry into Nigerian's territorial water to load crude oil without proper approval.

I would like to stress for a moment: "entry into Nigerian waters" and "to load crude oil without proper approval."

Then the note verbale goes on:

> It is pertinent to indicate that the *"Heroic Idun"* was a Martial Island [sic] flagged ship but escaped into Equatoguinean maritime domain by raising a false piracy alarm to avoid collateral damage.[21]

Mr President, Members of the Chamber, the complaint from Nigeria is plain: "load crude oil without approval" and "illegal fuel supply". No violence, no detention, no depredation as would be required under Article 101 of the Convention. In other words, no piracy.

Equatorial Guinea now argues that the definition of piracy must account for the Gulf of Guinea's peculiarities where piracy and oil theft are often linked.[22] This is fine, but the existence of a link does not mean that every case of oil theft becomes *ipso facto* a piracy incident or can be suspected to be a piracy incident without any other element pointing in the direction of piracy. The note verbale on which Equatorial Guinea relies does not even suggest oil theft; it refers only to loading oil without approval.[23]

Mr President, Members of the Special Chamber, this is suggestive of an administrative infraction, not an act of piracy.

I would like to add here: the term "infraction" is not Counsel's attempt to play down or to minimize the matter. This is the very word used by Nigeria itself in the note verbale of 12 September 2022: "infraction".[24] Equally, the suggestion by Equatorial Guinea that the *"Heroic Idun"* – a slow, extremely difficult to manoeuvre, 336-metre carrier requiring a crew of 26 people – might have been a pirates' mother ship is entirely detached from reality. I don't need to elaborate on this because the Chamber heard this clearly during yesterday's witness examination. I refer the Chamber to that examination of the Chief Officer.

The only reference to piracy in both the first WhatsApp message and the note verbale is to an alleged false piracy alarm raised by the *"Heroic Idun*". Yet, accusing the *"Heroic Idun"* of launching a false piracy alarm is the very opposite of accusing the *"Heroic Idun"* of being a pirate vessel. What Nigeria was, in fact, alleging was that the *"Heroic Idun"* reported a piracy attack against it that never actually took place. Now, how could this possibly transform the *"Heroic Idun"* into a vessel suspected of piracy, let alone into a pirate vessel? Can Equatorial Guinea seriously maintain that Nigeria accused the vessel of issuing a false piracy alarm but then somehow failed to state that it had actually committed a suspected act of piracy, if that truly had been Nigeria's position?

Mr President, Members of the Special Chamber, there is more. As I have emphasized, piracy, under UNCLOS, can only occur on the high seas. Nigeria's own note verbales to Equatorial Guinea, not once, but twice, located the incident in Nigerian territorial waters.[25]

[21] REG-019.
[22] Rejoinder, paras. 200-210.
[23] REG-019.
[24] Counter-Memorial, para 60. REG-021.
[25] REG 019, REG-020.

Equatorial Guinea's explanation now is that reference to territorial waters must be disregarded.[26] But what is really happening here is plain. Equatorial Guinea is straining to recast the contemporaneous record to shoehorn at all costs Equatorial Guinea's appreciation of the incident into the legal definition of piracy.

This is to the point of effectively rewriting the communications that it received from Nigeria.

I would like to add one more point in this regard. Equatorial Guinea located the *"Heroic Idun"* 48 hours after receiving Nigeria's WhatsApp messages and notes verbales. This was, therefore, not a situation in which accuracy had to be sacrificed due to urgency or any other operational necessity.

Equatorial Guinea had a full 48 hours, two days, to properly assess and consider the content of Nigeria's communications and confirm or dispel any suspicion of piracy, if that was Equatorial Guinea's concern.

Mr President, Members of the Chamber, as we have seen, Nigeria never mentioned allegations of piracy prior to the interception of the "*Heroic Idun*."

As we indicated in our pleadings, following the arrest of the "*Heroic Idun*", Nigeria issued further notes verbales to Equatorial Guinea and then also published a press release concerning the events.

Now, this material, too, contains no reference whatsoever to piracy. On the contrary, it rules out piracy. Take, for instance, the press release of 20 August 2022[27] and the note verbale of 12 October 2020.[28]

I don't propose to address this material, but they are in your Judges' folder at tabs 24 and 25.

What I want to say is that both documents made clear that the allegation concerned only an attempt to load crude oil without authorization at the Akpo Oil Field. Now, even if one were to accept, *arguendo*, that an alleged act of loading crude oil without authorization could somehow be characterized as an act of violence, depredation or detention under Article 101 – which it plainly cannot – case law makes it clear that an attack against an oil platform cannot amount to piracy.

The Akpo Oil Field was clearly not a ship. It was an oil platform. I recall in this regard the Annex VII tribunal's finding in the *Arctic Sunrise* case. And I quote from this decision:

> An essential requirement of Article 101 is that the act of piracy be directed "against another ship". The Prirazlomnaya is not a ship. It is an offshore ice-resistant fixed platform. … Having concluded that the Prirazlomnaya is not a ship, the Tribunal need not consider the other elements required to show piracy within the meaning of Article 101.[29]

Mr President, Members of the Special Chamber, why did Equatorial Guinea fail to consider any of this information – both before and after the apprehension – which plainly ruled out piracy? Why did it never once raise the issue of piracy with Nigeria at the time of the events? Why did it not inform any international authority that a VLCC flying the Marshall Islands' flag had been arrested on allegations of piracy? Why did it never raise it with the Marshall Islands during and in the aftermath of the events, despite numerous communications

[26] Rejoinder, para 211.
[27] Annex SA/-5, referred to in the Counter-Memorial, para. 56.
[28] Letter from the Ministry of Defence of the Republic of Nigeria to the Ministry of Foreign Affairs of Equatorial Guinea dated 12 October 2022 (REG-040); see also Nigeria's Notes Verbales to Equatorial Guinea dated 26 October 2022 (REG-044) and 1 November 2022 (REG-046).
[29] *Arctic Sunrise (Netherlands* v. *Russia)*, Award on the Merits (Permanent Court of Arbitration, 14 August 2015), Award, paras. 238-240.

between Equatorial Guinea and the Marshall Islands at that time? And why did it raise piracy with the Marshall Islands for the first time in the Counter-Memorial in these proceedings on 15 July 2024?

The answer is straightforward: because the apprehension of the *"Heroic Idun"* had nothing whatsoever to do with piracy – neither then nor now. Piracy is an *ex post facto* construct devised by Equatorial Guinea solely for the purposes of these proceedings, in the hope that it may provide the only defense capable of excusing conduct so manifestly inconsistent with the principles of freedom of navigation and exclusive flag State jurisdiction.

Equatorial Guinea provides three arguments to seek to rebut this.

First, it relies on a tweet by the Equatoguinean Vice-President dated 10 November 2022.[30] This is in your Judges' folder at tab 22.

I emphasize this tweet marks the very first time, the very first time since the events of August 2022, that allegations of piracy were linked to the *"Heroic Idun"*.[31]

Mr President, Members of the Chamber, this tweet is dated the same day the Marshall Islands commenced prompt release proceedings before ITLOS: 10 November 2022. The same day. This is not a coincidence.

This tweet serves only to confirm the Marshall Islands' position that the piracy defense was concocted solely for the purpose of litigation; it was never a genuine issue.

Second, there is a note verbale to which Equatorial Guinea refers dated 3 June 2023, which Equatorial Guinea addressed to Nigeria, in which Equatorial Guinea made the point that the *"Heroic Idun"* had been pursued by Nigerian authorities because it had carried out an act of piracy.[32] This is Equatorial Guinea saying to Nigeria that Nigeria had been pursuing the *"Heroic Idun"* because of piracy. This is also in your Judges' folder at tab 23.

Now, this note verbale came six months after the commencement of prompt release proceedings by the Marshall Islands and five months after the submission of this dispute to compulsory settlement under UNCLOS on 18 December 2022.

But the issue with this note verbale is not simply one of timing. Equatorial Guinea appears to be putting words in Nigeria's mouth – hoping, perhaps, that Nigeria would say that, yes, piracy was the reason it pursued the "*Heroic Idun*."

It is telling that there is nothing on the record, though, to suggest that Nigeria ever responded to that note verbale of 3 June 2023; so the note verbale, again, stands as a plainly self-serving, unilateral, exercise by Equatorial Guinea crafted solely for the purposes of this litigation.

Last, Equatorial Guinea argues that *"Heroic Idun"* accepted liability for an offence under Nigerian - and I quote - "piracy-related" legislation.[33]

Now, if Equatorial Guinea intends this to be confirmation that the *"Heroic Idun"* could reasonably be suspected of being a pirate vessel, that suggestion is, with respect, dishonest.

I will not go into the reasons why the vessel accepted liability; this was, in effect, an act of extortion. But what matters is that the offence in question had nothing to do with allegations of the vessel being a pirate vessel.

The offence concerned the reporting of an alleged piracy incident – again, the allegation that the *"Heroic Idun"* falsely reported being the victim of a piracy attack.

What Equatorial Guinea evocatively refers to in its pleading as "piracy-related" legislation is Nigeria's Suppression of Piracy and Other Maritime Offences Act of 2019.[34] I emphasize: other maritime offences.

[30] SA/25.
[31] Rejoinder, para. 213(a). SA/25.
[32] Rejoinder, para. 213(b). REG-053.
[33] Rejoinder, para. 213(c).
[34] Rejoinder, para. 213(c).

It is for "another maritime offence" under the Act that the *"Heroic Idun"* accepted liability, and not for piracy.

Mr President, Members of the Chamber, our analysis could end here. Equatorial Guinea had no information suggesting that Nigerian authorities were pursuing the *"Heroic Idun"* on suspicion of piracy. On the contrary, all the information it possessed pointed in the opposite direction.

It is entirely immaterial to our analysis to examine the actual reasons why Nigeria may have requested the vessel's arrest.

However, for completeness and context only, let me explain why the *"Heroic Idun"* was, in fact, being pursued. It was being pursued for what is, essentially, an act of defamation, for falsely raising a piracy alarm in waters that must be perceived as safe.

Nigeria, itself, made this clear in a note verbale to Equatorial Guinea in which it complained that the *"Heroic Idun"*'s actions, and I quote, and you can see it here in the slide, "portray exaggerated insecurity in the general area".[35]

Now, Mr President, Members of the Special Chamber, if there is any risk of undermining anti-piracy efforts in this case, it is precisely this: that a vessel that, in good faith, reports a suspected piracy attack, that then turns out to be unfounded, should be punished in the way the *"Heroic Idun"* and its crew were punished.

Mr President, Members of the Special Chamber, I now turn to the Marshall Islands' second argument in response to Equatorial Guinea's piracy defense. This is that, even if Equatorial Guinea had any basis to suspect the *"Heroic Idun"* of piracy, its seizure, diversion to Equatorial Guinea, and prolonged detention there, nonetheless violated UNCLOS. This is, as I said, an argument we make in the alternative.

As I did in respect of the first part of my submissions, I will start first by addressing the law. UNCLOS provides for the possibility of exercising enforcement powers in respect of a pirate vessel.

The definition of a pirate vessel is provided for in Article 103 of UNCLOS. It is in front of you in the slide and it provides that

> A ship ... is considered a pirate ship ... if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship ... has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Now, Article 105 of the Convention sets out the right of every State on the high seas to apprehend a pirate ship. It does so in the following terms:

> On the high seas, or in any other place outside the jurisdiction of any other State, every State may seize a pirate ship ... or a ship ... taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.

So, apprehension is authorized in two cases only: either the ship is a pirate ship, or it is a ship taken by piracy and under the control of pirates. At the risk of stating the obvious, allegations of falsely reporting a piracy attack do not trigger the powers under Article 105.

Now, Article 110 provides for the right of visit. In the relevant part, this provision sets out that "a warship which encounters on the high seas a foreign ship is not justified in boarding

[35] REG-040.

it unless there is reasonable ground for suspecting that, *inter alia*, (a) the ship is engaged in piracy".

Before addressing the relationship between these two provisions and Article 105 and 110, I would like to make one observation. The enforcement powers conferred by UNCLOS are limited to piracy. They do not extend to other forms of criminal conduct that do not fall within the legal definition of Article 101. Equatorial Guinea has a tendency, in its pleadings, especially when referring to the Yaoundé Code, to blur the lines a little, to mix piracy with other maritime offences or with crimes under domestic law, or with other forms of transnational crime. But the law is the law and the law is precise: universal enforcement powers are a narrow exception to the principles of freedom of navigation and exclusive flag State jurisdiction. Piracy alone justifies the exception.

Mr President, Members of the Chamber, the Marshall Islands has explained in its pleadings that there is a relationship of progression between the right of visit under Article 110, and the right to seize a ship under Article 105.[36] In other words, that if there is a suspicion on reasonable grounds that a ship may be engaged in piracy, this may be visited. If it is confirmed to be a pirate ship, it may be seized.

Equatorial Guinea contests this. First, it claims that Article 105 contains no express requirement to exercise the right of visit under Article 110 beforehand, and that the two provisions are therefore unconnected.[37] But contrary to what Equatorial Guinea claims, there is an evident connection between these two provisions. Article 105 refers to a pirate ship – not a suspected pirate ship. Article 110, by contrast, speaks of reasonable grounds for suspecting that a ship is engaged in piracy. These are clearly different standards, standing in a progressive relationship to one another and entailing distinct enforcement powers, also standing in a relationship of progression to one another. This is the connection. Measures under Article 105 are considerably more intrusive and in greater tension with freedom of navigation than those permitted under Article 110. It is therefore entirely consistent with the ordinary meaning of the words in Articles 105 and 110, read in their context, that where only a suspicion of piracy exists, Article 110 powers should ordinarily be exercised.

Second, Mr President, Members of the Special Chamber, Equatorial Guinea contends that there is no support for the Marshall Islands' position on the relationship between Articles 105 and 110 in leading UNCLOS commentaries.[38] Equatorial Guinea notes, as an example, that the leading Proelß commentary does not support the proposition of the Marshall Islands on the relationship between Articles 105 and 110.[39] I think this must have been an oversight because the Proelß commentary notes, and I quote, that "such a seizure" and this is not part of the quote, but a seizure pursuant to Article 105, and I start quoting again, "can only follow boarding and inspection of a suspected vessel."[40] Mr President, Members of the Special Chamber, it could not have been stated more clearly. More broadly, I refer the Special Chamber here to our pleadings where the Marshall Islands has cited several established law of the sea scholars in support of its interpretation of the relationship between Articles 105 and 110.[41]

Third, Equatorial Guinea asserts that the Marshall Islands' interpretation of the relationship between Articles 105 and 110 is neither realistic nor achievable.[42] However, Equatorial Guinea studiously mischaracterizes the Marshall Islands' position as suggesting that

[36] Reply, paras. 113-118.
[37] Rejoinder, paras. 185-188.
[38] Rejoinder, paras. 189-190.
[39] Rejoinder, para. 189(a), footnote 329.
[40] Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck–Hart–Nomos 2017), page 754.
[41] Reply, paras. 113-118.
[42] Rejoinder, paras. 190-193.

the exercise of powers under Article 105 is always strictly, and I quote, "under any circumstances" contingent upon the prior exercise of the right of visit under Article 110.[43]

Mr President, Members of the Special Chamber, Equatorial Guinea is once again engaging in scaremongering, implying that the Marshall Islands seeks to dictate how Equatorial Guinea, or any other State, should conduct its anti-piracy operations in any given case. The Marshall Islands is not proposing a rigid checklist of how every vessel suspected of piracy must be confronted in any possible scenario.

There may be exceptional situations where suspicion of piracy may warrant the triggering of Article 105 powers, but evidently this will turn on the intensity of the suspicion, on the existence of corroborating elements, on the conduct of the suspected vessel, on any specific operational needs, and so on and so forth. I would like to refer you to a quote by Geiss and Anne Petrig in our pleadings: "on the basis of the wording of Article 105 of UNCLOS, a mere suspicion that a ship might be engaged in piracy would not seem to suffice to trigger the enforcement powers provided by Article 105 of UNCLOS."[44]

Mr President, Members of the Special Chamber, a mere suspicion without anything else, is certainly not enough.

Mr President, Members of the Special Chamber, ultimately let me make it clear, you do not need to determine the precise relationship between Articles 105 and 110 in every conceivable case, but only in this case. And on the particular facts and circumstances of this case, Equatorial Guinea should, at most, have exercised the right of visit of the "*Heroic Idun*." Let me explain this further.

First, even assuming that Equatorial Guinea harboured a suspicion of piracy based on the communications it received from Nigeria, that suspicion was at best tenuous – a mere suspicion we would say. This is because, as I said, there is absolutely nothing in the documents from Nigeria that even mentions piracy allegations.

Second, when the *"Heroic Idun"* was located in the EEZ of São Tomé, it was instructed to stop its engines and the Master, as you heard, immediately complied. The Master communicated with *"Capitan David"* and remained fully cooperative without throughout the entire process. Now, what operational need justified interdiction in these circumstances? Equatorial Guinea does not say.

Third, the *"Capitan David"* itself indicated that all they wanted to do was to investigate the vessel. I emphasize the word "investigate" here, because investigate is language that brings us clearly into Article 110 territory. The right under Article 110 is precisely to board to investigate suspicions of piracy.

Fourth, the Master requested whether the Equatoguinean unit wanted to board the vessel and expressly invited them to do so. Mr President, Members of the Tribunal, they were expressly invited on board. What kind of pirate vessel would do that? Again, what kind of operational need required seizing the vessel in circumstances where the vessel invited them on board to investigate?

In conclusion, the question that the Chamber needs to answer is this: was it lawful, in the circumstances, to seize the *"Heroic Idun"* without first taking the proportionate step that would plainly and easily have dispelled any allegation of piracy? The law tells us that it was not.

Mr President, Members of the Chamber, I now turn to Article 100 and anti-piracy cooperation, on which Equatorial Guinea relies on heavily. Article 100 of UNCLOS provides that: "All 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."

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[43] Rejoinder, para. 184.

[44] Reply, para. 116. Anna Petrig & Robin Geiß, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press, 2011), para. 56.

Now, the central point here is that Article 100 is not even engaged in these proceedings, because this case is not about piracy. The reliance on Article 100 suffers from the same flaw as Equatorial Guinea's belated invocation of piracy: it is an *ex post facto* construct.

In any event, Article 100 cannot provide Equatorial Guinea with an additional independent basis to interdict the *"Heroic Idun"* beyond what UNCLOS permits. In this case, it was unlawful for Equatorial Guinea to exercise Article 105 powers. It remained unlawful to do so, even in the context of a request for anti-piracy cooperation.

Equatorial Guinea, again, tries to hide behind Nigeria, but a State cannot, under the guise of anti-piracy cooperation, do what it would otherwise have no lawful authority to do by itself.

Anti-piracy cooperation, as any form of cooperation in international law, must remain within the bounds of what is lawful for the requested State.

It is relevant in this regard that nothing in the wording of Article 100 of UNCLOS suggests that, in order to comply with this provision, the requested State is tied to the specific conduct or outcome requested by the requesting State. The International Law Commission's commentary to Article 38, which is the precursor of Article 100 of UNCLOS, makes clear that the requested State is allowed "a certain latitude" in deciding how to cooperate in any given case.[45] This certain latitude is also to ensure that the requested State complies with its international obligations.

Mr President, Members of the Special Chamber, I would now like to conclude my submissions by turning to Article 106 of the Convention, because, quite apart from the other arguments and considerations that I have made thus far, even if there were some merits in Equatorial Guinea's piracy defence, this would not absolve it of its obligations to compensate the Marshall Islands for the damage it caused.

The provision is in front of you, and is clear: when a seizure is made without adequate grounds, the State making the seizure shall be liable to the State of nationality for any damage caused.

In the present case, the seizure was carried out without adequate grounds. The assessment is *ex post facto* and it is objective: was the vessel a pirate vessel for purposes of Article 105? Was it under the control of pirates for purposes of Article 105?

If the answer to both these questions is in the negative – as it plainly is in this case – then the seizure under Article 105 was made without adequate grounds.

This is confirmed by comparing Article 106 and Article 110(3) of UNCLOS, concerning reparation in the case of boarding of a suspected pirate vessel.

Article 110, paragraph 3 provides:

> If the suspicions [of piracy] proved to be unfounded and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

I would like to make four points to conclude my presentation.

First, if a vessel is to be compensated under Article 110 for having been boarded, when the suspicions of piracy are unfounded, then it must also be compensated when it is seized, without actually being a pirate vessel.

Second, "adequate grounds" for purposes of Articles 105 and 106 is clearly a different, and more stringent standard to a "reasonable suspicion" of piracy for purposes of Article 110. Equatorial Guinea's position is that it had "adequate grounds" to seize the vessel because it had

[45] Report of the International Law Commission covering the work of its eight session, 23 April – 4 July 1956, A/3159 "Commentary to the articles concerning the law of the sea" in Yearbook of the International Law Commission, 1956, vol II, p. 265 at p 282.

a "reasonable suspicion of piracy". But this flies in the face of the distinction between Articles 105 and 110, which is a very material distinction that cannot be done away with.

Third, when a vessel is boarded on the basis of an ungrounded suspicion of piracy, it must be compensated, provided it has not committed any act that would justify the boarding. No such qualifiers as in Article 110(3) appear in Article 106.

Fourth, and last, in any case, the "*Heroic Idun*" did not commit any act that would justify the seizure of the vessel, as I discussed today. Quite to the contrary, the vessel was cooperative throughout all its interactions with Equatorial Guinea.

Whatever one may think of Equatorial Guinea's piracy defence, compensation to the Marshall Islands is due in any event under Article 106 of the Convention.

Mr President, Members of the Special Chamber, this concludes my presentation. Thank you very much for your attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Dr Busco for your submission.

I now invite Ms Nevill to make her statement.

STATEMENT OF MS NEVILL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/3/Rev.1, p. 49–55]

Mr President, Members of the Special Chamber, I echo my colleagues in expressing my pleasure in appearing before you and on behalf of the Marshall Islands.

My presentation today, Mr President, is probably over the 20 minutes that we have left with your indulgence in this session, but I propose that I will see where I have gotten to at 1.20 p.m., and we can take it from there.

As my colleague, Dr Busco, has set out, Equatorial Guinea has sought to defend its interception and detention of the *“Heroic Idun”* as anti-piracy cooperation under Article 100 of the Convention. As he has also explained, Equatorial Guinea cannot rely on Article 100. This is because the information on which Equatorial Guinea relies to justify its interception and detention of the vessel on 12 August 2022, which is information that it itself has produced in these proceedings, does not support its claim. The request from Nigeria, on which Equatorial Guinea alleges that it was compelled to act, did not state that an act of piracy had been committed by the *“Heroic Idun”* or that it had been overrun by pirates. Put simply, Article 100 did not apply and did not justify Equatorial Guinea’s conduct.

Equatorial Guinea attempts to get around this obvious difficulty by relying on the Yaoundé Code. The Yaoundé Code is the shorthand title for the “Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa”. It was developed with the technical support of the IMO and was signed in 2013, by 25 States in Western and Central Africa.

In my submissions, I will explain why the Yaoundé Code does not assist Equatorial Guinea. In making this submission, the Marshall Islands does not seek to underplay the importance of the Yaoundé Architecture in global initiatives to combat piracy. It is simply that the Code does not, as Equatorial Guinea contends, provide legal cover for its egregious acts against the *“Heroic Idun”* and its crew in violation of the Convention and applicable law.

Equatorial Guinea says, variously, in its written pleadings, that it had “commitments”[1] or a “clear duty”[2] or “obligations”[3] or “undertakings”[4] under the Yaoundé Code to act as it did in intercepting and detaining the *“Heroic Idun”* in light of Nigeria’s request of 10 August (in my oral statement, you will have footnote references to the relevant parts of the pleadings).

Equatorial Guinea suggests that, had it failed to comply with this request, it would have been in breach of its “commitments” under the Code.[5] Equatorial Guinea also makes the extraordinary submission that, because the Code gives effect to its obligations under UNCLOS “regarding cooperation in the repression of piracy under Article 100”,[6] “Marshall Islands-flagged vessels present in the maritime zones of Central and West African States who are parties to the Yaoundé Code may be dealt with pursuant to the Code”[7] and “may be subject to the Code.”[8]

The Marshall Islands does not dispute that the States Parties to the Convention have an obligation under Article 100 to cooperate to combat piracy and that international cooperation on anti-piracy measures is critically important, or that the Yaoundé Code and other regional

[1] Counter-Memorial, paras. 3, 106, 107, 125, 129, 139, 178, 178, 255, 344; Rejoinder, paras. 34, 117, 167, 216.
[2] Counter-Memorial, para. 43.
[3] Counter-Memorial, paras. 25, 129, 195, 231; Rejoinder, paras. 33, 257.
[4] Counter-Memorial, paras. 254, 257.
[5] Counter-Memorial, para. 211; Rejoinder, para. 167.
[6] Rejoinder, para. 179.
[7] Rejoinder, para. 180.
[8] Rejoinder, para. 152.

instruments, such as the "Djibouti Code" – which is the shorthand for the 2009 Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden – are an expression of that cooperation.

Indeed, as emphasized by the Attorney General yesterday, the Marshall Islands, as the world's third-largest flag State, fully supports anti-piracy cooperation.

However, what the Yaoundé Code does not do is authorize Equatorial Guinea to act in breach of the Convention.[9] Nor does it impose obligations on the Marshall Islands and other flag States sailing in the Gulf of Guinea, or limit their rights and freedoms under the Convention. It does not do so as a matter of the application of the basic rules of treaty law, and it does not do so as a matter of the provisions of the Code itself. I address each of these in turn.

There are at least five reasons why, as a matter of the application of the rules of treaty law, that the Yaoundé Code does not assist Equatorial Guinea.[10]

First, the Marshall Islands is not a signatory to the Code.

Second, the Code is not binding between its signatories, except possibly in one limited respect which does not apply here. This is expressly stated in Article 19(a) of the Code, shown on the slide, which says in relevant part that: "Nothing in this Code is intended to: (a) create or establish a binding agreement."[11]

It follows that Equatorial Guinea did not, as it suggests,[12] have a legally binding obligation under the Code to intercept and detain the *"Heroic Idun"* on Nigeria's request. For the same reason, the Code is not a "rule of international law" for the purpose of Article 293(1) of the Convention.[13]

Equatorial Guinea claims that it is moot that the Code is not binding or that the Marshall Islands is not bound by it. In support of this proposition, it cites the Seabed Disputes Chamber's reliance on the articulation of the precautionary principle in Principle 15 of the Rio Declaration in its Advisory Opinion on the Area, and the decision of the Annex VII tribunal in *Barbados* v. *Trinidad and Tobago* to take the 1990 Trinidad and Tobago-Venezuela maritime delimitation agreement into account in delimiting the maritime boundary of Barbados and Trinidad and Tobago.[14]

Neither example is apposite. Principle 15 was incorporated by express reference into the Nodules and Sulphide Regulations, which, as the Seabed Chamber pointed out, "transform[ed] this non-binding statement into a binding obligation."[15]

As to the reliance on *Barbados* v. *Trinidad and Tobago*, this case does not concern a dispute concerning delimitation of maritime boundaries, where it is well-established that existing territorial and maritime delimitation agreements in the area may be taken into account.

I move now to my third point. The Code only has 25 signatories, from which it follows that the Code is not a "subsequent agreement" between the 170 parties of UNCLOS "regarding its interpretation or the application of its provisions" for the purposes of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.

Fourth, for the same reason, the Code is not "subsequent practice in the application of the treaty which establishes the treatment of the parties" regarding the interpretation of the Convention within Article 31(3)(b) of the Vienna Convention. You can see those provisions on the slide.

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[9] Cf. Rejoinder, para. 117.
[10] Reply, paras. 91, 94-96, 160-161.
[11] Reply, para. 162.
[12] Rejoinder, para. 158.
[13] Reply, paras. 91, 93.
[14] Rejoinder, paras. 150-151.
[15] *Responsibilities and obligations of States with respect to activities in the* Area, Advisory Opinion, *1 February 2011, ITLOS Reports 2011*, p. 10, para. 127.

Equatorial Guinea asserts that practice by the signatory States under the Code is subsequent practice under Article 31(3)(b), and, I quote, "in its regional context",[16] but the authority it cites in support of this proposition does not support "a regional context" approach to interpretation. And, as elaborated by the International Law Commission in its Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties", Article 31(3)(b) is limited to "subsequent practice" as a means of authentic interpretation that establishes the agreement of "all the parties to the treaty".[17]

There is no evidence that the Marshall Islands, or any parties to UNCLOS which are not signatories to the Code, have all agreed to a "regional context" interpretation of the Convention in the Gulf of Guinea. Much less have they agreed to a "regional approach" which, on Equatorial Guinea's construction of the Code, limits their freedom of navigation and, in effect, radically extends the definition of piracy and the grounds on which non-flag States can stop, board and detain vessels on the high seas and in the EEZs of third States. The Code, as interpreted by Equatorial Guinea, is plainly "incompatible with the Convention". It, therefore, would not meet the requirements of Article 293(1), even if it were a rule of international law.

Furthermore, UNCLOS already makes provision for the possibility for two or more States Parties to conclude agreements modifying the operation of the provisions of the Convention, in paragraph (3) of Article 311, but this is subject to meeting certain requirements. These requirements include that such modification only applies between the parties to that agreement and that it cannot affect the enjoyment by other States of their rights under the Convention. Equatorial Guinea's argument that the Marshall Islands and other States "may be the subject of the Code" is thus directly contradictory to UNCLOS itself.

Equatorial Guinea's submission also fails to take into account the presumption, articulated by the ILC in conclusion 7, paragraph 3, of its "Draft conclusions on subsequent agreements and subsequent practice", which is shown on the slide, that "the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty" – they don't intend to "amend or modify it". "The possibility of amending or modifying a treaty by subsequent practice of the parties has not generally been recognized."

In any event, even if the rules of treaty interpretation in Article 31(3)(a) or (b) could be relied on to amend UNCLOS in the way that Equatorial Guinea suggests, which they cannot, silence or any failure to object to the Code by the Marshall Islands and other parties to UNCLOS could not be characterized as acquiescence or a tacit understanding. This is because, as I will come to shortly, the text of the Code does not purport to depart from UNCLOS.

Turning to my fifth point under this heading, for the same reasons that the Code is not a subsequent agreement or practice for the purposes of Article 31(3)(a) and (b) of the Vienna Convention, the Code is not a rule of international law "applicable in the relations between the parties" of the Convention for the purpose of Article 31(3)(c) of the Vienna Convention on the Law on Treaties.

Equatorial Guinea maintains that, in any event, the Code qualifies as a supplementary means of interpretation of the Convention under Article 32 of the VCLT.[18] However, Equatorial Guinea has not met the criteria for the application of Article 32. It has not established that the Yaoundé Code, or its provisions, confirm the interpretation of Article 100 or the other anti-piracy provisions in UNCLOS "reached in the application of Article 31" nor that its interpretation of these provisions – to which Dr Busco has already referred –according to Article 31 is manifestly absurd or unreasonable.

[16] Rejoinder, paras. 153, 155.

[17] *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, p. 16, para. (16) of the commentary to conclusion 4.

[18] Rejoinder, paras. 154-155.

There is nothing in Article 100 or any other provision of UNCLOS which provides that a breach of UNCLOS is excused because it is undertaken in furtherance of an obligation of cooperation under Article 100. It follows that a breach of UNCLOS is not excused because it was undertaken in furtherance of commitments made in a non-binding instrument, which was itself concluded in furtherance of the obligation under Article 100. If that were the case, States could alter their obligations under the Convention and avoid responsibility by the simple expedient of concluding agreements invoking cooperation with one or more other State Parties. This is plainly not what the Convention or international treaty law provides or allows. Nor is this what the Code itself provides or allows, and this is the subject to which I now turn in the second part of my submissions.

The text of the Code itself simply does not support Equatorial Guinea's case, on either the construction of UNCLOS or of the Code itself. Crucially, the Yaoundé Code itself does not purport to depart from UNCLOS, does not purport to displace the signatories' obligations or rights under UNCLOS, and does not purport to impose obligations on third States.

This is plain from the wording of the Code.[19] I will show several provisions of the Code on the slides to illustrate my points. I will start with Article 2, "Purpose and scope." Paragraph 1 of Article 2 of the Code sets out the signatories' intention to cooperate in the repression of "transnational organized crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea". But, as you will see in the phrases highlighted on the slide, the intention to cooperate is to be consistent with applicable rules of international law.

"Transnational organized crime in the maritime domain" is defined in paragraph 5 of Article 1. The definition lists 12 acts, including "piracy and armed robbery at sea" at subparagraph (c), "illegal oil bunkering" at (d), "crude oil theft" at (e), and "vandalization of offshore infrastructure" at (l).

I note the references to "illegal oil bunkering", "cruide oil theft" and "vandalization of offshore infrastructure" in the definition in Article 1(5) for two reasons. Firstly, because Nigeria's first request to stop the vessel said it was "suspected of being involved in an illegal fuel supply operation".[20] The second request said that it was involved in "theft of crude oil"[21] and the third was that it was "involved in the illegal entry into Nigeria's territorial waters to load crude oil without proper approval."[22]

The second reason I note these references is because Equatorial Guinea argues that the inclusion of these acts in the definition "aligns with the well-known connection between piracy and other criminal maritime activity at sea." Somehow – and the argument is not entirely clear – this means that the definition of "piracy" or the agreement to cooperate in the repression of piracy under Article 100 incorporates these other acts, so that the provisions in UNCLOS and the Code concerning seizure of pirate vessels also apply to "illegal oil bunkering", "crude oil theft" and "vandalization of offshore infrastructure".[23]

However, as I have already alluded to, the Code does not purport to make such a radical departure from the text of the Convention and conventional understandings of the meaning of "piracy". The Code itself plainly distinguishes "piracy" from "armed robbery at sea", "illegal oil bunkering", "crude oil theft" and "vandalization of offshore infrastructure".

"Piracy" is defined in Article 1(3) of the Code in identical terms to Article 101 of UNCLOS, and the definition of a "pirate ship" at Article 1(7) is in materially identical terms to Article 103 of UNCLOS. The only reference in the Code to cooperation in seizing or rescuing vessels beyond the outer limit of any State's territorial sea is in Article 6, "Measures

[19] Reply, para. 163.
[20] Reply, para. 100.a.
[21] Reply, para. 100.b.
[22] Reply, para. 100.c.
[23] Rejoinder, paras. 178-180.

to repress piracy." This provision is limited to piracy. There is no equivalent provision suggesting seizure of vessels for the other acts listed in the definition of "transnational organized crime", such as "armed robbery at sea", and so on. The Code is, in this respect, entirely consistent with UNCLOS and other rules of international law concerning interdiction. Even SUA, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and its 2005 Protocol, which are cited in the preamble to the Code and regarded as advancing enforcement operations at sea, does not authorize actions against vessels flagged to other parties unless with the consent of the flag State.

"Piracy" in the Yaoundé Code constitutes a basis to "intend to cooperate" in seizing pirate ships and vessels, and seizing pirate ships beyond the outer limit of any State's territorial sea. So it provides a basis for that cooperation beyond the territorial sea. However, "robbery at sea", "illegal oil bunkering", "crude oil theft", and "vandalization of offshore infrastructure" do not provide a basis for such cooperation under the Code.

That the signatories to the Code do not and did not intend to go beyond the limits of UNCLOS and international law is confirmed in Article 19, paragraph (d), now shown on the slide. Article 19, paragraph (d) states:

> Nothing in this Code is intended to: ... apply to or limit boarding of ships conducted by any Signatory in accordance with international law, beyond the outer limit of any State's territorial sea, including boardings based upon the right of visit, ... or an authorization from the flag State to take law enforcement or other action.

This is also consistent with the title of the Code. It is called a "Code of Conduct", not an "agreement" or a "convention".

The language used throughout the Code is an important indicator of the signatories' intentions and its non-binding character.

I would just pause there, Mr President, to say that I have one more page of submissions.

As I was saying, the language used throughout the Code is also an important indicator of the signatories' intentions and its non-binding character. It is hortatory, not mandatory. Articles 2 and 6 provide that the "signatories", "intend to cooperate": it does not say they "shall" cooperate. Article 6, paragraph 2, provides that they "may", not "shall", "seize a pirate ship". There is no obligation to seize pirate ships.

Article 13, entitled "Assistance among signatories", shown now on the slide, says that a signatory "may" request another signatory State to take "effective measures in response to reported transnational organized crime in the maritime domain", but the requested State is not required to take any such measures by the Code.

Mr President, Members of the Special Chamber, in conclusion, my submissions on the Code can be summarized in four brief points:

First, the Yaoundé Code did not impose a binding obligation on Equatorial Guinea to comply with Nigeria's request to interdict the "*Heroic Idun*" and its crew.

Second, the Yaoundé Code did not even impose a non-legally binding obligation on Equatorial Guinea to respond to the request.

Third, the Code is not a subsequent agreement or practice of the parties to the Convention, or a "relevant rule of law applicable in the relations between the parties" for the purposes of interpreting the Convention.

Fourth, and this is my final point, it follows from points one to three that cooperation under the Yaoundé Code cannot, and does not, relieve Equatorial Guinea of its obligations to the Marshall Islands under UNCLOS, and it does not relieve the Marshall Islands of its rights

under UNCLOS.[24] It simply does not provide a defence or excuse to Equatorial Guinea's interception and detention of the *"Heroic Idun"* and its crew in violation of UNCLOS.

Mr President, Members of the Special Chamber, this brings to a close the Marshall Islands' submissions on its first claim. Dr Busco will address you after the lunch adjournment on our second claim, Equatorial Guinea's excessive exercise of prescriptive jurisdiction.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Nevill, for your statements.

This brings us to 1.20 p.m., and it is time for us to withdraw for lunch.

So this brings us to the end of this morning's sitting, and the hearing will be resumed after 3 p.m., when I will give the floor to Dr Busco for his statement. This sitting is now closed.

(The sitting closed at 3 p.m.)

[24] Reply, para. 160.

PUBLIC SITTING HELD ON 7 OCTOBER 2025, 3 P.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 6 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 7 OCTOBRE 2025, 15 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l’audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l’audience du 6 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber will now continue its hearing in *The M/T “Heroic Idun” (No. 2) Case*. This afternoon’s session will be extended until approximately 6.20 p.m.

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

First round: Marshall Islands (continued)

STATEMENT OF MR BUSCO
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/4/Rev.1, p. 1–10]

Thank you, Mr President.

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

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

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

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

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

One final preliminary observation before I start.

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

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

First, and I quote from the *"Enrica Lexie"* tribunal here, prescriptive jurisdiction is – and I open the quote – "the authority of a State to make laws in relation to persons, property or conduct".[1]

The second proposition is that ITLOS, in the *M/V "Virginia G"* case, indicated that tribunals constituted under UNCLOS can rule over "whether in enacting or implementing its

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

laws, a State Party has acted in conformity with the Convention".[2] I emphasize the word "enacting" here. This means that a law of the sea tribunal can rule whether a piece of legislation – *per se* and irrespective of its implementation – is consistent with UNCLOS. Of course, and all the more so, it can rule whether the implementation of the enacted legislation is consistent with UNCLOS.

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

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

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

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

For example, in the *"Norstar"* case, this Tribunal found that Italy had breached the freedom of navigation of a vessel registered in Panama by arresting it under laws that unlawfully sought to regulate the activities of foreign ships on the high seas. In that case, it was bunkering.

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

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

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

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

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[2] *M/V "Virginia G" (Panama* v. *Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014*, at para. 227.
[3] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment of 1 July 1999, ITLOS Reports 1999*, at para. 136.

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

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

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

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

As far as freedom of navigation under Article 87 is concerned, again, in *"Norstar"*, this Tribunal indicated that "it does not matter whether or not a chilling effect is produced. Regardless of such effect, 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 freedom of navigation [...]."

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

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

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

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

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

Now, that a positive basis in the Convention is required was established by this Tribunal in the case of the M/V "*SAIGA*" *(No. 2)*. There, the Tribunal addressed the legality of the extension of the custom laws of Guinea to its Exclusive Economic Zone. It put the issue in these terms:[7]

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

What the Tribunal referred to as "justification" is, in essence, shorthand for a legal basis. The question was whether the Convention provided any positive legal basis for Guinea to apply its custom laws in the Exclusive Economic Zone. The Tribunal found that there was

[4] *M/V "Norstar" (Panama* v. *Italy), Merits Judgment of 10 April 2019, ITLOS Reports 2018–2019*, at para. 225.
[5] *The "Enrica Lexie" Incident*, Perm. Ct. Arb Case No. 2015-28 at para. 527.
[6] International Law Commission, "General Commentary to the Articles on State Responsibility" in *Yearbook of the International Law Commission (2001)*, vol. II, Part Two, p. 31; at p. 57, para. (12) of the commentary to Article 12.
[7] *M/V "SAIGA" (No. 2)*, at para. 126.

no such basis and, once again, emphasized the requirement for a positive legal basis. On this occasion, the Tribunal used the word "empower", stating that:[8]

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

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

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

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

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

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

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

The second is Article 12 of Law No. 2/2020 dated 8 July.[10] According to this, "all 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."

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

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

Mr President, Members of the Chamber, it must be made perfectly clear: there is no conceivable reason why these provisions should have applied to the *"Heroic Idun"* in the light of the facts and circumstances of this case.

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

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[8] *M/V "SAIGA" (No. 2)*, at para. 127.
[9] RMI/-42.
[10] RMI/-42.
[11] RMI/-42.

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

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

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

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

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

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

The Tribunal noted:

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

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

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

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

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

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

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[12] *M/V "SAIGA" (No. 2)*, at para. 122.

[13] Counter-Memorial, para 279.

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

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

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

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

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

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

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

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

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

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

It is true that there have been a few isolated and exceptional attempts to restrict the entry of certain categories of vessels into an Exclusive Economic Zone, typically on the grounds of preventing oil pollution. These measures concerned single-hull tankers aged fifteen years or older, carrying heavy fuel oils. By contrast, the provision on which Equatorial Guinea

[14] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion (4 February 1932), Permanent Court of International Justice, P.C.I.J Series A/B No. 44,* at p. 24.
[15] Counter-Memorial, para. 275.
[16] Counter-Memorial, para. 278.
[17] Counter-Memorial, footnote 437.

relies refers in unqualified terms to "all vessels". The purported restriction is therefore unqualified and extends far beyond any such limited precedents that may have existed.

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

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

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

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

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

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

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

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

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

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

I stress, "upon request," not continuously.

And, indeed, scholars who have looked into the matter have reached the exact same conclusion. Let me quote this very simple yet very telling passage from a recent article: "We learned that basically there is no international law requiring that a ship fly a flag on the high seas."[20] This quote is based on a recent review of the practice as the academic article I am quoting from was published in 2017.

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[18] Rejoinder, para. 173.

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

[20] Barry Hart Dubner and Mary Carmen Arias, "Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?" (2017) 29 *U.S.F. Mar. L. J.* 99, at p. 141.

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

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

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Dr Mr Busco for his statement and I now invite Dr Manuel Casas to take the floor.

You have the floor, sir.

STATEMENT OF MR CASAS
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/4/Rev.1, p. 10–16]

Mr President, Members of the Chamber, I am honoured, privileged and happy to appear before you on behalf of the Marshall Islands. I will address you for approximately 20 minutes on the first two "other breaches" of UNCLOS based on the other instruments as well as general international law.[1] Ms Grafton and Ms Nevill will address the remaining "other breaches".

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

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

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

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

The independent nature of these claims is supported by precedent: this was the approach taken in *"SAIGA"*, in the *"Virginia G"*, and in the *"Duzgit Integrity"*.[2] Importantly, this is not merely a technicality, an academic point; it has practical significance. These claims, these specific claims, relate to which powers Equatorial Guinea exercised and how, regardless of whether the exercise of those powers was itself justified under the Convention.

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

The Marshall Islands contends that the Chamber must determine whether Equatorial Guinea's conduct was reasonable, understood as meaning necessary and proportionate. Under that standard, the Chamber must determine whether Equatorial Guinea's measures were necessary, whether they were reasonable, and whether they were proportionate. Doing so, in turn, requires considering the measures against the State's alleged justification for taking them. That is the formulation generally used by law of the sea tribunals.[3] In the words of former President Paik, that is a "fact-intensive and circumstance-dependent"[4] analysis. Ultimately, it is a matter of objective determination based on the facts at issue.

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

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

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[1] Memorial, paras. 242-249; Reply, paras. 183-207.
[2] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment of 1 July 1999, ITLOS Reports 1999*, at paras. 136, 150, 155, 183(9); *M/V "Virginia G" (Panama* v. *Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014*, at paras. 360–362, 452(13); *Arbitration regarding the Duzgit Integrity (Malta v. São Tomé and Príncipe)*, Award of 5 September 2016 (2018) 173 *I.L.R.* 95, at paras. 209, 254.
[3] *Duzgit Integrity*, para. 258 and *Arctic Sunrise*, Compensation Award, paras. 76-77.
[4] Separate Opinion of Judge Paik, at para. 17.

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

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

Second, Equatorial Guinea relies on the Joint Dissent of *"Virginia G"*.[5] However, the Joint Dissent's learned comments must be analysed carefully. They must be viewed in their proper context. Doing so shows that the Joint Dissent does not support Equatorial Guinea's position. This is for two reasons.

First, the Joint Dissent's main disagreement with the majority on this issue relates to whether Guinea Bisau's confiscation of the *"Virginia G"* constituted a breach of Article 73 of the Convention.

The scope of the application of Article 73 - pausing here – that is a provision that deals with sovereign rights over marine resources in the EEZ – is quite different from the point at issue here. The key term is "sovereign rights". That distinction, in itself, renders the Joint Dissent's learned comments inapposite. Here we are dealing with enforcement powers, a very different issue. The authorities the Joint Dissent relies on by Judges Cot and Wolfrum illustrate this. They focus on Article 73.[6]

But even if I am wrong about that, the Joint Dissent's concern is with the majority's approach, insofar as they considered it came too close to acting as an appellate court by "substituting its judgment for that of the local authority".[7] That is far from the Chamber's task here, which is determining whether Equatorial Guinea's conduct and its enforcement measures were exercised reasonably.

More importantly, even if the margin of appreciation doctrine did apply, it does not assist Equatorial Guinea here, because the justification for invoking that doctrine is not satisfied. Equatorial Guinea claims that it should have a margin of appreciation because it is exercising its powers in response to maritime threats.[8]

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

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

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

Considerations of humanity may influence whether such powers are exercised reasonably. The Tribunal in *"SAIGA"* held that, when considering the use of force during the

[5] *M/V "Virginia G" (Panama* v. *Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014*, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia.
[6] Joint Dissent, para. 52.
[7] Joint Dissent, para. 55
[8]. Rejoinder, para. 248.

exercise of enforcement powers, and I quote, "considerations of humanity must apply in the law of the sea, as they do in other areas of international law".[9]

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

Mr President, Members of the Chamber, I will now turn to the grounds on which Equatorial Guinea breached the principles of reasonableness and humanity.[10]

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

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

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

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

The second one is the manner in which those enforcement powers were exercised. This was arbitrary, or, in the words frequently used by the Tribunal, the powers were exercised and it was done on the basis of facts that did not exist and which were patently erroneous.[11]

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

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

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

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

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

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

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

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

[9] *M/V "SAIGA" (No. 2)*, at para. 155.
[10] Reply, para. 199.
[11] *M/V "Virginia G" (Panama* v. *Guinea-Bissau)*, at para. 54.

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

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

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

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

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

Secondly, it did so by imposing substantial penalties for alleged failures to comply with its laws.[12] In so doing, Equatorial Guinea failed to give due regard to the rights that the Marshall Islands enjoy in the Equatoguinean EEZ.

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

The impingement on the right to freedom of navigation is obvious. Equatorial Guinea imposed a very large fine, and it detained the *"Heroic Idun"* and its crew for months. Again, we are in a situation where other, less severe measures, were easily available. Moreover, Equatorial Guinea has, to this day, failed to explain either the basis or the need for requiring prior authorization for, as Dr Busco said, all vessels to enter its EEZ as purportedly required under Article 12 of the merchant marine law.

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

Briefly, as to Equatorial Guinea's argument regarding the piracy defence:

First, Equatorial Guinea is wrong to assert, and I quote, "that reasonable conduct in the execution of enforcement measures taken against piracy cannot" breach due regard.[13]

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

At its core, what Equatorial Guinea is saying is that, if a measure is taken on grounds of committing piracy, then that State essentially has *carte blanche*. That simply cannot be right. If so, that would establish a universal rule of conduct, and that is precisely what the "*Enrica Lexie"* and the *"Chagos"* tribunals categorically refused to do.[14] Moreover, it would give priority to one activity, addressing alleged piracy concerns, over other activities, such as freedom of navigation and other rights of the flag State. Again, that simply cannot be right.

The *"Enrica Lexie"* tribunal's approach is illustrative. The Tribunal did not rule that all actions concerning piracy were excluded from the due regard obligations; nor did it hold that, in circumstances where piracy was involved, those allegations would trump other rights and obligations under the due regard test. Rather, the *"Enrica Lexie"* tribunal held that the

[12] *M/V "Virginia G" (Panama* v. *Guinea-Bissau),* at para. 54.

[13] Rejoinder, para. 290.

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

purpose of the due regard obligations was to "ensure balance between concurrent rights belonging to coastal and other States."[15] And that balancing is fundamental.

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

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

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

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

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

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

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Dr Casas for his statement.

I now call on Ms Courtney Grafton to take the floor.

[15] *Enrica Lexie, Merits Award* at para. 975.

STATEMENT OF MS GRAFTON
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/4/Rev.1, p. 16–25]

Thank you, Mr President, Members of the Chamber. My submissions will take us to approximately 4.30 p.m., right before the break.

And my task this afternoon is to guide the Chamber through the Marshall Islands' submissions on breaches arising from Equatorial Guinea's repeated failures to respect the crew's human rights.[1]

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

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

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

Equatorial Guinea has generally failed to engage with the substance of the human rights arguments in its written case.[2] Instead, it resists these submissions by primarily arguing that the Tribunal has no jurisdiction to hear them. That is not the case. The Marshall Islands only asks the Chamber to interpret and apply the Convention, and the Chamber has jurisdiction to do just that.

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

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

The Marshall Islands makes no claim directly under international human rights treaties or general international law independently of the Convention.[5]

There are two key issues between the Parties that go to whether the Chamber can adjudicate the human rights-related claims under the gateway provisions, and I note that these provisions are also referred to as rules of reference by ITLOS in its Climate Change Advisory Opinion.[6]

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[1] Memorial, paras. 253–282; Reply, 208–226.
[2] Counter-Memorial, paras. 301–319; Rejoinder, paras. 259–287.
[3] UNCLOS, Article 288(1).
[4] Memorial, para. 109; Reply, paras 86–89, 333(b).
[5] Reply, para. 87.
[6] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Advisory Opinion*, 21 May 2024, para. 131.

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

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

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

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

The critical question for the Chamber is whether these provisions do provide for a *renvoi* to international human rights law. The answer is 'yes'.

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

I note, with respect to the EEZ, the reference is limited to rules that are "not incompatible" with Part V of the Convention.[7]

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

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

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

"These rights" being the Convention rights.

Articles 58(2) and 2(3) of the Convention are also properly interpreted as imposing prescriptive obligations to exercise sovereignty in the territorial sea, and rights and duties applicable in a third State's EEZ, consistently with "other rules of international law". To the extent that Equatorial Guinea contests this,[9] it's wrong.

Indeed, with respect to the obligation imposed by Articles 58(2) and 2(3), the Chamber can, and should, adopt the interpretation of the Tribunal in the *Chagos Marine Protected Area Award*. Following a detailed analysis of Article 2(3), including each of its authentic language versions, its placement within the structural context of the Convention, its object and purpose,

[7] UNCLOS, Article 58(2), (3).

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

[9] Rejoinder, para. 156.

and the negotiating history,[10] the Tribunal concluded that Article 2(3) imposes an "obligation" on States to exercise sovereignty in accordance with other rules of international law.[11] The *South China Sea* tribunal agreed.[12] The same reasoning applies *mutatis mutandis* to Article 58(2). It is worth repeating the *Chagos* tribunal's observation that "a *renvoi* to the material beyond the Convention must be interpreted in a manner that is coherent with respect to all of the foregoing maritime zones".[13]

The Chamber can, and should, also adopt the view of the *Chagos* tribunal with respect to the Convention's due regard obligations, the content of which was addressed by Dr Casas.[14] The *Chagos* tribunal's view was that Article 56(2) (and by the same reasoning, Article 87(2)) requires due regard to the interests, rights, and duties of other States, including as acquired outside of the Convention.[15]

The Marshall Islands has a legal interest in the performance by all States of their human rights obligations.[16] Equatorial Guinea's ICCPR obligations are also owed to the Marshall Islands as another State Party to that treaty.[17]

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

Moving on, then, to the scope of "other rules of international law".[18] The "other rules of international law" referred to in the Convention, we say, are all norms of international law within the meaning of Article 38(1) of the ICJ statute that are relevant and applicable to the situation. That is the ordinary meaning of the words read in their context and in light of their object and purpose. With respect to treaties, the reference can, of course, only include treaties to which the State in question is a party.

The international human rights obligations relied on by the Marshall Islands were relevant and applicable rules of international law.

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

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

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[10] *Chagos Marine Protected Area, Award*, paras. 499–514.
[11] *Chagos Marine Protected Area, Award*, para. 514.
[12] *South China Sea Arbitration (Philippines/China) Award*, 12 July 2016, paras. 808, 812 (therefore finding that "*the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the 'other rules of international law' applicable in the territorial sea*").
[13] *Chagos Marine Protected Area, Award*, para. 503.
[14] See Memorial, paras. 152–156, citing *Enrica Lexie, Merits Award*, para. 975, *Chagos Marine Protected Area Award*, para. 519, *South China Sea Arbitration Award*, para. 742.
[15] *Chagos Marine Protected Area Award*, paras. 503–535.
[16] Human Rights Committee, "General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para. 2; *Barcelona Traction, Light and Power Co, Limited (Belgium* v. *Spain), Judgment of 5 February 1970, I.C.J. Reports 1970*, p. 32, p. 32; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, p. 422, p. 449.
[17] For the avoidance of doubt, the Marshall Islands was specially affected by breaches of Equatorial Guinea's breaches of its human rights obligations with respect to the crew of the *Heroic Idun* because the ship was sailing under its flag.
[18] Memorial, paras. 126–128; Reply, paras. 86–89.
[19] Memorial, paras. 265–280; Reply, para. 88, fn. 166.

Equatorial Guinea has not argued otherwise. In any case, the human rights jurisprudence clearly establishes that a State has full and exclusive control over a vessel and its crew, at least *de facto*, from the time it is intercepted by a State's Navy forces and in a continuous and uninterrupted manner while the Navy escorts it to shore.[20]

Third, and finally, there is nothing to suggest, nor has Equatorial Guinea argued, that the human rights obligations relied on by the Marshall Islands are incompatible with the Convention. It would be highly surprising, and unfortunate, if this Chamber concluded that any obligation arising under the Law of the Sea Convention could not be complied with in a way that respected human rights.

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

The second key jurisdictional issue is whether the gateway provisions relied upon by the Marshall Islands were applicable *ratione loci* to Equatorial Guinea's mistreatment of the *"Heroic Idun"* crew. Equatorial Guinea argues that the gateway provisions were inapplicable, particularly because none of the conduct forming the basis of the human rights-related claims occurred on the high seas.[21] This, too, is wrong.

First, it is a mischaracterization of the Marshall Islands' case to say that its claims only relate to treatment of the crew within Equatorial Guinea's territory. As I will come to, the Marshall Islands claims that the crew were arbitrarily and unlawfully detained contrary to their right to liberty from the time that the *"Heroic Idun"* was intercepted in São Tomé and Príncipe's EEZ on 12 August 2022.[22] On Equatorial Guinea's own case, therefore, its treatment of the crew was subject to the high seas regime in Part VII of the Convention, including Article 87(1).[23]

In any case, Equatorial Guinea's treatment of the crew was consequential upon its wrongful interception, diversion and detention of the *"Heroic Idun"* in a third State's EEZ and, therefore, the exercise of high seas freedoms.[24] Even taking Equatorial Guinea's case at its highest and assuming that its interception and detention of the *"Heroic Idun"* was conducted lawfully pursuant to Article 105 of the Convention, which it was not, Articles 58(2) and (3), and the obligations they impose to exercise Convention rights consistently with international law, would apply to those enforcement powers. Indeed, it is implicit in Equatorial Guinea's own reliance on Article 105 that the enforcement powers provided by it must carry through to the detention of the suspects in its territory and their transfer to a third State; here, of course, Nigeria. But Equatorial Guinea cannot have its cake and eat it, too. If it seeks to take the benefit of Article 105 powers to its territory, it must also take the burden: the requirement to exercise those powers in compliance with other rules of international law.

Second, Equatorial Guinea's objections to the application of Articles 58(2) and 2(3) is not really about their application *ratione loci*; it is about whether these provisions impose an obligation to exercise the rights and duties referred to subject to other rules of international law,[25] and we have already addressed that question. The answer is: 'yes'.

As a final point, before moving off jurisdiction, I note that Equatorial Guinea has relied upon several decisions of UNCLOS tribunals as purportedly establishing that the Marshall

[20] *Medvedyev v France*, App No 3394/03 (Grand Chamber, ECtHR, 29 March 2010) para. 67.
[21] Counter-Memorial, para. 319, fn. 479; see also para. 228; Rejoinder, paras. 143–147.
[22] Memorial, para. 281(a).
[23] Counter-Memorial, paras. 299, 319, fn. 479; Rejoinder, para. 144.
[24] Reply, paras. 225–226, fn. 419.
[25] Rejoinder, para. 146.

Islands' human rights-related claims fall outside the Chamber's jurisdiction.[26] None do the work that Equatorial Guinea needs them to.

In the *Arctic Sunrise*, the Netherlands' human rights-related claims were not brought under the Convention.[27] The tribunal's finding that it does not have jurisdiction "to apply directly provisions such as Articles 9 and 12(2) of the ICCPR" is therefore unsurprising.[28]

Similarly, the relief requested by Malta in respect of human rights in the *Duzgit Integrity Arbitration* was separate to the substantive obligations under the Convention. The tribunal's finding that it did not have "jurisdiction to determine breaches of obligations not having their source in the Convention" must be read in that context.[29]

And, third, the human rights-related allegations in *M/V "Virginia G"* were peripheral and were not substantiated as breaches of the Convention.[30] It is therefore unsurprising that the Tribunal did not make a finding in respect of the crew's human rights; it was not asked to.

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

Moving on, then, to my second subject: applicable law. To complete the picture, we must deal with the question whether the international law relied upon by the Marshall Islands constitutes applicable law for the purposes of Article 293(1) of the Convention.[31] Sir Daniel dealt with this provision yesterday, and the Chamber can move through this analysis swiftly. It is, in truth, a non-issue for the human rights-related claims.

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

To the extent that Equatorial Guinea argues that Article 293(1) also lays down limits for how this law can be used by the Chamber, its case is confusing and internally inconsistent.[32] There is simply nothing in Article 293(1) to suggest, as Equatorial Guinea does, that it includes only general international law and not also the rules of treaties binding upon the parties, or only international law and soft law that directly pertain to subject matters covered by UNCLOS. That is what Equatorial Guinea's case seems to require the Chamber to accept. But to do so would cut against the text of Article 293(1), its object and purpose, and the jurisprudence of those tribunals that have interpreted it, as Sir Daniel explained.

In any event, Equatorial Guinea has conceded that "the Chamber may have regard to international human rights standards so long as they are used to assist in the interpretation and application of provisions of UNCLOS."[33] And that is all the Marshall Islands asks the Chamber to do: apply the applicable law in order to interpret and apply the provisions of UNCLOS.

This brings me to my third and final part of my submissions, and that is the assessment of Equatorial Guinea's compliance with its Convention obligations with respect to human rights. For the purposes of oral submissions,[34] I will focus on two rights: first, the right to

[26] Counter-Memorial, para. 163 and fn. 314 (regarding *The Arctic Sunrise*), para. 161 (regarding *The Duzgit Integrity Arbitration*); Rejoinder, para. 263 (regarding *The M/V "Virginia G" Case*).
[27] *Arctic Sunrise Award*, para. 140(i)(c), see also para 193. Reply, para. 88.
[28] *Arctic Sunrise Award*, para. 198.
[29] *Duzgit Integrity Award*, para. 207.
[30] See *The M/V "Virginia G" Case (Panama/Guinea-Bissau*), Judgment, ITLOS Reports 2014, p. 4, 14 April 2014, paras. 345, 378.
[31] Memorial, 121–130; Counter-Memorial, paras. 168–178; Reply, paras. 91–97; Rejoinder, paras. 148–155.
[32] Counter-Memorial, paras. 174–178; Rejoinder, para. 146, 262–264.
[33] Rejoinder, para. 141.
[34] The Marshall Islands' written case also establishes several other human rights violations: Memorial, para. 281.

liberty;[35] and, second, the right to be treated with humanity,[36] and to be free from torture and cruel, inhuman and degrading treatment.[37]

First, the right to liberty:[38] The right to liberty prohibits unlawful and arbitrary deprivations of liberty. It applies to everyone, whatever the legal basis, objective, or form of arrest or detention.[39]

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

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

If the Chamber is of any doubt that the deprivation of liberty began with the *"Heroic Idun"*'s interception, I note that the European Court of Human Rights has found that confinement to a means of transport, including specifically a ship intercepted by and escorted to port by a navy vessel, can constitute a deprivation of liberty;[40] and the academic literature establishes the same.[41]

Respect for the right to liberty requires that the deprivation of liberty also meets substantive and procedural legality requirements, and the legal basis for the deprivation of liberty and enforcement of that law is itself not arbitrary.[42] The Human Rights Committee has clarified that the concept of "arbitrariness" is "not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".[43]

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

Equatorial Guinea's deprivation of the crew's liberty was also arbitrary. First, Equatorial Guinea has alleged that there was never "any criminal investigation, charges or

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

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

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

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

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

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

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

[42] Memorial, paras. 273–274.

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

proceedings … brought against the *"Heroic Idun"* crew members" in Equatorial Guinea.[44] Notwithstanding this allegation, it continued to hold the crew in detention after the initial investigations were complete and without any formal arrest or court order.

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

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

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

Equatorial Guinea's treatment of the crew while they were detained also violated the rights to be treated with humanity and respect for the inherent dignity for the person, and without cruel, inhuman and degrading treatment.[45] These were rights applicable through the crew's detention and irrespective of whether with the detention was unlawful or not.[46] The minimum standards of treatment during detention are set out in the Mandela Rules,[47] and they provide that the State must provide: sufficient floor space and cubic content of air for each prisoner, adequate sanitary facilities, provision of food and drinking water, provision of health care services, the right to be informed promptly of the reasons for their arrest and any charges against them, and access to their lawyer.[48]

Equatorial Guinea has not refuted that the crew were entitled to these minimum standards of treatments under international law.[49] It has contested only whether they were met on the facts and only in respect of some aspects of the crew's treatment in Luba.[50] Equatorial Guinea has not refuted, for instance, that it held the Chief Officer hostage prior to transferring the crew of "*Heroic Idun"* to Nigeria.[51]

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

For the avoidance of doubt, Equatorial Guinea cannot escape its failure to afford the crew minimum standards of treatment by pointing to the fact that the vessel owner's local

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[44] Rejoinder, para. 285.

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

[46] General Comment No. 21, paras. 2, 4.

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

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

[49] See, e.g., Counter-Memorial, para. 302.

[50] Counter-Memorial, paras. 303–319; Rejoinder, paras. 266–283.

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

agents, Besora, provided the crew with some basic necessities.[52] The obligations to treat detainees humanely and without cruel, inhuman and degrading treatment impose on the State non-delegable positive duties to provide systems that effectively apply the rules concerning the treatment of persons deprived of their liberty.[53] By relying upon Besora's provision of necessities to the crew, Equatorial Guinea admits its failure to do so; that is, Equatorial Guinea's case is premised on its own failure to put in place systems that ensured the crew were provided with the fundamental components of humane detention, including basic supplies of food and water.

The Chamber should therefore reject Equatorial Guinea's bald assertion that "the evidence shows that Equatorial Guinea acted in accordance with the principle of humanity in its treatment of the *"Heroic Idun"* and its crew members at all times".[54] It plainly did not.

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

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

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

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

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

Thank you, Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Grafton.

I believe that this is a good time for the Special Chamber to withdraw for a break of 30 minutes.

We will continue the hearing at 5.00 p.m.

(Break)

THE PRESIDENT OF THE SPECIAL CHAMBER: I now invite Ms Nevill to the podium.

You have the floor, madam.

[52] Rejoinder, paras. 65-70, 71-73, 80, 267-268, 274.
[53] General Comment No. 21, paras. 3, 6 - 7; General Comment No. 20, paras. 2, 8.
[54] Rejoinder, para. 266.

STATEMENT OF MS NEVILL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/3/Rev.1, p. 25–42]

Thank you, Mr President.

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

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

Starting with the IMO treaties claim.

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

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

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

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

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

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

Regulation V/14 of SOLAS, “Ships’ manning”, and Article III of the STCW, together require each ship to be provided with, and carry, a minimum Safe Manning Certificate issued by the government of the flag State. This must include the number of crew the ship must carry, in what positions, and the training requirements of those crew in accordance with the STCW.[1]

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

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

Regulation VIII/1 of the STCW regulates the relationship between safe manning and watch-keeping.[3]

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

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

[1] Memorial, paras. 294-301; Reply, paras. 238-242.
[2] Memorial, paras. 306-307.
[3] Reply, para. 231.

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

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

For example, rule 5 requires that "every vessel shall at all times maintain a proper lookout by sight".

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

When, on 14 August 2022, Equatorial Guinea took 15 of the 26 crew, including the Master and the Chief Engineer, off the vessel and detained them onshore in the detention facility, it left the vessel with 11 crew onboard, below the minimum 16, and without crew holding the necessary STCW certifications,[4] and also without enough crew to ensure that the COLREGS could be complied with.

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

As was explained earlier, the "*Heroic Idun*" is a huge VLCC. It is 336 metres long, 60 metres across, has a depth of 29.5 metres, and weighs nearly 160,000 tonnes.[5] The size comparison given earlier in the week was to the Empire State Building.

The location where the "*Heroic Idun*" was detained by Equatorial Guinea was not suitable for VLCCs, and was not, contrary to Equatorial Guinea's assertion, used by vessels the size of the "*Heroic Idun*", as the Master and the Chief Officer explain in their witness statements.[6]

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

There was a high risk of the vessel dragging the anchor, which meant that it could have run aground or collided with another vessel, especially as it was undermanned.[7] It was also detained in a busy area, with marine traffic going in and out of the Port of Luba.[8]

The Master described the change of port to Luba by the Equatoguinean authorities in his first statement as "extremely dangerous".[9] The evidence of the Chief Officer, who, as you will recall, was detained onboard, is that the vessel and crew "suffered frequent bad weather, including strong winds", which necessitated him "to prepare the engines requiring the help of two engineers and two crew who were sent forward for anchor stations. These crew were exposed to high risk because the ship was anchored 1 mile off land".[10]

The Senior Deputy Commissioner of the Marshall Islands Maritime Administrator, William Gallagher, attests that the "vessel was anchored in an unsafe condition, without appropriate crew to safely man or operate it".[11]

The Marshall Islands' Maritime Administrator, the Marshall Islands Ministry of Foreign Affairs, the vessel's managers, OSM, and the Master and the Chief Officer all

[4] Memorial, para. 308.
[5] Master-1, para. 10, Memorial/II/3.
[6] Master-2, paras. 23-24, Reply/II/12-13; Chief Officer-2, para. 29, Reply/II//26-27.
[7] Master-2, para. 22, Reply/II/12.
[8] Reply, para. 237; Kulblik-1 para. 74, Memorial/II/44.
[9] Master-1, para. 106, Memorial/II/19.
[10] Chief Officer-1 para. 50, Memorial/II/77; Chief Officer-2, para. 11, Reply/II/20-21.
[11] Gallagher-1, para. 30, Memorial/II/227.

repeatedly raised concerns about the unsafe manning of the *"Heroic Idun"* with Equatorial Guinea.

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

In addition to these requests, the Marshall Islands' Maritime Administrator issued a Detention Order on 7 November 2022, detaining the vessel for non-compliance with minimum safe manning requirements and preventing it from leaving unless the safe manning requirements were met, and, in addition, a safety inspection completed.[12]

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

All safe manning requests fell on deaf ears. As the Master puts it, "the authorities did not seem to care about this".[13] The flag State's Detention Order was ignored. The vessel was forced to sail before the Detention Order had been complied with.

The unsafe manning and unsafe location of the *"Heroic Idun"* had real and serious consequences, and posed real and serious risks to the vessel, to those on board, and others in the vicinity, and to the marine environment.[14]

The Master explains that the vessel was "completely unable to handle any emergencies",[15] and did not have enough crew "to keep the vessel and crew on board the vessel safe",[16] and that "the day-to-day management of the vessel was also a significant issue, because the crew were under extreme stress."[17]

I also refer you to the evidence of the Chief Officer[18] and others who were detained on board,[19] which is also listed on the slides.

Crew detained on board reported feeling exhausted, stressed, scared and unsafe. The Chief Officer emphasizes that "the atmosphere was very threatening and we were all afraid for our lives".[20] I also refer you to the evidence of the Junior Third Officer,[21] the Third Engineer,[22] the Electrician,[23] the Deck Cadet, the Third Ordinary Seaman, the Third Able Seaman and the Motorman.[24]

As detailed in the Marshall Islands' pleadings and evidence, it was also unsafe for the *"Heroic Idun"* to be at anchor for such an extended period without proper maintenance, especially because she was swinging on the anchor and undermanned.[25]

There were at least two potentially serious accidents. The first was when the "*Wele Nzas*," the Equatoguinean warship posted to guard the "*Heroic Idun*," dragged anchor nearby on the 26 September, almost causing a collision.[26] There were not enough crew on board to move the vessel safely out of the way. Collision was only averted because the *"Wele Nzas"*

[12] Annex MT/-43, Memorial/III.
[13] Master-1, para. 173, Memorial/II/28.
[14] Memorial, paras. 314-316.
[15] Master-1, para. 173, Memorial/II/28.
[16] Master-2, para. 21, Reply/II/11.
[17] Master-1, para. 174, Memorial/II/28.
[18] Chief Officer-1, para. 51, Memorial/II/77.
[19] Second Engineer, para. 16, Memorial/II/110.
[20] Chief Officer-2, paras. 8, 10, 12, Reply/II/19, 21.
[21] Junior Third Officer, para. 26, Memorial/II/93.
[22] Third Engineer, paras. 14, 16, Memorial/II/115.
[23] Electrician, para. 20, Memorial/II/129.
[24] Motorman-1, para. 13, Memorial/II/187.
[25] Master-2, para. 25-27, Reply/II/12-14; Chief Officer-2, paras. 11, 26, 28, Reply/II/20-21, 25-26. Memorial, para. 66 – 67; Reply, paras. 228, 237, 302, 307; Annex MT/-48, Annex MT/-6, page 62, Annex RMI/-50, paras. 25–28.
[26] Chief Officer-1, para. 55, Memorial/II/78.

regained control after the Chief Officer himself informed the warship that it was dragging anchor.[27]

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

It takes little imagination to see that this could have caused a major accident.[28]

The *"Heroic Idun"* simply did not have enough crew on board to fight a serious fire, and we must recall that the crew that were on board were seriously fatigued.

The Master Mariner, Ms Blount, in her expert evidence, also records her concern that other large vessels calling at the Port of Luba were unnecessarily forced to pass between the *"Heroic Idun"* and the *"Wele Nzas"*,[29] noting the particular example of the *"UAL BODEWES*".

This, she says, raises questions as to the port management and pilotage in the area.[30]

What is Equatorial Guinea's answer to all of this?

First, it maintains that the Special Chamber does not have jurisdiction to assess whether specific obligations under SOLAS, the STCW and the COLREGS have been breached.[31]

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

Article 94(3), read with Article 94(5) is relevant, because, as explained by the Annex VII Tribunal in the *South China Sea* arbitration, Article 94(3) incorporates IMO rules and regulations that apply to flag States.[32]

In this context, the flag State is Equatorial Guinea and the relevant IMO rules and regulations as regards the warship the *"Wele Nzas"* are the COLREGS.

Article 2(3) is the relevant gateway here because, and Equatorial Guinea has not disputed this, the vessel was detained in Equatorial Guinea's territorial sea.

The purpose of Article 2(3) is not, as submitted by Equatorial Guinea, "to recognize that the Convention does not expand or narrow a State's powers in its territorial sea vis-à-vis those on its land territory".[33]

As explained by the Annex VII tribunal in the *Chagos Marine Protected Area* arbitration, the purpose of Article 2(3) is to "exercise sovereignty subject to the general rules of international law",[34] and it is "a *renvoi* to material beyond the Convention".[35]

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

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

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

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

[29] Blount, paras. 12-13, 27-35, 37, Memorial/II/258-263.

[30] Blount, para. 29.

[31] Rejoinder, paras. 141-142.

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

[33] Rejoinder, para. 146(a).

[34] *Chagos Marine Protected Area*, Award, para. 516; see generally 502-516.

[35] *Chagos Marine Protected Area*, Award, para. 503.

I turn now to Equatorial Guinea's second argument, which is that it is not liable for its repeated refusals of safe manning requests because it did not have any obligations under SOLAS or the STCW vis-à-vis the "*Heroic Idun*".[36]

It says that the IMO treaties impose obligations primarily on flag States, and that its obligations were limited to the backup role of Port State inspection.[37]

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

Starting with SOLAS, the parties to SOLAS undertake in Article 1(b) 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 purpose for which it is intended".[38]

The parties to the STCW undertake in Article I(2), to "take all other steps which may be necessary to give the Convention full and complete effect, so as to ensure that, from the point of view of safety of life and property at sea and the protection of the marine environment, seafarers on board ships are qualified and fit for their duties".[39]

The parties to the COLREGS undertake in Article 1 to give effect to the Rules and other Annexes constituting the COLREGS.[40]

The ordinary meaning of these terms is plain: The contracting parties must take all steps which may be necessary to give SOLAS and the STCW full and complete effect, and to give effect to the COLREGS. Equatorial Guinea, in repeatedly refusing to allow the vessel which it had detained and which was within its control to be properly and safely manned, was plainly not taking all steps which were necessary to give SOLAS and the STCW full and complete effect by allowing and enabling the Marshall Islands as the flag State to meet its obligations. Giving these terms anything other than their ordinary meaning would evidently fail to give effect to the object and purpose of these treaties.

Equatorial Guinea's third argument is that SOLAS and the STCW did not, in any event, apply because the vessel was at anchor and not at sea.[41] This is not a correct interpretation and application of the relevant provisions in those treaties, and, in this respect, I invite the Chamber to refer to the detailed explanation the Marshall Islands gives in its Reply, with supporting evidence, of how the safe manning obligations applied to the vessel where it was detained by Equatorial Guinea at anchor in Luba Bay.[42]

As to the COLREGS, Equatorial Guinea does not appear to dispute that it had obligations under the COLREGS, but says that it did not breach the COLREGS because the vessel was not damaged.[43] This simply misses the point of the Rules which is to avoid accidents, injuries and environmental damage. It is no answer to a charge of breach to say that there were, in the event, no accidents, injuries or damage.

[36] Rejoinder, paras. 323-326, 333, 336-339, 341.
[37] Rejoinder, paras. 323-326, 336-339.
[38] Memorial, para. 295, Annex RMI/-48; Reply, paras. 234-235.
[39] Memorial, para. 300, Annex RMI/-49; Reply, paras. 232-233.
[40] Memorial, para. 302, Annex RMI/-47.
[41] Rejoinder, paras. 331-335 and 342-344.
[42] Reply, paras. 236-240.
[43] Counter-Memorial, paras. 296-297; Rejoinder, paras. 348-349.

Equatorial Guinea also says that the Marshall Islands' expert concluded that there was no concern for the safety of the vessel.[44] That is simply not true. I refer you to the evidence of Ms Blount at paragraphs 21, 33, 36 and 37 of her expert report.

It is notable in this regard that Equatorial Guinea has produced no expert evidence of its own. It relies on the evidence of Mr McDowall, the Director and Port Manager at Luba Freeport, who says the *"Wele Nzas"* dragging anchor and the supply boat fire did not pose a material risk to the vessel.[45] However, it is difficult to understand what he bases this assessment on. He is not an expert witness, not an expert mariner, was not on the vessel at the time of the incidents, and nor, as his evidence suggests, even in the Port at the time of the incidents. He also says that these incidents were never raised with the Port, but you heard evidence on this during the closed session yesterday afternoon, and I refer you to page 29 of the transcript at lines 27-35.

To conclude my submissions on the IMO treaties claim, the overwhelming evidence of all of those involved with the vessel was that the vessel and its crew were unsafe, because Equatorial Guinea detained the vessel in an unsafe location, removed more than half its crew and failed to respond to repeated safe manning requests. The vessel was exposed to at least two very close misses when the *"Wele Nzas"* nearly collided with it and the supply vessel caught fire. In so doing, Equatorial Guinea breached its obligations under SOLAS, the STCW, the COLREGS and the Convention as detailed in paragraphs 312 and 313 of the Memorial.[46]

I move now to the Marshall Islands' next claim that Equatorial Guinea breached Article 225 of the Convention.[47]

Article 225, which is up on the slide, provides that "in 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".

This Tribunal held in *M/V "Virginia G"* that "although Article 225 of the Convention is found in Part XII of the Convention concerning protection of preservation of the marine environment, it has general application".[48] The Tribunal considered that it followed that all these requirements were applicable to enforcement activities undertaken pursuant to Article 73(1) of the Convention.

The Marshall Islands contended in its Memorial that it would also follow that the obligation extends to all enforcement measures taken against a foreign vessel.[49] Equatorial Guinea, for its part, concurs that Article 225 applies when port and coastal States exercise their powers of enforcement against foreign ships.[50] It also agrees with the Marshall Islands that Article 225, must, in order to be effective – and I am quoting here from its submissions – "be interpreted in light of those measures and standards" and that these include Article 94 of the Convention and the COLREGS and SOLAS, and this is "to keep the Vessels and the marine environment safe and unharmed" and to meet the provisions of UNCLOS regarding obligations on all states regarding the marine environment.[51]

However, despite this apparent agreement, Equatorial Guinea also maintains that Article 94 and SOLAS, the STCW, and the COLREGS do not form part of the relevant interpretive context in this case, in respect of Article 225, because "obligations undertaken by

[44] Rejoinder, para. 348.
[45] Rejoinder, para. 348.
[46] Memorial, para. 312 and 313.
[47] Memorial, para. 351-355.
[48] Memorial, para. 318 and fn. 362.
[49] Memorial, paras. 319-322.
[50] Rejoinder, para. 228.
[51] Rejoinder, paras. 231, 237.

flag States in relation to their vessels flying their flag" do not "*ipso facto* become opposable to coastal States when exercising enforcement powers generally".[52]

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

This answers an argument the Marshall Islands did not make. The Marshall Islands does not say or claim that Article 94 and the IMO treaties are "directly opposable" to Equatorial Guinea under Article 225. Rather, the Marshall Islands' argument is that Article 94, which makes a *renvoi* to IMO rules, is relevant context under Article 31(2) of the VCLT for the purpose of the interpretation of Article 225, and that the IMO rules are themselves relevant rules applicable in the relations between the parties for the purposes of Article 31(3)(c) of the VCLT.

They are relevant context, via Article 94 of UNCLOS, and relevant applicable rules between the Parties because they represent the consensus of States as to what endangers the safety of navigation, is an unsafe port or anchorage, or exposes the marine environment to an unreasonable risk.[53]

Indeed, Equatorial Guinea itself expressly agrees that "the content and objectives of regimes set out in the COLREGS and SOLAS may inform what is considered to be 'adverse consequences' under Article 225."[54]

Turning to the application of Article 225 to the facts, it follows from the foregoing that the same facts which go to Equatorial Guinea's breaches of SOLAS, the STCW, the COLREGS, and Articles 2(3), 87 and 94 of the Convention addressed under the Marshall Islands' IMO treaties claim also go to breach of Equatorial Guinea's obligations under Article 225.

These include Equatorial Guinea's repeated refusals to allow the *"Heroic Idun"* to be safely and sufficiently manned, detaining it in an unsafe location given the characteristics of the vessel and its unsafe manning, and the unsafe manoeuvres engaged in by its warship, the *"Wele Nzas"*.[55]

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

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

Indeed, again, Equatorial Guinea recognizes this. It states that Article 225 operates to ensure that coastal and port States "act with due regard by adopting the necessary measures to avoid endangering the safety of navigation",[56] and so on.

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

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[52] Rejoinder, para. 232-237.
[53] Reply, para. 250.
[54] Rejoinder, para. 237.
[55] Memorial, paras. 323-324; Reply, paras. 252-254.
[56] Rejoinder, paras. 228.

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

I move now to the Marshall Islands' next "other breaches" claim, which is that Equatorial Guinea breached the Convention and applicable law by failing to notify the Marshall Islands, as flag State, of its enforcement measures against the "*Heroic Idun*".[57]

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

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

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

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

In our Memorial, we identified two potential sources for a general notification obligation. One is general principles of international law formed within the international legal system, identified through an inductive analysis of existing notification rules in treaties and other instruments.[58] The other is customary international law,[59] rooted in the conduct of States as evidenced by the same treaties.

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

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

On the existence of a customary rule, the principle point of difference between the Parties concerns the significance of treaties for the identification of customary law and whether a series of similar treaty provisions can evidence a customary rule. Both Parties draw on the ILC's 2018 "Draft conclusions on the identification of customary international law".[60]

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

The Marshall Islands has identified at least 26 treaties and instruments which contain requirements to notify the flag State of enforcement measures. They are detailed in the Memorial and Reply,[61] and a document containing the relevant provisions is included in your Judges' folders. The provisions do not contain identical language, but we say that they either employ similar language or apply the same general rule to a specific context; in this instance, enforcement action under the law of the sea and maritime law.

[57] Memorial, paras. 325-355.
[58] Memorial, paras. 330, 358.
[59] Memorial, paras. 350, 372.
[60] Draft conclusions on the identification of customary international law (2018), *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, p. 117, at p. 146; Memorial, para. 350 and n. 410; Rejoinder, para. 296.
[61] Memorial, paras. 332-339.

This is clearly more than a "select few instruments" as Equatorial Guinea contends.[62] The list includes UNCLOS with 170 parties; the key IMO treaties, which have near-universal acceptance and represent nearly 100 per cent of the world's tonnage;[63] it includes the IMO Port State Control Guidance; Port State Control MOUs, which, between them, cover large parts of the globe; the Fish Stocks Agreement and the Agreement on Port State Measures to combat IUU fishing; bilateral consular treaties which expressly contain consular functions *vis-à-vis* shipping; the codes of conduct developed with IMO technical assistance to address maritime security and safety, that is the Yaoundé and Djibouti Codes,[64] and the Maritime Labour Convention.

The question for you is whether repetition alone can evidence both elements of custom. I say here that the commentary to conclusion 11 may be described as equivocal, eventually concluding that "an investigation into whether there are instances of practice accepted as law (*opinio juris*) that support the written rule is required." A relevant factor in the Commission's reasoning was that, citing the ICJ's *Diallo* judgment, repetition could show the contrary, "in the sense States enter into treaties because of the absence of any rule or in order to derogate from existing but different rule of customary international law".[65]

However, here, there are no established rules of international law that the obligation to notify the flag State of enforcement measures would depart from. This is not a case like *Diallo*, where the ICJ rejected the argument that the large number of investment treaties was sufficient to show that there had been a change in the customary rules of diplomatic protection to allow protection by substitution.[66] Rather, the repetition evidences that, when States conclude treaties, instruments, codes or understandings which concern port or coastal State enforcement action against foreign-flagged vessels, a provision concerning notification of the flag State is included as a matter of course.

Equatorial Guinea contends that the only evidence of *opinio juris* is the witness statement of the Senior Deputy Commissioner of the Marshall Islands' Maritime Administrator, Mr Gallagher.[67]

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

In *Nicaragua v. Colombia*, the ICJ held that State practice can be indicative of *opinio juris*, that "State practice given its extent over a long period of time may be seen as an expression of *opinio juris*",[68] and that "*[o]pinio juris* may be demonstrated by induction based on the analysis of a sufficiently extensive and convincing practice".[69]

In its Advisory Opinion on *Climate Change*, the ICJ further observed that "customary principles may even develop under the influence of the [treaty]" and "[t]his is more likely where the relevant customary and treaty rules 'flow from a common fundamental principle'."[70]

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[62] Rejoinder, para. 299.
[63] Memorial, para. 350.
[64] https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/A2%20Revised%20Code%20Of%20Conduct%20Concerning%20The%20Repression%20Of%20Piracy%20Armed%20Robbery%20Against%20Ships%20Secretariat.pdf.
[65] Commentary to conclusion 11, para. (8), p. 146, citing *Diallo, Preliminary Objections*, para. 90.
[66] *Diallo*, paras. 88-91.
[67] Rejoinder, para. 298.
[68] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2023*, p. 413, para. 77.
[69] Id.
[70] *Obligations of States in Respect of Climate Change, Advisory Opinion*, 23 July 2025, para. 312.

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

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

I move now to Equatorial Guinea's alternative submissions, which are that any notification obligation was satisfied when the vessel's Managers contacted the Marshall Islands and that the Marshall Islands has accepted that it suffered no prejudice from Equatorial Guinea's failure to notify.

As to the first of these submissions, Equatorial Guinea relies on the "*Duzgit Integrity*" Annex VII arbitration.[71] However, this decision tends to support the existence of a notification obligation, given that São Tomé and Príncipe notified Portugal of its enforcement action and that the tribunal determined that such notification of a third State "was sufficient",[72] especially in light of the fact they were both EU Member States. The tribunal does not address whether there is a general duty to notify the flag State.

Equatorial Guinea also contends that the Marshall Islands' reliance on the ICJ's judgments in *Pulp Mills* and *Djibouti v. France* in its Reply was misplaced. Equatorial Guinea's argument is that, because these cases concerned specific treaties, they do not support a more general proposition that information submitted by or through private actors cannot substitute for the State's obligation to inform. However, it is evident from the reasoning into *Djibouti v. France* and *Pulp Mills*[73] that it was not the source of the obligation that was critical, but what communications could meet that obligation given its object and purpose in the context of that treaty. Thus, it was obvious that the obligation in *Djibouti v. France* to give reasons for any refusal of mutual assistance could not be satisfied through press reports.[74]

Likewise, the obligation to notify construction works in *Pulp Mills*, the purpose of which was to create the conditions for successful cooperation between the States Parties, could not be met by the information being conveyed through companies involved or non-governmental sources.[75]

Likewise, and for the reasons given by the Marshall Islands in its Reply, direct interstate communication is required to ensure one of the objects of notification, which is the opening of a formal channel of communication to enable and facilitate dialogue, diplomacy and dispute settlement.[76] This is also explained by the Senior Deputy Commissioner at paragraph 25 of his first statement.[77]

[71] Rejoinder, paras. 303-304.
[72] *Duzgit Integrity*, para. 266-268.
[73] *Pulp Mills*, para. 110.
[74] *Djibouti v France*, para. 150.
[75] *Pulp Mills*, para. 113.
[76] Reply, para. 262.b and fn. 523.
[77] Gallagher-1, para. 25, Memorial /II/226.

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

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

I turn now to the claim that Equatorial Guinea breached its obligation to release the *"Heroic Idun"* and its crew promptly without undue delay.[78]

The Marshall Islands' claim is that Equatorial Guinea, in breach of the Convention and applicable law, did not comply with its obligation to release the vessel and crew promptly. As I have already noted, Equatorial Guinea said that it had no obligation to promptly release the vessel.[79] In any event, it says, the international legal system does not indicate any support for a generally obligation to release a vessel which has been apprehended under suspicions of piracy.

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

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

Your Judges' folder contains a document setting out the prompt release obligations in the various treaties and instruments listed in our written pleadings,[80] and this is also shown on the slide. This list is clearly more than a "handful" of treaties as the Equatorial Guinea erroneously suggests.[81] I note that more could be added, such as Article 8(bis)(10)(ix) of SUA.

Equatorial Guinea again contends that the only evidence of *opinio juris* is the witness statement of the Senior Deputy Commissioner of the Marshall Islands Maritime Administrator.[82] As to that, the Marshall Islands refers back to its argument concerning the existence of a customary notification obligation. The treaties, instruments, codes and MOUs listed by the Marshall Islands evidence a widespread and uniform State practice that extends over a long period of time and is extensive and convincing. Again, the repetition evidences that, when States conclude treaties, instruments, codes or understandings which concern action against foreign vessels, a provision concern prompt release without undue delay is included.

Again, this rule flows from common fundamental principles which have been affirmed by this Tribunal and individual judges when addressing prompt release, and these are set out in our Memorial.[83] These include the humanitarian principle underpinning prompt release[84] and safeguarding the balance between the rights and obligations of the States Parties to the Convention and between flag States and port and coastal States.[85] Indeed, the account of the negotiations of Article 292 of the Convention given in the *Virginia Commentary*[86]

[78] Memorial, paras. 357-378.
[79] Rejoinder, paras. 310-311.
[80] Memorial, paras. 360-366; Reply, para. 266(e).
[81] Rejoinder, para. 299.
[82] Rejoinder, para. 313.
[83] Memorial, paras. **.
[84] Memorial, paras. 369, 371.
[85] Memorial, paras. 368, 370-371.
[86] Para. 292.1.

demonstrates that the obligation to promptly release a vessel, if necessary on the payment of a bond, is an important procedural safeguard. The importance of the fundamental principles underpinning the rule is also reflected in the evidence of the Senior Deputy Maritime Commissioner at paragraphs 18 and 19 of his statement.[87]

The other arm to Equatorial Guinea's defence to this claim is specific to its piracy defence. It argues that the international legal system does not indicate any support for a general obligation to release a vessel which has been apprehended under suspicion of piracy, pending final determination of the lawfulness of its acts; and that it was "not for Equatorial Guinea to determine the existence or lack of piracy allegations arising from acts committed in Nigeria"; and that it could not release the vessel pending such investigations of piracy by Nigeria because of its anti-piracy obligations under UNCLOS and the Yaoundé Code.[88]

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

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

Third, the facts simply do not support Equatorial Guinea's piracy case, as you have heard earlier.[89]

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

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

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

As detailed in the Memorial, Equatorial Guinea breached these obligations by repeatedly failing to engage with the Marshall Islands' communications raising a dispute under the Convention from 16 August 2022 onwards and by handing the vessel and crew over to Nigeria in the face of prompt release proceedings before this Tribunal.[90]

Equatorial Guinea contends in its Rejoinder that the "dispute" at issue for the purpose of the claim of breach of Article 283 is the one at issue before this Chamber, and that this was raised by the Marshall Islands in its communication of November 2022, after the transfer of the "*Heroic Idun*" to Nigeria on 11 November 2022.[91]

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

[87] Annex RMI/-30, Memorial/II/224.
[88] Rejoinder, paras. 316, 318-320.
[89] Memorial, para. 375-378.
[90] Memorial, paras. 396-397; Reply, paras. 269-273.
[91] Rejoinder, paras. 352-354.

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

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

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

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

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

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

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

(The session closed at 5.48 p.m.)

PUBLIC SITTING HELD ON 8 OCTOBER 2025, 10 A.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea:

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

as Agent;

and

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

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

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

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

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

as Counsel and Advocates;

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

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

Ms Maanya Tandon,

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

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

Ms Eva Keita,
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Mr Adalberto Acumu Ncogo Angono,
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Ms Gladys Delcourt Ncara Nzang,
State Lawyer of the Republic of Equatorial Guinea,

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

as Counsel;

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

as Adviser.

AUDIENCE PUBLIQUE TENUE LE 8 OCTOBRE 2025, 10 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l’audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale :

M. Carmelo Nvono-Ncá,
Ambassadeur de la République de Guinée équatoriale en France ; Représentant permanent auprès de l’UNESCO, Paris (France),

comme agent ;

et

M. Hussein Haeri KC,
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conseillère au Ministère du transport, des télécommunications et des systèmes d'intelligence artificielle,

comme conseils;

Mme Carmen Matas Gallardo,
conseillère en communication auprès de l'agent, Paris (France),

comme conseillère.

THE PRESIDENT OF THE SPECIAL CHAMBER: Good morning. The Special Chamber will now continue its hearing in *The M/T "Heroic Idun" (No. 2) Case*. I now give the floor to Ms Penelope Nevill to make a statement.

You have the floor, Madam.

First round: Marshall Islands (continued)

STATEMENT OF MS NEVILL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/5/Rev.2, p. 1–4]

Thank you, Mr President.

Mr President, Members of the Special Chamber, we move now to the legal consequences entailed by Equatorial Guinea's wrongful acts.

The Marshall Islands seeks full reparation for the injuries caused by Equatorial Guinea's breaches of the Convention and applicable law. The prayer for relief set out in the Reply includes compensation for material damage of $42,915,536.07[1] and $15,028,000 for non-material damage[2] suffered by the crew. As regards the fine of €2,000,132, the Marshall Islands recognizes that this could be awarded as either restitution or compensation. The Marshall Islands seeks, in addition, interest on those amounts[3] and the costs of these proceedings,[4] satisfaction and assurances and guarantees of non-repetition.[5] Dr Casas will shortly take you through the detail of each of these remedies claims.

Before he does so, I will first address you on the law and key differences of principle between the Parties relevant to the assessment of damage. I will not address the aspects of Equatorial Guinea's arguments on compensation in Chapter 6 of its Rejoinder which repeat its arguments on liability.[6]

The Parties agree that Article 31 of the ILC's Articles on State Responsibility is to be taken into account in the assessment of damage,[7] and this is well-established in the Tribunal's jurisprudence.[8]

That is, "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act" and "2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

There is broad concurrence between the Parties as to the applicable standard of causation and both Parties make reference to the discussion of the requirements of the "causal link" in paragraph (10) of the commentary to Article 31.[9]

The Marshall Islands relies on the articulation of the standard by this Tribunal in the *M/V "Norstar"* as one of "directness", that is, that "only damage directly caused by the wrongful act ... is the subject of compensation".[10]

Equatorial Guinea relies on the articulation of the standard by the International Court of Justice, in *Diallo, Armed Activities* and other cases, of "whether there is a sufficiently direct and certain causal nexus between the wrongful act ... and the injury suffered",[11] and also references to the language in "*Virginia G"* of "direct consequences" and "direct nexus".[12]

[1] Letter to the Registrar dated 10 September 2025.
[2] Memorial, paras. 416-423.
[3] Memorial, paras. 424-427.
[4] Memorial, paras. 428-431.
[5] Memorial, paras. 432-437.
[6] See, e.g. heading C, p. 100, para. 364.
[7] Counter-Memorial, para. 349; Reply, para. 401.
[8] *Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10 ("*Activities in the Area*"), para. 194, "*Virginia G", Judgment*, para. 429, *M/V "Norstar", Merits, Judgment*, para. 318.
[9] Counter-Memorial, para. 349-350; Reply, para. 279.
[10] Para. 334.
[11] *Diallo* (2012), para. 14.
[12] Counter-Memorial, para. 352, referring to *Virginia G*, pars. 435-436.

Equatorial Guinea also cites the second report of the fourth ILC Special Rapporteur on State Responsibility, Mr Arangio-Ruiz of 1989, where he said that "[r]ather than the 'directness' of the damage, the criterion ... is the presence of a clear and unbroken causal link". However, this formulation was not adopted by the ILC in its final report on the topic in 2001, and it is not the standard that has been adopted by the ICJ or this Tribunal. Subject to this qualification, the Parties are broadly aligned on the standard the Chamber is to apply.

Equatorial Guinea does not dispute that the requirements of causation are met for the immediate losses caused by its acts in the 92 days in the EEZ of São Tomé and Príncipe and in Equatorial Guinea and in, and in respect of, its territorial sea and EEZ.

Its case on immediate losses is that the acts which caused those injuries were not wrongful or did not cause any loss, or it contests evidence of quantum. The key difference between the Parties lies in the treatment of loss after the 92 days.[13]

Before I turn to that, I wish to dwell on one point concerning the nature of the causal nexus required, and this can be illustrated by reference to Equatorial Guinea's argument that it is not responsible because the "prompt release application did not result in any ... order to release the Vessel."[14]

Only one of the Marshall Islands' 10 heads of claim alleges breach of a primary rule requiring release of the vessel. The ICJ explained in the *Armed Activities* case, that "[t]he causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury."[15] Similarly, the ILC in its commentary to Article 31 says that a relevant factor includes "whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule", and that "the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation".[16]

It follows that the causal nexus required may vary between each of the Marshall Islands' claims by reference to the primary rule or rules relied on and the nature and extent of the Marshall Islands' injuries. Whether there is an obligation to make reparation for a particular injury will turn on whether that injury was caused by the breach of the primary rule under consideration.

This can be illustrated by reference to the Marshall Islands' non-aggravation claim, where Equatorial Guinea's conduct in respect of the prompt release application is directly in issue. The primary rules concerned are not an obligation to release the vessel, but the obligation not to aggravate a dispute and prejudice the rights of the other party pending proceedings. Handing over the vessel and crew to Nigeria in the face of prompt release proceedings is relied on as evidence of breach. When considering the causal nexus required between the wrongful act and the injury suffered in relation to that primary rule, a relevant consideration is that the nature of the Marshall Islands' injuries is not only monetary and that one of the forms of reparation it seeks is satisfaction.

I move now to the key point of difference between the Parties. Equatorial Guinea maintains that the Marshall Islands has not established a causal link for its losses after the 92 days because it was the actions of Nigeria, not Equatorial Guinea, that directly caused those injuries, and that the Marshall Islands is requesting that "Equatorial Guinea pay for Nigeria's actions".[17]

This is wrong. The question before this Chamber is Equatorial Guinea's responsibility for its breaches of the Convention and the applicable law, and your role is to ascertain the damage caused by those wrongful acts. It was Equatorial Guinea's choice to act as it did.

[13] Rejoinder, para. 368.

[15] Para. 93

[16] Para. (10), p. 93.

[17] Rejoinder, para. 369.

There can be no question but that Equatorial Guinea is responsible for – in addition to the immediate losses that were quantifiable within the 92 days – the loss, damage and injury that occurred thereafter, and that became visible thereafter, that were a direct consequence of its conduct during the 92 days.

Equatorial Guinea also says, referring to its arguments on admissibility, that it cannot be liable for Nigeria's wrongful acts because the conditions of Article 16 of the Articles on State Responsibility are not satisfied,[18] and that, in any event, relying on Article 16 engages the *Monetary Gold* principle.[19]

As to its Article 16 point, Equatorial Guinea is contesting a case that the Marshall Islands does not make. The Marshall Islands is not relying on Article 16. It also agrees with Equatorial Guinea that Article 47 of the Articles on State Responsibility is not relevant[20] because it is not claiming that Equatorial Guinea and Nigeria are responsible for the same internationally wrongful act or acts, and it is not seeking to recover by way of compensation more than the damage that it has suffered.

As to the *Monetary Gold* principle, this goes to the admissibility of a claim. It stands or falls as a threshold matter. It does not rise up like a phoenix at the point of ascertaining damage. Notably in "*Norstar*", the *Monetary Gold* principle, which had been unsuccessfully pleaded by Italy in the Preliminary Objections phase, was not referred to again in the Merits phase by the Tribunal or by the parties.

Furthermore, it would be unjust if a State could effectively wash its hands and immunize itself from responsibility for injuries caused by its wrongful acts, simply by invoking the involvement of another State in the chain of events.

There is, in any event, no need to import *Monetary Gold* admissibility into the causation analysis. The relevance, if any, of the involvement of a third State in the chain of events can be addressed through the ordinary application of the rules on State responsibility and the "directness" standard of causation.

Equatorial Guinea also says, as regards the losses suffered after the 92 days, that it had no knowledge or involvement during this period and "only Nigeria can provide information".

Having knowledge of or involvement in the suffering of damage is not the test for, or a prerequisite of, the existence or establishment of a causal link, and it is plainly not correct that only Nigeria can provide that evidence. The Special Chamber has before it first-hand evidence concerning the direct consequences of Equatorial Guinea's actions and their long-term impact.

To conclude, although the context to this case involves another State, the rules of State responsibility are capable of addressing this situation.

Mr President, Members of the Special Chamber, Dr Casas will now address you on the detail of Equatorial Guinea's responsibility under each of the Marshall Islands' heads of claim.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank you, Ms Nevill, and I give the floor to Dr Casas.

[18] Rejoinder, paras. 370-373.
[19] Rejoinder, para. 374.
[20] Rejoinder, paras. 381-382.

STATEMENT OF MR CASAS
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/5/Rev.2, p. 4–21]

Mr President, Members of the Special Chamber, good morning. It is a pleasure to be with you again today. I will be addressing you for the next hour on the topic of remedies. My submissions will cover five topics: material damages; non-material damages; interest; costs; and satisfaction and guarantees of non-repetition.

I will start by addressing the Marshall Islands’ claim for material damages. Before I delve into the details of those claims, I want to briefly address three points regarding the Marshall Islands’ approach to its claim for material damages.

I should start with the observation that our claim for material damages falls broadly into two categories. The first category are the claims that were caused by Equatorial Guinea and that were visible and quantifiable during those 92 days. These are immediate losses. But the second category are the claims for the losses that are, we say, a direct consequence of Equatorial Guinea’s conduct, but which only crystallized after this 92-day period, or claims that only became visible and quantifiable after that period.

As you have just heard from Ms Nevill, we say we are entitled to recover claims for both categories. Moreover, as I will explain throughout my submissions, there are some cases in which the lines between those two categories are blurred.

The second point relates to the evidence that the Marshall Islands has adduced. The Marshall Islands has been extremely thorough. It has produced a significant amount of supporting evidence. This has resulted in eight annexes with almost 2,000 pages of documents. We are very far from a situation where a claim for damages has not been supported with granular evidence.

One key aspect of the Marshall Islands’ approach is that we have sought to provide the Chamber with all the underlying documents for each claim, instead of presenting, for instance, just a headline invoice.

Let me provide a concrete example. In a line item dealing with travel costs, we have included, for instance, the invoices for the airfare, hotels, taxis and subsistence items purchased during those travels. Our friends across have, with forensic skill, gone through all those documents, all 2,000 pages of them, with a fine-toothed comb. They have tried to identify any issues that may be used against the Marshall Islands to cast aspersions on our claims; however, we say that is incorrect.

First, Equatorial Guinea is only able to credibly criticize a very small fraction of the Marshall Islands’ claims and those are mainly for very minor expenses rather than, for instance, the loss of hire or fine claims which are worth million of dollars.

Second, in any event, and critically we say, those expenses were incurred because of the detention.

The third general point is that, contrary to what Equatorial Guinea claims, the Marshall Islands has indeed provided a detailed breakdown of the different heads of damage it is pursuing.

The Marshall Islands is claiming for nine different heads of damage. Most of those are, in turn, comprised of different subclaims. The Marshall Islands has provided a detailed breakdown for each of them.

This is evident from the Marshall Islands’ Rejoinder,[1] which we have on screen, where the components of the first head of damage are set out in detail. We find the same throughout that entire section of the Reply. For instance, at paragraphs 293, 298, 301, 308 and so on.

[1] Para. 285.

Insofar as Equatorial Guinea complains that the Marshall Islands has not provided a detailed breakdown of how each of these claims is supported by evidence, a breakdown of each invoice, that criticism, we say, is unfair. Detailed spreadsheets, showing with absolute granularity how tallies of invoices add up, may be common in some proceedings, say, in construction arbitrations, but they are not normally adduced in inter-State proceedings.

Nevertheless, Mr President, Members of the Chamber, insofar as it would be helpful to the Chamber, and also to nip this criticism in the bud, I will be providing detailed tallies throughout my submissions.

When addressing each specific head of damage, we will project on the screen a table that shows how each figure for every sub-item of every head of claim is calculated. This will also include a brief description of the documentary evidence that supports that claim, with the corresponding annex and page reference.

With this, the Chamber will see how all the numbers add up – I am cautious saying this as a lawyer, but we say they do add up – and how they are all supported by evidence. That may not be entirely correct. There are two items, sub-items, for which we have not been able to obtain supporting documents. Their combined value is less than $2,000. They are identified as such in the tables.

If the Chamber would benefit from being taken to any specific invoice or document, or has any questions about them, I am more than happy to address that. However, for obvious reasons, including being respectful of the Chamber's time and attention, I am not proposing to take the Chamber to each individual invoice; rather, I will focus on discussing the legal principles applicable and how they support the Marshall Islands' claim.

For the issues that I will not be able to cover due to time constraints, I remit the Chamber to the Marshall Islands' written pleadings.[2]

Now, in terms of structure in sequencing, I propose following a slightly different approach to the one followed in the Rejoinder. I will address the Marshall Islands' heads of damage in decreasing order of their quantum, beginning by the largest claim and then going down.

And the reason I propose doing this is simple. The Marshall Islands' claim for material damages is just under $43 million. However, $36 million, so almost 84 per cent of our claims, is based on only two heads of damage: loss of hire and the payments made to secure the release of the vessel and the crew.

The other seven heads of material damage only represent about $7 million. So what I propose doing is approaching these claims in a proportionate manner. And I will start with the loss of hire claim; it is also perhaps the most complex one.

Mr President, Members of the Chamber, the Marshall Islands is claiming $19.3 million for loss of hire.[3] That is, essentially, a claim for lost profits. There are four points, factual and legal, I would like to touch upon.

First, a point of legal principle. The Marshall Islands is entitled to recover lost profits caused by the detention of the vessel. Law of the sea tribunals have accepted, for a long time, that flag States can claim damages for lost profits based on the loss of hire of a merchant vessel, and that is because they are entitled to claim for the unit of the vessel. This has been articulated by ITLOS since the *M/V "SAIGA" (No. 2)*,[4] which we have on screen.

More recently, the *Duzgit Integrity* tribunal awarded compensation for loss of hire. And if we can move to the next slide. That tribunal held at paragraph 87 of its Award on Reparation that:

[2] Memorial, paras. 398-415; Reply, paras. 284-317.
[3] Reply, paras. 308-313.
[4] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment of 1 July 1999, ITLOS Reports 1999*, at para. 172.

> While wrongfully detained in São Tomé, the *Duzgit Integrity* was unavailable for service by any charterer ... Malta [the flag State] is entitled to claim for the harm to its vessel that follows from this unavailability.[5]

This proposition is widely recognized. This Tribunal, for example, in both "*Virginia G"* and *M/V "Norstar",* held and recognized that flag States could claim for lost profits arising from the detention of a vessel. In those cases, it refrained from doing so based on evidentiary shortcomings which, in my submission, we do not have here.[6]

Mr President, Members of the Chamber, the *"Heroic Idun"* is a state-of-the-art, very large crude carrier. It was not available for service by any charterer. It simply could undertake no work, and of course that entailed an important economic loss.

Second, Equatorial Guinea contends that a claim for loss of hire is inherently speculative. With respect, that is wrong. Here, the claim for lost profits relates to the profits that would be generated by the hire of a very large crude carrier. There is a market for this – the large tanker market – it is commoditized. It is a market for which we have robust economic benchmarks, and those robust economic benchmarks can be used to ascertain the applicable freight rates the *"Heroic Idun"* would have been able to obtain. All of this allows us to determine, with specific precision, the profits that the *"Heroic Idun"* would have been able to generate. We are in a case where we have calculation, not speculation.

And of course, until December 2023, the amounts the vessel would have been able to earn are even more easily ascertainable, because they can be calculated based on the applicable charter in place at that time. Those amounts are fixed. They were invoiced. We know them with complete certainty, so there is no speculation there.

Third, to support its claim, the Marshall Islands presented an expert report by Mr Tim Horne.[7] Mr Horne is a shipbroker with more than three decades of experience in the tanker market.[8]

Mr Horne's report is based on hard economic data. It is derived from the vessel's own charter as well as from market sources that are used daily throughout the shipping world.

Now, pausing there, Equatorial Guinea has not produced a rebuttal report. Nor does it challenge the accuracy or reliability of Mr Horne's calculations. Nor does it challenge the accuracy or liability of his data. There are some criticisms made in legal submissions, which the Marshall Islands has answered in legal submissions, but there is no competing expert report challenging Mr Horne's findings.

Now, what Mr Horne does is, he calculates three periods of hire, which we have on screen, and he applies the daily rate for each of those periods.[9] The Chamber and the Judges will have his report at tab 29 of the Judges' folder.

Now, as Mr Horne explains,[10] the first period starts on 12 August – that is the date the vessel was detained – and it ends on 26 December 2022, the date the time charter ended.

The second period, period B, was calculated between 26 December until 27 May 2023. That is the period the vessel was detained in Nigeria.

And the third period, period C, was calculated between 27 May 2023 – and that is when the vessel was released from Nigeria – and runs until 24 July 2023, when the vessel re-entered

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[5] *Duzgit Integrity,* Award on Reparation, para. 87.
[6] *M/V "Virginia G" (Panama v. Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014,* at paras. 432–434; *M/V "Norstar" (Panama v. Italy), Merits Judgment of 10 April 2019, ITLOS Reports 2018–2019,* at paras. 322–323.
[7] Memorial, Vol. II, Annex RMI/-39, page 478.
[8] Memorial, Vol. II, Annex TH/-1, page 498-501.
[9] Memorial, Vol. II, Annex RMI/-39, page 493, para. 57.
[10] Memorial, Vol. II, Annex RMI/-39, page 492.

operations under a new time charter. This last period also covered the time the vessel had to go to the UAE for drydocking and repairs.

Mr President, Members of the Chamber, I will now explain how Mr Horne calculated the applicable hire rate for the first hire period that you have on screen.

Now, a basic charter agreement would normally establish a daily rate. We would then multiply that daily rate by the number of days of detention, you would get a number, and that would be the end of it.

However, this charter is a bit more complex and, in a way, reflects the type of entity that hires a sophisticated vessel such as this. I will need to ask for the Chamber's indulgence; this is one issue I will need to cover in detail.

Now, Mr Horne explains the time charter set hire rates at a variable level, following a formula. He explains at paragraph 48(A), he says: "Here, the daily rate set out in the hire clause ... was not expressed as a pre-agreed daily figure, but as a formula based on a variable index which sought to reflect the prevailing market rate."[11]

This is evident from the text of the charter itself. We have this at rider clause 55.[12] Very briefly, if you have that on screen, and this is described in the first line under the heading, we see "an index based time charter – fully floating."

As to the methodology used for that, we see right at the bottom: "profit sharing methodology". Then if we can go to the next page, we see: "based on an Agreed Excel Calculator using Baltic Exchange methodology for TD3C TCE, Middle East Gulf to China". And further there in that clause, we have reference to other variables, such as speed, port costs and bunkering prices.

The key point I would like the Chamber to focus on is the use of the TD3C TCE rate. That is a lot of acronyms, but we will break them down. To simplify, that refers to the index – the average price – of freight costs for crude or petroleum products between the Middle East and China. That is a common route for this type of vessel. Mr Horne explains that the TD3C index is considered "the benchmark route for VLCC spot market earnings".[13]

That is the right benchmark to use, for a very simple reason: it is the one agreed on by the parties in the charter. It is also the one widely used to determine the earnings of these types of vessels. Now, the information on which that index is calculated is compiled by the Baltic Exchange, an independent entity and a leading provider of shipping market information.

Mr Horne included in his report the calculator and the hire invoices. I will invite the Chamber to quickly look at the calculator.[14] There are a lot of numbers, but, Mr President, Members of the Chamber, I promise you that, for our purposes, only a few are relevant.

We can see at the top left-hand corner that the variables are in red. Then we can see the reference to the Worldscale rate. We see that in red at the top, 69.08. Then we see, also in red, the prices for HSFO and MGO, that is, fuel, bunkers, and then we have in the other column in red the port costs. This leads to the highlighted figure at the bottom, where we have 48.224, and that is called the TCE, which stands for "Time Charter Equivalent" and that is, for our purposes, the way of calling the daily rate.

Over the page, we can very quickly see the inputs. These are the figures that were then plugged into the calculator, to use a Latin term. We see bunker prices, we see the reference to the index in the first column. WS means Worldscale, TD3. Then we see those rates are applied for every single day of the month, and then we have an average at the bottom, and that is the figure they used in the calculator.

[11] Memorial, Vol. II, Annex RMI/-39, page 490.
[12] Memorial, Vol. II, Annex TH/-2, p. 553.
[13] Memorial, Vol. II, Annex RMI/-39, para. 39, page 486.
[14] Memorial, Vol. II, Annex TH/-4, page. 646.

Then over the page, we see how all this information is reflected, thankfully, somewhat more simply, in the hire invoice.[15] This was sent by the owners of the vessel to the charterer. We see the daily rate. We see we had the 48.224 TCE figure from the calculator. We see this labelled here as a daily rate. We have that multiplied by the number of days in the month, and then we end with the total rate. That same calculation was done for August, September, October, November, December; that is the time the charter was in place.[16]

The Chamber will no doubt note that there is a marked increase in the applicable daily rate between August and December, and this is because the VLCC market is subject to seasonal volatility. That volatility peaks in October/November and is related to the start of the winter season in the northern hemisphere, which, of course, has an impact on energy demands.

We can easily visualize this fluctuation in the graph provided by Mr Horne.[17] We have it on screen. We see the yearly fluctuation of the index, and we can see the rates start on the left-hand side at about $20,000 per day in July, and then they go up to almost $120,000 per day in November. To be very clear, this index covers the movements of the entire tanker market. It's not only the *Heroic Idun*, it's the entire market.

Pausing there, the Chamber has, for two-and-a-half days, heard how this case has centred on the 92 days the vessel was detained in Equatorial Guinea. But, as I said at the start of my submissions, the Marshall Islands is also claiming for damage that was a direct consequence of Equatorial Guinea's actions, even when that damage only crystallized after the vessel had left Equatorial Guinea.

However, if the Chamber is not with us on that proposition, then we have, on screen, the calculation of the loss of hire for the 92-day period the vessel was detained in Equatorial Guinea. As you can see here, that calculation is very straightforward: we take the daily rate applied by the calculator, we multiply it by the relevant number of days, and then we get a total.

The Tribunal will see that comes up to $5.3 million. This is, of course, a substantial sum. It is almost, however, a quarter of the total $19 million amount the Marshall Islands is claiming.

However, in this scenario, we would nevertheless say that, even if the Chamber is inclined to exclude loss of hire for the time the vessel was in Nigeria, the Marshall Islands should nevertheless be able to recover loss of hire for at least part of the period after the vessel was released from Nigeria, but before it became seaworthy again in July 2023, following repairs.

In particular, the Marshall Islands should recover for the time the vessel took to sail for the crew change, the time the vessel took to get to the drydock and be repaired, and for the short time (less than a week) before it could start its new contract of employment.

The reason we say we are entitled to this is because those damages are a direct consequence of Equatorial Guinea's conduct. Our case is that they would have happened, regardless of whatever happened in Nigeria.

I invite the Chamber to test the point this way: had Equatorial Guinea released the vessel on 11 November 2022, as we say they promised, the vessel would have needed to go to drydock for repairs and inspection before it could resume service. And, in any event, it would have needed to be repaired anyway, too. The vessel would have been unavailable for hire during all that time, and that is a direct consequence of Equatorial Guinea's detention.

The marine growth on the vessel's hull, the damage to the vessel's paint, the damage to the pumps caused by inactivity – all of that would have happened regardless of the detention in Nigeria. That period may have augmented that damage, but it did not cause it.

[15] Memorial, Vol. II, Annex TH/-4, page. 648.
[16] Memorial, Vol. II, Annex RMI/-39, para. 55, page 492.
[17] Memorial, Vol. II, Annex RMI/-39, para. 40, page 487.

As a conservative estimate, the time I mentioned post release adds up to 46 days. The Tribunal has on screen the calculation for that.[18] A claim, we say, for lost profits is appropriate for that time, too.

The Tribunal will see that the daily rate applicable at that time is lower, and that reflects the season of volatility. The figures we have for those months are quite lower.

I will now take the Chamber more quickly through the calculations for the second and third periods.

Essentially, what Mr Horne did was calculate the Time Charter Equivalent figure, the daily rate that we talked about, based on the TD3C index for those periods, and that is set out in his report which we have on screen.

What Mr Horne did, and it's something that our friends across take issue with, is he added a bunker adjustment, and that is for the simple reason of reflecting the greater efficiency of the "*Heroic Idun*". To briefly explain, the index is based on the earnings of a generic vessel. It means an older, less efficient vessel than the almost brand new, highly efficient "*Heroic Idun*".

This is a very important point. The Chamber has heard for the past days about the size, the speed, the manoeuvreability, or lack thereof, of the "*Heroic Idun*". It has not heard much about the technical specifications of the vessel. The "*Heroic Idun"* is a state-of-the-art ship. It was built in 2020 by Daewoo Shipbuilding. That is a first-class shipyard in Korea. It has top line efficiency and environmental features, such as a scrubber and an exhaust gas cleaning system. And what those features do, is that they reduce the vessel's emissions – which has environmental benefits – but, critically, they also operate with less fuel, and that is one of the main costs for a vessel; so more efficiency in fuel use leads to higher earnings.

I have taken the Tribunal through some figures. I hope I will have a more light-hearted slide next, and I will provide a land-based example to illustrate this point.

Fuel is one of the main costs. Imagine you are running a taxicab business. One of your taxis is a 20-year-old car. It runs on petrol. It has a large, inefficient motor. You also have a brand new car, with a hybrid engine, hi-technical specs; it is much more efficient and consumes much less fuel. Logically, the earnings from the new taxi will be higher than for the older, less efficient taxi. And it is that very difference that Mr Horne addressed by adding an adjustment to reflect that. And then, based on that adjustment, if we can move on, that leads to a daily rate that he then just multiplies for the period.[19]

Now, very briefly, our friends across take issue with Mr Horne and they say that he does not take into account the expenses that would have "naturally arisen in the course of operation". That is incorrect. Mr Horne did take those expenses into account.

I have already taken the Chamber through the formula; I do not intend to do so again. But you will recall the formula included the price of HSFO and MGO – that is, fuel. The Chamber will also recall that it includes port costs. What this shows is that the charter party calculator, again, a document prepared by sophisticated entities in the shipping industry, itself already included those costs.

Further, when Mr Horne relies on the indices – say, the TD3C index – he relies on the Time Charter Equivalent figure, the TCE, and that is why he uses that as a figure. Mr Horne explains that the TCE, and I cite, is "widely used in the shipping industry to calculate a vessel's daily revenue."[20] The key operative word is "revenue."

[18] First Witness Statement of Eivind Kulblik, Memorial, Vol. II, Annex RMI/-2, paras. 90-96 and 101-104, pages 47-48 and 50.
[19] Memorial, Vol. II, Annex RMI/-39, para. 57, page 493.
[20] Memorial, Vol. II, Annex RMI/-39, para. 24, page 484.

He then explains that the freight calculations under the TCE already deducts "voyage costs (bunkers, port costs, fees, agency etc)." What this means, very simply, is that the TCE figure that he uses is already adjusted downwards to adjust for those expenses.

In short, Mr Horne's calculations are well founded and the Marshall Islands is entitled to recover damages for loss of hire.

Mr President, Members of the Chamber, you will perhaps be relieved to hear that all the other heads of damage can be dealt with much faster.

The second largest of the Marshall Islands' claims is for the payments made to secure the release of the vessel and the crew.[21] This claim is very straightforward. It is composed of only two elements. The first one is the €2 million paid to Equatorial Guinea for the fine. This is directly and immediately associated with Equatorial Guinea's breaches of UNCLOS. The Chamber already heard yesterday in detail why the imposition of the fine was in breach of the Convention, why the Marshall Islands considered it was extortionate, etc., so I will not repeat that point now.

The second element is the $15 million paid to Nigeria. Equatorial Guinea says this was a result of a plea bargain. It says it had no involvement in that. Be that as it may, we say that it is also a direct consequence of Equatorial Guinea's wrongful conduct, namely, Equatorial Guinea's rendition of the vessel and crew to Nigeria.

Moving on, the Marshall Islands is also entitled to recover the costs incurred for bunkers consumed and agency fees.[22] This is in our pleadings what we call "costs and expenses relating to the vessel and crew" which we will have on the screen shortly. This is a straightforward claim. It is for approximately $3 million. To clarify, the Marshall Islands has withdrawn the claims related to vessel investigation expenses and for provisions, so this claim is only composed of two elements which we have detailed on screen.[23]

So the claim for bunkers consumed, this claim is supported by the purchase invoices for the bunkers. They show the amounts paid, and the Marshall Islands also relies on the vessel's engine logs. These are contemporaneous documents which show the amount of bunkers that were consumed at different points in time. In part, this is also necessary because some of the bunkers that were consumed during the 92 days the vessel was detained in Equatorial Guinea were already on the vessel when it arrived there, so there are obviously no invoices for that.

Briefly, the other component is agency fees, and we can see on the table how the invoices add up, and we have the specific annex references for them.

Moving on, the Marshall Islands is also claiming compensation for the costs and expenses it incurred to assist the crew during detention,[24] admittedly, both in Equatorial Guinea and Nigeria and afterwards.

This claim is approximately for $1.7 million. This claim, as the Chamber will have seen from our submissions, is based on 12 sub-categories. In the interest of time, I will combine these into four broader categories.

The first category is additional payments to the crew. This includes additional salary, Christmas, high-risk, and additional bonuses paid to the crew, as well as a disembarkation bonus.

I want to be absolutely clear on one point: the Marshall Islands is not claiming the regular salary of the crew. We are not claiming what they would have been paid during normal operations. We are only claiming the additional payments made during detention, and we say that is because those payments were made because of the detention.

[21] Reply, paras. 295-297.
[22] Reply, paras. 293-294.
[23] Letter from the RMI to the Registrar, dated **.
[24] Reply, paras. 285-292.

The Marshall Islands is entitled to recover those additional payments because they would not have been made but for the detention.

Moreover, in some cases, those payments were made due to legal obligations arising under the applicable collective bargaining agreements. For example, the Chamber will now see on screen the collective bargaining agreement applicable to Indian officers. The Chamber knows a large percentage of the crew were from the Indian subcontinent, and we have Article 17 of the CBA; this applies when the vessel enters into high-risk or warlike operations areas.[25] You have on screen clause 17.3. The third bullet provides that if the vessel is in a warlike operations area, the crew will receive a bonus equal to 100 per cent of the daily basic wage. And this is not an uncommon provision in this type of agreement.

The second broad category relates to medical and psychological assistance. This includes medical treatment during detention. It also covers ongoing medical treatment at home. Some conditions, as the Chamber has heard, started being acute but then became chronic, that required treatment at home, and the Marshall Islands, we say, is entitled to recover that. This component also includes the cost to provide psychological support.

The third broad category is correspondent costs, and these are BUDD's expenses and they are for, among other things, defending the case against the authorities.

Finally, the fourth category is travel costs. This is a smaller claim for about $69,000. It includes costs of OSM, the managers, to travel to the Indian subcontinent to have discussions and support meetings with the crew's families. We have heard how those families were reasonably, understandably distressed; the managers went there to update them and to support them. The managers also had discussions with the Indian authorities.

Moving on to the fifth head of damage, that is for the costs and expenses to repatriate the crew and for the vessel's call to Cape Town.[26] That is where the crew change occurred. This is for almost $700,000. It has three components, very briefly: the first one is the cost of a security escort vessel and security guards, and that was to accompany the vessel after it sailed from Nigeria into Cape Town. This was necessary given the understandable fright the crew had when sailing after being detained.

This component also includes travel wages and the standby payment for the on-signing crew, the replacement crew.

Finally, the cost of the vessel's call to Cape Town. This includes the port call costs, hotel expenses for crew and owners, and the flight expenses of owners' representatives, and, importantly, that of the clinical psychologist, Dr Perman-Kerr, who flew to Cape Town to provide assistance and assess the crew.

Moving on, we have costs and expenses to repair the vessel.[27] The Marshall Islands is claiming these costs. These repairs, in total, we have an updated amount of approximately $438,000. To be clear, some of the original items that we were including here have been withdrawn, so the figure we have now is reduced.

Mr President, Members of the Chamber, ITLOS has allowed claims for vessel repairs in cases when those claims have arisen because of detention. In "*Virginia G*", the Tribunal stated that:

> In the view of the Tribunal, only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation.[28]

[25] Reply, Volume IV, page 1082.
[26] Reply, paras. 298-300.
[27] Reply, paras. 301-307.
[28] Para. 42.

There are now just three items: the first one, if we can go back to the table, is the drydocking and deslopping costs; the second one is painting; the third one is the repair of the Scanjet machines. These are a component of the vessel's pumps.

The Marshall Islands is entitled to recover these damages because these are not caused by regular wear and tear. Rather, as Mr Kulblik explained,[29] these were caused by the vessel's detention. These type of vessels are not meant to be stationary for months and months, as what happened here. These damages occurred because of the vessel being stopped. Yesterday, the Tribunal saw, the Chamber saw a chart showing how the vessel was gyrating on its own axis,[30] round and round, on its anchor. That caused damage to the vessel. There was also marine growth, barnacles, similar damage occurring because the vessel was stationary, and that does not occur in normal operations.

Critically, and I touched on this at the start, these damages would have been incurred regardless if the vessel had been released from Equatorial Guinea after the 92 days. The damage to the vessel suffered during that period of detention was enough to warrant and require drydock repairs and inspections.

Moving on, we have a claim for the Marshall Islands' wasted costs in the prompt release proceedings.[31] For the avoidance of any doubt, this is not a claim for costs. I will address that subsequently. It is, rather, a claim for wasted costs and these costs were wasted, as we have explained, because Equatorial Guinea improperly transferred the vessel to the Nigerian authorities in the face of prompt release proceedings before ITLOS. Because of that, those proceedings were frustrated. The Marshall Islands had already incurred costs for those proceedings, it had incurred costs to make the application and to prepare for the hearing, and all of those costs were wasted. Now, this is supported by a two-page invoice. A table is not necessary here.[32]

Equatorial Guinea contends that there is no authority to support this proposition. That is correct; there is none. And that just goes to show how extraordinary Equatorial Guinea's conduct was. There is no principled reason why the Marshall Islands should not be able to recover those costs when it was Equatorial Guinea's wrongful conduct that rendered them moot.

Mr President, Members of the Chamber, that concludes my submissions on material damages. I will now turn much more briefly to the claims for non-material damage.

We have provisionally estimated this claim at approximately $15 million. I will address five points.

First, as a matter of legal principle, it is well established in international practice, including that of ITLOS, including that of Annex VII tribunals, and including that of the ICJ, that an award for damages for non-material injury that is caused by detentions is appropriate.

For instance, the *Duzgit Integrity* tribunal held that, and I cite, "the prolonged detention of the ship (with the crew on board) and the Master ... formed part of the circumstances the Tribunal considered to be disproportionate ... an award for moral damages in respect of the treatment of the Master and Crew would further the objectives of achieving full reparation."[33]

Second, the approach that international courts and tribunals have generally followed to ascertain this amount of compensation is generally, but not necessarily, to determine a daily rate and then multiply that daily rate by the number of days the person was detained, but there is no hard and fast rule. It should be calculated based on the factors and circumstances of the detention. It is ultimately a matter of equitable considerations.

[29] Witness Statement of Eivind Kulblik, Annex RMI/-2, paras. 99-102, pages 49-50.
[30] Memorial, Volume 5, Annex EK/-66, page 211.
[31] Reply, paras. 316-317.
[32] Reply, Annex X.
[33] Award on Compensation, para. 183.

There has been, admittedly, some variation in the applicable rates that international courts have used. To focus on the more recent authorities, we have that the ICJ in *Diallo* used a figure that, if we adjust for inflation, was almost $1,500 per day.[34]

In contrast, the *Arctic Sunrise* tribunal set a rate which, if adjusted for inflation, is $420 per day.[35] There is some variation.

Third, the Marshall Islands is claiming a rate of $2,000 per day per detained crew member.

Mr President, Members of the Chamber, this rate is higher than the rate set out in *Diallo*, but we say it is justified. It is justified based on equitable considerations due to the circumstances of the case.

In any event, insofar as there is a parallel with another case, the detention here is much closer, much more analogous to the situation in *Diallo* rather than the situation in *Arctic Sunrise*.

In fact, the *Arctic Sunrise* tribunal itself drew a distinction with the approach taken by the ICJ in *Diallo* on account that the ICJ "also considered the significant psychological suffering and loss of reputation", caused by the detention.[36]

And there are two important points of distinction between our case and the *Arctic Sunrise*.

First, the crew in the *Arctic Sunrise* were committed environmental activists. They were deliberately engaging in high-profile protest activities in Russia. That is admirable. They were courageous. But it implied serious risk that those persons willingly, voluntarily assumed.

Here, in contrast, we have the crew that were merchant seamen that were simply doing their jobs.

Second, the *Arctic Sunrise* crew were only detained for two months and, critically, they were later granted an amnesty by the Russian Federation. That is in stark contrast with the situation here, where the crew were held for 92 days in Equatorial Guinea and then for almost 300 days in total.

Further, this case is closer to *Diallo*. There, the ICJ identified four factors that informed its decision on compensation. Three of those factors arise here.

First, the ICJ considered that Mr Diallo was "arrested without being informed of the reasons for his arrest and without being given the possibility of a remedy".[37] Pausing there, this tracks with the situation here. The crew were simply held, they were not told why, they were not told what they were charged with, and there was not even an attempt of a legal process. They were not even given access to lawyers when they were being interrogated.

Second, the ICJ held that Mr Diallo, and I cite, "was detained for an unjustifiably long period pending expulsion."[38] The period in *Diallo* was 72 days – 20 days shorter than the time of detention here.

Third, Mr Diallo was made, and I cite, "the object of accusations that were unsubstantiated".[39] Again, that is parallel with the circumstances here.

Fourth, the loss of reputation suffered by the crew was arguably more severe than that considered in *Diallo*. The crew were honourable, honest merchant seamen. They were

[34] Reply, para. 419.
[35] Reply, para. 420.
[36] *Arbitration regarding the Arctic Sunrise (Netherlands* v. *Russia), Award on Compensation of 10 July 2017* (2019) *R.I.A.A.* XXXII 317 at para. 75.
[37] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, at para. 21.
[38] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, at para. 21.
[39] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, at para. 21.

wantonly, baselessly, we could even say perhaps maliciously, accused of either being oil thieves, or, even worse, pirates.

More than 2,000 years ago, pirates were described in *The Odyssey* as being those who risk their lives at sea to bring disaster to other people.[40] And I want to emphasize this point because an accusation of piracy, of being a pirate, is arguably the strongest, most damaging allegation that could be made against an honest seafarer.

Equatorial Guinea's handling of the issue aggravated the reputational injury to the crew and their families. The presumption of innocence was not respected; rather, there was a presumption of guilt. It was accompanied, that presumption of guilt, by very public, very serious accusations.

These accusations, whether of oil theft or of piracy, had profound reverberations on the Indian subcontinent, they had a profound negative impact on the crew's families. At times, they faced social backlash. That backlash reached the point where some had to pull children out of school because of bullying. Some were not even able to leave their houses. This is reflected in the crew statements the Chamber has.[41] These are concrete, real-world consequences of severe reputational harm.

Mr President, Members of the Chamber, critically, as you heard on Monday and yesterday, the detention also had an impact on the livelihoods of some of the crew. Because of this ordeal they went through, because of the trauma they endured, some of them were unable to return to sea.

The Chamber has heard first-hand from both the Master and the Chief Officer, men who were at the pinnacle of their vocation – they were Masters of vessels – they have nevertheless had to transition to shore-based jobs, which have, as they have told the Chamber, lower pay. This represents a serious long-term negative impact on their livelihoods.

The Chamber has already heard in detail the circumstances of their detention; I will not belabour that point again.

Fifth, the Marshall Islands has provided evidence of non-material harm. It has provided witness statements from the entire crew that was taken when they arrived in South Africa. The Chamber has also heard from the Master and the Chief Officer. It has also seen the expert report of Dr Lesley Perman-Kerr. To reiterate, she is a clinical psychologist with a long track record, working with parties involved in traumatic incidents, including kidnapping, piracy and captivity.[42]

Equatorial Guinea attempts to discard that evidence – we say, with respect, on spurious grounds. Instead of engaging with the substance of that evidence, with the facts, it attempts to cast doubts on the credibility of those witnesses on the basis of a purported conflict of interest. They claim that the crew have a "vested interest in the success of this particular claim", and they say that is the case because they stand to gain substantial sums if it succeeds.[43] Mr President, Members of the Chamber, that is unfair and, with great respect, it is a somewhat callous argument.

Equatorial Guinea's attempt to discount the evidence of the individuals it detained because they stand to gain from any award for non-material damage is inherently misconceived. The victims of wrongful conduct – be they torts, be they crimes, be they internationally wrongful acts – generally testify in proceedings where those torts, crimes or internationally wrongful acts are being adjudicated. That is a basic premise of the legal system. In any event,

[40] Homer, *The Odyssey*, (Emily Wilson, trans), 2018, 250.
[41] 2nd Engineer-1, Memorial, Vol. II, Annex RMI/-11, para. 29; 3rd Officer-1, Memorial, Vol. II, Annex RMI/-8, para. 28; Able Seaman No 1-1, Memorial, Vol. II, Annex RMI/-17, para. 25.
[42] Report by Dr Perman-Kerr, Memorial, Vol. II, Annex RMI/-39, page. 498 and ss.
[43] Rejoinder, para. 414.

the Chamber has heard from Marshall Islands' witnesses. It has had them here. It will be able to form its own view as to their credibility.

Finally, as to psychological harm, Equatorial Guinea has tried to discredit this by saying that the crew could have received adequate psychological assistance remotely. There is no evidence for that assertion. But, in any event, the contemporaneous record shows that owners tried to arrange for a psychologist to visit the crew in Equatorial Guinea. That was not possible given Equatorial Guinea's refusal to allow them into the country.[44]

In sum, the Marshall Islands is entitled to recover non-material damages based on the treatment, injury, and suffering of the crew.

Mr President, moving on to interest. First, the Marshall Islands is entitled to interest and that should not be controversial. Interest is considered a constitutive element of full reparation. That is reflected in Article 38 of the Articles on State Responsibility. Moreover, both ITLOS and Annex VII tribunals have awarded interest. In the case of ITLOS, this has been the position since the *"M/V SAIGA"* judgment.

Second, to go to a more recent authority, according to the *Duzgit Integrity* tribunal, determining what amount – and type – of interest depends on three issues.[45]

The first one is the rate of interest applicable to the award of damages. The *Arctic Sunrise* tribunal considered that the applicable interest rate should be that of the "commercial conditions prevailing in the countries where the expenses were incurred".[46]

Here, for material damages, the correct rate should be the US prime rate plus one. The overwhelming majority of the sums were paid in US dollars. For the fine, which was paid in euros, we say the applicable rate is the EURIBOR six-month rate, plus 5 per cent.

The second element is whether simple or compound interest should be awarded. Again, law of the sea tribunals have accepted that compound interest can be applicable. For example, in "*Virginia G*", ITLOS held that interest should compound annually.[47] Here, we say an award of compound interest is appropriate with semi-annual compounding, as that reflects current market conditions.

The third one is the date, or dates, from which interest should run, and the Marshall Islands' position is that ascertaining those dates is straightforward: interest should start running either from the date of the commission of the wrongful act, or from the date the costs or expenses were incurred, and they should run until compensation is paid.

Third, and finally, Equatorial Guinea contends that interest for any award for non-material damages must be different from the rate applicable to an award for material damages.

Equatorial Guinea relies on the Tribunal's decision in *"SAIGA"*, and that is true; that was the approach taken in that case, which is now more than 25 years old. There, the Tribunal applied different rates for different types of damage. But that is not the approach taken by more recent decisions.

Both the ICJ in *Diallo* as well as international human rights tribunals, such as the European and Inter-American courts of human rights, have all held that interest for compensation for non-material damages should run at commercial rates.[48] That is the current more updated position.

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[44] Witness Statement of Eivind Kulblik, Annex RMI/-2, para. 33, page 38.

[45] *Arbitration regarding the Duzgit Integrity (Malta* v. *São Tomé and Príncipe), Award on Reparation of 18 December 2019.* at para. 205.

[46] *Arctic Sunrise, Award on Compensation.* at para. 122.

[47] *M/V "Virginia G" (Panama* v. *Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014.* at para. 445.

[48] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo), Compensation, Judgment of 19 June 2012, I.C.J. Reports 2012,* at para. 56; see e.g., *Drozdyk and Mikula* v. *Ukraine,* Applications nos. 27849/15 and 33358/15, Judgment dated 24 October 2024, at dispositive point 5(a)–(c), applying the same interest rate to

In short, the Marshall Islands is entitled to interest at the rates and periods that I have mentioned, which are set out in our written submissions.

Moving on to the fourth issue, costs. Mr President, Members of the Chamber, the Marshall Islands is, we say, entitled to recover its costs in these proceedings. I will address this briefly.

It is true that, so far, ITLOS has not yet awarded costs. Nevertheless, it is also undisputed that Article 34 of the Statute authorizes the award of costs, and here, there are three reasons which justify the Marshall Islands receiving its costs.

First, despite the Marshall Islands' attempts to diplomatically engage with Equatorial Guinea, Equatorial Guinea simply refrained from doing so. Had there been diplomatic engagement, these proceedings may have been completely unnecessary.

Second, Equatorial Guinea misled the owners and the crew into believing that, if they paid the fine, they would be released. In reality, they were planning on rendering them to Nigeria.

Third, Equatorial Guinea aggravated this dispute by transferring the vessel and crew to Nigeria in the face of prompt release proceedings before the Tribunal. As I said, an extraordinary fact.

Therefore, even if the standard practice is for each party to bear its own costs, Equatorial Guinea's conduct in these proceedings justifies a cost award in the Marshall Islands' favour.

Finally, the Marshall Islands are entitled to satisfaction and the guarantee of non-repetition.

Mr President, Members of the Chamber, a mere declaration that Equatorial Guinea's conduct has breached UNCLOS would not suffice in these particular circumstances.

The Chamber has heard from the Marshallese Attorney General and its Agent the particular importance that this case has for the Marshall Islands as a flag State, as the third-largest flag State in the world, and it has heard how it can potentially impact the thousands of vessels flying its flag.

Given the severity of Equatorial Guinea's breaches and the importance that this issue has before the Marshall Islands as a flag State, and we could say for the shipping world more broadly, it is appropriate and necessary, in these particular circumstances, for the Chamber to order Equatorial Guinea to provide an assurance and a guarantee of non-repetition.

Mr President, Members of the Chamber, this concludes my submissions. I am grateful for your attention on what may sometimes be a slightly arid subject.

Mr President, we will have short submissions from Sir Daniel and from the Attorney General.

Should we break and then return, or should we continue?

THE PRESIDENT OF THE SPECIAL CHAMBER: Dr Casas, I believe we can continue until the break, and if we haven't finished with the statement, perhaps we take the break and then continue thereafter. So Sir Daniel may make a statement now.

So thank you, Dr Casas.

You have the floor, Sir Daniel.

SIR DANIEL: Thank you, Mr President.

Mr President, I note that my submissions may go marginally beyond the break; if you would be content to sit, perhaps, for five or six minutes beyond the break, that would allow us to come to the end of the session.

payments for pecuniary and non-pecuniary damage; see e.g., *Caso Hidalgo v. Ecuador, Merits, Reparations and Costs* (Series C No. 534), Judgment dated 28 August 2024, at para. 139.

THE PRESIDENT OF THE SPECIAL CHAMBER: That is quite in order.

STATEMENT OF SIR DANIEL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/5/Rev.2, p. 21–25]

Thank you very much, Mr President.

Mr President, Members of the Chamber, you have had almost two-and-a-half days of detailed submissions from the Marshall Islands on the facts, on the evidence and on the law, and you have heard from our principal witnesses.

Before we close our argument, I would like to step back a little from the detail and pull together key elements of our case.

In doing so, Mr President, Members of the Chamber, I note that this is a portentous case. It is a case of very considerable moment. It is wide-ranging in its scope and its scale, with freedom of navigation, flag State jurisdiction and interference with flag State responsibility at its heart. But it also draws in other issues of fundamental importance going to the welfare of seafarers and considerations of humanity, which are an unspoken pillar of UNCLOS. Your judgment in this case, Mr President, Members of the Chamber, on the issues of which you are seized in these proceedings will mark the course of the development of UNCLOS dispute settlement for some considerable time to come. It is a portentous case.

As you heard from our Agent and from the Attorney General of the Marshall Islands, the imperative behind this case is the looming issues of principle that the Marshall Islands considers need affirmation in the clearest and most ringing of terms. This is not simply a dispute between the Marshall Islands and Equatorial Guinea that comes before you for binary settlement – who is right and who is wrong. The case raises issues that go far beyond that narrow circumference to encompass wide systemic questions of the interpretation and application of UNCLOS, of the jurisdictional reach of ITLOS and the other adjudicatory bodies under its umbrella, such as Annex VII tribunals, and of the scope of the applicable law and whether this requires the application of other rules of international law not incompatible with the Convention or casts them only as an aid to interpretation.

Mr President, Members of the Chamber, we were given an inkling of Equatorial Guinea’s case to come in the brief cross-examination of the Master and the Chief Officer over the last days. The key focus of the questions was the events of 8 August involving the incident with the Nigerian navy boat, the “*Gongola*”, unidentified at the time with the AIS off in the dark of night, in a High-Risk Area for piracy, threatening gunfire against an oil tanker. This of course goes to Equatorial Guinea’s narrative that this case is all about Nigeria, nothing about Equatorial Guinea. We expect to hear a good deal more in the coming days about the 8 August incident and no doubt also about the events after 12 November. Less so, I imagine, about the events during the 92 days in which the *“Heroic Idun”* and its crew were in the physical custody of Equatorial Guinea under its sovereign control within its jurisdiction and under its guns.

The other theme of the cross-examination seemed intent on laying the groundwork for a claim that the crew were actually treated quite well. The Hotel Anda, where the crew were taken after approximately 84 days in a squalid detention centre, we were told by Counsel from Equatorial Guinea – and I mean no disrespect to my friends opposite – we were told by my friend from Equatorial Guinea testifying to his experience that it was a “very nice hotel”, “quite an upgrade”, with a pool and two restaurants – an observation that persisted in the face of evidence of illness, of elevated anxiety at the uncertain prospects of release and of continuing restrictions on the part of those held there.[1] The medical facility, we were similarly told in testimony from Equatorial Guinea’s Counsel, was “really impressive”,[2] an observation that

[1] ITLOS/PV.25/C32/3 (Confidential), page 28, line 18 - page 29, line 15.
[2] ITLOS/PV.25/C32/3 (Confidential), page 28, line 6.

was seemingly impervious to the shocking and quite extraordinary testimony that we heard from the witness a little earlier, which you will find in the transcript at the reference provided in my speaking note,[3] having regard to the sensitivity of that part of the *in camera* testimony. We will listen closely to how that aspect of Equatorial Guinea's case is developed in the coming days.

With these anticipatory snippets of Equatorial Guinea's case to come, let me identify the key elements of our case as advanced over the past two-and-a-half days.

First and foremost, it is a case about Equatorial Guinea's conduct, and about its conduct alone, in the 92 days from the interception of the *"Heroic Idun"* on the 12 August 2022 to its rendition of the vessel and the crew to Nigeria on the 11 November 2022. This was all Equatorial Guinea's time – the vessel and crew held within its sovereign jurisdiction, under the guns of its officers, mistreated by its officials, extorted by its Navy; all Equatorial Guinea, no one else. This case is not concerned with pre-12 August and post-11 November developments. We do not hide from those events, but they are context. They are not an excuse and they are not a defence for Equatorial Guinea's conduct. Nigeria's conduct is not in issue in these proceedings.

The claims of the Marshall Islands, and our requests for relief, are set out in detail in our pleadings, and will be addressed in our final submissions at the close of our argument on Monday. Let me identify them, though, in high level summary.

First, there is the violation of the Marshall Islands' freedom of navigation rights.

Second, there is the violation of the Marshall Islands' flag State jurisdiction rights.

Third, there is the violation of Equatorial Guinea's due regard obligations in respect of the exercise of the Marshall Islands' flag State jurisdiction duties, including with respect to SOLAS, STCW and its COLREGS responsibilities, and I note also in this regard the Marshall Islands' Detention Order in respect of the *"Heroic Idun"*, having regard to the unsafe crew manning levels and the safety of the vessel.

Fourth, there is the breach of the Marshall Islands' rights and responsibilities with respect to the crew of its flagged vessel.

Fifth, there is the breach of the rules and principles of humanity regarding the detention and care and treatment of the crew.

These are simply the headlines, Mr President, Members of the Chamber, and there are also a range of other more detailed claims.

These rights and claims are overwhelmingly, not just preponderantly, overwhelmingly and manifestly the rights and claims of the Marshall Islands. This is not a claim of diplomatic protection.

The Marshall Islands makes no claim against Nigeria in these proceedings. We seek no determination of Nigeria's rights. We make no request for any findings of law in respect of any conduct by Nigeria in these proceedings.

Equatorial Guinea's case on piracy is an afterthought. It was not raised at the time of the interception and detention of the vessel and of its crew on 12 August, nor at any other time in close proximity to these events. Indeed, it was not raised at all with the Marshall Islands, even in the face of successive correspondence seeking to engage with Equatoguinean officials, and even at the point at which prompt release proceedings were commenced. The first time that Equatorial Guinea raised a piracy claim with the Marshall Islands, as the flag State of the *"Heroic Idun"*, was in its Counter-Memorial in these proceedings, filed on 15 July 2024, almost two years after the interception and detention of the vessel.

[3] ITLOS/PV.25/C32/3 (Confidential), page 11, lines 17-31.

Mr President, Members of the Chamber, Equatorial Guinea was simply making things up as it went along. On the evidence, the piracy claim was and is a sham, a dissembling fiction, aimed at diverting attention away from proper scrutiny of Equatorial Guinea's conduct.

Article 293(1) of UNCLOS, the applicable law provision, is injunctive in its terms, requiring that once jurisdiction is established, the application of rules of international law not incompatible with the Convention is required. It is injunctive in its direction to the application of these rules of international law.

There is a panoply of rights, both express and implicit in UNCLOS, as well as properly in focus through the "other rules" *renvoi* clauses in the Convention, that address considerations of humanity with regard to seafarers. Your jurisdiction has clearly in focus, and must have clearly in focus, those considerations of humanity in respect of the crew of the *"Heroic Idun"* in the circumstances of this case.

Mr President, Members of the Chamber, I commend, as I have done once before, I commend for your close attention and careful review, the psychological report of Dr Lesley Perman-Kerr appended to our Memorial.

When it comes to remedies, the breaches committed by Equatorial Guinea cannot simply be addressed and resolved through declarations of breach and just satisfaction. More is required. There were flagrant and continuous violations of the law over an extended period. There was extortion. As you have just heard from Dr Casas, there was lasting loss, damage and injury to the crew. There was damage to the vessel. Equatorial Guinea's egregious conduct requires response. Violations of this moment must have, and must be seen to have, consequences.

Reparations due in this case cannot be limited to addressing the loss, damage and injury that was apprehended at the point of the commission of the unlawful acts. Reparations are not, and cannot be, just what was visible and quantifiable in those 92 days. It must address all loss, damage and injury that is a direct consequence of Equatorial Guinea's unlawful conduct.

You have heard and you have seen the Master and the Chief Officer. You have before you the witness statements of the other 24 members of the crew. You have Dr Perman-Kerr's expert report. There is lasting damage that is a direct consequence of Equatorial Guinea's actions.

You have also heard from Ms Nevill and Dr Casas this morning about the wider direct loss, damage and injury, both to the vessel and to the crew, in consequence of Equatorial Guinea's conduct.

As you have just heard from Dr Casas, this loss, damage and injury falls to be assessed in two categories: the first is the loss, damage and injury that was caused by Equatorial Guinea that was visible in the 92 days. This is the immediate loss, damage and injury caused by Equatorial Guinea. The second category is the loss, damage and injury that was a direct consequence of Equatorial Guinea's conduct in the 92 days but which only crystallized after this period or only became visible and quantifiable after this period.

A ready example of this second category is that addressed by Dr Perman-Kerr, concluding that what had been an acute trauma for the crew during the 92 days became a chronic and more severe trauma after the crew were rendered to Nigeria on 11 November.

Similarly, as you have just heard from Dr Casas, there is loss, damage and injury to the vessel that was a direct consequence of Equatorial Guinea's conduct in the 92 days but only crystallized after this period or only became visible and quantifiable after this period. This includes the damage to the hull that required drydock repairs and led to consequent loss of hire. The proximate cause of the damage was the initial period of three months' detention at Luba anchorage in Equatorial Guinea, that loss, damage and injury only becoming visible and quantifiable after the vessel was released from Nigeria.

Mr President, Members of the Chamber, the critical question, for purposes of reparation, is whether the loss, damage and injury was a direct consequence of Equatorial Guinea's conduct. In other words, the question is whether Equatorial Guinea's conduct was the proximate cause of the loss, damage and injury. It is a question of causation, without temporal limitation.

Mr President, Members of the Chamber, to address this issue, you do not need to make determinations of law about Nigeria's conduct. We acknowledge that loss, damage and injury caused by Nigeria cannot be the subject of reparations in these proceedings. This said, the illegality of Equatorial Guinea's conduct in rendering the vessel and the crew to Nigeria requires that all consequential loss, damage and injury that is sufficiently proximate to this unlawful act is properly traceable to Equatorial Guinea, and requires recompense. This is our case. Mr President, Members of the Chamber, this will require your careful assessment and your wise judgment.

Mr President, Members of the Chamber, the Marshall Islands will listen attentively to Equatorial Guinea's case over the coming days and we will be ready to address any issue that may arise that warrants our response in our second-round submissions on Monday.

Mr President, Members of the Chamber, that concludes my submissions and that concludes the substantive submissions of the Marshall Islands in this first round of opening. Mr President, though, before you close the proceedings, may I ask you to call upon the Attorney General for the Marshall Islands to make some very, very brief closing remarks.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Sir Daniel.

I now invite Mr Bernard Adiniwin, Attorney General of the Marshall Islands, to make a statement.

You have the floor, sir.

STATEMENT OF MR ADINIWIN
REPRSENTATIVE OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/5/Rev.2, p. 26]

Thank you. Mr President, Members of the Special Chamber, I wanted to say a few words before I leave Hamburg tomorrow to return to the Marshall Islands.

The Marshall Islands takes this case very, very seriously and I am grateful for all the careful attention you have shown our submission over the last two-and-a-half days. We will continue to monitor the case closely from the capital, but you are in very safe hands with our Agent and the rest of our team from the Marshall Islands who will remain here for the rest of the hearing. Thank you very much.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Adiniwin, Attorney General of the Marshall Islands, for those closing remarks.

This brings us to the end of this morning’s sitting and also concludes the first round of oral argument of the Marshall Islands.

The hearing will be resumed tomorrow, 9 October, at 2:30 p.m., not 3:00, at 2:30 p.m., to hear the first round of oral arguments of Equatorial Guinea.

This sitting is now closed.

(The sitting closed at 11.35 a.m.)

PUBLIC SITTING HELD ON 9 OCTOBER 2025, 2.30 P.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 9 OCTOBRE 2025, 14 HEURES 30

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l'audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l'audience du 8 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber will continue its hearing in *The M/T "Heroic Idun" (No. 2) Case*, and we meet this afternoon to hear Equatorial Guinea's first round of oral argument.

I now invite the Agent of Equatorial Guinea, His Excellency, Mr Carmelo Nvono-Ncá, to make his opening statement.

You have the floor, sir.

First round: Equatorial Guinea

STATEMENT OF MR NVONO-NCÁ
AGENT OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/6/Rev.1, p. 1–6]

(*Interpretation from Spanish*) Mr President, Members of the Special Chamber, it is an honour to appear before you in my capacity as Agent for Equatorial Guinea to open Equatorial Guinea’s submissions on the merits of the dispute concerning the *“Heroic Idun”* between the Marshall Islands and Equatorial Guinea.

We thank you, Mr President and the Members of the Special Chamber, for the opportunity to present our position and interact with our colleagues from the Marshall Islands. We’d also like to thank ITLOS, and, in particular, the Registrar and her team for their assistance and for the exemplary execution of their mandate in these proceedings.

President, Members of the Special Chamber, allow me to continue now in English, especially so that the Marshall Islands delegation can follow and better understand what happened, how it happened, and why the incident in the Gulf of Guinea happened.

(Continued in English) Mr President, Members of the Special Chamber, just over three years ago, Equatorial Guinea received and acted in response to a request from Nigeria and apprehended the *“Heroic Idun”* after an encounter between the *“Heroic Idun”* and the Nigerian authorities in the Nigerian Exclusive Economic Zone near Akpo Offshore Terminal. Equatorial Guinea did so on reasonable suspicion of piracy, in accordance with the communications transmitted by Nigeria. It acted pursuant to its international obligations under the United Nations Convention on the Law of the Sea and its commitments under the Code of Conduct concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa (called the Yaoundé Code), to which both countries, Equatorial Guinea and Nigeria, are parties. The Code’s commitments complement, and are consistent with, obligations under the Convention to combat piracy. I wish to remind this Chamber that only recently, over 40 per cent of global piracy incidents occurred in the Gulf of Guinea.

The *“Heroic Idun”* was apprehended by Equatorial Guinea and escorted to Luba Freeport, on the southwest side of Bioko Island. It was anchored here, where it remained safely for the duration of its stay in Equatorial Guinea. The crew of the *“Heroic Idun”* either remained on board the vessel or were stationed on shore at an accommodation facility, and for some days and some time at a luxury hotel in Malabo, where they were at all times treated with humanity, and provided with all requested provisions and high-quality medical care during this time. In that moment, both the Equatoguinean and Nigerian authorities conducted their own investigations into the vessel and its conduct.

On request from Nigeria, and in compliance with the Yaoundé Code of Conduct, Equatorial Guinea transferred the vessel to Nigerian custody. This was done after entering into an agreement with Nigeria that it would respect the crew’s human rights and guarantee the safety of the vessel while under investigation in Nigeria. The vessel later accepted liability to an offence under Nigeria’s piracy-related legislation.

Now, before this Chamber, the Marshall Islands attempts to paint a picture of Equatorial Guinea that sits entirely at odds with Equatorial Guinea’s responsible and reasonable conduct and assistance rendered to Nigeria.

Equatorial Guinea acted in good faith, Mr President, to the best of its ability, Members of the Special Chamber, in accordance with the United Nations Convention on the Law of the Sea and its regional commitments to maritime and security co-operation and ensured that all

those within its jurisdiction as a result were treated with dignity and humanity. Much of the Marshall Islands' own evidence confirms this.

As the Special Chamber will be aware, these events began and ended in Nigeria. Simply put, they would not have happened without Nigeria, both temporally and logically speaking. It is undisputed that Equatorial Guinea acted at the request of Nigeria for the interception, detention and ultimately the return of the vessel to Nigeria. Equatorial Guinea has always understood that Nigeria retained ultimate control over the vessel, within the framework of the Yaoundé Code of Conduct.

Yet, the Marshall Islands chose not to commence proceedings against Nigeria despite informing Nigeria that it intended to do so. Instead, and for its own reasons, the Marshall Islands has sought to redirect its case solely against Equatorial Guinea, claiming damages of 58 million United States dollars of alleged losses. This raises a serious question of good faith.

On 18 April of 2023, following consultations with the President of the Tribunal, the Parties concluded that the Special Agreement by which the present dispute was submitted to this Special Chamber. This demonstrates that the confidence and faith that Equatorial Guinea has in this Tribunal, and recognition of its unique position as the only permanent tribunal with the authority to ensure the proper interpretation and application of the United Nations Convention on the Law of the Sea.

Mr President, Members of the Special Chamber, I will first briefly address an important overarching point in this dispute chamber concerning Equatorial Guinea's place in the regional West African maritime security architecture, and the implications of the Marshall Islands' positions. Second, I will briefly summarize Equatorial Guinea's first round of oral presenting in this hearing.

I turn first to address Equatorial Guinea's position in the regional maritime architecture.

The threat of piracy and maritime crime is one of the most serious and continuing challenges present in the Gulf of Guinea. In May 2022, just a few months prior to the events surrounding the "*Heroic Idun*" in the present case, the United Nations Security Council recognized the persistent threat of piracy, armed robbery and transnational organized crime at sea in the Gulf of Guinea, and expressed deep concern about the threat that piracy, armed robbery and transnational organized crime at sea posed to international navigation, security, and sustainable development of States in the region.

It is recognized that States in the region bear primary responsibility for countering this threat. As a result of consistent efforts by national authorities and regional co-operation, especially the ongoing operationalization of the Yaoundé Architecture Code, piracy in the Gulf of Guinea has started to decline. Mr President, Members of the Special Chamber, my country's contribution is highly significant, in line with our responsibilities and obligations.

This is because the Yaoundé Code creates, in line with obligations under the Convention, a regional framework to counter piracy and armed robbery at sea, committing States to cooperate to the fullest extent in the repression of transnational organized crime in the maritime domain. It includes, for example, responsibilities to interdict suspected ships, and to ensure apprehension and prosecution of persons responsible.

The Yaoundé Code has established different geographic zones to coordinate joint patrols and action between the States. Equatorial Guinea sits in Zone D of the Yaoundé Code, alongside Cameroon, Gabon, and São Tomé and Príncipe. In addition, Equatorial Guinea has a close and important maritime security relationship with Nigeria, within the framework of both multilateral and bilateral agreements.

United Nations authorities have recognized that this decline in piracy is due to the significant efforts of national authorities. In May 2022, the United Nations Security Council 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. In November 2022, the United Nations Secretary-General recognized the Yaoundé Architecture "as the most appropriate regional framework to coordinate and strengthen counter-maritime crime efforts in the Gulf of Guinea". Further, in June 2023, the United Nations Assistant Secretary-General for Africa acknowledged that a key factor that had contributed to this decline was the ongoing operationalization of the Yaoundé Architecture.

Indeed, the Marshall Islands and other countries have consistently benefited from the protection provided by the armed forces of Equatorial Guinea. For example:

a) In 2020, the Equatoguinean Navy rescued the *"Methane Princess"*, a Marshall Islands-flagged vessel, which had been attacked by pirates and later secured by our naval forces.

b) Equatorial Guinea acted in 2021 to rescue and assist the *"Sea Phantom"*, another Marshall Islands-flagged vessel, from pirate attack in the exclusive zone of São Tomé and Príncipe (the same zone where the *"Heroic Idun"* was apprehended in the following year).

c) In February 2021, the *"Maria E"*, a Panama-flagged vessel, was attacked by pirates and subsequently assisted by our armed forces.

d) In May 2019, the *"Blue Merlin"*, a Dutch-flagged vessel, was attacked by pirates and rescued by ships from our armed forces, with support from a vessel of the Spanish Navy.

e) In 2024, the vessel *"HANA I"*, flying the flag of Tuvalu, was attacked by pirates and rescued by the Equatoguinean Navy.

Mr President, Members of the Special Chamber, as you can see, the acts of Equatorial Guinea's national maritime authorities are carried out in good faith, with the utmost professionalism, and in full respect of our international treaty obligations, as well as regional, bilateral, and domestic agreements.

The Yaoundé Code and its operationalization will continue to evolve and improve over time, and Equatorial Guinea will play its part in this process, in line with the United Nations Convention on the Law of the Sea and all other international legal obligations.

Mr President, Members of the Special Chamber, all States in West Africa know that they cannot address this problem alone and rely on joint cooperation to do so. Equatorial Guinea deeply appreciates the importance of playing its role within this regional framework and being a reliable and effective security partner.

No State is able to conduct surveillance over such a vast maritime zone as the Gulf of Guinea. Equatorial Guinea must rely on the assessments, analyses and requests made by other States, particularly its close partners in the region. It may be necessary to act quickly to deter in response to urgent threats, in real time, often without a complete factual picture.

Indeed, 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. Equatorial Guinea did not have then, nor possesses now, the complete factual record of events relating to the *"Heroic Idun"*.

The documents and evidence that Nigeria may possess, including those that explain or justify its own assessments and actions, are not on the record and have not been shared with Equatorial Guinea.

Regarding the critical events in Nigeria, Equatorial Guinea is limited to those documents received by its own authorities and documents that the Marshall Islands has chosen to place on the record. Even this limited factual record proved that Equatorial Guinea acted in accordance with international law and the Yaoundé Code, with the urgency required to respond to a reasonable threat of piracy and in line with the principles of reasonableness and humanity.

The factual implication of the Marshall Islands' arguments is that Equatorial Guinea should not have responded as it did and should instead have ignored a request for security assistance from Nigeria arising from a perceived maritime security threat.

However, this would have great implications for the West African and Gulf of Guinea region, as for all regions where maritime security relies on joint information sharing and naval responses by multiple States. The legal 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.

First, these would run counter to the Yaoundé Code's well-recognized material positive impact on reducing piracy and maritime crime in the Gulf of Guinea region, including as recognized by the United Nations Security Council. For example, in May 2022, just a few months before these events began, the United Nations Security Council Resolution 2634 welcomed and encouraged the full and effective implementation of the Yaoundé Code and called upon regional organizations to further operationalize the Yaoundé Code architecture.

Second, these would create a chilling effect on lawful measures taken by States in cooperative and joint efforts against piracy and maritime crime. For West and Central Africa, this would have serious consequences for regional security, for its trade, its people, and their well-being and prosperity.

What remains entirely absent from the Marshall Islands' claim is the proper appreciation that must be given to States in cross-border cooperation to combat piracy and the maintenance of the international rule of law in areas outside the territorial sea. The very principles that the Marshall Islands says it is seeking to uphold, including freedom of navigation, presume and rely upon unimpeded, safe and secure maritime passage, which are gravely threatened by piracy.

Mr President, Members of the Special Chamber, Equatorial Guinea's oral presentations will proceed as follows:

Today, Equatorial Guinea will call its two witnesses for examination before this Chamber. First, Ms Cláudia Baró Huelmo will examine Captain Juan Nsue Esono Nchama. Next, Professor Hussein Haeri KC will examine Mr Alberto Hernández Martín before then providing an overview of the factual events underpinning this dispute.

Tomorrow, Friday, 10 October, Professor Haeri will make objections of admissibility of several of the Marshall Islands' claims, based on the *Monetary Gold* principle. Professor Dapo Akande will then address matters of jurisdiction and applicable law in the dispute. Next, Ms Floriane Lavaud and Francisco Moro Nve Obono will address objections of inadmissibility based on the failure of the Marshall Islands to exhaust local remedies.

Later, Professor Akande will submit on the powers relating to piracy under the Convention, and address the Marshall Islands' claims based on an alleged breach of exclusive flag State jurisdiction and freedom of navigation. Professor Haeri will make submissions on considerations of humanity and the treatment of the vessel's crew while in Equatorial Guinea. Finally, Professor Akande will conclude with submissions concerning Article 225 and the principle of reasonableness.

On Saturday, 11 October, Professor Akande will address those claims of the Marshall Islands based on alleged breaches of treaties and instruments external to the Convention, and of alleged aggravation of this dispute. Ms Lavaud will address those claims of the Marshall Islands concerning the exercise of Equatorial Guinea's prescriptive jurisdiction, obligations to notify the flag State, and obligations of prompt release. Finally, Professor Haeri will address issues of causation and the quantum of damages sought by the Marshall Islands.

Mr President, Members of the Special Chamber, it is a privilege for Equatorial Guinea to participate in these proceedings before the Special Chamber of the International Tribunal for the Law of the Sea. My delegation remains available to provide any such assistance as the Special Chamber might need and welcome any questions from the Special Chamber. We will be pleased to offer our fullest collaboration and cooperation to the delegation for the Marshall Islands in making this hearing as helpful as possible for the Special Chamber.

To assist the Special Chamber, we have provided Judges’ folders to the Registry, which contain a copy of the presentation slides to be used during Equatorial Guinea’s oral statements.

Mr President, I now respectfully request that you invite Ms Cláudia Baró Huelmo to call Equatorial Guinea’s first witness.

Thank you, Mr President, and thank you very much for your kind attention, Members of the Special Chamber.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank the Agent of Equatorial Guinea for his opening statement.

Examination of witnesses
[ITLOS/PV.25/C32/6/Rev.1, p. 6]

THE PRESIDENT OF THE SPECIAL CHAMBER: My understanding is that Equatorial Guinea wishes to call its first witness. May I ask the Agent of Equatorial Guinea to confirm this? You have already mentioned that, but could you just confirm it?

MR NVONO-NCÁ: Yes, I confirm that, Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Your Excellency.

Pursuant to the decision of the Special Chamber to which I referred to on Monday, the next part of this sitting shall be held *in camera*. It is estimated that this will apply until the mid-afternoon break and possibly after that.

I, therefore, request the Registry staff to ensure that the public has left the courtroom and that the online broadcast has been interrupted. This may take a few minutes.

(The hearing went in camera.*)*

(The sitting closed at 6.28 p.m.)

PUBLIC SITTING HELD ON 10 OCTOBER 2025, 10 A.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 10 OCTOBRE 2025, 10 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l’audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l’audience du 8 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good morning. The Special Chamber will now continue its hearing in *The M/T “Heroic Idun” (No. 2) Case*, and I now invite Mr Haeri to the podium to give his statement.

You have the floor, sir.

First round: Equatorial Guinea (continued)

STATEMENT OF MR HAERI
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/7/Rev.1, p. 1–11]

Good morning, Mr President, distinguished Members of the Special Chamber. It is an honour and a privilege for me to appear before you today and to do so on behalf of the Republic of Equatorial Guinea.

I will continue Equatorial Guinea's submissions today by first setting out a factual overview of the events giving rise to the present dispute.

Mr President, Members of the Special Chamber, before I make my submissions on the factual background of this case, I would like to make an observation on the revised approach of the Marshall Islands we have heard during this hearing in the relevant factual period.

Over the past three days, we have heard a lot about the period the vessel spent in Equatorial Guinea, newly styled as the "92-day case". However, we cannot forget that the Marshall Islands does not limit its factual submissions to events that took place in Equatorial Guinea. Rather, it makes extensive written submissions about what it says transpired in Nigeria.

This reflects the Marshall Islands' realization that what happened foundationally and conclusively in Nigeria is germane to the period segued between when the vessel was in Equatorial Guinea.

I will focus on what Equatorial Guinea submits are five key events. They demonstrate that the salient events cannot be told without Nigeria.

First, the encounter between the *"Heroic Idun"* and the Nigerian naval authorities on 8 August 2022;

Second, Nigeria's plea for help to the Equatoguinean authorities on 10 August 2022;

Third, the investigations Nigeria conducted while the vessel and crew were in Equatoguinean territory and the treatment of the crew;

Fourth, Nigeria's repeated requests to return the vessel to Nigeria, culminating in an agreement between Nigeria and Equatorial Guinea for the vessel to be returned to Nigeria;

And fifth, the plea bargain under which the vessel admitted criminal liability for offences under anti-piracy legislation in Nigeria and under which $15 million was paid to Nigeria.

Mr President, Members of the Special Chamber, I turn to address the first of these five points.

We have heard from two witnesses of the Marshall Islands: the Master and the Chief Officer. In each case, their evidence reinforced the troubling picture of the actions of the *"Heroic Idun"* on 8 August 2022 when it encountered the Nigerian naval vessel *NNS "Gongola*." There are seven points to which I would respectfully draw your attention.

First, the Master confirmed that he overheard discussions between Akpo Terminal and the "*Gongola*." This also led the Chief Officer to think that "the vessel that was speaking with the Terminal was a patrolling boat".[1] This is the only reasonable conclusion, since a pirate ship would not engage in communications with Akpo Terminal at all, let alone before trying to hijack the "*Heroic Idun*".

Second, the Terminal informed the Master not once, not twice, but three times that a Nigerian Navy ship was heading in its direction, as the Chief Officer confirmed in his oral evidence. This is a different point from the contention that the Master and Chief Officer simply

[1] Witness statement of Chief Officer, 9 June 2023, RMI-5, para. 17.

misheard the name of the vessel and, therefore, could not determine whether it was a Nigerian Navy ship.

On that latter point, the Marshall Islands submitted that the multiple "references to the *"Gongola"* in the transcript do not reflect what the crew actually heard", as "the VDR transcript was prepared months after the incident by lawyers".[2]

The Marshall Islands has not submitted into evidence the recording of the VDR.

Third, the *"Heroic Idun"* and the *"Gongola"* engaged in a lengthy conversation prior to the *"Heroic Idun"*'s flight.[3] As the Master confirmed, the *"Gongola"* asked him many administrative details: his name, his nationality, the port of registration, the owner of the vessel, and the vessel's agent in Nigeria, to name a few. It would be highly surprising, it's respectfully submitted, for pirates to engage in such a structured and prolonged exchange focused on administrative details. This is particularly so having seen the multiple requests for confirmation on how to spell certain names, which would be relevant for the Navy, but useless information to a pirate.

Fourth, it was during this exchange with the *"Gongola"* that the *"Heroic Idun"* admitted that it did not have the necessary clearances to load oil in Nigeria.[4] Even more extraordinary was the Master's evidence that he was not aware he needed a naval clearance and the NNPC clearance to load oil until he arrived at Akpo Terminal, as he led the entry of a vessel the size of the Empire State Building into Nigerian waters.[5] To say that this is surprising, if it is true, is an understatement.

In any event, the Master admitted to knowing that he didn't have the clearances that were required when the Nigerian Navy addressed his ship as the *"Heroic Idun"* and asked for them. This is relevant context.

Fifth, when it became clear that the Nigerian Navy wished to investigate the activities of the *"Heroic Idun*," the Master insisted that the *"Heroic Idun"* was in international waters, not Nigerian waters – his point being to communicate, as he admitted, that the Nigerian Navy would not have jurisdiction in international waters.[6]

But this supports that the Master understood that he was speaking with the Navy, since it wouldn't make sense to debate with pirates on the extent of their jurisdiction.

Sixth, the Master admitted twice that he told the Nigerian Navy that the next port of call was Ceiba, Equatorial Guinea. Yet, he confirmed that, in fact, the real destination was still Nigeria.[7] The Master, therefore, told the Nigerian Navy something that was untrue. Why would he do that?

In any event, after the flight of the *"Heroic Idun*," it is, therefore, unsurprising that Nigeria turned to Equatorial Guinea as the next apparent port of call of the *"Heroic Idun*."

Which takes me to my seventh and final point. In the counterfactual scenario, meaning had Equatorial Guinea had not interdicted the vessel, the *"Heroic Idun"* would have returned to Akpo Terminal in Nigeria. This is the counterfactual posited by the Marshall Islands. That's what they say would have happened had there been no interdiction, the vessel would have returned to Nigeria.

As the Master explained: "Eventually, once the documentation was in place, now that I knew the clearances were required and there should not be any problems, the *"Heroic Idun"*

[2] ITLOS/PV.25/C32/4, p. 16 (lines 20-24) (Ms Grafton).
[3] ITLOS/PV.25/C32/3 (confidential), pp. 22 (lines 4-9); 22 (lines 11-14) (Master).
[4] Memorial, para. 30; Transcript of audio from the bridge on the Voyage data recorder on the evening of 8 August 2022, MT-26, p. 271.
[5] ITLOS/PV.25/C32/3 (confidential), p. 23 (lines 19-30) (Master).
[6] ITLOS/PV.25/C32/3 (confidential), p. 24 (lines 30-37) (Master).
[7] ITLOS/PV.25/C32/3 (confidential), p. 22 (lines 39-42); p. 25 (lines 28-39) (Master).

would return to Nigeria once all the clearances were in place and the Terminal allowed us to go back, we would go back just in time for loading".[8]

Had the *"Heroic Idun"* returned to Nigeria as planned, it would have been investigated in Nigerian territory, rather than Equatoguinean territory, and it would have faced criminal prosecution in the same manner. This is an important point of causation, and I will return to it on Saturday when I make submissions on that.

The Marshall Islands fails to explain how the *"Heroic Idun"* planned to then load oil from Nigeria without explaining itself to the Nigerian authorities with the consequences that we know followed.

Of these events, the Marshall Islands says they are merely "context". But "without context a piece of information is just a dot", is how the essayist Michael Venture put it.

I will now turn to the second fact to which I would like to draw the Chamber's attention, Nigeria's plea for assistance.

On 10 August 2022, Nigeria made a request to the Equatoguinean Director General of Military Cooperation, in which it requested Equatorial Guinea's assistance in the tracking, interdiction and repatriation of the *"Heroic Idun"* to Nigeria for investigation following the events in Nigeria.[9]

Yesterday, we heard Captain Esono Nchama's testimony that he had suspicions of a probability of piracy concerning the *"Heroic Idun"* when he received this request, and the reasons why he did so.

As he explained in clear terms, VLCCs like the *"Heroic Idun"* can be used by pirates as mother ships so that they can refuel without having to go onshore. Captain Esono Nchama also testified to the importance of cooperation in the region as the only effective way to combat piracy in the Gulf of Guinea. He told us no State can counter piracy by itself.

Against this background, and in direct response to Nigeria's request, Captain Esono Nchama ordered the *"Capitan David"* to interdict the *"Heroic Idun"*.[10] Recently, within the last month, the Marshall Islands put into the record the VDR transcript of the communications between the *"Capitan David"* and the *"Heroic Idun"* on the 12 August 2022. It clearly demonstrates that the *"Heroic Idun"* had to be asked not once, not twice, but three times to stop its engines.[11]

Captain Esono Nchama's evidence was that this conduct, following Nigeria's request, further enhanced Equatorial Guinea's suspicions that the *"Heroic Idun"* was probably involved in piracy, potentially as a mother ship. The transcript also shows that efforts were made to investigate the vessel.

As we can see on the screen, at 14:32, the *"Capitan David"* asked, "Do you have a small boat?" And requested that the Captain, Chief Engineer and an official come aboard the *"Capitan David*".

In response, the Master of the *"Heroic Idun"* explained: "We don't have a small boat ... We have lifeboat but ... a lifeboat cannot manoeuvre like that".[12]

As acknowledged by the Marshall Islands, "at this stage the vessel was in ballast, sitting very high in the water, not yet having loaded any cargo".[13] The Master further confirmed the

[8] ITLOS/PV.25/C32/3 (confidential), p. 25 (lines 31-34) (Master). See also Witness Statement of the Master dated 15 December 2023, RMI-1, paras. 83-85; Witness statement of Chief Officer dated 9 June 2023, RMI-5, para. 40; Second Witness Statement of the Chief Officer (Sanu Jose), RMI-61, para. 8.

[9] 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, para. 18.

[10] Witness statement of Captain Juan Nsue Esono Nchama, 10 July 2024, REG-WS-007, para. 8.

[11] Witness statement of Master, 15 December 2023, RMI-1, paras. 88-90.

[12] VDR transcript of exchanges between the Vessel and Capitán David on 12 and 13 August 2022.

[13] ITLOS/PV.25/C32/1, p. 19 (lines 22-23) (Sir Daniel).

distance from the waterline to the main deck was some 15 metres,[14] rendering impractical the Marshall Islands' suggestion that it should, and could only, have been boarded at this time.

The *"Capitan David"* then accompanied the vessel to the Port of Luba. At no point was any force used against the vessel by the *"Capitan David*."

The *"Heroic Idun"* and its crew arrived safely in Luba Freeport on the evening of the 13 August 2022. The vessel remained stationed in Luba Freeport until its departure on 11 November 2022, accompanied by Nigerian authorities.

The Equatoguinean Vice-President communicated publicly at that time that Equatorial Guinea had responded to "the motto 'zero tolerance' for any act of piracy in our area. We are proud to have collaborated with Nigeria for the *HEROIC IDUN* arrest as a sign of respect for our agreements against maritime piracy".[15]

In June 2023, Equatorial Guinea again communicated, this time to Nigeria, its understanding that the vessel had been pursued by the maritime authorities of Nigeria "due to having carried out illicit acts of illegal purchase of fuel and piracy".[16]

I will now move on to the third fact, namely, that upon arrival to Equatorial Guinea, Nigeria directly launched its investigations about the conduct of the *"Heroic Idun"*. It is undisputed that Nigerian authorities conducted their own separate investigations, in which Equatorial Guinea was not substantively involved. The evidence of the *"Heroic Idun"*'s own crew members also notes that the interviews with the Nigerian authorities focused on the actions of the vessel in Nigerian waters.[17]

Equatorial Guinea's own investigation was concluded by 23 August 2022 with the remainder of the time that the vessel and crew were in Equatorial Guinea being necessary for Nigeria's investigation. Apart from the fine imposed by Equatoguinean authorities on 23 September 2022 under the CEMAC Code,[18] Equatorial Guinea took no other legal or judicial action against the vessel. The fine had no impact on the safety of the vessel or the care and treatment of the crew. During the crew's interviews with the Equatoguinean authorities, representatives of Besora were present and facilitated for translation to English for crew members all communications from the authorities, as we heard very clearly from Mr Hernández Martín's evidence yesterday. The crew were ultimately read their statements in English and were able to make amendments prior to signing, which they also did, as he again confirmed.

On 20 August 2022, the Nigerian Navy issued a press release confirming that the vessel was not cleared to be in Akpo oilfield at the time. It noted that the vessel's defiance of the Nigerian authorities led Nigeria to invoke and request the assistance of Equatorial Guinea through the Yaoundé Code, and that a Nigerian Navy surveillance facility was used to track and constantly update Equatorial Guinea on the location of the vessel.[19] This is not surprising since, as we heard, the Master had wrongly told the *"Gongola"* that Equatorial Guinea was the next destination of the *"Heroic Idun*".

A note verbale from Nigeria to Equatorial Guinea on 24 August 2022 confirmed Nigeria's profound gratitude for the prompt arrest and progress made so far regarding the

[14] ITLOS/PV.25/C32/3 (confidential), p. 8 (lines 30-35) (Master).
[15] Tweet by Vice-President of Equatorial Guinea, 10 November 2022, SA-25.
[16] 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. 3.
[17] Witness statement of Master, 15 December 2023, RMI-1, paras. 129-131; Witness statement of Chief Officer, 9 June 2023, RMI-5, para. 52.
[18] Resolution from the Ministry of National Defence of Equatorial Guinea, 23 September 2022, REG-039.
[19] Nigerian Navy Press Release, 20 August 2022, SA-5.

ongoing investigation.[20] Even the Marshall Islands' own diplomatic communications around this time, this time within the 92-day period, evidence that it acknowledged and understood Nigeria's central role in relation to the vessel.

On 17 and 18 August 2022, within the 92-day period, the Marshall Islands wrote to Nigeria and Equatorial Guinea separately acknowledging that the "*Heroic Idun*" evading Nigerian authorities and its subsequent apprehension may be directly linked.[21]

On 30 August 2022, the Marshall Islands again wrote to Nigeria referencing its interpretation of the position under UNCLOS regarding freedom of navigation and exclusive flag State jurisdiction. The two points that Marshall Islands says are at the heart of its case, and I will return to this point on the issue of inadmissibility. Equatoguinean authorities were not copied to this letter.[22]

On 13 September 2022, the Marshall Islands acknowledged that the Equatoguinean investigation had been completed but they expressed concern at the allegations made against the vessel by Nigerian authorities.[23]

What this means is that during the 92 days, the Marshall Islands was writing to Nigeria saying "you, Nigeria, are in breach of UNCLOS." Notably, this is before Equatorial Guinea returned the vessel to Nigeria.

Mr President, Members of the Special Chamber, the Marshall Islands makes a series of complaints about the treatment of the vessel and the crew. Very notable in this regard is that the Marshall Islands fails to engage with the central role of Besora Marítima, maritime agents responsible for the vessel and crew. The argument made in the Marshall Islands' submissions that Equatorial Guinea did not itself provide such amenities fundamentally misses that point.

The evidence from Mr Alberto Hernández Martín on this point was crystal clear. At all times, Besora was authorized by the Equatoguinean authorities to have complete and constant access to the crew, to facilitate and provide all necessary amenities, food and provisions, and assist in the response to any other needs from the crew. Mr Hernández Martín's evidence was similarly clear that the crew was provided with any provisions or items requested during their stay in Equatorial Guinea. This included food, clothing, toiletries, and necessities as well as recreational items such as alcohol and cigarettes. Additionally, all the crew retained possession of their mobile phones, received local SIM cards, and had complete access and communications with Besora as their dedicated maritime agents.

The crew at all times had their own safe accommodation – either on board the vessel, at the accommodation facility or at Hotel Anda.

On board the vessel, the evidence from the Chief Officer has shown that the crew played sports on a regular basis, including with the guards,[24] shared meals with the guards, and slept in their own rooms.

Those crew members stationed in Malabo were housed in suitable and safe accommodation. Again, Mr Hernández Martín confirmed that the accommodation facility was comfortable, being a brand new building, and had suitable rooms, bathrooms and air conditioning. Besora arranged to furnish the accommodation suitably with bedding and

[20] 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.
[21] Letter from the Marshall Islands' Maritime Administrator to the Chief of the Naval staff at Nigerian Naval headquarters, 18 August 2022, SA-7; 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, para. 29.
[22] Letter from the Marshall Islands' Maritime Administrator to Director General of Nimasa, 30 August 2022, SA-10.
[23] Letter from the Marshall Islands' Maritime Administrator to the Attorney General of Equatorial Guinea, 13 September 2022, SA-11, p. 122.
[24] Log, 12 August - 8 September 2022, EK-4, p. 27.

provisions. The crew at all times had access to safe bottled drinking water and a variety of foods from different restaurants, including Indian food made to order by a chef.

The crew stationed in Malabo also spent several days in Hotel Anda, chosen by Mr Hernández Martín as one of the best hotels in Malabo, and had unrestricted access to all its amenities. Neither the accommodation facility nor the hotel is consistent with the Marshall Islands' suggestion of inhumane mistreatment.[25]

The crew was also given complete access to medical care. It is undisputed that the crew were seen and treated, several times, at La Paz, which Mr Hernández Martín described as the "premier hospital in Equatorial Guinea".[26]

It has not been disputed that it was Besora itself which would select and arrange the crew's medical visits when requested. They would personally accompany the crew to either a local hospital or to La Paz. The crew were also able to be visited and seen individually by a chaplain, as confirmed by the Marshall Islands' evidence and by Mr Hernández Martín.[27]

In short, there is a stark contrast between the insinuation that the crew were somehow deprived or denied medical care and the fact that they had regular and unimpeded access to the country's top medical facility and hospital staff. No suggestion is offered by the Marshall Islands explaining why La Paz was made available to the crew at all, if there was an intention to mistreat them, nor would any such suggestion be plausible.

In conclusion, the crew were never mistreated – physically or otherwise – by Equatoguinean authorities. They were always treated well, with respect, as Mr Hernández Martín confirmed very clearly.

Mr President, Members of the Special Chamber, the Marshall Islands also makes a number of allegations about the conditions and position the *"Heroic Idun"* was in during its time in Luba. As evidenced in the witness statement of Mr Howard McDowall, the general manager of Luba Freeport, Luba Bay is well-situated to receive and host vessels the size of the *"Heroic Idun*."

As he makes clear, Luba Freeport is in 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, with larger waves. Luba port serves large oil vessels,[28] and has two tug vessels available to assist at all times.

The Freeport's VHF radio channel 16 is manned 24 hours a day to respond to communications from vessels in the bay at any time, and the Freeport is well equipped to respond to any safety incidents. At all times, the *"Heroic Idun"* had the ability to contact port authorities in the event of any danger or threat.

And yet – how many such incident calls did the Freeport radio channel receive from the *"Heroic Idun"*? Not a single one. In his examination, the Chief Officer stated that he did not know he could contact Mr McDowall's team in the event of danger. Such a statement is simply not credible. VHF radio channel 16 is designated as an international distress frequency, as reflected in the Akpo Terminal Handbook attached to the Master's witness statement as MT-14.[29]

Throughout the entire time that the *"Heroic Idun"* was stationed at Luba Freeport – including during the incidents that the Marshall Islands now suggests posed a danger to the vessel – it is undisputed that not a single communication was made via this channel to communicate distress to the vessel.

[25] Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 22.
[26] Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 27.
[27] Email, 29 August 2022, 16:08, EK-18; Email, 31 August 2022, 00:42, EK-19.
[28] Witness statement of Howard James McDowall, 2 July 2024, REG-WS-006, para. 9.
[29] Email and AKPO Terminal Regulations and Procedures, 1 August 2022, MT-14, p. 233.

Again, the allegations presented by the Marshall Islands sit at odds with its own evidence:

a) 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".[30] The same report also noted that the "vessel, machinery and outfitting were found to be in a good condition which can be expected for a similar vessel with a similar age".[31]

b) the chosen expert of the Marshall Islands, Ms Blount, is stated to be a trainee solicitor at Reed Smith, Counsel on the record for the Marshall Islands in these proceedings.[32] That is an unusual choice for an independent expert. That said, as noted even in Ms Blount's assessment, "the *"Heroic Idun"* was not in imminent peril during her detention".[33]

c) The Marshall Islands places much emphasis on two hypothetical scenarios resulting from the *"Wele Nzas"'* movement in Luba Freeport. However, it is not even alleged that there was damage to the *"Heroic Idun"* as a result.

d) Similarly, the Marshall Islands references the risk of potential twists in the vessel's anchor.[34] In his first statement at paragraph 21, Mr Hernández Martín explained that "the owner requested permission to lift the *"Heroic Idun"'*s anchor, as they thought it was twisted. They requested permission to do this. I recall that eventually this request also was approved although, in the end, there was no issue with the anchor".[35]

Having shown that no harm occurred to vessel or crew during their stay in Equatorial Guinea pending Nigeria's investigation, I turn now to the fourth key fact: Nigeria made multiple requests for the repatriation of the vessel to Nigeria during this 92-day period. One of the key complaints of the Marshall Islands is that Equatorial Guinea, out of the blue, returned the vessel to Nigeria in November 2022. This is clearly contradicted by the evidence.

As we can see from the request for cooperation dated 10 August 2022, Nigeria "kindly requests [Equatorial Guinea] to intervene in the track, arrest and repatriation of an illegal VLCC *"Heroic Idun"*." Moreover, it says: "It would be highly appreciated if, in line with subsisting defence cooperation protocols between the two countries, Equatorial Guinea would track and arrest the vessel and hand them (both vessel and crew) over to the Nigerian Government for proper investigation"[36] – investigation, in other words, in the place where the incidents that were germane to that investigation had taken place, as Captain Juan said.

The request is repeated on multiple occasions in subsequent consequent notes verbales, for example:

a) On 12 September, Nigeria states that "... The Yaoundé Code of Conduct is a valid legal basis for Equatorial Guinea to transfer the vessel and her crew to Nigeria."[37]

We have highlighted the dates of these notes verbales, all of which occur within the 92-day period.

b) On 12 October, Nigeria reiterates that "The vessel by her actions between 7 and 8 August 2022 breached a number of international conventions ..." such as the United Nations

[30] Condition Survey Report, EK-78, p. 280.
[31] Condition Survey Report, EK-78, p. 299.
[32] First Expert Report of Voirrey Blount including annexes, 24 November 2023, RMI-37, p. 264.
[33] First Expert Report of Voirrey Blount including annexes, 24 November 2023, RMI-37, para. 36.
[34] See for example, Witness statement of Eivind Kulblik, RMI-2, para. 73.
[35] Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 21.
[36] 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.
[37] 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.

Convention on the Law of the Sea. "Consequently, it is desirable for *M/T "Heroic Idun"* and her crew to be repatriated to Nigeria for investigations."[38]

c) Also on 12 October, Nigeria sent a second note including the following:

> The Federal Government of Nigeria is indeed 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*.[39]

d) And then Nigeria followed up on its repatriation request four times – on 26 October, 31 October, 1 November and 3 November.[40] You can see an example and the relevant references on the slide.

These changes culminated in the official handover agreement between the Nigerian and Equatoguinean authorities on 5 November, which Captain Juan referenced in his evidence.[41] Moreover, despite extensive submissions on human rights, Counsel for the Marshall Islands has chosen not to address the fact that, as an addendum to this agreement, Equatorial Guinea requested and obtained an undertaking from Nigeria to treat the vessel's crew in accordance with the provisions of the International Convention of Civil and Political Rights and to guarantee the safety of the vessel while under investigation in Nigeria.[42] The fact that Equatorial Guinea did so is again simply not congruent with the suggestion of the Marshall Islands that Equatorial Guinea intended to treat the crew inhumanely.

On 11 November 2022, the *"Heroic Idun"* left the port safely and without incident. Accordingly, on 11 November 2022, Equatorial Guinea's involvement assisting Nigeria in the matter of the *"Heroic Idun"* ended.

Turning to my fifth and final key fact, I would respectfully like to draw the Chamber's attention to what we know happened in Nigeria: the vessel plead guilty to an offence under Nigerian anti-piracy legislation.

As Captain Juan explained, "You could say I was wrong, if they hadn't plead guilty, but they did, and I was right."

We know that, on arrival in Nigeria, the crew were handed charge sheets charging them with two alleged offences under section 12 of Nigeria's Suppression of Piracy and Other

[38] 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.
[39] 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.
[40] 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; 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; 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.
[41] Ref to REG-50.
[42] Official handing over of the tanker MT Heroic Idun between the governments, Addendum, 10 November 2022, REG-011.

Maritime Offences Act 2019 and a third offence under section 1(17)(b) of the Miscellaneous Offences Act of 2004.[43]

The charges were amended on 14 November 2022. The amended charges were, amongst others, that the crew "conspired" amongst themselves "to commit a maritime offence" under section 10 of the Suppression of Piracy and Other Maritime Offences Act 2019.[44]

In mid-January 2023, the Marshall Islands was contemplating bringing action against Nigeria – noting it was "nearly ready",[45] "but the feeling is that with things being so sensitive, in terms of timing we will see what next week brings and reconsider this at the end of next week."

Then, in April of 2023, the vessel agreed to plead guilty to an offence under section 16(5)(b) of the Suppression of Piracy and Other Maritime Offences Act. The vessel also agreed to pay a statutory fine of $15 million as "restitution", and 5 million Naira, (approximately 5,000 British pounds) and to make an apology in Lloyd's List to Nigeria. The owners of the vessel made payment on 12 May 2023.[46] The Marshall Islands did not then bring a claim under UNCLOS against Nigeria as it had previously threatened to do.

The Marshall Islands' conduct shows the centrality of Nigeria to the Marshall Islands' claims concerning freedom of navigation and exclusive flag State jurisdiction, a point to which I will return on inadmissibility.

The Marshall Islands now, before this Chamber, seeks to deflect scrutiny from the formative and concluding events, all of which occurred in Nigeria and culminated in its guilty plea there. Yet, this covers the vast majority of a 10-month period in which the vessel was held, a period of 289 days, of which 198 were spent in Nigeria.

Importantly, Nigeria, as shown, was also central to the period in which the vessel was in Equatorial Guinea. Nigeria's role is an unbroken continuum. It is not as though Nigeria somehow disappeared during the 92 days when the vessel was in Equatorial Guinea, as the Marshall Islands prefers to suggest, somehow reappearing at the end of that period. The facts, we would respectfully submit, are clear on Nigeria's central role in the *"Heroic Idun"* saga.

Mr President, Members of the Special Chamber, this concludes my presentation on the factual overview of this dispute, and I would respectfully request that, Mr President, the Special Chamber invite Professor Akande to address you on jurisdiction and applicable law.

Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Haeri for his statement, and I now give the floor to Mr Dapo Akande.

You have the floor, sir.

[43] Notification and Statement of Claim, para. 55; Amended charge sheet from the Federal High Court of Nigeria, 14 November 2022, SA-32.
[44] Notification and Statement of Claim, para. 55.
[45] Email, 15 January 2023, 10:06, EK-69.
[46] Proof of Payment of 15 million paid to Nigeria, 12 May 2023, EK-72.

STATEMENT OF MR AKANDE
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/7/Rev.1, p. 11–21]

Mr President, Members of the Special Chamber, it is an honour to appear before this Tribunal again and a privilege to do so on behalf of the Republic of Equatorial Guinea. You have heard a lot this morning about the facts as seen from the perspective of Equatorial Guinea. We now move to our legal arguments in the case. The issues in this case are very wide ranging, but one thing that emerges from the legal arguments of the Marshall Islands is that across this broad range of issues, they encourage you to take a very expansive approach to the interpretation of the law and of the Convention. In many places, their arguments, in effect, rewrite the Convention.

Members of the Chamber, I will from time to time take you to provisions of the Convention. I won’t always put them up on the screen, but I understand they are in tab 1 of your folder.

This morning, I will be setting out the grounds on which Equatorial Guinea contests the jurisdiction of this Chamber to deal with some of the claims presented by the Marshall Islands. In this section of our pleadings, I will be making three overlapping points.

The first is that the Marshall Islands confuses the concepts of jurisdiction and applicable law. It wrongly seeks to use the principle that rules of international law other than the Convention may, in some cases, constitute applicable law, to extend the jurisdiction of this Special Chamber.

The second is that, other than in limited cases, this Special Chamber does not have jurisdiction to make determinations regarding alleged breaches of treaties or rules of international law outside of the United Nations Convention on the Law of the Sea.

The third is that the Marshall Islands has a rather cavalier approach to applicable law and indiscriminately seeks to have this Chamber apply rules of international law that are not applicable to claims that fall within the jurisdiction of the Chamber.

Mr President, I begin with the first of those points: how the Marshall Islands confuses jurisdiction and applicable law. In the submission of Equatorial Guinea, and in the words of Article 288(1) of UNCLOS, this Special Chamber can only exercise jurisdiction with respect to disputes “concerning the interpretation or application of th[e] Convention which is submitted to it in accordance with [Part XV]” – “disputes concerning the interpretation or application of this Convention”.

The jurisdiction of this Chamber does not extend to disputes regarding the interpretation or application of any other instrument of international law or rule of customary international law.

There is a fundamental distinction between the provisions of Article 288(1) which sets out and circumscribes the Special Chamber’s jurisdiction on one hand and, on the other hand, what is provided for in Article 293(1) regarding applicable law, the law applicable to the case.[1] According to the latter provision, “[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”[2]

The important point here is that it is only after the Special Chamber has established its jurisdiction over the dispute submitted to it, that it can then proceed to apply the relevant law, i.e., the Convention and other rules of international law not incompatible with it.

[1] *M/V “Norstar” (Panama* v. *Italy), Judgment, ITLOS Reports 2018–2019*, p. 10, 10 April 2019, para. 136.
[2] Emphasis added.

Contrary to what the Marshall Islands' case seems to suggest, the Special Chamber does not have jurisdiction over a dispute regarding the interpretation or application of any rule of international law that happens to be "not incompatible" with the UN Convention on the Law of the Sea. The Chamber can apply such rules in resolving disputes regarding the interpretation or application of the Convention

In the words of this Tribunal in the "*Norstar*" case: "Article 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal."[3]

A similar point was made by the Annex VII tribunal in *Arctic Sunrise* when it stated: "Article 293(1) does not extend the jurisdiction of a tribunal."[4]

In the case before you, the Marshall Islands has sought to elide these two provisions – and consequently the concepts of jurisdiction and applicable law – by calling upon you to make findings regarding alleged violations of a whole host of instruments and rules of customary international law that the Marshall Islands itself recognizes are "outside" the Convention.[5] It relies for such incorporation on a number of so-called "gateway provisions"[6] – their terminology. The Marshall Islands attempts to use these provisions to expand the Special Chamber's jurisdiction so as to cover essentially "any question of international law" – to borrow the language of Article 36(2) of the Statute of the International Court of Justice.

In the oral pleadings you heard earlier this week, you were told repeatedly, that Article 293(1) is injunctive,[7] in the sense that you are required to apply international law. But this provision is not untethered from your jurisdiction. You must apply relevant rules of international law but only in relation to matters within your jurisdiction, as circumscribed by Article 288(1).

It is one thing for a tribunal under Part XV to be able to apply rules of international law that are not incompatible with the Convention in order to resolve a dispute as to the interpretation or application of the Convention. It is quite another for such a tribunal to entertain disputes over the interpretation or application of all rules of international law not incompatible with the Convention.[8] The former is an appropriate recourse to other rules of international law as part of the applicable law. The latter is to seek to confer jurisdiction with respect to disputes concerning other rules of international law.

Mr President, Members of the Chamber, this leads me to my second point. According to both the text of the Convention and the consistent jurisprudence of tribunals constituted under Part XV, the jurisdiction of these tribunals with respect to violations of international law only extend to breaches of the Convention. Such jurisdiction does not, as a general matter, extend to making determinations about violations of other treaties or other rules of international law. Now, one exception to this jurisdictional limit is explicitly set out in Article 288(2) of the Convention in relation to cases where an international agreement other than the Convention specifically confers jurisdiction on the Tribunal. That exception is not applicable here.

The point that determination of violations of rules of international law other than the Convention falls outside the jurisdiction conferred by Article 288(1) was explicitly noted by the Annex VII tribunal in the *Arctic Sunrise* case, when it stated: "Article 293 is not ... a means to obtain determination that some treaty other than the Convention has been violated."[9]

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[3] *M/V "Norstar" (Panama* v. *Italy), Judgment, ITLOS Reports 2018–2019*, p. 10, 10 April 2019, para. 136.
[4] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia),* PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 188.
[5] Memorial, para. 108.
[6] Memorial, paras. 125-126.
[7] See ITLOS/PV.25/C32/1, p. 36 (line 32) and p. 38 (line 2) (Bethlehem).
[8] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom),* PCA Case No. 2011-03, Award, 18 March 2015, para. 316(c).
[9] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia),* PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 192.

In that case, just like in this one, the Annex VII tribunal was asked by the Applicant to make determinations that the Respondent had breached obligations under a human rights treaty – the International Covenant on Civil and Political Rights (ICCPR). The tribunal in that case clearly held:

> 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.[10]

The Annex VII tribunal in *Duzgit Integrity* took a similar position, holding that it was "not competent to determine if fundamental human rights obligations were violated by São Tomé."[11]

Now, in this case, the Marshall Islands, in the submissions which conclude its written pleadings, has also urged you to find that Equatorial Guinea has breached provisions of human rights treaties and customary international human rights law. These are matters and determinations that, in our submission, fall outside the jurisdiction of a court or tribunal constituted under Part XV

The Marshall Islands seeks to present its human rights claims as if they fall within the scope of the Chamber's jurisdiction by suggesting that it is only asking for determination of a violation of the Convention, of UNCLOS. However, the wording of its submissions makes it clear that it invites you to make determinations of breaches of specific human rights treaties.

In paragraph (f) of those submissions, the Marshall Islands requests the Chamber to adjudge and declare that Equatorial Guinea has failed "to respect and [has] violat[ed] the human rights of the crew, including as set out in the ICCPR and the African Charter and in customary international law."[12]

In addition, the Marshall Islands, in its pleadings, is quite clear in repeatedly alleging violations of these human rights treaties, even addressing the elements required by these treaties and inviting you to make findings on those elements.[13]

In addition to its human rights claims, the Marshall Islands asks the Tribunal to make specific findings that Equatorial Guinea has breached obligations under various instruments adopted under the auspices of the International Maritime Organization (IMO). In particular, the Marshall Islands seeks findings of violations of the Convention for the Safety of Life at Sea (SOLAS), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (the STCW), the Convention on the International Regulations for Preventing Collisions at Sea (the COLREGS). I will refer to them collectcally as "the IMO instruments" or "IMO treaties".

The Marshall Islands argues that the Chamber has jurisdiction over these instruments through Article 297(1)(c) of the Convention. It also argues that this provision, 297(1)(c), confers jurisdiction on the Chamber so that claims can be made independently of UNCLOS. However, this is not what the wording of Article 297 says. The *chapeau* to that article is actually very clear:

> Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction

[10] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 198.
[11] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 210.
[12] Memorial, paras. 438(f) and 281; Reply, para. 333(f).
[13] Memorial, para. 281.

> provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases ....

And then (c) is one of those cases, "disputes concerning the interpretation or application of this Convention ...".

So the text allows for reference to external rules referred to in paragraph 1(c) but with respect to disputes concerning the Convention.

However, Equatorial Guinea accepts that what the text of Article 297(1)(c) allows for are determinations in relation to breaches of the external rules but in cases of disputes under UNCLOS. If anything, the presence of Article 297(1)(c) confirms our general argument on jurisdiction and applicable law that the fact that there is a reference to external rules does not mean that claims can be brought under those external rules, as they suggest.

If that proposition were true, Article 297(1)(c) would hardly be needed. Article 297(1)(c) is an exception to the general rule.

Even broader than its human rights claims and claims regarding the IMO instruments, the Marshall Islands seeks a determination that, and I quote from their submissions, "all measures adopted by Equatorial Guinea subsequent to the arrest of the *Heroic Idun* and her crew in the EEZ of São Tomé and Príncipe are without basis not just in UNCLOS, but also in international law ...."[14] It seeks a determination that they are without basis in international law. This is the clear embodiment of the point I made earlier that the Marshall Islands attempts to expand the Special Chamber's jurisdiction so as to cover "any question of international law". The jurisdiction of tribunals under Part XV does not go this far.

To paraphrase the Annex VII tribunal in the *Arctic Sunrise* case, Article 293 is not a means to obtain determination that rules of international law other than the Convention have been violated.

Mr President, Members of the Chamber, with your permission, I now turn to my third point. The Marshall Islands has adopted a cavalier approach to the issue of applicable law and indiscriminately seeks to have this Chamber apply rules of international law that are not relevant to claims that fall within the jurisdiction of the Chamber.

The Marshall Islands seems to have taken the view that, because Article 293(1) provides that the Chamber may apply other rules of international law not incompatible with the Convention, that it is then possible to import all of international law, indiscriminately, into the Convention. It seems to assume that there is no need to assess the relevance of the Convention provision or of the rule of international law that is being invoked to the matters that are actually before the Tribunal.

However, this approach is plainly incorrect and inconsistent with the approach adopted by tribunals under Part XV. It is of course correct that such tribunals may in appropriate cases refer to relevant rules of international law in the exercise of their jurisdiction under the Convention. The key question is, when is it appropriate to do so? This will be determined by the relevant rule of the Convention at issue and which it is sought and the rule which it is sought to interpret by reference to the other rules of international law.

Let us look at the human rights claims put before you by the Marshall Islands. I noted earlier that a tribunal exercising jurisdiction under Part XV may not make direct determinations about breaches of human rights treaties. However, the Annex VII tribunal in the *Arctic Sunrise* case considered 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

[14] Memorial, para. 438(c); Reply, para. 333(c) (see ITLOS/PV.25/C32/1, p. 34 (lines 10-17) (Bethlehem)).

reasonable and proportionate."[15] Still, the tribunal denied that it had jurisdiction to find breaches of provisions of the ICCPR "as such".[16] Human rights was regarded as relevant, if at all, "in order to assist in the interpretation and application of the Convention's provisions that authorize the arrest or detention of a vessel and persons".[17] This is a very specific use of human rights law and it relates to the interpretation of specific rules of UNCLOS. The tribunal did not imply that a tribunal exercising jurisdiction under Part XV may assess all measures adopted by a State in the context of arrest and detention of a vessel by reference to human rights law. That would be to turn these tribunals into human rights tribunals. As the Annex VII tribunal noted in relation to the ICCPR, "that treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime."[18]

Members of the Chamber, even when there is a specific reference to international law in a provision of the Convention, this does not give room to import all of international law into that provision. Let us take Article 2(3) that is relied on by the Applicant. It is in tab 1 of the Judges' folder. Article 2(3) which relates, of course, to the territorial sea provides that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". The Marshall Islands then suggests that there is a breach of Article 2(3) whenever a State breaches other rules of international law within its territorial sea. On this basis, it asserts that violations of human rights treaties in the territorial sea, violations of the IMO treaties in that zone, are automatically a violation of Article 2(3).

This approach to the incorporation of other rules of international law in interpreting the Convention is neither logical nor consistent with the jurisprudence under the Convention. It is not logical to take the view that any breach of other rules of international law in the territorial sea is automatically a breach of Article 2(3). This would mean that courts and tribunals exercising jurisdiction under Part XV are, in effect, legally competent to assess violations of all rules of international law in the territorial sea. There is nothing special about human rights law in this regard that would make violations of human rights law in the territorial sea lead to violations of 2(3), while violations of other rules of international law do not.

We can take two examples to see where this approach would lead. Imagine that a coastal State takes measures within the territorial sea in relation to the imposition of customs duties or tariffs which are alleged to be incompatible with its obligations under the World Trade Organization Agreements. Could it then be argued that it is not exercising sovereignty in accordance with other rules of international law, and so this Tribunal could so hold on the basis of the breach of WTO law?

Take another example: a coastal State takes measures against a foreign-owned oil platform or a foreign fishing vessel, foreign-owned submarine cable, located in its territorial sea. It is alleged that this is a breach of its obligations under some international agreement which protects foreign investment and foreign investors. It could be that the State nationalizes this investment, it fails to protect the platform or the cable as required by international investment law. Could it be argued that this Tribunal can then determine a breach of Article 2(3) because of the breach of that other international investment agreement?

[15] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia),* PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 197.
[16] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia),* PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 197.
[17] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia),* PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 198 (emphasis added).
[18] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia),* PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 197.

It seems inconceivable that the effect of Article 2(3) is to import into that provision compliance with any and all rules of international law, and thus make them applicable in cases before tribunals constituted under Part XV.

A similar point can be made with regard to Article 87(1), which of course provides that freedom of the high seas "is exercised under the conditions laid down by this Convention and other rules of international law". In this regard, I note the point that was made by the Annex VII tribunal in the *Chagos Marine Protected Area* arbitration: "The formulation of Article 2(3) is identical to that of Article 87(1) concerning the high seas and any interpretation the Tribunal may reach regarding the scope of the obligation embodied in the former" – that's 2(3) – "would apply equally to the latter."[19]

So you see where this approach would take us.

Other tribunals considering the interpretation of Article 2(3) have not, in fact, adopted such an expansive approach that would bring in all other rules of international law. In the *Chagos Marine Protected Area* arbitration, the tribunal accepted that Article 2(3) is not merely descriptive, but that it does impose obligations. However, it then "conclude[d] that the obligation in Article 2(3) is limited to exercising sovereignty subject to the general rules of international law".[20] Now, two points are worthy of note in relation to that decision.

First, the tribunal engaged in an extensive review of the work of the International Law Commission when it drafted the provision that is now reflected in Article 2(3). The Tribunal found that, in the Commission, the view that prevailed was a desire to reflect in this provision– what is now 2(3) – the specific limitations imposed by international law on sovereignty over the territorial sea, in addition to importing certain general rules of international law which are applicable in the matter, such as the principle prohibiting the abuse of rights and, generally, the law of State responsibility.[21]

Second, in its actual decision in that case – this is the *Chagos* MPA arbitration – the tribunal gave effect to the principle of good faith, especially as it applied to undertakings dealing with fishing rights in the territorial sea.[22] It did not seek to import all of international law into Article 2(3).

The Annex VII tribunal in the *South China Sea* arbitration also accepted that Article 2(3) imposes an obligation, but its consideration of the other rules of international law that were incorporated into that provision was also limited to fishing rights. It stated that "[t]raditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the 'other rules of international law' applicable in the territorial sea."[23]

The key point, Members of the Special Chamber, is that the so-called gateway provision of Article 2(3) does not open the gate for incorporation and application of all rules of international law, but only of those which specifically impose limitations on sovereignty in the territorial sea.

Mr President, Members of the Special Chamber, permit me to make a further point regarding when it will be appropriate to have resort to other rules of international law for the purpose of interpreting or applying a provision of the Convention. The applicable law before

[19] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 503.
[20] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 516.
[21] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 511.
[22] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, paras. 520, 535, together with paras. 417-456, particularly para. 455.
[23] *The South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, PCA Case No. 2013-09, Award, 12 July 2016, para. 808 (emphasis added).

this Chamber may include other rules of international law to be used in the interpretation and application of the Convention. However, such rules must, in fact, be applicable. In other words, they must apply to the situation at hand.

This point was emphasized by the Annex VII tribunal in the "*Enrica Lexie"* case, where, like here, Italy had invoked the references to other rules of international law that you find in Article 2(3), 56(2), 58(2), 297(1). Italy invoked those references. However, the attempt to use those provisions to import other rules of international law was dismissed because, "in the view of the Arbitral Tribunal, these Articles are not pertinent and applicable in the present case".[24]

Now, in our case, the Marshall Islands has alleged that the Chamber should find that Equatorial Guinea is in breach of the IMO treaties. However, it has to be shown (i) that the specified international rule actually applies; and (ii) that it is being used to interpret or apply a provision of the Convention that is also applicable.

I will return to some of these points tomorrow when I address the merits of the Marshall Islands' claim under these IMO instruments. I will show then that these instruments do not, in fact, impose any relevant obligations on Equatorial Guinea with respect to the "*Heroic Idun"*.

But, for now, let's focus on the provisions of the Convention through which the applicant seeks to bring these IMO instruments in. The Marshall Islands says that these IMO instruments may be applied because they are generally accepted international rules and standards incorporated into the Convention through various provisions, including Article 94, Article 217 and 297(1)(c).[25] I have already dealt with 297.

I note that the Marshall Islands fails to specify how the other Convention provisions apply in this case. It is not at all clear how it matters in our case that Article 94 or 217 refers to "generally applicable international rules and standards", when these provisions, on their face and explicitly, refer to the duties of the flag State. Article 94 has that title: "Duties of the flag State".

Paragraph 1 provides that "[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".[26]

Paragraph 3 provides that "[e]very State shall take such measures for ships flying its flag."[27]

So, though the generally accepted international rules and standards are relevant to these provisions, these UNCLOS provisions simply do not apply to the conduct of Equatorial Guinea in our case, as it is not the flag State in relation to the vessel in question.

There is no dispute regarding the interpretation or application of Equatorial Guinea's duties as a flag State to which, then, these IMO treaties could become relevant.

Article 217 is headed "Enforcement by flag States", also inapplicable. Paragraph 1:

> States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through competent international organizations or general diplomatic conference.[28]

No assistance is also to be gained by seeking to use Article 2(3) with respect to conduct within the territorial sea, because the relevant obligations under these IMO instruments are imposed on the flag State.

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[24] *The "Enrica Lexie" Incident (Italy* v. *India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 798.
[25] See ITLOS/PV.25/C32/4, p. 26 (lines 11- 23) (Grafton).
[26] Emphasis added.
[27] Emphasis added.
[28] Emphasis added.

Indeed, the pleadings of the Marshall Islands themselves make that clear. In its Memorial, when it sets out the relevant obligations incumbent on the Administration, the Marshall Islands itself notes that, in these instruments, the Administration is the Government of the flag State.[29]

So it is not just the UNCLOS provisions which make clear that these treaties are only applicable insofar as one is considering the duties of the flag State. The IMO treaties themselves make that clear.

A similar point can be made in relation to Article 230, also relied on, which refers to "applicable international rules and standards". This provision also clearly refers to imposition of penalties for the prevention, reduction and control of pollution of the marine environment. Imposition of penalties for the prevention, reduction and control of pollution of the marine environment.

There is no claim here that some action has been taken against the "*Heroic Idun*" for the prevention, reduction and control of pollution of the marine environment.

Mr President, Members of the Chamber, let me conclude. Equatorial Guinea submits that the jurisdiction of this Chamber is limited to disputes relating to the interpretation and application of UNCLOS. Equatorial Guinea does not dispute that the Special Chamber may have resort to rules of international law "not incompatible with the Convention" in interpreting the provisions of the Convention whose violation is alleged in these proceedings. However, in our submission, the so-called "gateway provisions" do not allow for the jurisdiction of the Chamber to be extended to make determinations of breaches of treaties that are "outside" the UN Convention on the Law of the Sea or under general international law, other than in the exceptional cases I set out above.

Finally, Equatorial Guinea submits, that in assessing on the merits whether external rules of international law constitute part of the applicable law that should be taken into account in the interpretation and application of claims under the Convention, it is essential to consider whether such rules are, in fact, relevant to such provisions, and whether the provisions and other rules of international law are applicable to the facts of this case.

Mr President, that concludes my submissions for this morning. I thank you for your kind attention, and perhaps, in view of the time, this might be a convenient time to take the coffee break.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akande.

Indeed, I think this is an appropriate time to take a break of 30 minutes. So we will resume again at 10 minutes to 12.00 p.m.

So the hearing will resume then. The meeting is adjourned. Thank you.

(Adjourned at 11.22 a.m.)

THE PRESIDENT OF THE SPECIAL CHAMBER: I now invite Mr Haeri to continue his statement.

You have the floor, sir.

[29] Memorial, paras. 297, 301.

STATEMENT OF MR HAERI
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/7/Rev.1, p. 21–35]

Thank you, Mr President, Members of the Special Chamber. I will address you now on the first issue of admissibility, namely the *Monetary Gold* or “indispensable third party” principle.

Mr President, Members of the Special Chamber, the Marshall Islands’ claims relating to the interdiction and the return of the *“Heroic Idun”* to Nigeria are inadmissible pursuant to the *Monetary Gold* or indispensable “third party principle”. This principle precludes the Marshall Islands’ claims regarding freedom of navigation and exclusivity of flag State jurisdiction, the heart of its case. Those claims necessarily impugn Nigeria’s legal rights and interests as a non-participating State in these proceedings, as it was Nigeria that made the request for the interdiction and return of the vessel.

The test is one of subject matter. The interdiction and return of the *“Heroic Idun”* is the subject matter of the Marshall Islands’ claims on freedom of navigation and exclusivity of flag State jurisdiction. That is why those claims are inadmissible.

If the Special Chamber were to find that Nigeria was wrong to have made that request for interdiction and return, this would on any analysis implicate Nigeria. Moreover, the Marshall Islands’ suggestion that Equatorial Guinea can be sanctioned for the interdiction and return of the vessel to Nigeria without consideration of Nigeria’s request to do so is contrived and unconvincing. The facts are clear and undisputed that what took place here is that Equatorial Guinea lent its hand of help to the aid and assistance of Nigeria. By positing that Equatorial Guinea can in this context be treated in isolation, the Marshall Islands begs the question: What Mr President, Members of the Special Chamber, is the sound of one hand clapping? The position of the Marshall Islands, divorced as it is from reality, rings hollow.

The international law parameters of the indispensable third party principle are well rehearsed and have been opined on multiple times by the International Court of Justice and the international adjudication *fora*. The principle applies to the proceedings under UNCLOS, a point considered and so concluded by ITLOS in the *“Norstar”* case in terms that resonate with that of the Court. Notably, the Parties essentially agree on the legal ambit of the principle and their point of divergence is its application in this case, namely, what is the subject matter at issue.

For the Marshall Islands, the subject matter, the vital issue in this case, is the particular parameters of the right of visit under Article 110 of UNCLOS. Equatorial Guinea doesn’t agree. The attempt to narrow what is said to be the vital issue to be decided in this case is self-serving and unpersuasive. Rather, Equatorial Guinea’s submission is that the subject matter is the interdiction and return of the *“Heroic Idun”* to Nigeria. These respective positions of the Parties on the principle of indispensable third party is the main point of disagreement between them.

Nigeria’s legal rights and interests fall, in line with the jurisprudence, for prior temporal and logical assessment regarding the Marshall Islands’ claims on the interdiction and return of the *“Heroic Idun”* to Nigeria. Temporally, Nigeria’s request for aid and assistance preceded Equatorial Guinea’s subsequent giving of that aid and assistance. Nigeria’s request came first in time. Logically, Equatorial Guinea’s aid and assistance to Nigeria necessarily implicates Nigeria’s request for that aid and assistance. If Equatorial Guinea was wrong to provide that aid and assistance previously sought by Nigeria, Nigeria must have been wrong to ask for it.

Mr President, Members of the Special Chamber, I turn now to the first of five submissions that I will make in this regard. The first one concerns the subject-matter test for the indispensable third party.

Mr President, Members of the Special Chamber, it is a well-recognized general principle of international law that claims where the legal rights and interests of third States "would form the very subject-matter of the decision" are inadmissible in inter-State proceedings. Although some attempt was made by the Marshall Islands in its opening to imply that this was somehow a marginal principle, without any authority for such a suggestion, it is anything but.

On the contrary, it is a cardinal principle founded on the cornerstone of State consent to inter-State proceedings. As there is no particular disagreement on the nature of the test for the engagement of the principle, I will only very briefly recap some key authorities on it.

The core test for assessing the applicability of this principle was first set out by the International Court of Justice in its decision in *Case of the Monetary Gold removed from Rome in 1943*. At its core, the test requires an identification of the "subject-matter" of the claim at issue.

In particular, the Court found:

> 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 content 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.[1]

As Albania's legal interest would have formed "the very subject-matter" of the decision, the Court declined to exercise its jurisdiction.[2]

A similar approach was taken by the Court in the *Case concerning East Timor (Portugal* v. *Australia)*. In that case, Portugal objected to the conclusion of a treaty between Australia and Indonesia which created a zone of cooperation in a maritime area between the then Indonesian Province of East Timor and Australia.

The Court held that Australia's behaviour could not be assessed without "first entering into the question why it is that Indonesia could not lawfully have concluded" the treaty in question. It again held that "the very subject-matter of the Court's decision" would require a determination of whether Indonesia could act as it had done.[3]

The Court accordingly held that it

> could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.[4]

This was so even where the obligations were those *erga omnes*, holding that "whatever the nature ... of the obligations invoked, the Court could not rule on ... the lawfulness of the conduct of another State which is not a party to the case."[5]

Far from being a fringe issue, this indeed shows the importance of the principle, no matter the nature of the obligations claimed to be at issue, whether *erga omnes* or otherwise.

The suggestion was made in the Marshall Islands' opening that the arbitration case of *Larsen v. Hawaiian Kingdom* was somehow unhelpful to Equatorial Guinea's position because it had been addressed in a footnote in pleadings. The opposite is the case.

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[1] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question*), *Judgment of 15 June 1954, I.C.J. Reports 1954*, p. 19, p. 33.
[2] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question*), *Judgment of 15 June 1954, I.C.J. Reports 1954*, p. 19, p. 35.
[3] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 90, 30 June 1995, para. 28.
[4] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, 30 June 1995, para. 29.
[5] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, 30 June 1995, para. 29.

Firstly, in that case, the principle was raised by that distinguished tribunal *proprio motu*, as the Marshall Islands accepts. Again, this underscores the importance of the principle. Even when not pleaded, where it is at issue, it has inevitable consequences. Nor is the Marshall Islands' suggestion correct that, because it is a matter of admissibility, it is purely a matter of discretion, if that were suggested.

While judgment is of course required on the application of the test, it is not a discretionary power such as would allow for it to be ignored.

Secondly, the relevant framing of the test in East Timor, which is highly germane, was explicitly endorsed by the arbitral tribunal in *Larsen* v. *Hawaiian Kingdom*. The tribunal cited with approval the Court's finding in *East Timor* that "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 the conduct of another State which is not a party to the case."[6]

As noted by Judge *ad hoc* Couvreur in *Guyana* v. *Venezuela*, "[p]arties to proceedings before the Court cannot act in the place of a sovereign third party to defend the latter's rights, nor can they be required to assume the burden of proving that that State has performed its obligations."[7]

The Tribunal in "*Norstar"*, to which I will return later in more detail, adopted essentially the same test as that of the Court. It held that "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, an international court or tribunal cannot, without the consent of that third State, exercise jurisdiction over the dispute".[8] There can be no doubt, therefore, of the importance, relevance, and consequences that flow from the indispensable third party principle.

This leads me on to my second submission, that the subject matter at issue is the interdiction of the *"Heroic Idun"* and its return to Nigeria, which corresponds to claims on freedom of navigation and exclusive flag State jurisdiction.

Mr President, distinguished Members of the Special Chamber, the crux of the disagreement between the Parties is the application of the test I have just set out – namely, what is the subject matter in this case, the vital issue to be decided? The Marshall Islands suggests that it is the right of visit under Article 110 of UNCLOS. This is in keeping with the theme of the Marshall Islands' new approach at the hearing assiduously to direct your attention away from the picture, the jigsaw puzzle, and towards a particular part of a particular piece on the board regarding Article 110.

The problem is that that piece makes no sense on its own. It's just a piece of a puzzle. What possible motive could Equatorial Guinea have had to interdict and return the *"Heroic Idun"* to Nigeria with a story that is now said to start on 12 August 2022 with the vessel simply drifting in and out of the respective Exclusive Economic Zones of Equatorial Guinea and São Tomé and Príncipe? This makes no sense.

Only a year earlier, Equatorial Guinea rescued a Marshall Islands' vessel attacked by pirates, the "*Sea Phantom*". Why the change here, the Marshall Islands' position begs? But it doesn't want the Chamber to consider the answer, because the answer is terminal to the admissibility of claims it advances here.

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[6] *Larsen v. Hawaiian Kingdom*, PCA Case No. 1999-01, Arbitral Award, 5 February 2001, para. 12.15, citing *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, 30 June 1995, para. 29.

[7] *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela), Preliminary objections*, 6 April 2023, Partly separate and partly dissenting opinion of Judge *ad hoc* Couvreur, para. 44.

[8] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 172.

So the other pieces of the jigsaw puzzle, the Marshall Islands submits, is what it dismissively calls "context". Well, "context is everything", as neuroscientist Dr Beau Lotto, has observed.

Context contains the reason why these events happened. Yet, for the Marshall Islands, context is *just* context – to which this Chamber should have no regard. And so, the *non sequitur* and flawed premise of the Marshallese position is that there is – and can be – no reason.

Leaving aside that context is what makes an event understandable, have meaning, this is a self-serving artifice. The subject matter of the case is not the right of visit under Article 110; it is quite evidently the interdiction and return of the *"Heroic Idun"* to Nigeria. This is where the Parties disagree on the application of the *Monetary Gold* test.

As an aside here, I note that the Marshall Islands makes other claims, such as on considerations of humanity and regarding the fine in Equatorial Guinea, which aren't affected by this admissibility objection and will be addressed separately.

Returning to the subject matter at issue, it is clear that the interdiction of the *"Heroic Idun"* and its return to Nigeria concerns alleged breaches of freedom of navigation on the high seas and the exclusivity of flag State jurisdiction.

Notably, and contrary to its Article 110 subject-matter argument, the Marshall Islands accepts this in both of its written pleadings in these proceedings in the following terms:

a) The Marshall Islands' Memorial pleads that: "At its core, the dispute between the Marshall Islands and Equatorial Guinea concerns Equatorial Guinea's interception and diversion of the '*Heroic Idun*' and her crew ..., contrary to the principles of freedom of navigation and exclusive flag State jurisdiction."[9]

b) Again, in its Reply, the Marshall Islands states: "At its core, however, the case concerns the Marshall Islands' freedom of navigation and exclusive flag-State jurisdiction ...."[10]

We heard this in the Marshall Islands' opening from multiple speakers, including Dr Busco, who called these two issues "the very heart of the Marshall Islands' case."[11]

On this, Equatorial Guinea agrees. The dispute regarding the interdiction and return of the *"Heroic Idun"* to Nigeria – the very subject matter of this particular set of claims – plainly corresponds to the Marshall Islands' claims about freedom of navigation and exclusivity of flag State jurisdiction.

In this case, the sole and exclusive basis upon which the *"Heroic Idun"*'s navigation was intercepted was Nigeria's request. The only reason the *"Heroic Idun"* was intercepted – and the only reason the Parties are before this Chamber today – is because of Nigeria's actions, Nigeria's assessments and Nigeria's request.

This request by Nigeria plainly impacted upon the *"Heroic Idun"*'s freedom of navigation and Marshall Islands' flag state State jurisdiction. It was only to that request that Equatorial Guinea responded.

Indeed, as Captain Esono Nchama explained before this Chamber yesterday,[12] and as I noted earlier this morning, the *"Heroic Idun"* remained in Equatorial Guinea for the period that it did until it was formally transferred to Nigeria pursuant to an agreement between the governments of Nigeria and Equatorial Guinea;[13] the subject matter of the dispute, therefore, necessarily implicates Nigeria.

[9] Memorial of the Marshall Islands, para. 18.
[10] Reply of the Marshall Islands, para. 3.
[11] ITLOS/PV.25/C32/3 (confidential), p. 32, lines 8-9 (Busco).
[12] ITLOS/PV.25/C32/6 (confidential), p. 40 (lines 43-46), p. 41 (4-7, 11-14) (Esono Nchama), p. 44 (lines 16-18) (Esono Nchama).
[13] 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.

The Marshall Islands notably acknowledges in its Reply that "Nigeria may ... be relevant in respect of the Marshall Islands' claims that the *"Heroic Idun"* was arrested on the high seas, and subsequently transferred to Nigeria ...."[14] Indeed, as explained, Nigeria is undisputedly and necessarily not just relevant, but central, to those claims.

Faced with the clear implications this has on the admissibility of its claims concerning the interdiction and return of the *"Heroic Idun"* to Nigeria, the Marshall Islands attempts to construe the subject matter at issue in an artificially narrow way.

In particular, in its written Reply, the Marshall Islands argues that the specific rights and obligations contained in Article 110 of UNCLOS constitute "the very subject-matter" of the dispute.[15] That is incorrect. The subject matter of the dispute is not the right of visit under Article 110 of UNCLOS. The core subject matter, as elsewhere acknowledged by the Marshall Islands, is the interdiction and return of the *"Heroic Idun"* to Nigeria corresponding with claims of freedom of navigation and exclusivity of flag State jurisdiction.

As such, this is the main point of disagreement between the parties. Is the "vital issue" – the "core" of the dispute – really the particularities of the right of visit under Article 110 of UNCLOS? Clearly, that is not a tenable position. Rather, in addressing the vital issue of the interdiction and return of the *"Heroic Idun"* to Nigeria, the triangular relationship between Nigeria as primary actor and requestor, Equatorial Guinea as assisting State, and the Marshall Islands as flag State is at issue.

The consequence is that findings on freedom of navigation and exclusive flag State jurisdiction would, in the words of the Court, "imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case."[16] As such, these claims are inadmissible.

This leads me on to my third submission, that Nigeria's legal rights and interests fall for prior temporal and logical assessment.

Mr President, Members of the Special Chamber, it is not disputed that Equatorial Guinea acted solely in compliance with Nigeria's request to interdict the *"Heroic Idun"*. This fact sits alongside accusations made by the Marshall Islands in its opening submissions that Equatorial Guinea, and I quote from submissions on Wednesday, acted "wantonly" and "baselessly".[17]

The reason it was wanton and baseless, so the Marshall Islands' logic goes, is that our story begins on 12 August 2022, with the *"Heroic Idun"* transiting between the Exclusive Economic Zones of Equatorial Guinea and São Tomé and Príncipe, minding its own business, when an Equatoguinean warship arrives all of a sudden.

Of course, it is self-evidently not wanton or baseless when you consider the request Nigeria had made for the interdiction, a point dismissed as mere "context" but which is, in fact, the whole point.

It is baseless, the Marshall Islands says, because you can't inquire why it was done if it's not within the 92 days they try to delineate. But that's completely circular. It's the equivalent of blaming someone for acting without any reason, while denying consideration of the obvious reason, because it is said to have taken place too early to be considered. If the reason is outside the 92-day case which has been formulated as such, so the logic goes, there can't be any reason. Thus, the Marshall Islands arrives at its preordained conclusion that Equatorial Guinea acted baselessly.

In referring back to the *Monetary Gold* decision, the International Court of Justice noted in the case of *Certain Phosphate Lands* that the link between Albania's responsibility and the

[14] Reply of the Marshall Islands, para. 67.
[15] Reply of the Marshall Islands, para. 73.
[16] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, 30 June 1995, para. 29.
[17] ITLOS/PV.25/C32/5, p. 17 (line 25) (Casas).

decision requested of the Court was "not purely temporal but also logical".[18] That test is equally met here.

The determination of Nigeria's ability to request this under the Convention is therefore a logical and temporal prerequisite to a determination of Equatorial Guinea's compliance with its obligations in responding.

As to temporality, the Marshall Islands does not dispute that Nigeria's prior request to Equatorial Guinea to intercept the *"Heroic Idun"* was the factual predicate to Equatorial Guinea doing so: it was the *sine qua non*. Without Nigeria's request, Equatorial Guinea would not have intercepted the *"Heroic Idun*". As a matter of chronology, it is clear that Nigeria's request for assistance preceded Equatorial Guinea providing it.

To briefly recap, on 8 August 2022, the *"Heroic Idun"* was approached by the Nigerian Navy ship NNS *"Gongola"* in Nigeria's Exclusive Economic Zone. The incidents that followed, interactions with the Nigeria vessel NNS *"Gongola"*, triggered Nigeria's subsequent request to Equatorial Guinea for the vessel's interdiction.

It is only because of these events in Nigeria that, in the early hours of 10 August 2022, Equatoguinean authorities received an urgent request from the Nigerian Navy to interdict the *"Heroic Idun"*, including providing the location and direction of travel of the vessel. Relying on the information provided by Nigeria, Equatorial Guinea did so. Nigeria's legal rights and interests clearly, therefore, fall for prior temporal assessment to the Marshall Islands' claim against Equatorial Guinea for the interdiction of the vessel.

Similarly, as a matter of logic, the subject matter of claims by the Marshall Islands concerning the principles of freedom of navigation and exclusive flag State jurisdiction directly concern Nigeria's rights and interests. To find that Equatorial Guinea had contravened the Convention by responding to Nigeria's request to interdict the vessel would necessarily require assessment – as a matter of prior logical and legal necessity – of Nigeria's rights and interests, including its right to have made such a request. That is, for Equatorial Guinea's action to be unlawful, the preceding request by Nigeria must also have been unlawful.

In other words, the Chamber cannot consider whether such assistance was legally provided by Equatorial Guinea without first examining whether Nigeria was entitled to invoke such assistance. In this case, it is Nigeria's assessments on which its request for Equatorial Guinea's assistance was grounded. If Equatorial Guinea acted wrongfully in giving that assistance, Nigeria must necessarily have acted wrongfully in requesting it.

Given that Equatorial Guinea was not present during the acts giving rise to Nigeria's request to interdict the vessel, it was necessarily compelled to rely upon the assessments and request made by Nigeria in this regard. Informational and capability asymmetries exist throughout the Gulf of Guinea, and between Yaoundé Code signatories.

Cooperation and assistance under the Yaoundé architecture rely upon assessments and directives taken by one State given to another. Plainly, given the urgency of the request, Equatorial Guinea responded accordingly, rather than allow the presence of a serious maritime security threat to go unaddressed. This, too, was clear from the evidence given yesterday by Captain Esono Nchama.

Simply put, the Marshall Islands submits that there was no factual or legal basis to impede the *"Heroic Idun"*'s freedom of navigation or the exclusivity of the Marshall Islands' jurisdiction as its flag State. That claim necessarily implicates Nigeria's rights and interests as it was the State requesting the interdiction of the vessel that gives rise to the subject matter of these claims.

[18] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, 26 June 1992, para. 55, citing *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15, 1954, I.C.J. Reports 1954*, p. 19, p 32.

This leads me to my fourth submission: the *"Norstar"* case supports that it is Nigeria's legal interests that form the subject matter of the dispute, not Equatorial Guinea's legal interests.

Mr President, Members of the Special Chamber, I turn now to examine the relevance of the *"Norstar"* case. As I submitted earlier, the *Monetary Gold* principle has been affirmed in application to cases under the Convention, particularly in *"Norstar"*.

That dispute raises several parallels to this case. In that case, a Panamanian-flagged oil tanker was engaged in supplying gasoil to yachts off the coast of France, Italy and Spain. On 11 August 1998, an Italian public prosecutor issued a decree of seizure against the *"Norstar"* in the context of criminal proceedings against eight individuals for alleged offences concerning 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 (or, "the Strasbourg Convention"). Spanish authorities seized the *"Norstar"* when it was anchored in Palma de Mallorca in September 1998. Panama brought a dispute against Italy, alleging violation of, among others, freedom of the high seas.

The Tribunal noted that Italy's request was "central to the eventual arrest of the vessel" by Spain. The Tribunal further held that it was clear that "without the Decree of Seizure, there would have been no arrest."[19] That is very similar to the situation here. Nigeria's request was evidently central to the interdiction of the *"Heroic Idun"*, and without Nigeria's request, there would have been no interdiction.

The Tribunal found that the detention carried out by Spain was part of the investigation and proceedings of Italy against the *"Norstar*". It was, accordingly, the legal interests of Italy, not Spain, that formed the subject matter of the decision to be rendered.

As the Tribunal noted:

> 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.[20]

The Tribunal held that Spain had "merely provided assistance in accordance with its obligations under the Strasbourg Convention"[21] regarding the seizure of the *"Norstar"*.

By contrast, as noted, it was the legal interests of Italy, not those of Spain, that formed the subject matter of the decision to be rendered by the Tribunal.[22] For those reasons, Italy was "the proper respondent" to Panama's claim.[23]

Mr President, Members of the Special Chamber, the position of Equatorial Guinea is similar to that of Spain in the *"Norstar"* case, and Nigeria's position is similar to that of Italy.

Equatorial Guinea provided assistance to Nigeria in accordance with the Yaoundé Code. Similar to the Strasbourg Convention, under which Spain was acting in *"Norstar"*, the Yaoundé Code contains commitments to "cooperate to the fullest possible extent in the

[19] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 165.
[20] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 173.
[21] *M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 167.
[22] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 173.
[23] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 168.

repression of transnational organized crime in the maritime domain", including in "interdicting ships and/or aircraft suspected of engaging in transnational organized crime in the maritime domain" and "ensuring that the persons committing or attempting to commit in transnational organized crime in the maritime domain ... are apprehended or prosecuted."[24]

Here, the seizure of the *"Heroic Idun"* occurred as a result of cooperation between Nigeria and Equatorial Guinea, to which Nigeria's request was foundational. Similar to Italy's Decree of Seizure in *"Norstar"*, Nigeria's request was the only reason for the interception of the *"Heroic Idun*". Without Nigeria's request, no interception of the *"Heroic Idun"* by the Equatoguinean Navy would have occurred. Accordingly, it is the legal interests of Nigeria, not those of Equatorial Guinea, that form the subject matter of the decision to be rendered on the Marshall Islands' claims regarding the interdiction of the vessel and its return to Nigeria.

Like Spain in *"Norstar"*, Equatorial Guinea's position in relation to the *"Heroic Idun"* was secondary and facilitative of that State – here, Nigeria – which ordered the interdiction and return of the vessel, and whose rights to do so form the "subject matter" of the dispute. As for Spain in *"Norstar"*, the correct characterization of Equatorial Guinea's assistance to Nigeria was that it was just that – assistance. As we have seen in *"Norstar"*, the Tribunal noted that "Spain merely provided assistance in accordance with its obligations under the 1959 Strasbourg Convention".[25]

The Tribunal further noted in *"Norstar"*: "The present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State."[26] This fact-based approach and finding is equally apposite here. The present case similarly fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act. That doesn't turn on the pleaded case being articulated as one of joint responsibility. Rather, it turns on the fact-based approach taken by the Tribunal in the *"Norstar"* and equally apposite here.

This points to the critical issue of relevance from the *"Norstar"*: like Spain, Equatorial Guinea's interdiction of a vessel was done only to assist another State, whose request is necessarily implicated and forms the subject matter of the claim.

This brings me to my fifth and final submission, Mr President, Members of the Special Chamber, that the Marshall Islands' own pleadings in this case and its contemporaneous correspondence with Nigeria support that Nigeria is an indispensable third party.

In its Reply, the Marshall Islands states that it "could have decided to seek the determination of Equatorial Guinea's responsibility in aiding and abetting a possible wrongful act by Nigeria – which may have required the prior logical determination of Nigeria's rights and obligations".[27] In doing so, the Marshall Islands acknowledges that in such a situation of aid and assistance, the wrongfulness of the aid or assistance given is dependent on the wrongfulness of the act of the main requesting State.[28]

However, the Marshall Islands argues that the way "it calibrated its submissions"[29] means that Nigeria's rights and obligations are no longer relevant. It claims that "whether *Monetary Gold* applies depends on how the Marshall Islands has presented its claims".[30]

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[24] 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.
[25] *M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 167.
[26] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 166.
[27] Reply of the Marshall Islands, p 24, footnote 121.
[28] Reply of the Marshall Islands, p 24, footnote 121.
[29] Reply of the Marshall Islands, p 24, footnote 121.
[30] Reply of the Marshall Islands, para. 71.

Of course, the Marshall Islands can formulate its claims as it sees fit. However, there are limits to the purported elevation of form over substance. Here, the Marshall Islands acknowledges that the relationship between Nigeria and Equatorial Guinea's actions can rightfully be characterized as one of aid and assistance.[31] This necessitates the prior finding of a wrongful act by Nigeria for Equatorial Guinea's assistance to be implicated. But the Marshall Islands fails to explain why – on its chosen characterization of the claims – the relationship is not one of aid and assistance. As the Tribunal held in the "*Norstar*", the relevant fact-based test is whether the circumstance actually "fits into a situation of aid or assistance".

While the Marshall Islands may formulate its claims with "calibration", this cannot obfuscate the subject matter upon which the dispute is based. That subject matter is Nigeria's interactions with the vessel and Nigeria's request for the interdiction and return of the vessel which was the predicate to Equatorial Guinea's corresponding assistance to Nigeria.

The logic of the Marshall Islands' counter-argument is essentially that primacy should be given to what it refers to as the "calibration" of its claims over the subject matter itself. Equatorial Guinea's respectful submission is that this is incorrect. Rather, the proper characterization of the subject matter of claims concerning the interdiction of the "*Heroic Idun"* necessarily implicates Nigeria, a point which no amount of artful drafting can circumvent.

Mr President, Members of the Special Chamber, the evidence on the record indicates that the Marshall Islands itself recognized the centrality of Nigeria to the subject matter of the "*Heroic Idun*"'s interdiction.

In a letter sent by the Marshall Islands to Nigerian naval authorities on the 18 August 2022, the Marshall Islands noted that the incidents of 8 and 12 August may be "directly linked", implicated provisions protecting flag State jurisdiction and freedom of navigation and requested "an explanation of the actions taken by both Nigeria and Equatorial Guinea".[32]

This tracks correspondence of 16 August 2022 from the Marshall Islands' Maritime Administrator to the Governor of Luba.[33] The Marshall Islands' own communications to the Nigerian and Equatoguinean authorities accordingly show that the subject matter of the dispute regarding freedom of navigation and exclusive flag State jurisdiction applies equally to Nigeria.

Again, very similar words were used in a letter of 26 August 2022 addressed to Equatorial Guinea by the Marshall Islands.[34] Thus, the Marshall Islands early on recognized and characterized this dispute regarding the interdiction and return of the "*Heroic Idun"* as relating to freedom of navigation and flag State jurisdiction vis-à-vis Nigeria. That is, the very same "subject matter" to that advanced in these proceedings against Equatorial Guinea was contemporaneously accepted by the Marshall Islands to apply equally to Nigeria.

Mr President, Members of the Special Chamber, while the Marshall Islands may seek to characterize the respective rights and obligations contained in Article 110 of UNCLOS as constituting "the very subject-matter" of the dispute,[35] as we saw – which Equatorial Guinea does not accept – even on that case, it is notable that the "subject-matter" has also been expressed by the Marshall Islands as relating to Nigeria, from the references made to Article 110 in the letter to Nigeria of the 18 August, which I mentioned earlier at SA 7.[36]

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[31] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 166.

[32] Letter from the Marshall Islands' Maritime Administrator to the Chief of the Naval staff at Nigerian Naval headquarters, SA 7.

[33] Letter from the Marshall Islands' Maritime Administrator to Governor of Luba, SA 6.

[34] Letter from the Marshall Islands' Maritime Administrator to the Attorney General of Equatorial Guinea, SA 9, pp 93-94.

[35] Reply of the Marshall Islands, para. 73.

[36] Letter from the Marshall Islands' Maritime Administrator to the Chief of the Naval staff at Nigerian Naval headquarters, SA 7.

The Marshall Islands has itself admitted in these proceedings that, "What happened in Nigeria and the actions of various of its officials form part of the context and factual matrix and, in part, explain the damage and injuries suffered by the Marshall Islands ...".[37] Yet, the position we heard earlier this week, where the purported 92-day case was reframed as such for the first time, is that the actions of Nigeria and Equatorial Guinea can somehow be artificially disaggregated from each other. That is untenable. Equatorial Guinea's assistance to Nigeria cannot be divorced from its "context", a term the Marshall Islands disparagingly suggests is a distraction, but which is more usually and properly understood as the situation in which something happens and which helps you to understand it.

Equatorial Guinea's assistance to Nigeria cannot be treated in isolation without necessarily implicating Nigeria, whether explicitly or otherwise. The very provisions pleaded by the Marshall Islands under the Convention necessitate a determination of Nigeria's legal position.

However, that cannot be done as the Marshall Islands decided for its own reasons not to advance the proceedings it threatened against Nigeria, under UNCLOS.

Moreover, other communications by the Marshall Islands and evidence on the record demonstrate the Marshall Islands' own assessment at the time that the dispute involved the responsibilities (and rights) of Nigeria. For example:

a) A note verbale from the Marshall Islands to Nigeria in November 2022 (mistakenly titled to Equatorial Guinea) noted that "The Nigerian Navy has confirmed that the arrest and detention of M/T HEROIC IDUN occurred at the behest of the Nigerian authorities and that they intend to unlawfully bring the M/T HEROIC IDUN and her crew into the custody and control of Nigeria authorities, including for purposes of prosecution". The Marshall Islands' letter asserts that Nigeria was in breach of, *inter alia*, Articles 58, 87, 92 of the Convention – strikingly, the very same provisions it now accuses Equatorial Guinea of breaching;[38] that, at SA 27.

b) On 4 November 2022, the Marshall Islands sent a letter to Nigeria threatening to commence proceedings under UNCLOS unless the vessel and the crew were released, reflecting the Marshall Islands' awareness of Nigeria's role.[39]

c) An email to the IMO in November 2022 referred to a then upcoming meeting in London in which "Marshall Islands and other delegations will confront Nigeria about it's *[sic]* unlawful intended rendition by force tomorrow of the above vessel from Equatorial Guinea".[40]

d) An email from the vessel's managers dated 15 November 2023, which we saw earlier today, acknowledged that "the action against Nigeria is nearly ready".[41] That, at EK 69.

Further, Nigeria's own communications with Equatorial Guinea at this time evidence that Equatorial Guinea's role was one of assistance to Nigeria.

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 ongoing investigation" of the vessel.[42]

[37] Memorial of the Marshall Islands, para. 23.
[38] Note verbale with covering letter from the Marshall Islands to Equatorial Guinea, SA 27.
[39] Letter from the Marshall Islands' Maritime Administrator to Director General of the Nimasa, 4 November 2022, SA 19.
[40] Email, SA 20.
[41] Email, EK 69.
[42] 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.

Again on 9 November 2022, Nigeria via note verbale noted that the *"Heroic Idun"* had been in Equatorial Guinea "at the behest of [Nigeria] for certain infractions within the Nigeria maritime space".[43]

A tweet by the Equatoguinean Vice-President on 10 November 2022 noted that "... we respond to the motto 'zero tolerance' for any act of piracy in our area. We are proud to have collaborated with Nigeria for the *HEROIC IDUN* arrest as a sign of respect for our agreements against maritime piracy".[44]

On 3 June 2023, the Equatoguinean Minister of External Affairs wrote to his Nigerian counterpart explaining that it had acted "within the framework of respect for international and subregional obligations, after being informed by the Nigerian maritime authorties 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".[45]

The evidence unequivocally supports that Equatorial Guinea's interdiction of the *"Heroic Idun"* was done to assist Nigeria. There is no evidence to the contrary. Thus, the situation is one of aid or assistance, whether pleaded as such or not. Accordingly, as the Marshall Islands tacitly indicates this, "may have required the prior logical determination of Nigeria's rights and obligations".[46] Indeed, that is the case.

Mr President, Members of the Special Chamber, this brings me to the end of my submissions on the indispensable third party principle and it's applicability to the case. With the permission of you, Mr President, and the Members of the Special Chamber, this might now be a convenient moment for the lunch break, if that is convenient. Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Haeri.

I think we can break now for lunch, so we will then resume at 3.00 p.m. this afternoon.

MR HAERI: Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: The hearing is adjourned.

(The sitting closed at 12.42 p.m.)

[43] 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.
[44] Tweet by Vice-President of Equatorial Guinea, 10 November 2022, SA 25.
[45] 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.
[46] Reply of the Marshall Islands, p. 24, footnote 121.

PUBLIC SITTING HELD ON 10 OCTOBER 2025, 3 P.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 6 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 10 OCTOBRE 2025, 15 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l'audience du 6 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l'audience du 8 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber will now continue the hearing in *The M/T "Heroic Idun" (No. 2) Case*. I now call on Ms Floriane Lavaud to make her statement.

You have the floor, Madam.

First round: Equatorial Guinea (continued)

STATEMENT OF MS LAVAUD
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/8/Rev.1, p. 1–8]

Monsieur le Président, Mesdames et Messieurs de la Chambre spéciale, bonjour. C’est un honneur et un privilège pour moi de comparaître aujourd’hui devant vous au nom de la République de Guinée équatoriale.

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

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

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

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

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

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

The International Law Commission concluded that the rule of exhaustion of local remedies is a well-established principle of customary international law[1] and a principle of general international law.[2] This principle, for example, is reflected in Article 44(b) of the Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that the responsibility of a State may not be invoked if “the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted”.[3]

Without revisiting the detailed origins of the rule, it is important to recall that its underlying rationale is that, as a matter of both fairness and efficiency, the host State should have a sufficient opportunity to remedy the injury.[4] In its judgment in the *Interhandel* case, the International Court of Justice underscored that “the State where the violation occurred should

[1] *Interhandel (Switzerland* v. *United States of America, Preliminary Objection Judgment, I.C.J. Reports 1959*, p. 27.
[2] International Law Commission Draft Articles on Diplomatic Protection 2006 (in *Yearbook of the International Law Commission* (2006), Vol. II (Part 2), p. 26), (“Draft Articles on Diplomatic Protection”), Commentary to Article 14, para. 1.
[3] International Law Commission, “Responsibility of States for Internationally Wrongful Acts”, *Yearbook of the International Law Commission*, 2001, Volume II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, A/CN.4/SER.a/2001/Add.1 (Part 2), Article 44, para. b.
[4] *Interhandel, Preliminary Objection Judgment, I.C.J Reports 1959*, p. 6, at p. 27; James Crawford and Thomas D Grant, “Local Remedies, Exhaustion of” (January 2007*) Max Planck Encyclopedia of Public International Law*, para. 7.

have an opportunity to redress it by its own means, within the framework of its own domestic system."[5]

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

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

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

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

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

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

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

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

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

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

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[5] *Interhandel (Switzerland* v. *United States of America), Preliminary Objection Judgment, I.C.J. Reports I959*, p. 27.
[6] Memorial, paras. 254, 438(f); Reply, paras. 86, 333(f).
[7] International Covenant on Civil and Political Rights, 16 December 1966, 999 *U.N.T.S.* 171, Article 41(1)(c); African Charter on Human and Peoples' Rights, 27 June 1981, 1520 *U.N.T.S.* 217, Article 50.
[8] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, 14 April 2014, para. 157.
[9] *M/V "Virginia G" (Panama/Guinea-Bissau*), Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, para. 7.
[10] ITLOS/PV.25/C32/2, p. 6 (lines 2-3) (Bethlehem).

The Tribunal made clear in "*SAIGA" (No. 2)*, "*Virginia G"*, and "*Norstar"* that the correct object of inquiry for the Chamber is the nature of the rights alleged to have been violated.[11]

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

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

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

Now, Equatorial Guinea respectfully submits that, in assessing the nature of the rights alleged by the Marshall Islands, the Chamber should distinguish between the "case" as a whole, and separate "claims" that comprise that case. Indeed, a distinction should be drawn between, on the one hand, cases where the alleged injury to individuals is factually and legally inseparable from the injury to the flag State – thus justifying their treatment as a single claim; and, on the other hand, cases where, although factually related, claims relating preponderantly to the rights of individuals are legally independent from those of the flag State and therefore must be addressed separately.

As the International Court of Justice made clear in the *Avena* case, a State can bring a claim on behalf of an individual without first exhausting local remedies only "in special circumstances of interdependence of the rights of the State and of individual rights".[14]

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

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

On this basis, we submit that the application of the rule of exhaustion of local remedies should be assessed in relation to each set of claims advanced by the Marshall Islands: those

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[11] See e.g., *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 267.
[12] ITLOS/PV.25/C32/1, p. 33 (lines 6-9) (Bethlehem).
[13] ITLOS/PV.25/C32/2, p. 41 (lines 1-2) (Grafton).
[14] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 12, para. 40.
[15] Memorial para. 265.
[16] Memorial para. 278.
[17] Memorial para. 119(b).

concerning the alleged violations of the flag State rights, and those concerning the alleged treatment of the crew.

I now turn to the application of the preponderance test. Applying this test demonstrates that several of the Marshall Islands' claims preponderantly relate to the treatment of individuals.[18] The application of the "but for" test leads to the exact same conclusion.

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

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

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

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

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

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

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

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

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

The Marshall Islands also attempts to rely on the cases of "*SAIGA" (No. 2)*, "*Virginia G"* and "*Norstar"* to argue that this case concerns freedom of navigation and

[18] Memorial, paras. 253-282; Reply, paras. 208-226.
[19] ILC Draft Articles on Diplomatic Protection, Commentary on Article 14, p. 46, para. 12.
[20] Reply, paras. 318, 334(a)(i)(2).
[21] Reply, para. 82.
[22] ITLOS/PV.25/C32/1, p. 33 (lines 6-7) (Bethlehem).
[23] *M/V "Virginia G" (Panama/Guinea-Bissau*), *Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014*, p. 4, 14 April 2014, para. 5.

exclusive flag State jurisdiction, and that the principal rights which have allegedly been violated are, by essence, State rights under UNCLOS, thereby excluding the application of the rule of exhaustion of local remedies.[24]

However, these cases do not support the Marshall Islands' argument. For one, in "*SAIGA" (No. 2)* and "*Virginia G"*, the flag State did not allege breaches of human rights of individual crew members in the way that the Marshall Islands presently does. In those cases, the treatment of the crew was not the subject of an independent alleged breach of UNCLOS. By contrast, the Marshall Islands has chosen to make specific submissions focusing exclusively and extensively on the treatment and human rights of crew members.

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

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

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

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

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

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

In fact, the *travaux préparatoires* show that the consensus reached by the States Parties in the final text was that the existing rules of international law regarding exhaustion of local remedies would apply to disputes relating to the law of the sea, and that Article 295 of UNCLOS would neither narrow nor broaden these rules.[28] Clearly, the consensus was not to create an exceptional or derogatory regime to those rules for disputes arising under UNCLOS.

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[24] Reply, paras. 80-82.
[25] *M/V "Norstar" (Panama* v. *Italy)*, Memorial of Panama no. 25, 11 April 2017, paras. 129 *et seq*.
[26] M*/V "Norstar" (Panama* v. *Italy)*, Reply of Panama no. 25, 28 February 2018, para. 404.
[27] *M/V "Norstar" (Panama* v. *Italy*), Judgment, ITLOS Reports 2018–2019, p. 49, para. 146.
[28] *United Nations Convention on the Law of the Sea, 1982: A Commentary (the "Virginia Commentary")*, edited by Myron H. Nordquist, Satya N. Nandan (general ed.), and others, p. 81, para. 295.6.

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

As Judges Cot and Kelly explained in *"Virginia G"*:

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

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

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

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

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

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

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Ms Lavaud.

I now invite Mr Francisco Moro Nve Obono to make his statement.

You have the floor, sir.

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

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

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

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

[33] Reply, paras. 83-84.

STATEMENT OF MR MORO NVE OBONO
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/8/Rev.1, p. 8–11]

(Translation from Spanish) Mr President, distinguished Members of the Special Chamber, good afternoon.

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

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

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

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

i) the International Pact of Political and Civil Rights;

ii) the African Charter of Human Rights and Peoples’ Rights.

Members of the Court, Article 13 of our Constitution also explicitly refers to fundamental human rights that are guaranteed under the Constitution. Many of these rights are the clear reflection of the rights already enshrined in international instruments to which I have previously referred you. I would point out that this provision includes the right to be defended and the right to legal assistance throughout every stage of the legal process, and also the right to present complaints or petitions and to request *habeas corpus* or legal assistance, should such rights be violated. This is a right that is furthermore protected by our own law regulating the right of complaint and petition.[1] In the same connection, we also have, among our institutions, a Centre for the Promotion of Human Rights and Democracy.

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

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

The above-mentioned legislation confirms the availability of legal remedies for any complaint or claim related to mistreatment of individuals by State authorities. To dispel any

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

doubts, these remedies were available to the crew of *"Heroic Idun"* at all times. These remedies are not limited to people who are formally accused or charged under Equatoguinean law, which was not the case with the crew of *"Heroic Idun"*. Rather, these are available to any person in Equatorial Guinea and, in this connection, those who has considered them necessary have benefited from them prior to presenting their claims to a foreign or supranational forum, such as ITLOS here.

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

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

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

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

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

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

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

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

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

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

In light of this, Mr President, and distinguished Members of the Special Chamber, there is no legal excuse that would allow the members of the crew to avoid availing themselves of

these legal instruments and its legal institutions to demand recognition of their allegedly violated rights.

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

> except for cases of *force majeure*, physical or legal persons shall be entitled to compensation from the State for any damage suffered to their property or rights, provided that such damage is the result of the normal or abnormal functioning of public services.[2]

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

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

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

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

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

As we have explained, pursuant to a fundamental principle under international law, and also as a gesture of international courtesy, Equatorial Guinea, as a sovereign State, just like all other States, should have been given the opportunity to provide reparation for any damage that happened on its own territory through its own means and through its own legal system.[5]

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

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

Thank you very much for your attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Moro Nve Obono.

I now give the floor to Ms Lavaud to complete her statement.

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[2] Law No. 2/2015 of 28 May, Legal System of the General State Administration, Article 142.1.
[3] Law No. 2/2015 of 28 May, Legal System of the General State Administration, Article 142.3.
[4] Law No. 1/2014 of 28 July, Administrative Procedure, Article 12.
[5] ICJ, *Interhandel (Switzerland* v. *United States of America), Judgment, I.C.J. Reports I959*, p. 27.

You have the floor, Madam.

STATEMENT OF MS LAVAUD
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/8/Rev.1, p. 12–13]

Thank you, Mr President, Members of the Special Chamber.

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

Article 15 of the draft Articles on diplomatic protection provides that the remedies need not be exhausted where “there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress”.[1]

The determination of whether effective local remedies exist does not turn on the likelihood of success. As explained by the ILC, “[t]he test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief.”[2]

The late Professor James Crawford observed that a balanced formulation of this rule is that it does not require the taking of every step that might conceivably result in a favourable determination, but the individual must take all steps that offer a reasonable possibility, if not a likelihood, of success.[3]

In addition, Mr President, Judge Hoffmann underlined in *“Virginia G”* that a “total condemnation of legal remedies” in the domestic legal system cannot justify the failure to pursue them.[4]

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

And yet, Mr President, Members of the Special Chamber, the Marshall Islands barely gives any explanation on this point. Instead, the applicant only addresses this question in the witness statement of Mr Stephen Askins. This statement mentions, in brief and speculative terms, an assumption that involving local courts would only cause events to drag out longer, that prosecutors could bring unwarranted charges against the crew, and that this would allegedly give the authorities an excuse to delay the case.[5] These broad and speculative assertions are clearly insufficient for the Marshall Islands to justify their failure to exhaust local remedies.

In any event, by initiating international legal proceedings before the individuals on whose behalf it now acts had exhausted available local remedies, the Marshall Islands frustrated the very purpose – or *raison d’être* – of the rule. It deprived Equatorial Guinea of the opportunity to redress any alleged violation by its own means, within the framework of its own domestic system.[6]

For this reason, the futility exception does not apply.

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[1] ILC Draft Articles on Diplomatic Protection, Article 15(a).
[2] *Ibid*.
[3] James Crawford and Thomas D Grant, “Local Remedies, Exhaustion of” (January 2007*) Max Planck Encyclopedia of Public International Law*, para. 20, citing Restatement (Second) of Foreign Relations Law of the United States § 207 comment. b (*Am. Law Inst. 1965*).
[4] ITLOS, *M/V “Virginia G” (Panama/Guinea-Bissau*), Judgment, Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 4, 14 April 2014, para. 12.
[5] Witness statement of Stephen Askins, RMI 3, para. 15.
[6] *Interhandel (Switzerland* v. *United States of America), Judgment, I.C.J. Reports I959,* p. 27.

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

Equatorial Guinea accepts that, consistent with the approach followed by the Tribunal in *"SAIGA" (No. 2)*,[8] the determination of whether such jurisdictional connection existed depends on the Tribunal's findings on the lawfulness of Equatorial Guinea's conduct – specifically, the interdiction and stationing of the vessel and its crew in Luba.[9]

However, the present case is not on all fours with *"SAIGA" (No. 2)*, as the Marshall Islands contends.[10]

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

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

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

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

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Ms Lavaud for her statement.

I now invite Mr Akande to take the floor.

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

[7] Memorial, paras. 118(d)-119(c); Reply, paras. 83-84.
[8] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, 1 July 1999, para. 100.
[9] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, 1 July 1999, para. 100.
[10] Reply, para. 84.

STATEMENT OF MR AKANDE
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/8/Rev.1, p. 14–28]

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

Good afternoon, Mr President and Members of the Special Chamber. Having dealt with questions of jurisdiction and admissibility, we now turn to the merits of the dispute. I will address you this afternoon on the lawfulness of Equatorial Guinea’s actions in intercepting and arresting the *“Heroic Idun”* on 12 August 2022. The facts as they relate to the interception and arrest emerge clearly from the oral testimony that you have heard and also this morning from the overview of the facts presented by my colleague, Professor Haeri. For present purposes, Equatorial Guinea would like to stress that, as has already been noted, the only reason for the interception and arrest of the *“Heroic Idun*”, is to be found in the actions of Nigeria. The interception and arrest of the vessel took place in response to the request of Nigeria, whose Navy had earlier sought to approach and eventually to intercept the *“Heroic Idun”* in an area designated as a high-risk area for piracy.[1]

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

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

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

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

Second, and as a consequence of this first point, I will demonstrate that Equatorial Guinea’s interference with the vessel was not in breach of its obligation to respect freedom of navigation on the high seas or in the Exclusive Economic Zone, nor was it in breach of the principle of exclusive flag State jurisdiction on the high seas.

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

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

And in relation to this point:

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

[1] Counter-Memorial, para. 24; Rejoinder, paras. 29, 33.

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

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

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

Mr President, Members of the Chamber, Article 100 of UNCLOS provides that "[a]ll States *shall cooperate to the fullest extent possible* in the repression of piracy on the high seas *or in any other place outside the jurisdiction of any State*."[2] This provision is not a mere exhortation as to best practice, nor is it a recommendation. It imposes an obligation on each party to the Convention to cooperate with other States in the repression of piracy.

Furthermore, it is an obligation to cooperate "to the fullest possible extent". Going beyond the obligation that Article 100 imposes on parties to UNCLOS in their relations with each other, it can even be said that Article 100 establishes a general duty to repress piracy. That is the logical implication of there being an obligation to cooperate to repress piracy.

This point emerges clearly from the decision of the Annex VII tribunal in the "*Enrica Lexie*" case, where that tribunal held that "[t]he repression of piracy by States ... is ... also, pursuant to Article 100 of the Convention ... a duty incumbent on all States."[3]

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

The Marshall Islands seeks to make something of the legal status of the Yaoundé Code, describing it as a non-binding code of conduct.[4] However, it is irrelevant whether the whole of the Yaoundé Code, some of it, or none of it, is binding or non-binding in and of itself. Cooperation in the repression of piracy is an obligation under international law. The Code simply sets out modalities for the implementation of that obligation.

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

In considering the relevance of the Code as a tool which can and should be used to interpret UNCLOS, the Marshall Islands is again wrong to focus on the regional nature of the

[2] Emphasis added.
[3] *The "Enrica Lexie" Incident (Italy* v. *India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 979.
[4] Reply, paras. 93 (a), 95, 162.

Code. It is correct that in taking into account subsequent practice in the interpretation of a treaty, the Vienna Convention on the Law of Treaties directs the interpreter, this Chamber, to look at practice which establishes the agreement of the parties. That is correct. However, three points are important to bear in mind:

One, it's been made clear by the International Law Commission that in coming to the conclusion that there is subsequent practice which establishes the agreement of the parties, one does not need to find active practice of all the parties to the treaty. In fact, the ILC does not go as far as to suggest that one must even find active practice of most of the parties. The ILC is clear. Silence on the part of parties may constitute acceptance.[5]

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

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

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

"Piracy" is defined in Article 101 of the Convention and I will return to significant aspects of that definition in a moment.

Article 105 entitles "every State" to "seize a pirate ship" on the high seas "or in any other place outside the jurisdiction of any State".

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

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

In accordance with Article 110(3), it is only when "suspicions prove to be unfounded, *and provided that the ship boarded has not committed any act justifying them*" that the ship "may be compensated for loss or damage that may have been sustained".[8] Relatedly, according to Article 106, it is only when "the seizure of a ship ... on suspicion of piracy has been effected without adequate grounds" that "the State making the seizure shall be liable to the State, the nationality of which is possessed by the ship ... for any loss or damage caused by the seizure".

Mr President, Members of the Chamber, Equatorial Guinea accepts that in the typical situation where a State unilaterally seizes a ship on grounds of piracy, that State will need to show that it has a reasonable suspicion of piracy. However, the situation in which we find ourselves is a bit more complicated. The complication is due to the triangular relationship between the State of the flag, the State requesting the interception and detention of the vessel, and the State effecting the interception and detention upon request. Notably, only two of these

[5] International Law Commission, "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties", *Yearbook of the International Law Commission*, 2018, Volume II, Part Two, A/73/10, Draft Conclusion 10(2).
[6] United Nations Security Council, Resolution 2634, S/RES/2634 (2022), 31 May 2022, REG-031.
[7] International Maritime Organization, "Prevention and Suppression of Piracy, Armed Robbery Against Ships and Illicit Maritime Activity in the Gulf of Guinea", Resolution No. A.1159(32), 28 January 2022, REG-087, p. 2.
[8] Emphasis added.

States are before you in these proceedings – but this has already been covered this morning by Professor Haeri in our objection to admissibility under the *Monetary Gold* principle, so I won't take this up again, but I merely highlight it for your attention.

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

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

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

The Marshall Islands has argued that Equatorial Guinea has failed to show that the vessel was seized on grounds of piracy.[9] It relies on the exchanges between Nigeria and Equatorial Guinea to suggest that there was no suspicion of piracy at the time. However, this is to ignore (a) the context, the factual context, in which the actions took place, and (b) important aspects of the law relating to piracy. The factual context was well known to both the Nigerian and Equatoguinean authorities, and the exchanges between them have to be interpreted with that context in mind. Captain Juan could not have been clearer yesterday, that he interpreted those changes with that context firmly in mind. And it is that context which not only shows that there was a reasonable suspicion of piracy, but which lays bare the reasons for the actions of those involved in the arrest of the vessel.

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

We thus have a ship that is acting suspiciously in a high-risk area. It was suggested to you that somehow it was reasonable for the *"Heroic Idun"* to suspect that it was about to be a victim of piracy in this high-risk area, but unreasonable to suspect that it could be involved in piracy. You were told by Counsel that it was "utterly absurd" that this vessel could ever be used as a mother ship.[10] One witness called by the Marshall Islands made exactly the same claim, when the point was specifically put to him. He said "I would say a bigger ship, a VLCC like the *"Heroic Idun"*, cannot be used as a mother ship for piracy for pirates."[11] However, it is well known that pirates around the world, and, indeed, in the Gulf of Guinea, use large vessels as mother ships or bases of operation for other pirate ships or attack skiffs. It is also known that large vessels may also be involved in the bunkering of other pirate ships.[12] Captain Juan was very clear on this. The vessels in these news reports that you find on the Internet, they were used as mother ships; they were, in fact, VLCCs.

[9] Reply, paras. 121-134.
[10] ITLOS/PV.25/C32/1, p. 17 (lines 35-38) (Bethlehem).
[11] ITLOS/PV.25/C32/2, p. 19 (lines 47-48) (testimony of Mr Jose).
[12] Rejoinder, paras. 39-42, 208-210.

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

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

The picture that was sought to be painted (and, in fact, you had a picture right up on the screen) was of a vessel so large, so slow it could not be involved in piracy. In fact, you were told specifically that it could not be involved in piracy because it could not easily evade investigation by naval vessels.[13] That is what one of the witnesses said. I am sure that the irony would not have been lost on the Members of the Chamber. We are all gathered here precisely because this vessel, the *"Heroic Idun"*, did, in fact, evade a naval vessel that was seeking to investigate its activities, a Navy vessel that you were told was a "small, highly manoeuvrable and fast-moving boat".[14]

Captain Juan was taken to a UN document, Annex SA-53, which, far from suggesting that larger vessels are never used as mother ships in the Gulf of Guinea, in fact – and I am quoting from that document that was put to him – "describes the occasional use of larger vessels, hijacked and used by a pirate group as a semi-permanent mother vessel, used for a shorter part-time (e.g. three to five days)."[15] True, the document suggests that VLCCs are less commonly used than fishing vessels as mother ships, that's correct. It is also correct that the document says "the use of mother vessels is occasional, largely opportunistic and for shorter periods than Somalia-based piracy."[16] But in the light of even this report, and in the light of the known activities of this vessel, what reasonable and responsible naval commander would conclude that it was absurd that this vessel was used a mother ship? And let us remind ourselves of the last known activities of this vessel over the few days that preceded its interception. What was it doing? It was fleeing a naval vessel. Now, it might have been silly that it did this with its AIS system on, but what there is no doubt about is that it was fleeing from what was in fact a naval vessel. And you heard the testimony of those in charge of the vessel.

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

It is true there was no conclusive evidence at the time that the "*Heroic Idun*" was engaged in piracy. But the Convention does not require any such conclusive evidence for the interception or even the seizure of a suspected pirate vessel. All that the Convention requires under Article 105 are reasonable grounds to suspect piracy for interception to take place and, under Article 106, what is required for seizure are adequate grounds for suspecting piracy. Neither standard requires certainty that a vessel is a pirate ship before it is seized. Reasonable grounds to suspect something allows a reasonable inference to be drawn from circumstantial evidence that a ship may be engaged in piracy, even if there are other inferences that are

[13] ITLOS/PV.25/C32/2, p. 20 (lines 2-4) (testimony of Mr Jose).
[14] ITLOS/PV.25/C32/1, p. 20 (line 35) (Bethlehem).
[15] UN Office on Drugs and Crime Global Maritime Programme, "Pirates of the Niger Delta: Between Brown and Blue Waters (ANNEX SA/-53)", p. 342.
[16] UN Office on Drugs and Crime Global Maritime Programme, "Pirates of the Niger Delta: Between Brown and Blue Waters" (ANNEX SA/-53), p. 342.

available and which may also be reasonable. Requiring a standard of certainty before seizure would be workable and would effectively negate what is, after all, a duty on the part of States to repress piracy and to cooperate in its repression. Likewise, and I touch on this briefly, imposing an obligation to compensate the vessel, even when it is engaged in acts which gave rise to suspicions, can only serve to deter attempts to combat piracy.

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

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

At this point, let me turn to the legal context, fundamental aspects of which the Marshall Islands obscures or even ignores. Let's start at the beginning – the definition of piracy, which you have in Article 101 of UNCLOS. Counsel for the Marshall Islands showed you the definition, this definition in Article 101. The highlighted bits are from the slide that was put up by Counsel, which takes you to paragraph (a), which provides that piracy consists of "any illegal acts of violence or detention, or any act of depredation, committed for private ends". He then dismissed Article 101 as irrelevant to the case at hand.[17] Well, let's just look at the rest of that provision.

As you see, Article 101(a) does not exhaust the definition of piracy. Let's read the *chapeau* and paragraph (c) together. Piracy consists of "any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b)". Thus – and this is important for our factual context in the Gulf of Guinea – when we are considering whether there was a reasonable suspicion that the vessel was engaged in piracy. The question is not necessarily one of whether there was a reasonable suspicion that a ship is engaged in illegal acts of violence or detention. One must also assess whether there was a reasonable suspicion that the vessel was intentionally facilitating those acts set out in Article 101(a) and (b).

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

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

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

Members of the Chamber, if bunkering of fishing vessels in the Exclusive Economic Zone brings the act of bunkering within the scope of jurisdiction of Coastal States to regulate fishing activities and eventually within the scope of its enforcement jurisdiction in the EEZ under the Convention, as this Tribunal found in *"Virginia G"*,[19] then why would bunkering of

[17] See ITLOS/PV.25/C32/3, p. 38 (lines 38-39) (Busco).
[18] Rejoinder, paras. 201-207.
[19] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, 14 April 2014, paras. 217, 255.

pirate vessels not bring the act of bunkering within the scope of jurisdictional powers of States with respect to piracy? Especially given the definition in Article 101(c). After all, to adapt the language of the decision in *"Virginia G"*, bunkering of pirate vessels "enables them to continue their activities without interruption at sea".[20]

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

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

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

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

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

The hearing will resume at 5.00 p.m.

(Break 4.28 p.m. – 4.57 p.m.)

THE PRESIDENT OF THE SPECIAL CHAMBER: I now invite Mr Akande to continue with his statement.

You have the floor, Sir.

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

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

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

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

The proper understanding of this provision goes beyond merely restating the obvious, that is that a State may request the cooperation of another State. A State, after all, can always request the cooperation of another State. There is no need to write that down in a formal document. The point of including a provision such as this is to highlight that proper consideration should be given to such a request for cooperation. Indeed, we should recall that Article 13, the provision that we have just been looking at, is headed: "Assistance among Signatories". The point of the provision is to promote assistance given by one signatory to another. Thus, the requests that "may" be made should not be declined without some convincing justification on the part of the requested State. Without such a justification, a State would be failing in its duty to cooperate to the fullest extent possible in the repression of piracy.

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

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

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

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

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

Be that as it may, in the circumstances of the case before you, and as far as Equatorial Guinea is concerned, the Nigerian request would appear to be a reasonable request. Equatorial Guinea was requested to intercept and detain a vessel that had been drifting in a high risk area for piracy, and that had evaded an approach by the Nigerian Navy. If that is not enough to trigger cooperation duties in the repression of piracy under international law, then it is not clear what remains of the relevant obligation.

The Marshall Islands suggests that a State is not entitled to arrest on the grounds of piracy as provided for in Article 105 until it has first exercised the right to visit provided for in Article 110, has boarded the ship, examined its papers, and confirmed a reasonable suspicion

of piracy. No doubt, this will be the natural progression of things in some cases, maybe many cases. However, there is absolutely nothing in the Convention that conditions the exercise of the power conferred in Article 105 on the right that is provided for in Article 110. Article 110 provides possible justifications for boarding a vessel on the high seas. It is absurd to suggest that there is a requirement of boarding before seizure.

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

A visit is reasonable where it can assist in establishing the allegation and where it will be effective, also where it's possible. A visit cannot be required in all cases, and nothing in UNCLOS suggests this. Now, Counsel suggested on Tuesday that there might be "exceptional situations" where there is no requirement to first board[21] – exceptional situations. But it is wrong to characterize the legal position as a situation of rule and exception. Whether the right of visit is exercised will always be contextual.

In this particular case, Counsel and the witness called by the Marshall Islands spoke of circumstances that would appear to make boarding on the high seas difficult. You were told that this is a very large crude carrier in ballast, and that it was high in the water.[22] You were also told that even when the vessel was brought into port, deboarding in port was difficult.[23] It would make no sense in such a case for the Convention to demand boarding on the high seas before seizure.

It is useful here to refer to the *"Norstar"* case, as we have already done. In that case, Spain acted on an obligation of cooperation that was similar to that established by Article 100 of UNCLOS, as operationalized by the Yaoundé Code. In particular, Spain acted upon a request of Italy on the basis of the 1959 Strasbourg Convention, Article 1 of which establishes an "undertaking" between the parties "to afford each other in accordance with the provisions, the widest measure of mutual assistance in proceedings in respect of certain offences."[24]

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

This Tribunal found in that case that "the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel".[25] It was clear for the Tribunal that "without the Decree of Seizure, there would have been no arrest".[26] Further, according to the Tribunal, it was

> Italy [that is, the requesting State] that adopted legal positions and pursued legal interests with respect to the detention of the *"M/V Norstar*" through investigation

[21] ITLOS/PV.25/C32/3, p. 46 (lines 14-17) (Busco).
[22] ITLOS/PV.25/C32/1, p. 19 (lines 21-23) (Bethlehem).
[23] Testimony of Chief Officer.
[24] European Convention on Mutual Assistance in Criminal Matters, Article 1.
[25] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 165.
[26] *Ibid*.

> and proceedings. Spain [the requested State] merely provided assistance in accordance with its obligations under the 1959 Strasbourg Convention.[27]

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

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

In any event, it should be clear that Equatorial Guinea acted in accordance with the obligation to cooperate in the repression of piracy under UNCLOS, as operationalized by the Yaoundé Code, in intercepting and detaining the "*Heroic Idun*" upon the request of Nigeria.

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

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

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

This Tribunal in the "*Norstar*" case, stated that freedom of navigation and the principle of exclusive flag State jurisdiction are not breached when the relevant interference is "justified by the Convention or other international treaties".[28] In the case before you, since the interference was justified by the Convention's provisions relating to piracy, the obligation to respect freedom of navigation and the principle of exclusive flag State jurisdiction could not have been breached.

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[27] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 167.

[28] *M/V "Norstar" (Panama* v. *Italy), Judgment, ITLOS Reports 2018–2019*, p. 10, 10 April 2019, para. 222; see also para. 225.

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

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

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

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

> if protection from and repression of piracy comprise a right and 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.[29]

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

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

[29] *The "Enrica Lexie" Incident (Italy* v. *India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 980 (emphasis added).

Now, in this connection, it is worth noting that the Marshall Islands raises the issue of good faith under Article 300 of the Convention.[30] However, the Marshall Islands fails to explain why the good faith that Equatorial Guinea owes to it is somehow more important than the good faith that Equatorial Guinea owes to Nigeria, a co-signatory of the Yaoundé Code and an important collaborator in maritime security in the Gulf of Guinea, who requested it to act in the circumstances. I have already explained how Equatorial Guinea was under a good faith obligation to honour a reasonable request for cooperation in the repression of piracy under the Convention, and especially so when that reasonable request comes from a co-signatory of the Yaoundé Code with significant intelligence apparatus and maritime domain awareness capability in the relevant maritime area.

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

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

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

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akande.

This brings us to the end of this afternoon's sitting. The hearing will be resumed tomorrow at 10 a.m. This sitting is now closed.

(The sitting closed at 5.28 p.m.)

[30] Memorial, paras. 157-159; 179; 238.

PUBLIC SITTING HELD ON 11 OCTOBER 2025, 10 A.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands:

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

as Agent;

and

Mr Bernard J. Adiniwin,
Attorney-General,

as Representative;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

as Counsel;

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

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

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

as Advisers.

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 11 OCTOBRE 2025, 10 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall :

Mme Meredith Kirby,
Commissaire adjointe aux affaires maritimes, Administrateur des affaires maritimes de la République des Îles Marshall,

comme agent ;

et

M. Bernard J. Adiniwin,
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comme représentant ;

M. Daniel Bethlehem KC,

barrister, Twenty Essex, Londres (Royaume-Uni) ; membre du barreau d'Angleterre et du pays de Galles,

Mme Penelope Nevill,
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M. Paolo Busco,
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M. Manuel Casas Martínez,
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Mme Courtney Grafton,
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Mme Julia Z. Cyrson,
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M. James Myazoe,
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M. Joseph Bigler,
Commissaire adjoint aux affaires maritimes, Administrateur des affaires maritimes de la République des Îles Marshall,

M. Samuel K. Lanwi, Jr.,
Représentant permanent adjoint, Ambassade et Mission permanente de la République des Îles Marshall auprès de l'Office des Nations Unies et d'autres organisations internationales à Genève (Suisse),

comme conseillers.

Pour la Guinée équatoriale : [Voir l'audience du 8 octobre 2025, 10 heures]

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

You have the floor, sir.

First round: Equatorial Guinea (continued)

STATEMENT OF MR AKANDE
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/9/Rev.1, p. 1–6]

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

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

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

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

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

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

> In 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.

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

There is absolutely no evidence that, in this particular situation, the conduct of Equatorial Guinea exposed the *“Heroic Idun”* to any sort of danger at all, let alone any unreasonable danger or risk. We have shown in our written pleadings that the Equatoguinean authorities took measures to ensure that both the vessel and the crew would be safe and protected during the vessel’s detention in Equatorial Guinea and throughout the relevant investigation.[1] You have already heard evidence that the interception and detention of the vessel on the part of the Equatoguinean Navy took place without any resort to force. That the anchorage that was provided for the vessel was safe and appropriate for vessels of this type and size. That no concerns were raised with the Equatoguinean authorities regarding the safety of the vessel during its stay in Luba Bay.[2] And that the vessel and its equipment were ultimately found – even after its detention in Nigeria, on which, of course, Equatorial Guinea cannot

[1] Counter-Memorial, paras. 48, 252; Rejoinder, paras. 45, 239.
[2] Witness Statement of Howard James McDowall, REG-WS-006, para. 10; Second Witness Statement of Howard James McDowall, REG-WS-008, para. 11.

comment – but even after that detention, they were found to be in good condition given its type and age.[3]

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

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

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

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

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

This Tribunal and others constituted under Part XV of the Convention have held that a State which has a valid basis for taking enforcement measures under the Convention is to ensure that those measures are carried out in accordance with international law, including with the principle of reasonableness.[5] As the Tribunal is well aware, the origin of this principle was specifically in the context of the use of force, with the Tribunal making clear that, where force is used, the State doing so must still act reasonably, and, in particular, in accordance with the principles of necessity and proportionality.[6] It is true that, in subsequent cases, it's been stated that the requirement to act reasonably extends beyond the use of force.

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

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

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

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[3] Condition Survey Report, EK 78, pp. 280, 283, 299.
[4] Memorial, para. 321.
[5] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 209; *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 222.
[6] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, 1 July 1999, para. 155.

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

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

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

Members of the Chamber, I turn to my second point relating to the principle of reasonableness. When a court or tribunal is assessing compliance with specific obligations relating to enforcement by reference to reasonableness, account must be taken of the discretion given to States in matters of enforcement. It is true that tribunals have held that reasonableness encompasses the principles of necessity and proportionality.[8] However, it should also be recalled that in the *Duzgit Integrity* case, that Tribunal spoke of "the discretion that [the State] enjoys as part of its law enforcement jurisdiction."[9] This case shows that it is not correct to say, as the Marshall Islands says, that tribunals constituted under Part XV have not endorsed the idea that States have a margin of appreciation.[10]

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

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

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

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

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

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

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

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

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

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

Related to this point of respecting the discretion that ought to be afforded to States in law enforcement is a further point: care must be taken not to impose specific obligations in relation to matters of enforcement when the drafters of the Convention chose not to do so. An obligation of reasonableness must not be used to rewrite the Convention. To take one example, the Marshall Islands argues that Equatorial Guinea is in breach of the principle of reasonableness because it failed to notify the Marshall Islands of the exercise of enforcement action. The Convention provides an obligation of notification to the flag State in a number of specific instances, none of which applies on these facts – as our friends on the other side noted on Tuesday.[13] However, it is now being argued that the principle of reasonableness means that there should, or there must, always be notification to the flag State in the case of detention of a vessel. This approach would render the specific provisions of the Convention which require notification in specific instances redundant. What work would they be doing in the Convention if a general principle of reasonableness itself establishes an obligation of notification in all of these instances?

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

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

[13] ITLOS/PV.25/C32/4, p. 35, lines 15-17 (Nevill).
[14] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 268.
[15] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 262.

There is nothing in the record to indicate that Equatorial Guinea acted in bad faith in dealing with the Nigerian request to intercept and detain the "*Heroic Idun*". It was acting in response to a request from Nigeria, it was reasonable for it not to dismiss that request from a partner, it was reasonable for it to proceed to the arrest of the vessel rather than conducting an investigation on the high seas, given the difficulties that we heard about the boarding of a vessel of this nature, in ballast, high in the water. Nor is there anything in the record to indicate that Equatorial Guinea acted unreasonably in the manner in which it eventually handled the interception. There has been some focus in these proceedings on the threat of force. However, this Tribunal held in "*Virginia G"*, that a threat of force may not be unreasonable in certain circumstances.[16] In fact, going further, in *M/V "SAIGA" (No. 2)*, the Tribunal went so far as to state that firing a shot across the bow of a vessel might, in some circumstances, be reasonable.[17] Needless to say, Equatorial Guinea did not go so far in this case.

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

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

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Akande.

I invite Mr Haeri to make his statement.

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

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

STATEMENT OF MR HAERI
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/9/Rev.1, p. 6–12]

Good morning, Mr President, Members of the Special Chamber. I will address you on the principle of humanity and the treatment of the crew.

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

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

Notably, the Marshall Islands draws comparisons from the *Diallo* and *Arctic Sunrise* cases several times in its submissions on non-material damages.[1] I will return to non-material damages later today, but with reference to considerations of humanity, I would like to take a step back and recall the very different circumstances and treatment in those cases. In the *Diallo* case before the International Court of Justice, Mr Diallo had, among other things, been wrongfully expelled from a country where he had resided for 32 years, where he had engaged in significant business activities before he tried to recover a debt from the host State and State entities. It was in that context that the Court's findings on psychological suffering and loss of reputation must be understood. The tribunal in *Arctic Sunrise* noted that "the circumstances of the *Diallo* case [were] more extreme than the circumstances in [*Arctic Sunrise*]".[2]

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

> 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 [crew] held separately from one another.[3]

The Tribunal described this as "not optimal" treatment of the crew. What is important to note is how far removed from that mistreatment is the situation here as described by the vessel's agent, Mr Hernández Martín, and reflected in the contemporaneous documents.[4]

Let us consider how the crew of the "*Heroic Idun*" were treated in this case.

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

As Mr Hernández Martín testified, even before the vessel had arrived at the Luba port, the vessel's owners assigned Besora to assist the crew members in Equatorial Guinea and meet

[1] ITLOS/PV.25/C32/5, p. 16 (lines 28-37) and p. 17 (lines 1-7) (Casas).
[2] *Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.
[3] *Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.
[4] *Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.

their various needs.[5] The Equatoguinean authorities accepted this request from Besora on the vessel arriving at the port and, in Mr Hernández Martin’s words, “allowed” Besora to assist the crew members with whatever they needed at all times therefrom.[6]

This was the first of the numerous requests from Besora and the crew members that Equatoguinean authorities granted. Until the time that the vessel left to return to Nigeria, Besora would make daily requests of the Equatoguinean authorities on behalf of the crew members, and these requests were always granted,[7] as Mr Hernández Martín testified before this Special Chamber. As you heard from Mr Hernández Martín on Thursday, the Equatoguinean authorities allowed Besora to accompany the crew in all their interactions with the authorities and to ensure that the requirements of the crew, such as for food, water and regarding their accommodation, were met to the appropriate standard.[8]

Mr Hernández Martín spent a lot of time at the facility with the crew members and testified to the conditions.[9] As he explained, the authorities provided a large and new accommodation facility, with suitable bathrooms, air conditioning and a large outside area where the crew were able to freely move around, exercise and play sports such as football and cricket, for which suitable equipment was provided.[10] We can see that here in the receipts, from Besora, of provisions.

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

The crew members also never complained to Besora about the conditions at the accommodation facility, including the level of hygiene, cleanliness of water tanks, about any pests, or about the security personnel – things that come up for the first time in their witness statements in this case. Nor did Besora receive any such complaints through OSM, the vessel’s managers. Had such complaints been made, Besora would have taken steps directly to raise or address these with the Equatoguinean authorities, as Mr Hernández Martín explains in his witness evidence.[12] And if Besora did not act, the Equatoguinean authorities would have stepped in. There are no documents recording any such complaints, as would have been expected had that been the case.

The crew members kept their phones and were given local SIMs to facilitate communications with their families and anyone else whom they wished to speak with.[13] The Equatoguinean authorities authorized the agent to provide the crew with numerous other foods and drinks, which can hardly be said to be consistent with “inhumane” treatment.[14]

Mr Hernández Martín described to this Chamber how the crew members freely asked for whatever they wanted and that this was provided to them to ensure a comfortable stay. For example, “they decided they wanted pizza or Chinese food or hamburgers, whatever. So we

[5] ITLOS/PV.25/C32/6 (confidential), p. 46 (lines 39-40) and p. 47 (lines 11-13) (Hernández Martín). See also Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 12.
[6] ITLOS/PV.25/C32/6 (confidential), p. 47 (line 15) (Hernández Martín).
[7] ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 36-45) (Hernández Martín). See also Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 12.
[8] ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 36-45) (Hernández Martín). See also Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 6.
[9] ITLOS/PV.25/C32/6 (confidential), p. 49 (lines 10-14) (Hernández Martín).
[10] Receipts from Besora for provisions for the crew of the Heroic Idun, REG-013, p. 10; Costs and expenses relating to the Vessel and crew, RMI 61, p. 78.
[11] Receipts showing provision of food, provisions and cleaning items to crew, 23 August 2022, REG-042, p. 3; Costs and expenses relating to the Vessel and crew, RMI-061, pp. 2, 4.
[12] Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, paras. 15-16.
[13] ITLOS/PV.25/C32/3 (confidential) p. 26 (lines 45-50), and p. 27 (lines 1-10) (Master).
[14] Receipts from Besora for provisions for the crew of the Heroic Idun, REG-013, p. 28.

provided them".[15] Besora arranged for "one of the good restaurants in Malabo" to provide the crew members with what he described as "elaborate" meals twice a day, including Indian dishes as they had requested, made up for them by the chef per their requirements.[16]

Indeed, the documentary evidence shows that the owners themselves were "grateful that the crew 'had been treated well by those tasked to guard them'".[17]

The Marshall Islands has made much about the length of the crew's stay in Equatorial Guinea and not knowing why they were there.[18] This is easily answered. As we heard from the testimony of Captain Esono Nchama, the vessel and its crew were held in Equatorial Guinea until such time that the transfer proceedings with Nigeria were completed.[19]

The Marshall Islands' own representative, Captain Mustapha, understood as of 16 September 2022:

> I think that the final decision expected from the Guinean authorities depends on the completion of the investigation by the Nigerian Navy. I think this is expected.[20]

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

The crew was subsequently moved to Hotel Anda, chosen by Mr Hernández Martín, as he testified, because it was "one of the best hotels" in Equatorial Guinea, with a gym, swimming pool and two restaurants.[24] The hotel brochure also shows that there is a casino and two bars.[25] The crew freely ordered room service and made use of the hotel's buffet and various other facilities.[26]

In late October 2022, the Indian Ambassador visited the Indian crew members at the Hotel Anda for *Diwali*, an Indian national holiday.[27] The Indian Ambassador brought Indian food and presents for the crew members.[28]

The crew members who remained on board the *"Heroic Idun"* were similarly always able to contact Besora seeking necessary supplies provisions, including food, beverages,

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[15] ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 10-12) (Hernández Martín).
[16] ITLOS/PV.25/C32/6 (confidential), p. 48 (lines 14-24) (Hernández Martín).
[17] Letter from OSM to the Equatoguinean Attorney General, 16 September 2022, EK 36, p. 115.
[18] ITLOS/PV.25/C32/5, p. 17 (lines 11-12) (Casas); ITLOS/PV.25/C32/4, p. 23 (lines 32-33) (Grafton).
[19] ITLOS/PV.25/C32/6 (confidential), p. 32 (lines 14-17) (Esono Nchama).
[20] Captain Mustapha's Daily Reports from Malabo, WG2-1, p. 355.
[21] ITLOS/PV.25/C32/6 (confidential), p. 62 (line 40) (Hernández Martín).
[22] ITLOS/PV.25/C32/6 (confidential), p. 47 (lines 24-27) (Hernández Martín).
[23] ITLOS/PV.25/C32/6 (confidential), p. 49 (lines 24-34) (Hernández Martín). See also Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 16.
[24] ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 33-35) (Hernández Martín).
[25] Hotel Anda China brochure, REG-014. See also Witness statement of Jorge Gaona Reina, 1 July 2024, REG-WS-005, paras. 5-8.
[26] Invoice from Hotel Anda China, REG-016.
[27] See ITLOS/PV.25/C32/3 (confidential), p. 3 (lines 2-3) (Master). All references are made to uncorrected versions of the transcripts received by the Parties at the time of drafting.
[28] ITLOS/PV.25/C32/3 (confidential) p. 3 (lines 2-3) (Master); Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 23. See also Witness statement of Howard James McDowall, 2 July 2024, REG-WS-006, para. 12; Daily reports of the *Heroic Idun* provided by Besora, 13 August 2022 - 10 November 2022, REG-036, p. 5.

toiletries and restaurant meals.[29] The crew never complained to Besora about any ill treatment by Equatoguinean authorities on board the vessel at that time.[30]

Indeed, we heard from the Chief Officer of the vessel on Monday that the crew aboard the vessel would regularly play sports, such as basketball and cricket, and the Equatoguinean security personnel often joined in playing with the crew.[31] In the Chief Officer's words "these Navy people were there, two or three of them, they knew how to play basketball, so they joined us".[32] It is difficult to see how allegations of mistreatment, such as are made, tally with the crew members and the Equatoguinean security personnel freely playing sports together regularly.

Equatoguinean authorities similarly authorized Besora to take care of the crew members' medical needs, in line with the *"Heroic Idun"*'s managers and owners' wishes. Besora selected and arranged the crew's medical visits with doctors and hospitals which were, as Mr Hernández Martín testified, the La Paz Hospital, the premier hospital in Equatorial Guinea, and, alternatively, the Loeri Comba Hospital, another good hospital.[33]

The Marshall Islands does not dispute that La Paz is generally considered the best hospital in Malabo.[34] Mr Hernández Martín attested the crew all received appropriate medical care based on their ailments at the hospital, with attendant translations into English, such as he did for the Master, and he never heard of any serious illnesses of any crew members.[35] He also attested that instances of typhoid and malaria among the crew reflected "common illnesses in Equatorial Guinea".[36] Simply put, at no point during their stay in Equatorial Guinea were the crew members denied medical treatment.[37] The Equatoguinean authorities also authorized a chaplain to visit the crew in August 2022.[38]

The full circumstances of the conditions of the crew members' stay in Equatorial Guinea clearly do not support the Marshall Islands' alarming suggestion of mistreatment, let alone of torture, as is implied.[39]

The Marshall Islands has repeatedly insisted to this Chamber that the good living conditions of the crew are irrelevant, because Besora was the one physically meeting the various requests of the crew members and providing them with provisions. There is no jurisprudence to support that considerations of humanity applicable to the law of the sea require, as the Marshall Islands suggests, that State agents must be the ones directly providing the required care and treatment. There can be no breach of the principle and certainly no inhumane treatment where the State allows, facilitates and even encourages others to meet

[29] 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.
[30] Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, para. 13.
[31] ITLOS/PV.25/C32/2, p. 24 (lines 49-50) and p. 25 (lines 1-15) (Chief Officer).
[32] ITLOS/PV.25/C32/2, p. 25 (lines 14-15) (Chief Officer).
[33] ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 41-49) and p. 51 (lines 1-2) (Hernández Martín). See also Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 27.
[34] ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 42-43) (Hernández Martín). See also Witness statement of Dr Irvin Simbarashe, 10 July 2024, REG-WS-004, paras. 5, 8; Witness statement of Alberto Hernández Martín, 11 July 2024, REG-WS-003, para. 27.
[35] ITLOS/PV.25/C32/6 (confidential), p. 50 (lines 41-49) to p. 51 (lines 1-5) and p. 51 (lines 10-26) (Hernández Martín). See also Witness statement of Dr Irvin Simbarashe, 10 July 2024, REG-WS-004, para. 12.
[36] ITLOS/PV.25/C32/6 (confidential), p. 64 (lines 34-41) (Hernández Martín).
[37] ITLOS/PV.25/C32/6 (confidential), p. 64 (lines 37-41) (Hernández Martín). See also Second Witness Statement of Alberto Hernández Martín, 20 March 2025, REG-WS-009, paras. 12, 19-22.
[38] ITLOS/PV.25/C32/6 (confidential), p. 51 (lines 28-33) (Hernández Martín). See also Email, 29 August 2022, EK 18; Email, 31 August 2022, EK 19.
[39] ITLOS/PV.25/C32/1, p. 26 (lines 40-45) (Bethlehem). All references are made to uncorrected versions of the transcripts received by the Parties at the time of drafting.

those needs after they have requested to do so. In this case, the evidence shows that the owners appointed Besora who asked the Equatoguinean authorities if they could have access to and take care of the crew from even before they had arrived in Equatorial Guinea, a request to which the authorities acceded. Had the Equatoguinean authorities refused to allow Besora to take care of the crew in this way as requested, that would doubtless have formed the subject of criticism.

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

To conclude, notably at the time of handing over the crew, the Equatoguinean authorities sought an undertaking from Nigeria that it would respect the crew's human rights and treat them in accordance with the International Covenant on Civil and Political Rights.[40] This is entirely in keeping with Equatorial Guinea's consistent consideration for the crew members' well-being, which evidently would not have been done had Equatorial Guinea treated the crew inhumanely when they had been in Equatorial Guinea.

Captain Esono Nchama testified that at the time of being transferred to Nigeria that "many were crying, 'I don't want to go to Nigeria. We want to stay in Equatorial Guinea', up to the last minute."[41]

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

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

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

Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank you Mr Haeri.

I now call upon Ms Lavaud to make a statement.

You have the floor, Madame.

[40] ITLOS/PV.25/C32/6 (confidential), p. 41 (lines 11-14) (Esono Nchama). See also Official handing over of the tanker MT Heroic Idun between the governments, Addendum, 10 November 2022, REG-011.
[41] ITLOS/PV.25/C32/6 (confidential), p. 32 (lines 19-25) (Esono Nchama).

EXPOSÉ DE MME LAVAUD
COUNSEIL DE LA GUINÉE ÉQUATORIALE
[TIDM/PV.25/A32/9/Rev.1, p. 13–20]

Monsieur le Président, Mesdames et Messieurs de la Chambre spéciale, bonjour. C'est un honneur et un privilège pour moi de comparaître de nouveau devant vous afin de poursuivre la présentation des conclusions orales de la République de Guinée équatoriale.

Aujourd'hui, j'aborderai trois aspects de la présente affaire. Dans un premier temps, je commencerai par démontrer que la Guinée équatoriale a agi en vertu de sa compétence normative légitime.

J'aborderai dans un deuxième temps la prétendue existence d'une obligation de notification de l'État du pavillon et démontrerai que, contrairement à ce qu'affirment les Îles Marshall, cette obligation n'existe pas, ni en droit international coutumier ni au titre d'un principe général du droit international.

Je conclurai enfin en expliquant qu'aucune obligation de prompte mainlevée n'existe à la charge de la Guinée équatoriale, que ce soit en vertu de la Convention, du droit international coutumier ou d'un principe général du droit international.

Monsieur le Président, Mesdames et Messieurs les Juges, j'aborderai tout d'abord l'argument des Îles Marshall selon lequel l'amende imposée au capitaine du navire constituerait un exercice illégitime de sa compétence normative[1].

La Guinée équatoriale réfute cette affirmation. Le caractère exclusif de la juridiction de l'État du pavillon ne fait pas obstacle à l'exercice légitime par un autre État de sa compétence normative lorsqu'elle est prévue par un traité ou repose sur les bases pertinentes du droit international coutumier.

Pour reprendre les termes du juge Wolfrum :

> L'Etat côtier a compétence pour adopter des lois et règlements relatifs à la sécurité de la navigation et à la pollution causée par des navires étrangers dans sa zone économique exclusive (compétence législative) – dans laquelle les navires jouissent de la liberté de navigation – et il y est investi de vastes pouvoirs de police.[2]

Pour éviter toute ambiguïté, je tiens à rappeler que la Guinée équatoriale n'a pas appréhendé le navire pour avoir enfreint ses propres lois. Le professeur Akande a exposé hier avec précision et clarté la manière dont la Guinée équatoriale a répondu à la demande d'assistance formulée par le Nigéria. La Guinée équatoriale a [agi] conformément à ses obligations de coopération, telles qu'elles découlent de la Convention et du Code de conduite de Yaoundé.

Ce n'est qu'après que le navire eut été conduit au port de Luba et qu'il fit l'objet d'une enquête que des infractions ont été constatées et que le capitaine a été sanctionné par une amende.

L'amende, et la loi nationale sur laquelle elle se fonde, sont elles-mêmes basées sur les dispositions du Code communautaire de la Communauté économique et monétaire de l'Afrique centrale, ou CEMAC. Cette communauté regroupe six États d'Afrique centrale – à savoir le Cameroun, la République centrafricaine, le Tchad, la Guinée équatoriale, le Gabon, et la République du Congo – et établit des règles régionales en matière de douanes et de gouvernance maritime.

[1] Mémoire, par. 227-238 ; réplique, par. 166-180.
[2] Déclaration de Rüdiger Wolfrum, Président du Tribunal international du droit de la mer, « La liberté de navigation : nouveaux défis » (disponible sur le site web du TIDM), p. 3.

La CEMAC a pour objectif de promouvoir la paix, la coopération et l'intégration économique de ses membres. Elle vise également à créer « un espace économique intégré émergeant où règnent la sécurité, la solidarité et la bonne gouvernance »[3].

Dans une région où la piraterie et la sécurité maritime restent des défis pressants et urgents nécessitant des réponses multilatérales harmonisées, la CEMAC constitue un élément essentiel de l'architecture régionale permettant la coopération et les réponses conjointes sur ces questions.

Comme l'a rappelé Son Excellence M. Carmelo Nvono-Ncá, la Guinée équatoriale prend très au sérieux ses responsabilités dans le cadre de ces accords régionaux, notamment le Code de Yaoundé, qui a servi de fondement à la demande du Nigéria et à la réponse de la Guinée équatoriale dans cette affaire.

La Guinée équatoriale considère également le Code de la marine marchande de la CEMAC comme un instrument essentiel de son engagement au sein de l'architecture maritime régionale.

Elle reconnaît, à ce titre, la responsabilité qui lui incombe de contribuer activement au maintien et à l'exercice effectif des compétences reconnues par ce cadre institutionnel. La Guinée équatoriale a, pour sa part, donné plein effet au Code de la CEMAC en l'intégrant dans son ordre juridique interne. Ce cadre législatif vise à assurer la protection effective des droits juridictionnels de la Guinée équatoriale dans sa zone économique exclusive, conformément aux dispositions de la Convention.

C'est à la suite du constat de violation des dispositions applicables prévues par ce code et la loi équato-guinéenne qu'une amende a été imposée au capitaine du navire. Cette amende comprenait les frais administratifs, ainsi que les dépenses engagées dans le cadre de l'enquête conduite sur le navire et son équipage durant le temps passé en Guinée équatoriale. De tels frais administratifs ont d'ailleurs été admis dans d'autres affaires[4]. En l'espèce, comme l'ont souligné les Îles Marshall, le « Heroic Idun » est un pétrolier d'une dimension exceptionnelle, que l'on a comparé au « Empire State Building »[5]. Le maintien d'un navire d'une telle dimension dans le port de Luba a inévitablement engendré des coûts considérables pour la Guinée équatoriale. Pour toutes ces raisons, la Guinée équatoriale soutient que l'imposition de l'amende constituait un exercice légitime de sa compétence normative.

Monsieur le Président, Mesdames et Messieurs de la Chambre, je vais à présent aborder la demande des Îles Marshall portant sur la prétendue existence d'une obligation de notification.

Les Îles Marshall affirment que la Guinée équatoriale a manqué à son obligation d'informer les Îles Marshall, en tant qu'État du pavillon, des mesures prises à l'égard du navire[6]. Cependant, comme je vais le démontrer, ni la Convention, ni le droit international coutumier, ni les principes généraux du droit n'imposent d'obligation de notification à l'État du pavillon dans les circonstances de l'espèce.

Premièrement, comme l'a affirmé le tribunal dans « *Duzgit Integrity* » :

> (*Continued in English*) There is no relevant explicit provision in the Convention requiring that the flag State be notified.[7]

[3] Site web de la CEMAC, « La CEMAC en bref », REG-028.
[4] *The Duzgit Integrity Arbitration (Malte v. São Tomé-et-Príncipe)*, affaire CPA n° 2014-07, sentence, 5 septembre 2016, par. 255.
[5] TIDM/PV.25/A32/4, p. 29 (ligne 46) (Nevill). Toutes les références renvoient aux versions non corrigées des transcriptions reçues par les parties au moment de la rédaction.
[6] Mémoire, par. 325-355 ; réplique, par. 255-262.
[7] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, *para. 268*.

(*Reprend en français*) En effet, les Îles Marshall reconnaissent que

> Il n'existe pas de disposition expresse dans la Convention qui prescrit la notification lorsque des mesures de police ont été appliquées à l'encontre d'un navire étranger en haute mer ou dans la ZEE d'un État tiers.[8]

Dans cette déclaration dans l'affaire *« Norstar »*, le juge Kittichaisaree a précisé que seules deux dispositions de la Convention traitent de l'obligation de promptement notifier à l'État du pavillon tout exercice de la juridiction à l'encontre d'un navire battant son pavillon[9]. Il s'agit de l'article 27 3) – qui se rapporte au passage inoffensif dans la mer territoriale – et de l'article 73 4) relatif à la mise en application des lois et règlements de l'État côtier dans la zone économique exclusive.

Les Îles Marshall ne contestent pas que ni l'une ni l'autre de ces dispositions ne s'applique en l'espèce. Elles ont d'ailleurs confirmé cela en début de semaine[10]. Au contraire, les Îles Marshall cherchent à s'appuyer sur le commentaire de l'article 231 de la Convention pour démontrer l'existence d'une obligation générale de notification. Cet argument, avec respect, est erroné. L'article 231 se trouve à la section 7 de la partie XII de la Convention, qui traite exclusivement des mesures de police relatives à la protection et à la préservation du milieu marin. Son champ d'application se limite à l'application des mesures spécifiques décrites à la section 6 de cette même partie.

Cela m'amène à mon deuxième point. Contrairement à ce qu'affirment les Îles Marshall, une telle obligation n'existe pas en droit international coutumier, ni en tant que principe général du droit. L'article 293 de la Convention ne modifie pas cette conclusion. Comme l'a expliqué le professeur Akande, cette disposition prévoit que « [u]ne cour ou un tribunal ayant compétence en vertu de la présente section applique les dispositions de la Convention et les autres règles du droit international qui ne sont pas incompatibles avec celles-ci. » Elle ne saurait habiliter la Chambre spéciale à créer de nouvelles obligations là où il n'en existe aucune.

Il est bien établi que le critère permettant d'identifier une norme de droit international coutumier requiert deux éléments : une pratique générale des États et que cette pratique soit acceptée comme étant le droit, une *opinio juris*[11]. La Commission du droit international a également expliqué qu'une règle conventionnelle ne reflète le droit international coutumier que si elle codifie une règle existante, cristallise une règle émergente ou a engendré une nouvelle règle de droit par une pratique constante acceptée comme étant le droit[12].

En outre, selon les termes de la Commission :

> Le fait qu'une règle soit énoncée dans plusieurs traités peut signifier, sans toutefois que cela soit nécessairement le cas, que la règle conventionnelle reflète une règle de droit international coutumier.[13]

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[8] Mémoire, par. 329.

[9] Voir *Navire « Norstar » (Panama c. Italie), arrêt, TIDM Recueil 2018-2019*, 10 avril 2019, déclaration du juge Kittichaisaree, par. 20-21.

[10] TIDM/PV.25/A32/4, p. 38 (lignes 12-14) (Nevill).

[11] Commission du droit international, « Projets de conclusion sur la détermination du droit international coutumier et commentaires y relatifs », A/CN.4/L.908, 17 mai 2018, conclusion 2.

[12] Commission du droit international, « Projets de conclusion sur la détermination du droit international coutumier et commentaires y relatifs », A/CN.4/L.908, 17 mai 2018, conclusion 11 1).

[13] Commission du droit international, « Projets de conclusion sur la détermination du droit international coutumier et commentaires y relatifs », A/CN.4/L.908, 17 mai 2018, conclusion 11 2).

Dans le cas présent, les éléments présentés par les Îles Marshall pour tenter de démontrer l'existence d'une pratique générale des États se limitent à des dispositions en matière de notification figurant dans des instruments sectoriels, notamment la convention MARPOL, la convention BWMC, la convention STCW, la convention SOLAS, les procédures de contrôle des navires par l'État du port élaborées par l'Organisation maritime internationale et les mémorandums d'accord avec les États du port[14].

Les différentes dispositions et procédures relatives à la notification contenues dans ces instruments sont propres aux cadres réglementaires et aux mécanismes d'application de leurs régimes respectifs. Les Îles Marshall ne sauraient donc les extrapoler pour prétendre à l'existence d'une règle coutumière du droit international qui s'appliquerait, de manière générale, à toutes les mesures d'exécution adoptées par tout État, en toutes circonstances.

Comme l'a noté la Commission du droit international dans son projet de conclusions sur la détermination du droit international coutumier, les traités ne peuvent en eux-mêmes créer une règle de droit international coutumier, ni attester de manière concluante de son existence ou de son contenu[15]. En outre, dans son commentaire de la conclusion 11, dont nous avons reproduit l'extrait pertinent en anglais, la Commission du droit international précise, et je le lierai à haute voix :

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

(*Reprend en français*) Les Îles Marshall ont expliqué mardi que « [l]a question qui se pose est de savoir si la répétition à elle seule peut prouver les deux éléments de la coutume. »[17] Les Îles Marshall ont, sur ce point, qualifié le texte du commentaire de la Commission comme étant « ambigu »[18]. À la lecture du texte, la réponse apparaît pourtant claire. L'extrait du commentaire de la Commission que je viens de lire suggère fortement que la répétition de dispositions dans différents traités ne saurait, à elle seule, suffire à établir de façon concluante l'existence d'une règle coutumière de droit international.

En tout état de cause, dans le cas présent, la répétition de la norme dans les différents traités ne soutient pas l'argument des Îles Marshall. En effet, la plupart des instruments multilatéraux sur lesquels les Îles Marshall s'appuient pour soutenir l'existence présumée d'une obligation générale de notification, notamment, comme je l'ai cité précédemment, MARPOL,

[14] Mémoire, par. 333-339.
[15] Commission du droit international, « Projets de conclusion sur la détermination du droit international coutumier et commentaires y relatifs », A/CN.4/L.908, 17 mai 2018, conclusion 11, paragraphe 2.
[16] International Law Commission, "*Draft conclusions on identification of customary international law*", A/CN.4/L.908, 17 May 2018, conclusion 11, paragraph 8.
[17] TIDM/PV.25/A32/4, p. 39 (lignes 29-30) (Nevill). Toutes les références renvoient aux versions non corrigées des transcriptions reçues par les parties au moment de la rédaction.
[18] TIDM/PV.25/A32/4, p. 39 (lignes 31-33) (Nevill). Toutes les références renvoient aux versions non corrigées des transcriptions reçues par les parties au moment de la rédaction.

STCW, SOLAS, et plusieurs protocoles d'accord, sont antérieurs à la signature et à l'entrée en vigueur de la Convention.

Monsieur le Président, Mesdames et Messieurs de la Chambre, si les États Parties à la Convention avaient eu l'intention d'incorporer une obligation générale de notification aux États du pavillon, ou si une telle obligation existait déjà en vertu du droit international coutumier, on pourrait raisonnablement s'attendre à ce qu'elle ait été explicitement incluse dans le texte de la Convention. Or tel n'était pas le cas.

L'absence d'une telle disposition expresse est non seulement révélatrice. Elle confirme qu'aucune obligation générale de notification n'existe en vertu de la Convention ou du droit international coutumier.

L'autre source sur laquelle les Îles Marshall s'appuient pour affirmer l'existence d'une *opinio juris* est la déposition du Commissaire principal adjoint auprès de l'Administrateur des affaires maritimes des Îles Marshall[19]. Comme nous l'avons expliqué dans nos écritures, cette déclaration ne répond pas aux exigences de l'identification d'une *opinio juris* aux fins d'établir une règle de droit international coutumier[20].

Les Îles Marshall cherchent également à s'appuyer sur la méthode dite « par induction », qui exige de démontrer l'existence « d'une pratique suffisamment étoffée et convaincante »[21]. Cependant, même pris ensemble, les instruments spécifiques auxquels les Îles Marshall font référence ne prouvent pas l'*opinio juris* nécessaire à l'identification d'une règle de droit international coutumier selon ce critère.

Il s'ensuit qu'en se référant simplement à un certain nombre d'instruments bilatéraux et multilatéraux portant sur des sujets différents, les Îles Marshall ne satisfont pas aux deux conditions nécessaires pour établir une règle coutumière, à savoir une pratique étatique étendue et une *opinio juris*.

Les sources et autorités sur lesquelles les Îles Marshall entendent s'appuyer ne démontrent pas non plus qu'une obligation générale de notifier l'État du pavillon existe en tant que principe général de droit[22].

La Commission du droit international explique que, pour déterminer l'existence d'un tel principe, il est nécessaire de démontrer : « a) L'existence d'un principe commun aux différents systèmes juridiques du monde ; et b) La transposition de ce principe dans le système juridique international »[23].

Contrairement à ce qui a été allégué mardi par les Îles Marshall[24], la Guinée équatoriale a adressé ce point et nous vous renvoyons aux sections pertinentes de nos écritures à cet égard[25].

Cela m'amène à mon troisième point. En tout état de cause, l'objectif des obligations de notification prévues dans certaines dispositions de la Convention est de permettre à l'État du pavillon d'avoir connaissance de l'événement afin d'intervenir dès les premières mesures prises à l'encontre du navire[26]. En l'espèce, les Îles Marshall ne peuvent prétendre qu'en tant qu'État du pavillon, elles n'avaient pas connaissance des actes du navire et de son interception

[19] Contre-mémoire, par. 263-266 ; duplique, par. 295-302.
[20] Duplique, par. 297-298.
[21] TIDM/PV.25/A32/4, p. 40 (lignes 21-25) (Nevill) ; *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)*, arrêt, C.I.J. Recueil 2023, p. 447, par. 77.
[22] Contre-mémoire, par. 263-266 ; duplique, par. 295-302.
[23] Commission du droit international, « Principes généraux du droit : texte du projet de conclusions provisoirement adopté par le Comité de rédaction en première lecture », 12 mai 2023, A/CN.4/L.982, projet de conclusion 4.
[24] TIDM/PV.25/A32/4, p. 38 (lignes 30-32) (Nevill). Toutes les références renvoient aux versions non corrigées des transcriptions reçues par les parties au moment de la rédaction.
[25] Duplique, par. 295-309.
[26] *Navire « Virginia G » (Panama/Guinée-Bissau)*, arrêt, TIDM Recueil 2014, 14 avril 2014, par. 328.

par la Guinée équatoriale. Les éléments versés au dossier confirment qu'elles ont été, et je cite cette fois en anglais :

> (*Continued in English*) notified about Equatorial Guinea Navy's interception, diversion, and detention of the HEROIC IDUN ... on 12 August 2022 shortly after the vessel was intercepted and diverted by the Navy to Malabo....[27]

(*Reprend en français*) Les diverses communications entre les Îles Marshall avec le Nigéria et la Guinée équatoriale montrent que les Îles Marshall étaient informées non seulement de l'interception du navire, mais également de son immobilisation en Guinée équatoriale[28]. Quant aux discussions relatives à la manière dont cette notification peut être communiquée, nous vous renvoyons également à nos écritures sur ce point[29].

Pour toutes ces raisons, la Guinée équatoriale soutient que les Îles Marshall n'ont pas établi l'existence d'une obligation générale de notification à l'État du pavillon, que ce soit en vertu de la Convention, du droit international coutumier ou d'un principe général du droit.

Monsieur le Président, Mesdames et Messieurs de la Chambre spéciale, je conclurai mes observations en abordant l'argument selon lequel la Guinée équatoriale aurait manqué à une obligation de prompte mainlevée en vertu de la Convention ou du droit international général[30].

Cet argument, toutefois, échoue pour bon nombre de raisons similaires que celles que j'ai déjà évoquées concernant l'obligation de notification. Je me réfère donc aux développements que je viens d'exposer, ainsi qu'à nos écritures, et je me limiterai, Monsieur le Président, à une brève réponse sur ce point.

Tout d'abord, les Îles Marshall reconnaissent qu'« [i]l n'y a pas dans la Convention de disposition expresse prescrivant une libération prompte et sans retard excessif »[31] susceptible d'application dans le cas de l'espèce.

Les Îles Marshall tentent alors d'établir une obligation de prompte mainlevée en vertu du droit international coutumier ou des principes généraux du droit et, pourtant, sans succès.

Les éléments et sources cités par les Îles Marshall ne satisfont pas au caractère permettant d'identifier une norme de droit international coutumier ou un principe général du droit.

Il convient par ailleurs de souligner que l'adoption d'une telle obligation générale de prompte mainlevée en vertu du droit international aurait pour conséquence de priver de portée les dispositions spécifiques de la Convention relative à cette procédure.

Par ailleurs, le droit international ne prévoit aucune obligation générale de libérer un navire intercepté sur la base d'un soupçon raisonnable de piraterie avant que la conduite du navire ne soit définitivement établie. Au contraire, le droit international, y compris la Convention, impose des obligations de réprimer la piraterie qui, en l'espèce, étaient incompatibles avec une prompte mainlevée du navire.

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

[28] Lettre de l'Administrateur maritime des Îles Marshall au Gouverneur de Luba, 16 août 2022, SA 6 ; Lettre de l'Administrateur maritime des Îles Marshall au Chef d'état-major de la marine au quartier général de la marine nigériane, 18 août 2022, SA 7 ; Lettre de l'Administrateur maritime des Îles Marshall au Procureur général de Guinée équatoriale, 26 août 2022, SA 9 ; Lettre de l'Administrateur maritime des Îles Marshall au Directeur général de la NIMASA, 30 août 2022, SA 10 ; Lettre de l'Administrateur maritime des Îles Marshall au Procureur général de Guinée équatoriale, 13 septembre 2022, SA 11 ; Lettre de l'Administrateur maritime des Îles Marshall au Procureur général de Guinée équatoriale, 18 octobre 2022, SA 15.

[29] Contre-mémoire, par. 302-309.

[30] Mémoire, par. 356-387 ; Réplique, par. 263-268.

[31] Mémoire, par. 358.

Pour toutes ces raisons, la Guinée équatoriale soutient n'avoir violé aucune obligation de prompte mainlevée.

Monsieur le Président, Mesdames et Messieurs de la Chambre spéciale, ceci conclut mes observations pour aujourd'hui. Je vous remercie de votre aimable attention. Cela peut être le moment idéal pour une pause-café, Monsieur le Président ?

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Ms Lavaud.

I believe it may be an appropriate time for us to withdraw for a break of 30 minutes. So we will resume, the hearing will resume at 11.45 a.m.

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

Mr Akande, you have the floor.

STATEMENT OF MR AKANDE
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/9/Rev.1, p. 19–29]

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

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

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

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

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

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

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

Equatorial Guinea submits these arguments about the jurisdiction of the Tribunal, issues of admissibility, and the questions of when external rules are applicable, because there are important systemic questions at hand regarding the integrity of the Convention, and the role of dispute settlement under Part XV. You are the guardians of the integrity of this system and of the Convention. All States have a legitimate interest, together with you, in ensuring the proper interpretation of the Convention. These are not just matters about the application of human rights law in interpreting the Convention; they raise significant questions of jurisdiction and of

methodology with regard to applicable law in cases brought before tribunals exercising jurisdiction under Part XV.

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

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

If the Marshall Islands is, in fact, only seeking determinations of violations of UNCLOS provisions, that characterization has significant consequences. Its human rights claims must then be limited to allegations of violations of human rights at sea. This, Members of the Chamber, is the first substantive point on the merits regarding the territorial scope of human rights law.

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

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

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

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

The Marshall Islands, in a footnote in its Reply,[1] suggests that Article 87 may be applicable and breached, not only by conduct on the high seas, but also by conduct in respect of the high seas. They point to a statement made by the Tribunal in *M/V "Norstar"* which notes that freedom of navigation on the high seas will be violated where a State extends its laws to activities of foreign ships on the high seas, even if enforcement takes place in internal waters.[2] That was simply a statement that an exercise of prescriptive jurisdiction which seeks to regulate conduct on the high seas can still be a breach of Article 87.

The idea that exercising prescriptive jurisdiction over conduct that takes place on the high seas can be a breach of Article 87 has nothing to do with an assertion that acts carried out on land or in another zone amount to a violation of freedom of navigation on the high seas.

[1] Reply of the Marshall Islands, footnote 419.

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

What the Tribunal said in *"Norstar"* relates to acts which deal with or seek to effect conduct on the high seas. Any violation of the obligation to respect freedom of navigation must relate to the interference on the high seas. Consequently, any human rights claims that are said to be part of that interference must also be so limited. The human rights violations that constitute interference must take place on the high seas.

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

For the avoidance of doubt, the same goes for the EEZ, *mutatis mutandis*. The arbitral tribunal in *Enrica Lexie* was crystal clear on precisely this point in relation to Articles 56 and 58. Italy made the same arguments that the Marshall Islands now seeks to make – that through the due regard provisions in Articles 56 and 58, other rules of international law applied in relation to enforcement action taken on land, after the interference in the EEZ. In that case, *Enrica Lexie*, it was argued by India that the rules on State immunity should be applied. Here, it is argued that Equatorial Guinea has breached human rights treaties. The tribunal in the *Enrica Lexie* case held that the violations of the other rules of international law invoked could not be applied because "those Articles are not pertinent and applicable in the present case."[3] And why not? They were not pertinent because the relevant acts relating to detention did not occur in the zones that those articles apply to. The tribunal went on to say:

> Article 2, paragraph 3, 56, paragraph 2, 58, paragraph 2, apply to the exercise of rights and duties in the territorial sea and the exclusive economic zone by the coastal States, while the evidence in the present case demonstrates that India enforced its jurisdiction over the Marines only in its internal waters and on land, when the Marines were arrested and detained.[4]

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

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

However, even if this argument that Article 2(3) suffices, or does not suffice, to give you jurisdiction, even if that argument is not right, and if they are right, that Article 2(3) does suffice to give you jurisdiction in considering any violation by the coastal State of international law in the territorial sea, this will also have consequences. It means that the human rights claim, in relation to the crew detained on land, cannot be considered – or cannot be covered by this provision – and it would fall outside your jurisdiction. After all, the law relating to the exercise of sovereignty in the territorial sea does not apply on land. You already saw this clearly and expressly stated in the *Enrica Lexie* case. Thus, all that you heard about the conditions in the detention facility, which was on land, is irrelevant to the claims that it is argued you have jurisdiction over. And this is taking the Marshall Islands' case at its best.

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[3] *The "Enrica Lexie" Incident (Italy* v. *India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 798.
[4] *The "Enrica Lexie" Incident (Italy* v. *India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 798.

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

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

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

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ....[6]

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

There was a passing reference made on Wednesday to a decision of the European Court of Human Rights relating to confinement of a ship that was intercepted and escorted to port by a navy vessel,[7] but no discussion of the significance of the extraterritoriality point in that case. I just wish to note that in that case that was referred to – and this may have been relevant to whether the individuals in question were subject to the jurisdiction of the State on the high seas, and thus within the scope of the human rights treaty, so jurisdiction for the human rights purposes – the State deployed guards on the vessel throughout its journey to port.

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

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[5] Memorial of the Marshall Islands, para. 281(d).

[6] Emphasis added.

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

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

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

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

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

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

> The Contracting Governments undertake 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 the safety of life, a ship is fit for the service for which it is intended.

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

First, it argues that this "general obligation" does not purport to prescribe the specific steps that a party must take, because it includes a duty "to take all other steps".[8] In this way, the Marshall Islands suggests that the obligation may be violated without reference to any other specific provision of the SOLAS Convention or of the annexes which constitute "an integral part" of the Convention.

Second, the Marshall Islands argues that this general obligation applies to a party with control and custody of a vessel.[9]

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

[8] Reply of the Marshall Islands, para. 232(c).
[9] Reply of the Marshall Islands, para. 232(c).

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

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

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

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

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

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

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

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

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

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

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

What is more, this particular Convention, the STCW, provides specifically for seafarers on board ships to be qualified and fit for their duties. This obligation, of course, falls primarily on the flag State, hence Article II(b) of the Convention defines again as "Administration" "the Government of the Party whose flag the ship is entitled to fly". It is upon that State that obligations to ensure that seafarers are qualified and fit for duty fall – port States being limited, by virtue of Article X of the Convention, to controlling certification or dispensation on board vessels in port.

It is thus difficult to conceive how Equatorial Guinea could have breached any provision of the STCW Convention in the case at hand. It is impossible to argue that it has breached Article1(2) of the Convention in isolation.

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

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

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

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

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

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

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

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

The Marshall Islands argues that there is a freestanding, general duty of non-aggravation of a dispute, in particular where that dispute is, in one way or another, pending before an international court or tribunal. The Marshall Islands argues that Equatorial Guinea breached this obligation by handing over control and custody of the vessel and crew to Nigeria on 11 November 2022, after the Marshall Islands had made an application to ITLOS under

Article 292 for prompt release of the vessel and crew, and after the application had been communicated to Equatorial Guinea.

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

> when a court or tribunal issues provisional measures directing a party to refrain from actions that would aggravate or extend the dispute, it is not imposing a new obligation on the parties, but rather recalling to the parties an obligation that already exists by virtue of their involvement in the proceedings.[10]

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

A court or tribunal constituted under Part XV may prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute".[11] That's Article 290(1) of the Convention. "Any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute." This reference to the respective rights of the parties was considered as particularly relevant by this Tribunal in the *"San Padre Pio"* Provisional Measures order.[12] Institution of dispute settlement proceedings does not entitle one side to simply deny to the other side rights that the other side would otherwise have. Institution of proceedings is not – and should not be made into – a means of just freezing the situation in order to prevent a party from engaging in lawful acts. In this particular case, Equatorial Guinea's obligations to cooperate in the repression of piracy did not cease or become non-existent the day the Marshall Islands filed prompt release proceedings.

Further, had the Marshall Islands brought a request for a prescription of non-aggravation as a provisional measure, it would have had to show that the rights which it sought to protect in that main claim are plausible.[13] It is uncertain how a determination on this question would have come out, given that prompt release proceedings were initiated in a case where there were no allegations of infringement of either fisheries or environmental laws and regulations.

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

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

[11] Emphasis added.

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

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

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

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

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

This sitting is now closed.

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

PUBLIC SITTING HELD ON 11 OCTOBER 2025, 3 P.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 11 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 11 OCTOBRE 2025, 15 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l’audience du 11 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l’audience du 8 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber will now continue its hearing in *The M/T “Heroic Idun” (No. 2) Case*. I invite Mr Haeri to the podium again to make his statement.

You have the floor, sir.

First round: Equatorial Guinea (continued)

STATEMENT OF MR HAERI
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/10/Rev.1, p. 1–12]

Thank you. Good afternoon, Mr President, Members of the Special Chamber. I will address you now on the issues of causation and the remedy claim respectively.

The focus of the Marshall Islands' remedy claim is for compensation, which it now quantifies, after numerous shifts in its assorted claims, at the extraordinary sum of nearly $58 million. As already addressed, several of the Marshall Islands' claims are inadmissible or relate to treaties for which there is no jurisdiction in these proceedings. The Marshall Islands has, moreover, failed to establish the liability of Equatorial Guinea. For each of these two reasons, the Marshall Islands' claims for remedies are unavailing.

I will now address two further reasons why the Marshall Islands' claims for relief should be dismissed.

Firstly, there is a lack of causation, as a matter of international law, between any internationally wrongful act of Equatorial Guinea and the alleged damage claimed by the Marshall Islands. As such, the claims fail at this stage too.

Finally, I will address the very serious deficiencies in the compensation claim put forward by the Marshall Islands, which render it in any event unviable.

Firstly, causation. On causation, which I will now address, I will make four main submissions. I will briefly summarize them, before addressing them in turn.

The first submission is that, as a matter of international law, the causal link at issue between an allegedly wrongful act and the damage claimed must be direct, certain, clear and unbroken before compensation could be theoretically possible. This is a rigorous threshold, squarely addressed in the jurisprudence, and a terminal barrier here to the claims advanced.

Secondly, I will address that it was the actions of the *"Heroic Idun"* in Nigeria and Nigeria's subsequent request to Equatorial Guinea to interdict the *"Heroic Idun"* and return it to Nigeria that caused the alleged damage. In our respectful submission, this is quite apparent in any realistic assessment of causation. It cannot be said that Equatorial Guinea was somehow the direct or clear cause of these events; it was merely responding to Nigeria's request. Leaving aside, for this purpose, the issue of inadmissibility under the *Monetary Gold* principle, or liability, this is also a key issue of causation. Nigeria's request was cause; Equatorial Guinea's responsive assistance was consequence.

Third, I will address the counterfactual of the Marshall Islands' case that the *"Heroic Idun"* intended to return to Nigeria after the events that had occurred there. This renders irrelevant – from a causation perspective – Equatorial Guinea's assistance to Nigeria in the interdiction and return of the vessel to Nigeria. Equatorial Guinea could not have been responsible for the consequences of events in Nigeria that would have transpired in any event in the "but for" world in the Marshall Islands' own case. Put simply, there is no reason to conclude that Nigeria would have acted any differently than the way it did once the *"Heroic Idun"* had voluntarily returned to Nigeria, as is said would have happened.

Fourth and finally, I will address the later events in Nigeria, including the *"Heroic Idun"*'s guilty plea and payment of a fine, which would, irrespectively, break any chain of causation said to have somehow started in Equatorial Guinea.

I turn now to the first of these four submissions: the causal link must be "direct", "certain", "clear" and "unbroken".

International law firmly establishes that there must be a "direct", "certain", "clear" and "unbroken" causal link between an internationally wrongful act of a State and the damage

claimed.[1] The ILC Commentary on the Articles on State Responsibility confirms that the damage suffered must be "consequential"; it must not be too "indirect", "remote", "speculative" or "uncertain".[2] As counsel for the Marshall Islands also agreed, with reference to the Armed Activities case, "[t]he causal nexus required may vary depending on the primary rule violated and the nature of and extent of the injury".[3]

ITLOS jurisprudence supports the requirement of a direct nexus between conduct alleged to be in breach of UNCLOS and the compensation sought.[4] Indeed, in its Reply, the Marshall Islands concedes, with reference to the *M/V "Norstar"*, that "only damage directly caused by the wrongful act ... is the subject of compensation".[5] The Marshall Islands, moreover, does not refute that the causation nexus must additionally be "sufficiently direct and certain".[6]

The Marshall Islands does not refute the well-accepted principle that it falls to the party seeking compensation to establish the causal nexus,[7] though it does fail to establish that nexus.

This brings me on to the second submission on causation – namely, that Nigeria was the primary cause of later events. The first event in the chain of causation regarding the apprehension of the *"Heroic Idun"* is the conduct of that vessel in Nigeria and Nigeria's request to Equatorial Guinea to apprehend and return it to Nigeria. In other words, the foundational and direct event in the chain of causation is not something done by Equatorial Guinea, but, rather, by Nigeria. If the causal link is seen as an extending chain, the chain starts with Nigeria's request for assistance.

Consider the counterfactual: had Nigeria not asked Equatorial Guinea to interdict and return it to Nigeria, the Marshall Islands would not have incurred the alleged damage. This chain of causation does not start with Equatorial Guinea, and Equatorial Guinea accordingly cannot be said to have directly caused the losses claimed.

The Marshall Islands defensively argues that "Nigeria's actions or what happened in Nigeria are entirely irrelevant to most of the Marshall Islands' claims".[8] This protestation is unconvincing. It is, moreover, irreconcilable with the Marshall Islands' request for compensation from Equatorial Guinea for various acts of Nigeria.[9] Strikingly, the vast majority of claims advanced in these proceedings relate to events that occurred directly in Nigeria.

Consider the three main heads of claim put forward by the Marshall Islands from a quantum perspective: firstly, the fine of $15 million imposed by Nigeria; secondly, lost profits; and, thirdly, non-material damage. These, together, account for approximately $50 million of

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[1] 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, para. 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 2022, para. 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), para. 37.

[2] 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, para. 10, and p. 104, para. 27, fn. 566.

[3] ITLOS/PV.25/C32/5, p. 2 (lines 34-36, 42-43), p. 3 (line 1) (Nevill).

[4] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, 14 April 2014, paras. 435-436; *M/V "Norstar" (Panama* v. *Italy), Judgment, ITLOS Reports 2018–2019*, p. 10, 10 April 2019, para. 370.

[5] Reply, para. 279.

[6] 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, para. 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 2022, para. 93.

[7] *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, para. 93.

[8] Reply, para. 66.

[9] Memorial, para. 413.

the almost $58 million claimed. They all relate to events occurring in or by Nigeria. Therefore, the vast majority of the Marshall Islands' compensation claim leads directly to Nigeria from a causation perspective.

Let me address these three heads briefly in turn to illustrate this point:

The first head of claim is the $15 million claimed for payments made to Nigeria by the owners of the *"Heroic Idun"* to secure the release of the vessel and her crew from Nigeria.[10] From a causation perspective, it is self-evident that Nigeria was the direct cause of the fine it imposed on the *"Heroic Idun"*, not Equatorial Guinea. In any event, the plea bargain accepted by the owners would, on any analysis, break the chain in causation.

The second head of claim is for $19.3 million claimed for loss of hire.

Most of this claim relates to the loss of hire during the time spent in Nigeria, for which Nigeria is the direct cause, not Equatorial Guinea. For the first time, on Day 3 of this hearing, the Marshall Islands sought to distinguish the loss of hire for the time spent in Nigeria from that in Equatorial Guinea. However, the quantification put forward by the Marshall Islands is at odds with the calculations of its own expert.[11]

Moreover, as it was Nigeria that requested the interdiction of the vessel by Equatorial Guinea, it cannot be said that any loss of hire was caused by Equatorial Guinea, let alone being "directly" caused by Equatorial Guinea. Rather, this head of claim is again referable directly to Nigeria from a causation perspective. That is all the more so given the counterfactual scenario since the vessel was going to return to Nigeria in any event.

For the period when the *"Heroic Idun"* was in Equatorial Guinea, Mr Horne relies on the charterparty to calculate lost profits. Counsel for the Marshall Islands spent a considerable amount of time explaining the labyrinthic calculations of Mr Horne based on this document. However, the charterparty was apparently novated on 4 July 2022 to reflect a change of ownership. Mr Horne admits this, and he also admits that he has not seen the novation document.[12] The Marshall Islands, despite producing almost 3,000 pages of quantum documents, has not provided this basic document, either to its expert or during the proceedings. Without it, we cannot know which provisions of the charterparty stand, if at all, and which ones were modified to take account for the change of ownership. Accordingly, there cannot be any certainty that the numbers relied upon by Mr Horne are correct.

In such cases, this tribunal in *M/V "Norstar"* has made clear that a loss of profits claim cannot stand. In that case, the tribunal noted the absence of information or documents to demonstrate the possible revenues and expenses related to the operation of the vessel, which led the Tribunal to reject the claim for loss of profits.[13] The same defect is present here, which should lead the Chamber, with respect, to the same conclusion.

The third head of claim is for $15 million claimed in non-material damages "to compensate the unlawful detention of the vessel's crew",[14] it is said, "for each day that the Master and crew were detained by Equatorial Guinea and Nigeria".[15] As already explained, any consideration of causation regarding the detention of the vessel inevitably leads to Nigeria, not Equatorial Guinea. The overwhelming majority of the time that this amount is claimed for was spent in Nigeria under the direct control of the Nigerian authorities. Even while in

[10] Memorial, para. 413(c).

[11] Counsel for the Marshall Islands claims for, roughly USD 5.3 million for loss of hire for the period the vessel spent in Equatorial Guinea. However, its own expert shows that roughly USD 2.7 million were paid during that period. In fact, there was no loss for the month of August 2022. Therefore, Mr Horne quantifies the loss at a much lower level than counsel for the Marshall Islands. See First Expert Report of Tim Horne including annexes, paras. 55-56.

[12] Expert Report of Tim Horne, RMI 39, para. 8.

[13] *M/V "Norstar" (Panama* v. *Italy*), Judgment, ITLOS Reports 2018–2019, p. 10, 10 April 2019, para. 432.

[14] Reply, para. 318.

[15] Memorial, para. 423 (emphasis added).

Equatorial Guinea, it was the Nigerian investigations which caused the stay of the vessel and its crew, which again cannot be said to have been caused by Equatorial Guinea. This head of claim is therefore also referable directly to Nigeria as a matter of causation.

Beyond these three areas which make up the vast majority of the Marshall Islands' claims, the Marshall Islands has submitted numerous invoices for expenses claimed to have been incurred in Nigeria and has frequently marked them as being related to the "Nigerian Conflict" and "Nigeria Conflict", even for expenses incurred while the crew was in Equatorial Guinea. We can see that on this slide, RMI 60, page 528, where the reference is "Nigeria Conflict" and the date is 22 October 2022 within the 92-day period when the vessel and its crew were in Equatorial Guinea.[16]

Even the Marshall Islands' own internal categorization of the State with which it considered itself to be in "conflict" leads to Nigeria. The disconnect between that reality and the damages claim now said to have been "caused" by Equatorial Guinea is striking. Contemporaneous evidence demonstrates that some of these costs were incurred, and I quote "[...] following incident in Nigeria port on 08/08/2022".[17] That's in RMI 60. The causation chain starts with, and flows from, what happened with Nigeria on 8 August 2022, as the Marshall Islands' own evidence shows.

Although the Marshall Islands contends that it is not attempting to attribute responsibility of the "actions of another sovereign State" to Equatorial Guinea, that is exactly what its quantum case demonstrates.[18]

This leads me to the third submission: the Marshall Islands' counterfactual would have seen the *"Heroic Idun"* return to Nigeria in any event, exemplifying that its causation case against Equatorial Guinea is misplaced.

Under the Marshall Islands' own case concerning lost profits, the *"Heroic Idun"* would have continued its operations by returning to Nigeria and would therefore have had to address the situation caused by its evasion of the Nigerian Navy.[19] As the Marshall Islands' own evidence shows and as its witnesses have confirmed, the vessel was to obtain clearance to load oil and remain drifting offshore before returning to Akpo Terminal for loading on 17 August 2022.[20]

We can see that reflected here: 12 August, the vessel awaits return to Akpo Terminal; the two blue dots reflect the actual world; the two orange dots, what the evidence was given as to what would have happened but for the interdiction in Equatorial Guinea. 17 August 2022, the vessel was to return to Akpo Terminal; and from August 2022 to May 2023, therefore, Nigeria would have been expected to conduct its investigations as it did.

Thus, whatever actions Nigeria has taken in the present case would have been taken when the vessel returned to Nigeria in any event. This means that, under the Marshall Islands' own counterfactual scenario, its lost profits claim fails as there is no possible scenario in which the *"Heroic Idun"* would have been allowed to continue its operations in Nigeria without accounting for its actions.

It cannot therefore be said that Equatorial Guinea is causally responsible for events which occurred in Nigeria that would have taken place there in any event in the Marshall

[16] Costs and expenses to assist the crew during detention, RMI 60, pp. 528, 749, 783, 960, 964, 965, and 975.
[17] Costs and expenses to assist the crew during detention, RMI 60, p. 1023.
[18] Reply, para. 281.
[19] ITLOS/PV.25/C32/1, p. 21 (lines 30-33) (Bethlehem). All references are made to uncorrected versions of the transcripts received by the Parties at the time of drafting. See also Reply, para. 26; Witness Statement of the Master, RMI 1, paras. 85-86.
[20] ITLOS/PV.25/C32/1, p. 21 (lines 30-33) (Bethlehem). All references are made to uncorrected versions of the transcripts received by the Parties at the time of drafting. Email from Akpo to the Master, 11 August 22 at 21:41, MT 34, p. 313.

Islands' own case of what "should have" happened, as it says. This clearly breaks any causation nexus said somehow to have been commenced by Equatorial Guinea.

Turning now to my fourth and final point on causation, a notable feature of this case is that the vessel and its owners secured release of the vessel by signing a plea agreement in April 2023 when the vessel accepted liability under Nigeria's anti-piracy legislation. It therefore paid a fine in furtherance of such plea agreement on 12 May 2023.[21] On any account, at this point, any causal chain said somehow to have "commenced" in Equatorial Guinea was decisively broken.

This is not a question of whether the owners now wish to say they disagreed with the fine that they agreed to pay to Nigeria, or even whether they have reason to so disagree. While Equatorial Guinea is not in a position to address the fine that the owners agreed to pay in Nigeria, the fact of the matter is that the owners agreed to pay that fine. On any analysis, that would break a so-called causal chain said to have started in Equatorial Guinea.

In conclusion, the Marshall Islands has failed to establish the causal chain between its alleged damage incurred and any alleged internationally wrongful act of Equatorial Guinea. This essentially renders redundant the Marshall Islands' remedy claims for compensation.

I come on now to the second part of my submissions this afternoon, which is the remedy claim, starting first with material damages and then moving on to non-material damages.

So I will now move on to address the irremediable deficiencies in the Marshall Islands' compensation claim for material damages, and I will start by making two overarching points:

Firstly, the Marshall Islands has failed to meet its burden of proof. It has not shown that it has suffered any alleged damages caused as a result of an internationally wrongful act attributable to Equatorial Guinea.

Secondly, there are numerous irregularities in the documents said to underpin the claims. This includes expenses which bear no relation whatsoever to the present case.

I will address these two points in turn.

Firstly, the failure to substantiate damage claimed under the various heads of losses.

The Marshall Islands failed to provide any damages evidence with its Memorial. After Equatorial Guinea pointed this out in the Counter-Memorial, the Marshall Islands filed many volumes of evidence with its Reply with no reference as to which document related to which specific claim. A month ago, on 11 September, it unloaded even more documents into the record, many of which were duplicates of documents already put in the record by the Marshall Islands. On Day 3 of the hearing, we received a number of new tables supposedly setting out which items belong under which category. It is clearly unreasonable for Equatorial Guinea to be expected to reply to such an ever-shifting damages case. Moreover, and in any event, the Marshall Islands fails to show the causal link between an internationally wrongful act of Equatorial Guinea and the damages claims. It even fails to show how a number of expenses it claims were calculated.

Another critical issue is double counting, which has already been acknowledged to be an issue. Following Equatorial Guinea's objections in its Rejoinder,[22] on 11 September the Marshall Islands admitted that it double counted several of its claims and withdrew not one, not two, but seven of them.[23] However, the duplication of documentation and lack of proper reconciliation of figures means this continues to be an issue.

I move on to my second submission in this respect: the irremediable flaws in the Marshall Islands' compensation claim.

Turning to my second overarching point, what can be gleaned from the quantum documents of the Marshall Islands presents a troubling picture. The documents submitted show

[21] Proof of Payment of 15 million paid to Nigeria, EK 72.
[22] Rejoinder, paras. 391(b)(i), 393(a), 394.
[23] Letter from the Marshall Islands to the Registrar, 10 September 2025, p. 3.

numerous expenses allegedly incurred, firstly, for items whose relevance are unknown; secondly, by unknown individuals; and, thirdly, at times when Equatorial Guinea was not involved in this matter, including before 12 August 2022. These flaws appear across the Marshall Islands' various heads of claims and beg three key questions that the Marshall Islands has failed to address on the compensation claimed, namely: What? Who? And when? I will address these three questions in turn with reference to the Marshall Islands' evidence. In the interests of time, this is necessarily going to be indicative of the issues they raise and multiple deficiencies they reflect.

A more comprehensive exposition is set out in Equatorial Guinea's Rejoinder based on what it had received at that time.

Firstly, what? The first question is what? The Marshall Islands' documents relate to a variety of expenses that do not appear to have any link to its various heads of claims. I will provide some illustrative examples.

You can see here on the slide invoices of unexplained cash payments of, firstly, $50,000 to the Master and another cash payment of an additional $20,000 to the Master.[24] What head of damages do these unexplained cash payments relate to? It's not explained.

We also have receipts for hard liquor and alcohol consumption of OSM employees. We can see that here at RMI 60 at page 180, with some expenses labelled as "Beer All Day" and "Liquer [sic] All Day".[25] Again, what claim does this go to? It's not explained.

Expenses for materials to equip the *"Heroic Idun"* for future operations in July 2023 – meaning more than a month after the vessel was released by Nigeria – such as flat screen smart TVs, kitchen appliances and air conditioning.[26] What's not explained is, what claim does this relate to?

Random expenses such as a barely legible receipt for a two-year gold membership for glasses for crew members, RMI 60, at page 928.[27] Again, what does the claim relate to?

The Marshall Islands needs to show how each of these expenses has been incurred as a result of an internationally wrongful act attributable to Equatorial Guinea. For example, had Equatoguinean authorities damaged kitchen appliances in the *"Heroic Idun"*, such expenses might potentially have been claimable. That is clearly not the case here and it is not even alleged by the Marshall Islands. So why are these things being claimed for?

Importantly, a significant number of these expenses are not appropriate. This includes the bar tab of OSM employees at the pool bar of a 5-star hotel in Dubai. The Marshall Islands has filed these expenses in duplicate under two claims; "Costs and expenses to repair the vessel" and "Costs and expenses relating to the vessel and crew", but these invoices clearly bear no connection to any allegedly wrongful act of Equatorial Guinea under either head of claim.

Despite the fact that Equatorial Guinea has highlighted these inappropriate expenses in its Rejoinder and even though the Marshall Islands has belatedly amended its quantum claim since then, it has chosen to maintain its claim for these duplicated items.

Regarding expenses incurred assisting the crew, the Marshall Islands claims for a number of additional wages and bonuses said to be paid to the crew "due to their detention".[28] However, the Marshall Islands has not demonstrated how these wages and bonuses are

[24] Costs and expenses to repatriate the crew, RMI 63, p. 77; Costs and expenses to repair the vessel, RMI 64, p. 120.
[25] Rejoinder, p. 104; Costs and expenses to assist the crew during detention, RMI 60, pp. 180, 645; Costs and expenses to repatriate the crew, RMI 63, pp. 158, 167; Costs and expenses to repair the Vessel, RMI 64, pp. 56-57, 59, 64-68.
[26] Costs and expenses to repair the Vessel, RMI 64, pp. 179, 190-193.
[27] Costs and expenses to assist the crew during detention, RMI 60, p. 928.
[28] Reply, para. 285(d)-(h).

anything other than voluntary payments by the owners.[29] In fact, their own witness Mr Kulblik appears to admit as much in paragraphs 97 and 98 of his first statement.

The Tribunal in *M/V "Virginia G"* dismissed claims for additional salaries during detention and maintenance of crew.[30] The Marshall Islands' claims for the various wages and bonuses to the crew should be similarly rejected.

This leads me on to the second of the three questions: Who?

I will now address that question: Who incurred the costs and expenses claimed for? For a number of them, the answer is that we do not know. There are multiple actors whose relevance to this case are unknown and unexplained. I will provide just two examples of many to illustrate this point.

The Marshall Islands has presented expenses of an individual in the Taj Hotel in Colombo, including for various alcohol consumption.[31] The references are there. Who this person is and how he incurred expenses as a result of an internationally wrongful act of Equatorial Guinea have not been explained. You can see that in RMI 60 at pages 149, 153, 614 and 618.

The Marshall Islands has also submitted receipts for medical treatment and tests for individuals other than crew members and for children who were obviously not aboard the *"Heroic Idun"* at any point in time.[32] Again, this is not explained.

The Marshall Islands has not established who these actors are and how their expenses relate to its heads of claim.

This leads me to the third question: When?

Briefly, on the third question we must consider when expenses were incurred. Notably, the Marshall Islands claims for expenses incurred before Equatorial Guinea even knew of the existence of the *"Heroic Idun"*.

This is an invoice from Gard, the insurer of the vessel whose representatives are attending this hearing, relating to a claim from the 9 August about, "escaping perceived hijacking".[33] This is a day before Equatorial Guinea was even requested to apprehend the *"Heroic Idun"*.

Similarly, the Marshall Islands has also presented a receipt for medical services in India dated 11 August 2022. The crew had not even made contact with the Equatoguinean Navy at that time.

The Marshall Islands also includes receipts for medical tests conducted before the interdiction of the *"Heroic Idun"* by Equatorial Guinea for people who were not even aboard the *"Heroic Idun"* at that time,[34] and this can be seen in RMI 60 at pages 952 and 953.

Similarly, the Marshall Islands apparently also claims for the provisions that the vessel, at that point still the "*Hunter Idun"*, purchased for its voyage to Nigeria in July 2022.[35] We can see that date on that slide, if we come back to it: 18/07, July, 2022, *"Hunter Idun"*, Colgate toothbrush and so on, cigarettes and various other things.

We even have expenses claimed from a non-crew member, from April, June, March and July 2022 – predating the *"Heroic Idun"*'s stay in Equatorial Guinea.[36] That's part of the additional documents at Volume VII, page 30.

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[29] Costs and expenses to repatriate the crew, RMI 63, pp. 6-8.

[30] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, para. 439 with reference to Reply of Panama, paras. 448, 450-453.

[31] Costs and expenses to assist the crew during detention, RMI 60, pp. 149, 153, 614, 618.

[32] Costs and expenses to assist the crew during detention, RMI 60, pp. 160, 209, 952–953.

[33] See also Costs and expenses to assist the crew during detention, RMI 60, pp. 26-27 (9 August 2022), p. 67 (9 August).

[34] Costs and expenses to assist the crew during detention, RMI 60, pp. 952-953.

[35] Additional Documents, Volume VII, pp. 257-260.

[36] Additional Documents, Volume VII, p. 30.

On the other hand, several of the expenses were incurred well after the vessel departed Equatorial Guinea and even Nigeria.[37] For instance, the Marshall Islands has sought reimbursement for expenses incurred between July and September 2023 relating to the *"Sea Lion"* (which is the new name given to the *"Heroic Idun"* after it left Nigeria). These items include: visa stamping for the crew[38] and payment of advance wages.[39] One can see that in RMI 60, pages 839 to 844, as well as RMI 63 at page 150.

None of these items, which clearly relate to the future operation of the vessel, can reasonably be said to have been incurred as a result of an internationally wrongful act of Equatorial Guinea. In the "but for" world, these normal operational costs would have been incurred regardless.

These examples demonstrate only some of the numerous flaws and deficiencies in the Marshall Islands' compensation case advanced here, which have been addressed in further detail in Equatorial Guinea's Rejoinder.

What they mean is that the compensation case put forward by the Marshall Islands does not bear scrutiny, and that point does not turn on the precise amounts reflected in the respective invoices at issue.

I come on now to the second area on this part of my submissions, namely, the remedy claim for non-material damages.

I will now address the claim concerning non-material damages. Under this head of claim, the Marshall Islands claims around $15 million.[40] Comparison with other cases is instructive.

Consider firstly the *"Arctic Sunrise"*. As I mentioned earlier, the crew were "confined to cold and unsanitary cells for 23 hours per day, the remaining hour consisting of solitary exercise in a small concrete box".[41] The difference in treatment provided by Equatorial Guinea could not be greater. Yet, in that case, the tribunal decided to grant non-material damages at a much lower level than is claimed here by the Marshall Islands.

Second, in *M/V "SAIGA"*, Guinean patrol boats fired ammunition at the *"Saiga"*, injuring crew members, before boarding and seizing the tanker. The indiscriminate use of gunfire caused severe injuries to two of the people on board.[42] The Master faced criminal prosecution and was convicted, sentenced and fined. In that case, the Tribunal also granted non-material damages at a much lower level than is claimed by the Marshall Islands.[43]

The Marshall Islands alleges that the crew suffered mental harm while in Equatorial Guinea.[44] It alleges that the reason for a lack of evidence of psychiatric harm in respect of the period that the crew spent in Equatorial Guinea is because "it was not possible to carry out more in-depth psychological assessments ... because the governmental authorities refused to grant the necessary permits".[45] That's what is said. This is unconvincing.

As the evidence shows, mental healthcare could have been provided by Dr Perman-Kerr at any time for any crew member through voice or video calls, the possibility for which was

[37] Reply, para. 298(c).
[38] Costs and expenses to repatriate the crew, RMI 63, p. 150.
[39] Costs and expenses to assist the crew during detention, RMI 60, pp. 839-844.
[40] Memorial, para. 423; Reply, para. 318.
[41] *Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, PCA Case No. 2014-02, Award on Compensation, 10 July 2017, para. 76.
[42] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, 1 July 1999, para. 158.
[43] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea*), Judgment, ITLOS Reports 1999, p. 10, 1 July 1999, para. 175.
[44] Reply, para. 322.
[45] Reply, para. 322.

considered at the time and is reflected in the contemporaneous evidence.[46] And we can see that, for example, in RMI 63 at page 16, line 7, where there was discussion of the possibility to "deploy the counsellor/psychiatrist, phone calls sessions with the crew".

The fact that no crew member appears to have even requested such treatment, despite having spoken to Dr Perman-Kerr while in Equatorial Guinea, a fact that Dr Perman-Kerr admits in her report, is further proof that the crew was well-treated and required no such support at the time.

As these cases and the circumstances show, a finding on non-material damage is not appropriate in this case where the crew was treated in accordance with the principle of humanity at all times, as already addressed earlier today.

To conclude my remarks on the remedies claimed by the Marshall Islands, I would like to draw the Chamber's attention to the fact that the Marshall Islands is asking this Chamber to do multiple things for the first time. For example: the Marshall Islands wants this Chamber to award the cost it claims to have incurred in the prompt release proceedings. The Marshall Islands also wants this Chamber to award it the costs of the entire proceedings.

It is not in dispute that ITLOS has never 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, and the Marshall Islands does not provide a credible one.[47] As such, these two claims should also, in our respectful submission, be dismissed.

Mr President, Members of the Chamber, with this I conclude my remarks on causation and the quantification claims presented by the Marshall Islands and this also concludes the first round of submissions of Equatorial Guinea.

Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Haeri.

As you have indicated, this concludes the first round of oral arguments.

The hearing will resume on Monday 13 October at 10 a.m. to hear the second round of oral argument of the Marshall Islands. The sitting is now closed.

(The sitting closed at 3.45 p.m.)

[46] See, for example, this possibility being mentioned in Costs and expenses to repatriate the crew, RMI 63, p. 16, line 7: "*Deploy the counsellor/psychiatrist, phone calls sessions with the crew*".

[47] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, 1 July 1999, para. 182.

PUBLIC SITTING HELD ON 13 OCTOBER 2025, 10 A.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 11 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 13 OCTOBRE 2025, 10 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l’audience du 11 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l’audience du 8 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good morning. Today the Special Chamber will continue its hearing in *The M/T “Heroic Idun” (No. 2) Case*. This morning we will hear the second round of oral argument of the Marshall Islands.

I now invite Sir Daniel Bethlehem to the podium to make his statement.

You have the floor, Sir.

Second round: Marshall Islands

STATEMENT OF SIR DANIEL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/11/Rev.1, p. 1–11]

Thank you very much, Mr President, Members of the Special Chamber.

I trust you had a restful adjournment. Less so for us, but we are pleased to be before you this morning to right the wrongs that you heard in the latter part of last week. I will be followed this morning by each of my colleagues in turn. Ms Grafton will address issues of fact and the witness evidence that you heard, as well as on considerations of humanity. Dr Busco will address freedom of navigation, flag State jurisdiction and the claim by our friends that this was all about piracy. He will also address the fine levied by Equatorial Guinea, which we have now heard from our friends opposite was for the expenses incurred in taking good care of the *"Heroic Idun"* at Luba anchorage. This will take us to the morning break.

After the break, Ms Nevill will address Equatorial Guinea's obligations to notify, its obligations of due regard, and jurisdiction in respect of the application of the IMO instruments. Dr Casas will then address our reparations claim. He will be followed by our Agent, Ms Kirby, who will make some brief closing remarks and then formally read the Marshall Islands' Final Submissions.

Mr President, Members of the Special Chamber, in this regard, I note that we have revisited our Final Submissions in the light both of Equatorial Guinea's Rejoinder and the oral arguments that we had last week, and we have both added to and subtracted from, and refined, our requests for relief to the Special Chamber. We hope that this will crystallize more clearly some of the points in dispute between the Parties.

I turn to my submissions. Mr President, Members of the Chamber, the task of good advocacy is to convey a compelling narrative on behalf of the party in question. And we heard some good advocacy, nicely delivered, from our friends on the other side. With this said, and genuinely meant, I am compelled also to say, though, that we also heard some contentions from our friends opposite that sailed pretty close to the wind of untruths, and at times played on that boundary. I do not here talk about the framing of the Equatoguinean case as one of piracy, when this was only a much belated construct superimposed on facts that saw no reference to piracy at the time. That is advocacy, even if it grasps for alternative truths and takes liberties with the evidential record. And we will come to this. What I am talking about is the veracity of submissions of fact made under cover of careful caveats. And I give you one example to highlight the point, to which each of us will return in our submissions.

We heard from Counsel in his submissions on damages about his "what, who, when" test. He gave examples of what he contended were manifestly egregious damages claims by the Marshall Islands. Compelling stuff. We left the hearing wondering what we had overlooked; could we have credibly made such claims?

We looked at our case and the record that we put before you. It took us five minutes. For each item that Counsel had flashed on the screen, there was a compelling response. One example from this will illustrate the point – to which Dr Casas will return in his submissions later.

Counsel for Equatorial Guinea highlighted a $20,000 item in an invoice for the cash payment to the Master. What he omitted to point out is that on the exhibit that Dr Casas presented on Wednesday, it is said explicitly in respect of this item "excl[uding] 20k cash to Master". This is clear also from the underlying composite invoice that is in evidence on which Dr Casas's table drew. This deducted, together with another amount, the $20,000 payment to

the Master from the invoice in question. This item is not included as part of the Marshall Islands' damages claim. Dr Casas will address these issues more fully.

Mr President, Members of the Chamber, I make these points in opening for three reasons. First, you need to know from the outset that the Marshall Islands has been fully attentive to its professional responsibilities, including as regards evidence. If there is a fault, it is that we have provided to Equatorial Guinea, and to this Chamber, the raw invoices, as opposed only to the headline amounts that are claimed. But we have not advanced claims in respect of every line item in those invoices, as Dr Casas has made clear. And I note that any assessment of the invoices against our heads of damages that might have been undertaken by a Marine Average Adjuster[1] – that is a specialist, an expert in assessing marine insurance claims – would have had little difficulty in identifying with a high degree of accuracy where there is documentary evidence for what we are claiming.

Second, you need to suspend belief in the veracity of the arguments advanced by our friends until you have carefully assessed them. Equatorial Guinea has had our heads of damages, alongside the raw data from which they were drawn, since November last year, with the exception of some additional data put in more recently. Had they undertaken the kind of assessment that Dr Casas put before you on Wednesday in his composite tables on the screen – which they would have been able to do – Equatorial Guinea would have been able to replicate the exercise that we undertook.

Third, in closing my submissions last Wednesday, I said that the Marshall Islands acknowledged, and I said this formally and on the record, and I quote what I said then, I said that the Marshall Islands acknowledges that "loss, damage and injury caused by Nigeria cannot be the subject of reparations in these proceedings".[2] I also addressed, in that same segment, what we consider can properly be the subject of a reparations claim, and the footnote references to my arguments last Wednesday are in the speaking note.[3] We heard nothing from Equatorial Guinea on that last week – no doubt for reasons that it did not suit their *Monetary Gold* hypothesis that the Marshall Islands is claiming for recompense for loss and damage caused by Nigeria. We are not. In reflection of this, and that we had previously, before this hearing, indicated that we would be withdrawing some elements of our damages claim, we will set out our revised damages claim in our final submissions at the close of our case this morning.

Mr President, Members of the Chamber, I move on to some other points that warrant comment. As I do so, let me make the further observation that there are many issues of contention of law and of contention of fact that we will not have an opportunity to get to in the brief 150 minutes that we have this morning. That should not be taken as an indication that we accept the submissions of our friends on the other side.

I note in passing, just to illustrate the point, one aspect of those contentions, which was the contention advanced by Counsel for the other side, that the non-aggravation claim could only arise in the context of a request for interim remedies. That, of course, cannot be the case. In any proceedings, there will be an implicit obligation of non-aggravation, whether it is with respect to the intimidation of witness, the production of documents, and so on. This is not limited to provisional relief.

You heard a simple narrative from our friends last week. They said this case is all about cooperation in respect of the suppression of piracy and all about Equatorial Guinea aiding and assisting, within the framework of Article 100 of UNCLOS, of which the Yaoundé Code simply sets out operational modalities. Again, this is compelling stuff in the simplicity of the message that is purporting to be conveyed, but it is divorced from the facts and from the law.

[1] https://www.average-adjusters.com/
[2] ITLOS/PV.25/C32/5/Rev.1, page 25, lines 26-28.
[3] ITLOS/PV.25/C32/5/Rev.1, page 24, line 47 to page 25, line 33.

There was a good deal on which you heard nothing from Equatorial Guinea last week. You heard nothing from them on Equatorial Guinea's failures to engage with the Marshall Islands. You see on the slide in front of you reference to seven letters and Notes Verbales from the Marshall Islands to Equatorial Guinea between 16 August and 14 November 2022. No response. No response to any of them.

You heard nothing from Equatorial Guinea on their failure to cooperate with the Marshall Islands, as flag State, in the repression of piracy under Article 100 of UNCLOS. Yes, Equatorial Guinea had an obligation to cooperate with us as well in the repression of piracy. We are the flag State. The much-vaunted obligation under Article 100, on which Equatorial Guinea very belatedly says it relies – in evidence that is completely unmoored from the facts – is prayed in aid of what is said to be an unquestioning obligation to assist Nigeria. But, as between the receipt of the WhatsApp message from Nigeria on 10 August and the interception of the "*Heroic Idun*" on 12 August, there was a period of 60 hours. Where was Equatorial Guinea's duty to cooperate with the flag State during that period? We are met by silence.

You heard virtually nothing from our friends opposite on the length of the detention of the vessel and the crew, the 92 days. You heard virtually nothing from them on the harrowing days prior to the rendition of the vessel and the crew to Nigeria. You heard nothing on the fine, other than that it was levied in respect of the costs incurred as a result of the detention of the vessel. With the greatest respect to our friends opposite, that is bordering on the offensive. All the evidence on the record confirms that the fine was a shakedown, it was an extortion from those detained to secure their release – although sadly to no good outcome.

You also heard virtually nothing on the evidence of non-material harm to the 26 members of the crew – evidence that is found in more than 28 witness statements from the crew, from other witnesses of fact, and in the expert report of Dr Perman-Kerr. On this, all you heard is that Dr Perman-Kerr should have conducted therapy sessions on Zoom.

You were given no explanation about the evidence missing from the heart of the Equatoguinean case, such as the statement that the Master felt compelled to sign while in detention in Malabo. We do not have that. Equatorial Guinea has that. Where is it in the record? You were given no explanation about the refusal to permit the crew to be accompanied by lawyers during the lengthy interviews conducted in police custody, in police cells. In substitution for this missing evidence, what did you get, Mr President, Members of the Special Chamber? What you got were references to Indian food prepared by the best chefs in Malabo and state-of-the-art medical facilities, although not about the highly troubling medical treatment that was actually administered to members of the crew.

We come then to the evidence and argument with which you were presented by Equatorial Guinea.

There was the WhatsApp message from Nigeria on 10 August. Dr Busco will take you back to this. Let me observe simply that the act on which Equatorial Guinea rests its entire case – its jurisdiction case, its admissibility case, its merits case – the act on which Equatorial Guinea rests its entire case is a short WhatsApp message on the basis of which it has then constructed an elaborate obligation to cooperate in the suppression of piracy. A VLCC with 26 crew was seized and detained for 92 days by Equatorial Guinea on the basis of a WhatsApp message, which we are told could properly simply be taken at face value, with no need for further inquiry. This WhatsApp message, we are told, was enough, without more, we heard from the Captain, for Equatorial Guinea to trigger Article 100 and to seize the vessel pursuant to Article 105 of the Convention. I will come to the law in just a moment. As a matter of credible appreciation, this simply beggars belief.

Mr President, Members of the Chamber, as you move forward to your deliberations beyond the issue of jurisdiction, you will be faced with two lines of inquiry in the light of

Equatorial Guinea's defence in this Chamber last week, both of which turn on the pivot of Equatorial Guinea's piracy defence.

The fundamental pivot for both lines of inquiry is whether Equatorial Guinea had, or could have, brought itself within a piracy exception of UNCLOS to justify its subsequent conduct. If it could not bring itself within that piracy exception but for its jurisdiction and admissibility defences, Equatorial Guinea's case collapses completely. It has put all of its merits defence eggs in the piracy basket. If the piracy basket falls, it has no other defence on the merits.

The second line of inquiry for you in your deliberations will arise if, on your pivotal assessment of the piracy claim, you conclude that Equatorial Guinea had and could have brought itself within the piracy exception of UNCLOS. If so, you will then need to address whether, in the face of this sufficiently robust apprehension of piracy, Equatorial Guinea conducted itself lawfully, having regard to that apprehension of piracy. We say that it did not. Equatorial Guinea did not undertake any steps whatever to cooperate with the Marshall Islands, as Article 100 obliged it to do, in the 60 hours between receipt of that WhatsApp message and the interception and the "*Heroic Idun*." This was not a hot pursuit operation. This was not a time-sensitive, logistically fraught or security-sensitive maritime interdiction. The vessel was not trying to flee. Its location was known from multiple sources, as was the much-vaunted counterfactual return to Akpo Terminal scheduled for 17 August. Where was the operational impediment to engaging and cooperating with the flag State, as Equatorial Guinea was legally obliged to do, on its own case, under Article 100?

Beyond Article 100, we heard from our friends opposite contorting themselves in an effort to avoid Article 110. But, if they cry piracy, they must bring themselves within the scope of the piracy provisions of UNCLOS. As Dr Busco will address, they cannot bring themselves within the scope of Article 110 – a point that Counsel opposite candidly accepts. Dr Busco will take you through Article 110.

Equatorial Guinea, accordingly, relied on Article 105, which provides a legal basis for the seizure of a pirate ship. You see the text on the screen.

Significantly, Counsel opposite, in his careful review of the provisions, parsing up the definition of piracy in Article 101, and taking you to sub-paragraph (c) of that provision, you will recall, in which he rooted his case, he failed entirely – entirely – to take you to Article 103, which is a rather remarkable and egregious oversight, as this contains the definition of the term "pirate ship" and is thus the predicate enquiry to the application of Article 105 and the entitlement to seize. If you do a search of the transcript record, you will see a number of references to Article 103; they are all by Counsel to the Marshall Islands.

Article 103 defines a pirate ship as a ship which "is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101". The same applies if the ship has been used to commit any such acts, "so long as it remains under the control of the persons guilty of that act".

So, before Equatorial Guinea could lawfully seize the "*Heroic Idun*" in the exercise of its *ex post facto* conceived piracy operation, cooperating with Nigeria alone, not with us, it would have had to have concluded that the "*Heroic Idun*" was in fact a pirate ship. This is not a "reasonable suspicions" clause: it is whether the "*Heroic Idun*" was, in fact, a pirate ship. This is not a "reasonable grounds for suspecting" test, as in Article 110 – it is a much higher test as it forms the legal basis for seizing a ship. We heard nothing from Captain Esono Nchama on this last week.

It would have been straightforward as anything for the old-school Colonel to have reached out to the Marshall Islands' Registry, indeed by simply picking up the telephone – the Registry maintains a 24-hour hotline – in the 60 hours or so before he acted, to seek the cooperation of the flag State. This would have enabled Equatorial Guinea to reach an informed

assessment of whether the *"Heroic Idun"* was indeed a pirate ship that could be seized. Captain Esono could have requested the cooperation of the flag State under Article 100 in enabling appropriate enquiries or investigations to be undertaken, whether in Equatorial Guinea or Nigeria or elsewhere. He, though, did none of this. Rather, Equatorial Guinea simply seized the ship and its crew, and held them for 92 days, and, in response to the seven letters and notes verbales from the Marshall Islands, increasingly desperate at the plight of the crew and the holding of the vessel, Equatorial Guinea gave no reply.

Mr President, Members of the Chamber, as I observed in my closing submissions last week, Equatorial Guinea is simply making things up as it goes along.[4] This is the problem with *ex post facto* justifications. It is challenging to squeeze them into the facts. Our friends opposite are leaving ragged edges to their case in the wake of arguments which don't quite fit. As I said on Wednesday, and put as a blinking light on your deliberations radar screen, Equatorial Guinea's piracy defence was and is a sham, a dissembling fiction, aimed at diverting attention away from proper scrutiny of its conduct. Dr Busco will make some further submissions on this shortly, including by reference to the evidence at some remove from the period of the interception and the detention that underline the absence of any contemporaneous appreciation that the seizure of the *"Heroic Idun"* and its crew had a suppression of piracy rationale in mind.

Mr President, Members of the Chamber, I come now, and regrettably only briefly, given the tight time constraints, to Equatorial Guinea's objections to jurisdiction and admissibility and its contentions on applicable law. As I do so, let me make an observation about what I have said so far about Equatorial Guinea's case.

With a genuinely meant compliment, our friends opposite have constructed an appealing narrative. They have attempted to recast the facts. They have polished a pristine legal defence. They have painted themselves as virtuous defenders of cooperation in the field of suppression of piracy. They have donned the garb of a good neighbour to Nigeria. They have vaunted their assistance to the Marshall Islands with respect to the *"Sea Phantom"*. They have burnished their rule of law credentials in the field of human rights, saying that the crew could have brought a case for *habeas corpus* or some other remedies under domestic procedures. From afar, without further enquiry, we would look at this newly polished case and wonder, what was the Marshall Islands thinking when it decided, after careful and responsible reflection, to bring the case?

The only problem is that, once one gets close to this newly polished case, it begins to smell. At first, it is not so clear where the smell comes from, but it smells. And as one gets closer, it becomes evident that the smell is everywhere. It is in the corners and under the seats. It is in the furnishings. It is in the burnishing of local remedies and the attempts to hide behind the skirts of Nigeria. It is in the evidence of the Colonel and the claim that the crew were treated well – they were given Indian food. It is in the failure even to address the unaddressed points that I identified at the start of my submissions.

Mr President, Members of the Chamber, I do not make this case lightly. When the dust of these proceedings settles, when we walk out of this Chamber tomorrow evening, the Marshall Islands and Equatorial Guinea will go back to a wider world in which constructive and good faith engagement going into the future will be both necessary and of looming importance for both of us. This said, there is an elephant in the room that needs to be called out if the interpretation of UNCLOS and the jurisdiction of ITLOS is not to get squashed against the walls.

On *Monetary Gold*, the exhaustion of local remedies, and applicable law, there would be a good deal to say in response to our friends' arguments, had there been time. I do not have time and, therefore, will limit myself to only a few observations.

[4] ITLOS/PV.25/C32/5/Rev.1, page 24, lines 4-7.

On *Monetary Gold*, Equatorial Guinea's case is that the principle is applicable to the Marshall Islands' claims regarding freedom of navigation and exclusivity of flag State jurisdiction because "it was Nigeria that made the request".[5] We are back to the WhatsApp message, the seizure of the ship on the basis of a WhatsApp message. The Marshall Islands does not dispute that Nigeria made a request, but we are still waiting to hear what rights and responsibilities of Nigeria must be determined in these proceedings. The reality is that there is nothing in this case that requires you to address and assess the lawfulness or otherwise of Nigeria's conduct.

Mr President, Members of the Chamber, the Marshall Islands makes no submission in this case that Nigeria was not entitled to request the cooperation of Equatorial Guinea to assist in its enquiries. We make no submissions in this case on whether the concerns that led to that request for assistance were well founded. We make no submissions in this case on whether the events from the 11 November 2022 to the 27 May 2023, when the "*Heroic Idun*" and the crew were in Nigeria's jurisdiction and under its control, had a lawful basis. We make no submissions on this. We make no claim in these proceedings for any loss, damage or injury that might have been caused by Nigeria. Indeed, the Marshall Islands makes no claim whatever in these proceedings about the lawfulness or otherwise of Nigeria's conduct in the period 7 August 2022 to 27 May 2023.

The focus of this case is Equatorial Guinea's conduct in giving effect to Nigeria's request and in undertaking it own sovereign conduct in the period 12 August to 11 November 2022. Nothing more.

If one State requests the assistance of another in the apprehension of a suspect and the extradition of that suspect upon apprehension to stand trial, that request is a matter of fact. The responsibility of the State whose assistance is requested is not engaged by the mere receipt of the request – whether it is received by WhatsApp or through Interpol. If, however, the State whose assistance is requested thereafter proceeds to apprehend the suspect, without addressing its own mind to the issues, to haul him into custody, in violation of the most basic due process safeguards, to take away his passport, to deprive him of his liberty, to refuse him a lawyer in the course of an interview on a compelled signature of a statement, to mistreat him, to detain him for 92 days, and then to render him through an extrajudicial process to the requesting State, that State cannot say, when called to account for its conduct, that it was simply following orders. Equatorial Guinea, from the moment it received the WhatsApp request, had a choice to make in the exercise of its own sovereign conduct, both in the manner in which it responded to Nigeria's request and in its choice of whether to inform and engage with the Marshall Islands. Equatorial Guinea chose to act as it did.

An assessment of the lawfulness and the responsibility of Equatorial Guinea from 10 August to 11 November does not in any shape or form require adjudication of any rights or responsibilities of Nigeria. Counsel for Equatorial Guinea, using a much-recited metaphor deployed by a departed giant of international law, said that these proceedings without Nigeria would be like the sound of one hand clapping. Not so. Not all callings to account require an orchestra, or even an ensemble, or even a duo. When the bell tolls, it can quite properly toll for Equatorial Guinea alone. It is Equatorial Guinea's conduct that is in issue in these proceedings, not Nigeria's.

Mr President, Members of the Chamber, had Equatorial Guinea, on receipt of that WhatsApp message on 10 August, reached out to the Marshall Islands, as flag State, in fulfilment of its duty to cooperate – assuming its piracy case, *quod non* – had they reached out in those 60 hours that were available for calm reflection, we would not be here. The Marshall

[5] ITLOS/PV.25/C32/7, page 21, line 40.

Islands is a responsible maritime State with a highly professional and skilled Registry. It would have bent over backwards to address and resolve any issues of concern with Equatorial Guinea.

Had Equatorial Guinea, in exercise of reasonable grounds for suspecting piracy – *quod non*, again – had they taken the steps that would have been available to it under UNCLOS to visit and investigate, we would not be here. Had Equatorial Guinea disembarked the crew under caution, or even under arrest, respecting their due process rights, and pursued enquiries with lawyers present, we would not be here. Had Equatorial Guinea required that the other interviews of the crew been conducted with proper regard for their due process rights, we would not be here. Had Equatorial Guinea completed its inquiries in due time, without prolonged detention of the crew, and then released the vessel and the crew, we would not be here. Had Equatorial Guinea not rendered the vessel and the crew to Nigeria through an extrajudicial process and in the face of Prompt Release proceedings, we would not be here. Equatorial Guinea is in this courtroom, before this Special Chamber, to account for its conduct and for its conduct alone.

Mr President, Members of the Chamber, I make one further point on the *Monetary Gold* argument, addressed to Equatorial Guinea's invocation of the "*Norstar*" judgment to support its case. Equatorial Guinea is much attracted to counterfactuals. The problem, though, with counterfactuals is that they are speculation and they are open to counter-counter hypotheses – such as in the case of the mooted return of the "*Heroic Idun*" to the Akpo Terminal on 17 August to load its nominated cargo. Absent the 92 days, on the counter-counterfactual of engagement with the Marshall Islands, who knows how things might have played out.

So too with "*Norstar*". The Tribunal rejected the *Monetary Gold* argument raised by Italy. Had, however, Spain detained the "*Norstar*" egregiously and in breach of the law, and Panama proceeded against Spain, Spain would not have been able to play a get-out-of-jail-free card by reference to Italy's request. With sovereign decision-making comes sovereign responsibility. Equatorial Guinea must be held to account for its own sovereign conduct.

I have time for only the briefest of observations on Equatorial Guinea's arguments on the exhaustion of local remedies, with no disrespect to my friends for their submissions on this point.

Mindful of the importance of the wider relationship between the Marshall Islands and Equatorial Guinea that goes beyond this case, the Marshall Islands, with careful thought and consideration, refrained from making a full-throated futility argument – conscious also of the hesitation expressed in the "*Virginia G*" joint dissenting opinion about the challenges of passing comment on a State's very system of legal protection. We hold back, even now, in the face of the submissions made last week, from making a full-throated case on futility. But, Mr President, Members of the Chamber, this diplomatic restraint in holding back on making this argument should not be mistaken for an implicit acceptance that, in the circumstances of this case, there were available local remedies to exhaust. The erudite submissions of Counsel for Equatorial Guinea notwithstanding, there were none. Indeed, as a footnoted reference in my submissions to the contemporaneous Human Rights Practices report by the U.S. Department of State makes plain, there were (and remain) elevated, highly elevated, concerns about prolonged detention without charges, about mistreatment in detention, about the denial of fair trials, and more, in Equatorial Guinea.[6]

Mr President, Members of the Chamber, there are three points that we do rest on in these proceedings. The first is that there was no requirement to exhaust local remedies in this case – relying on the preponderant test that has been much addressed. In the interests of time, I say nothing more on this element.

[6] https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/equatorial-guinea/

The second point is to recall the facts of this case – denial of the right to legal representation during prolonged interviews conducted in the police station; prolonged detention; Equatorial Guinea's facilitation of interviews by third parties without due process rights; the splitting up of the crew and concerns about provocation in the face of vulnerability; and more. Playing basketball with the guards, just like prisoner-of-war internment, does not suggest a benign environment, conducive to a *habeas corpus* application that is free from very serious risk of retribution.

My third point is simply to observe that we heard nothing from Counsel opposite in response to the *"SAIGA" (No. 2)* judgment, and that from Judge Wolfrum in his separate opinion, which I referenced in my submissions on Monday,[7] that for exhaustion of local remedies even to be in issue there must be a valid and a lawful jurisdictional nexus between the natural and juridical persons and the State whose local remedies are said to require exhaustion. There is none. There is no case to be made on this.

Mr President, Members of the Chamber, with the slide still on the screen from the Tribunal's *"SAIGA" (No. 2)* judgment, we've got paragraph 100, and I think there are two further pages which address both the exhaustion of local remedies and the nationality elements of the "*SAIGA*" judgment, but go to the very *raison d'être* of ITLOS dispute settlement and the notion of the unit of the ship.

With the slide still on the screen from the *"SAIGA"* judgment, the very first case that came to ITLOS, I make an observation that goes both to jurisdiction and applicable law, as well as to the interpretation and application of the substantive provisions of UNCLOS. It is no part of the Marshall Islands' case to seek to prise open jurisdiction or to enlarge the applicable law, no matter what our friends opposite say. We do not come before you with either litigious fervour or an inclination to use legal proceedings as a substitute for legislative consent. But we also come before you with a sense that Equatorial Guinea's case wishes to take you backwards, before "*SAIGA*", to a place that would limit jurisdiction and applicable law at every turn, would construe a State's right to unchecked conduct as widely as possible, and would limit the reach and application of constraints on conduct found in UNCLOS as extensively as possible. I concluded our first-round submissions with the observation that this is a portentous case – it has the potential to look to the future, but it also has the potential to go back to the past. Your wise judgment will be required.

Mr President, Members of the Chamber, before I conclude, I would like to briefly put on the screen and anticipate our revised Final Submissions that our Agent will read out at the end of the case this morning; the slide is there. It will, in large measure, be familiar to you. We have reformulated some of the language, but all of the key claims are there. We have, though, made some material changes, to narrow our claims on some issues, to enlarge them on others, and to refine them and crystallize the points of dispute where this is warranted. This is the purpose of the requirement in Article 75(2) of your Rules, that the Agent read the Final Submissions at the close of the hearing, to enable the request for relief to be sharpened as the arguments between the Parties hone the debate.

On the revisions, I highlight for your attention at this point just three. No doubt, we will hear much of this tomorrow from our colleagues.

As you will see at paragraph 5, which is now on the screen, we have added a number of requests for relief that go directly to Equatorial Guinea's contentions on piracy. We consider its case to be both disingenuous and unsustainable in fact and in law. And let me say that this can be no surprise. There can be no claim to ambush here. These are the very arguments that Equatorial Guinea advanced. We are simply calling them out and asking for a request for a relief for you to adjudge and declare.

[7] ITLOS/PV.25/C32/2, page 6, line 46 to page 7, line 17.

We then, at paragraph 6, we have crystallized our claims in respect of considerations of humanity and the IMO conventions more clearly, in the light of what we have heard from our friends, in both their Rejoinder and over the past days.

And then in paragraph 7, which Dr Casas will address more fully, we have materially revised our quantum claim to reflect the assessment of principle that I addressed in my closing submissions on Wednesday regarding the basis of which we consider we can properly claim in these proceedings and what should be removed. We have also broken down the quantum claim into its different phases, its different temporal phases, to make this more accessible and to facilitate your assessment of the various elements of the quantum claim. Dr Casas will address this more fully in his submissions shortly, and I do not anticipate those.

Mr President, Members of the Chamber, as I conclude and ask you to invite Ms Grafton to the podium, I note two procedural points. The first is that, as you deliberate, if there are issues of law or of evidence on which you consider that further submissions of the Parties would be appropriate, there is scope in your Rules to request such further submissions. The Marshall Islands would welcome any such inquiries.

Second, if, on remedies, you consider that it would be sensible to bifurcate this aspect of your assessment into a separate phase, because the quantification and the detailed review of invoices may be too difficult at this stage, or for any other reason, again, we would be entirely open to this.

Mr President, Members of the Chamber, with that said, that brings to a close my submissions in these proceedings over these eight days or so. I would like to thank you for your kind attention and I would like to invite you, Mr President, to call Ms Grafton to the podium to continue our submissions.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Sir Daniel for his statement, and I now give the floor to Ms Grafton to make her statement.

You have the floor.

STATEMENT OF MS GRAFTON
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/11/Rev.1, p. 11–14]

Mr President, Members of the Chamber, I will make my submissions in two parts: first, I will discuss the evidence before you; second, I will very briefly touch on considerations of humanity and human rights.

First, as to the evidence before you, I would like to discuss the documentary record and the witness evidence.

So, first, the documentary record. You have an undated WhatsApp on which the piracy defence rests, and you have note verbales from Nigeria to Equatorial Guinea. My colleagues will discuss this evidence shortly.

But what documents do you have on the record for the 92 days in question from the Equatoguinean Government? You have five. You have five documents on the record: you have the fine[1] – but it was, in fact, the Marshall Islands who first annexed this document; you have two innocuous note verbales that Equatorial Guinea sent to Nigeria;[2] you have the customs report that was prepared when the vessel arrived at Luba Bay, which says that there were no customs violations;[3] and you have a document which is said to hand over the vessel to Nigeria on 11 November.[4] That is it: five documents.

You do not have any document to show the basis on which Equatorial Guinea detained the crew and the "*Heroic Idun*". You do not have any of the alleged "security protocols".[5] You do not have any document from the crew interviews – none of the Spanish statements the crew had to sign, none of the contemporaneous notes of the officials. You do not have any government correspondence discussing the release (or not) of the vessel. You do not have any correspondence between Besora and the Equatoguinean Government. What you have is five documents.

What is even more stark is that the lack of documentary evidence regarding the "*Heroic Idun*" sits at odds with other evidence provided by Equatorial Guinea in this case. In particular, Equatorial Guinea annexed two letters that Colonel Esono sent in 2021 to the Ministry of Defence regarding the *"Sea Phantom"* incident.[6] But there are no letters from Captain Esono or anyone else regarding the *"Heroic Idun"* incident. No notes, no emails, no messages – nothing.

We say that you can and should draw adverse inferences regarding this lack of evidence.

This brings me to the second issue of evidence: the credibility of witnesses.

On Monday and Tuesday, we heard from the Chief Officer and the Master. They were open and honest. They described in a balanced manner the interception of the vessel and the conditions of their detention in Equatorial Guinea, and they explained clearly and coherently the impacts of Equatorial Guinea's conduct.

I need to emphasize that at no point during the *in camera* cross-examination of either witness was it put to them that they had lied in any of their dealings with the authorities. But at the public hearing last week, after the Master was back in India and watching these proceedings from home, you were told by Counsel for Equatorial Guinea that Mr Mehta had "told ... something that was untrue" on 8 August 2022. This is wrong. And although the substance of

[1] REG-039.
[2] REG-047, REG-050.
[3] REG-037.
[4] REG-050, addendum at REG-011.
[5] Nchama-1, para. 22 (REG-WS-001); Nchama-2, para. 14 (REG-WS-007).
[6] REG-005, REG-006.

the point is not relevant, it is important to correct the point now because the Captain was not afforded the opportunity to do so.

In short, Counsel for Equatorial Guinea told you:

> [T]he Master admitted twice that he told the Nigerian Navy that the next port of call was Ceiba, Equatorial Guinea. Yet, he confirmed that, in fact, the real destination was still Nigeria. The Master, therefore, told the Nigerian Navy something that was untrue. Why would he do that?

The answer to Counsel's question is that he did not do that. The exchange referred to is on the screen on the right. You will see at the top, the Navy asked the Master, "confirm your next port of call from this place" – that is, from Akpo. To which the Master replied, "After finishing, the next port of call is Ceiba, Equatorial Guinea". And the Master's response of course corresponds with the voyage orders of the vessel, which you can find at Annex MT/-10. I hope that the record is now clear.

Then, on Thursday, we heard from Colonel Esono and Mr Hernández. As to Colonel Esono, I highlight four points.

First, in examination, Counsel for Equatorial Guinea asked Colonel Esono why he was "immediately concerned that the *"Heroic Idun"* could be involved in piracy". He gave two reasons: first, the WhatsApp message received from Nigeria – and my colleague, Mr Busco, will address this – and, second, the way that the *"Heroic Idun"* reacted when it was first contacted by the *"Capitan David"*.[7] I will not read what Colonel Esono said into the record to respect the *in camera* proceedings, but I have included it in a hard copy on your slides.

On the slide, below his explanation which we all have on the screen, you will see a copy of the VDR transcript which sets out what, in fact, occurred. It is entirely at odd with Colonel Esono's narrative.

Second, you will also recall that, in cross-examination, Colonel Esono was shown his signatures on various documents. He then, to borrow a phrase used this week, tied himself into a pretzel. Again, I will not read out the exchanges, to respect the *in camera* proceedings, but, to put it lightly, his answers and his logic are difficult to follow.[8]

Third, despite referring to the millions of tricks and strategies of pirates, Colonel Esono refused to accept – less than 10 seconds later – that pirates could pretend to be naval forces, no doubt because he knew it might harm Equatorial Guinea's case.[9]

Fourth, Colonel Esono could not recall that he had said in his statements that a team of lawyers from Equatorial Guinea had assisted him nor could he recall who those lawyers were.[10]

In our submissions, such shifting, partisan answers should give you pause.

Turning then to Mr Hernández, his undated report to an unnamed and unknown person provided at an unknown time says it all. Ms Nevill displayed for the Chamber, and I display again, the discrepancies between the contemporaneous reports that Mr Hernández sent to the owners through BUDD, and the edited report that Mr Hernández sent to the Equatoguinean authorities. The changes – which seek to absolve Equatorial Guinea of any wrongdoing – are obvious to anyone reading the documents. Mr Hernández's evidence in these proceedings must be considered in light of this conduct.

For these reasons, we say that the evidence of Equatorial Guinea, both documentary and witness, must be approached with extreme caution.

[7] ITLOS/PV.25/C32/6, p. 12, lines 20-29.
[8] ITLOS/PV.25/C32/6, pp. 13-15.
[9] ITLOS/PV.25/C32/6, pp. 19-20.
[10] ITLOS/PV.25/C32/6, p. 14, line 31 to p. 15, line 5.

This brings me to the second part of my submissions on considerations of humanity and human rights. In light of the time, I will take this swiftly.

As regards considerations of humanity, Equatorial Guinea continues to try and paint the picture of the detention in a positive light. This narrative is divorced from reality.

I encourage you to do two things when evaluating the evidence.

First, look at what the Marshall Islands and its witnesses actually say about the conditions of detention, not what Equatorial Guinea says we say: the two often bear no resemblance.

Second, pay attention to what Equatorial Guinea doesn’t say. For example, in his lengthy submissions on considerations of humanity, Counsel for Equatorial Guinea did not mention – not once – the undisputed fact that the crew were denied access to lawyers in interviews, nor do the events of 4 to 11 November feature in Equatorial Guinea’s narrative. Instead, we hear a lot about the Hotel Anda. To assist in this exercise, in this respect and more generally, we have put together in your slides, and we’ll briefly put them on the screen, a list of demonstrably incorrect facts asserted by Equatorial Guinea in the oral proceedings. They are on the slides and in your hard copy.

As regards human rights, we addressed in our oral submissions whether the law is applicable *ratione loci* and the territorial scope of the human rights claims in our oral submissions on Tuesday, and this is what Equatorial Guinea subsequently addressed. For that reason, I don’t propose to repeat them again today, but I instead refer you to our submissions and you have the transcript references.[11]

Mr President, the Chamber, that concludes my submissions on behalf of the Marshall Islands, and I thank you for your kind attention.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Ms Grafton and I now invite Dr Busco to make his statement.

You have the floor, Sir.

[11] ITLOS/PV.25/C32/4, p. 20, lines 8-43; p. 19, lines 26-34.

STATEMENT OF MR BUSCO
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/11/Rev.1, p. 14–21]

Mr President, Members of the Special Chamber, I will address two issues: first, Equatorial Guinea's reliance on piracy to seek to justify the apprehension of the *"Heroic Idun"*; and, second, Equatorial Guinea's unlawful exercise of prescriptive jurisdiction, resulting, *inter alia*, in criminal charges and the imposition of a fine in excess of €2 million.

This conduct by Equatorial Guinea gives rise to two independent breaches of UNCLOS. I will turn to this point later. For now, I note that the conclusion in respect of both conducts is the same: Equatorial Guinea violated freedom of navigation and exclusive flag State jurisdiction of the Marshall Islands.

Before I start, I would like to make a preliminary observation. Counsel for Equatorial Guinea has said that the Marshall Islands is trying to change the "subject matter" of this case,[1] turning it into one concerning the right of visitation under Article 110.

Not at all. This is a case about the interdiction of the *"Heroic Idun"* in breach of freedom of navigation and exclusive flag State jurisdiction. Equatorial Guinea owes these obligations to the Marshall Islands and it does not owe them any less because Nigeria requested the apprehension of the vessel. As a matter of your jurisdiction under *Monetary Gold*, it is these obligations, owed by Equatorial Guinea to the Marshall Islands, that the Chamber is called upon to adjudicate. As a matter of merits, Equatorial Guinea's piracy defence provides no exception to these obligations.

Let me start with piracy.

In "*A Scandal in Bohemia*", Sherlock Holmes warns that "twist[ing] facts to suit theories, instead of theories to suit facts" is complicated, and it is very apt to quote this sentence in these proceedings.

We have heard many theories from Counsel for Equatorial Guinea, attempting to retrofit into the contemporaneous record a suspicion of piracy concerning the *"Heroic Idun"* that simply never existed. But constructing a narrative *ex post facto* is a dangerous exercise – the contemporaneous truth always seeps through the cracks of such experiments.

Let me start with just a few examples of Equatorial Guinea's twisting of facts to suit its piracy theories.

Captain Esono said in his oral submissions that he received (...) messages in which the Nigerian authorities were requesting the detaining of the *"Heroic Idun"* under suspicion of involvement of piracy. I refer you to the transcripts for his exact words.[2] But I would like to take the Chamber again through the WhatsApp messages here on your screen. Nowhere – nowhere – in these messages does Nigeria request to detain the vessel, or alleges that the *"Heroic Idun"* was involved in piracy.

Captain Esono also claimed that, when approached by the *"Capitan David"* on 12 August 2022, the *"Heroic Idun"* increased her speed and attempted to flee. He emphasized that this conduct corroborated the suspicion of piracy and is what justified the apprehension of the vessel.[3] Counsel for Equatorial Guinea, on his part, stressed that the *"Capitan David"* had to request not once, not twice, but three times that the *"Heroic Idun"* stop her engines,[4] attempting, evidently, to corroborate this "grand escape" theory.

Now, let's look again at the evidence. The first request to stop the engines came at 12:37:09, the second at 12:37:27, and the third at 12:37:59. Three requests, all within

[1] ITLOS/PV.25/C32/7, p. 24, lines 6-9.
[2] ITLOS/PV.25/C32/6, p. 12, lines 15-18.
[3] ITLOS/PV.25/C32/6, p. 12, lines 30-36.
[4] ITLOS/PV.25/C32/7, p. 4, lines 9-10.

50 seconds. *"Capitan David"* was not reacting to any sudden acceleration or attempt to flee; it would have been impossible to meaningfully, and especially visibly, increase the speed in 50 seconds. *"Capitan David"* was simply repeating the same instruction three times.

But what is even more remarkable, Captain Esono's attempt to retrofit piracy into this neutral repetition of instructions collapses in the face of the truth, and the truth is that the *"Heroic Idun"*'s speed was in fact decreasing, not increasing, through these exchanges.

Let's look at this video recording from the deck.[5] *(Audio recording played)*

If you look in the bottom left-hand corner, you can see RPM – these are revolutions per minute – and that is the engine coming down: 8.9 knots, 8.8 knots.

We can continue the video. *(Audio recording continued to be played)*

Mr President, Members of the Special Chamber, you will have an opportunity to, of course, review this video carefully during your deliberations. The point is that a ship does not escape by decreasing its speed.

Let's continue. Counsel for Equatorial Guinea told us that large tankers comparable in size to the *"Heroic Idun"* have been used as mother ships in the past. And that Equatorial Guinea was therefore justified in suspecting the same for the *"Heroic Idun"*.[6] Except that those large, very large, crude carriers were not tankers used by their crews as mother ships to facilitate pirates. They were, instead, tankers hijacked by pirates – vessels that had sent distress calls and had to be ransomed from those who seized them. And I note that Equatorial Guinea has never suggested that the *"Heroic Idun"* was hijacked by pirates.

Mr President, Members of the Special Chamber, Counsel for Equatorial Guinea has theorized a lot, but has engaged remarkably little with the contemporaneous record. The only contemporaneous evidence addressed by Equatorial Guinea is the first WhatsApp message at 14:48 p.m. on 10 August referring to an "illegal fuel supply operation". Counsel suggested that such an operation could be linked to piracy, citing the purported connection between oil theft and bunkering and piracy, and saying that Article 101(c) of UNCLOS includes acts of intentionally assisting pirates.[7]

The "illegal fuel supply operation" mentioned in the WhatsApp message is the alleged illegal loading of crude oil by the *"Heroic Idun"* itself – it is not the bunkering of some other ship. And, indeed, there is no reference to any distinct illegal oil supply operation in Nigeria's note verbale of 10 August 2022, which is the only formal communication from Nigeria prior to the apprehension. In any case, the point is that illegal oil bunkering is not piracy. It is precisely that – illegal oil bunkering. The Yaoundé Code itself draws this distinction, and Ms Nevill has shown you the other day.

Now, again, let's look more at the evidence that Equatorial Guinea has not engaged with.

We have on record, and you can see it on screen, a note verbale of 12 September 2022 from Nigeria to Equatorial Guinea.[8] This is a three-page document. It sets out, with granularity, the grounds on which Nigeria was allegedly pursuing the *"Heroic Idun*." It quotes in this regard Articles 56 and 60 of UNCLOS. Nowhere does it allege that the *"Heroic Idun"* was suspected of piracy. And one would expect allegations of piracy, including in the form of a reference to Article 100, or perhaps 101 of UNCLOS, to appear in a note verbale of this detail, if piracy were truly the issue.

Mr President, Members of the Special Chamber, as you have heard from Sir Daniel and Ms Grafton, this case is also about the evidence that does not exist. Our questions the other day

[5] MT – 35.
[6] ITLOS/PV.25/C32/8, p. 19, lines 9-20.
[7] ITLOS/PV.25/C32/8, p. 21, lines 1-4.
[8] REG – 021.

– that go to the concrete, contemporaneous data on which you need to decide this case – have remained unanswered.

If this were truly a piracy case, why was the first mention of allegations of piracy made three months after the *"Heroic Idun"*'s arrest, and in a tweet by the Vice-President of Equatorial Guinea, on the very same day the Marshall Islands initiated prompt release proceedings? And why is there not a single contemporaneous exchange between Nigeria and Equatorial Guinea mentioning piracy allegations or anti-piracy cooperation?

Let's dispel this piracy smokescreen once and for all. Equatorial Guinea apprehended the *"Heroic Idun"* on a precise understanding of what the WhatsApp messages and the note verbale of 10 August 2022 said – namely, that the vessel was suspected of having committed a crime in Nigeria. Not the crime of piracy. Just *a* crime.

Captain Esono believed that allegations of committing a crime – any crime – is sufficient basis for interdicting a vessel on the high seas and bringing her ashore for investigations. We told you during our first round of oral submission that the *"Heroic Idun"* was interdicted for an alleged crime "other than piracy";[9] and now the oral testimony of Captain Esono confirms this. I will not project his exact words on the screen, to respect the *in camera* nature of his examination, but you have what he said on the hard copy version of your slide and I would like that you take a few seconds to read it because this is really important.

Mr President, Members of the Special Chamber, you have read his words. It is disquieting if this is Equatorial Guinea's understanding of UNCLOS – that it can interdict a vessel on the high seas based on a suspicion of any crime, and then think that it was right to do so if that crime – not piracy – is purportedly established.

Mr President, Members of the Special Chamber, if, after hearing such statements from Captain Esono, you were to uphold a piracy defence for which there is not a shred of concrete contemporaneous evidence, any country subscribing to Equatorial Guinea's distorted interpretation of UNCLOS would have *carte blanche* to interdict vessels at will. All it would need to do is concoct a piracy narrative afterwards.

This is easy. Let me have a go at it. Any fishing vessels could be interdicted on the high seas upon request of another State because, I mean, after all, there is an evident connection between fishing and piracy. Pirates often use fishing vessels as mother ships – this is a fact – and sometimes they even disguise themselves as fishermen.

Mr President, Members of the Special Chamber, Equatorial Guinea also claims that it could rely entirely on Nigeria's intelligence and had no duty to conduct its own assessment. Not even *prima facie*. That is wrong, especially when the supposed intelligence was a WhatsApp message, and what stood on the other side of that WhatsApp message was a 336-metre foreign-flagged vessel with a crew of 26 people, exercising cardinal UNCLOS rights on the high seas. In any event, as we have seen, Nigeria's WhatsApp contained no suggestion that the *"Heroic Idun"* was engaged in piracy.

But even if someone in Equatorial Guinea read Nigeria's record as implying somehow piracy, any such suspicion, based on an objective interpretation, was not a suspicion on "reasonable grounds". The standard is not what Captain Esono thought. This is not how reasonableness is assessed in law. And even if the Chamber were to conclude that the suspicion was actually reasonable, this would still not have justified the seizure of the *"Heroic Idun"*.

Counsel for Equatorial Guinea is wrong claiming that "all that the Convention requires under Article 105 are reasonable grounds to suspect piracy for interception to take place".[10] The reasonable-grounds-to-suspect test engages Article 110, not Article 105.

[9] ITLOS/PV.25/C32/3, p.14, lines 32-33.
[10] ITLOS/PV.25/C32/8, p. 20, lines 12-13.

This brings me to the second part of my submissions on piracy: namely, what Equatorial Guinea should have done – but did not do – during the 60 hours between receiving the WhatsApp messages and approaching the *"Heroic Idun"*. I emphasize: this is not just a matter of what was reasonable to do, but of what UNCLOS required to be done in the circumstances, if there was a suspicion of piracy.

Now, first, Equatorial Guinea should have boarded the "*Heroic Idun*," as we have said, and investigated any piracy suspicion under Article 110.

Counsel for Equatorial Guinea said that deciding whether to board a vessel is "contextual".[11] He accepts that prior boarding of a vessel is natural in many cases, but that it would be unreasonable in certain cases, such as when "pirates on board a ship have significant weapons".[12] What contextual necessity prevented Equatorial Guinea from boarding the vessel in this case? The claim that *"Heroic Idun"* was attempting to flee is, as we have seen, false.

It was then suggested that boarding was "impractical"[13] or difficult. This, too, is an *ex post facto* theory. At 13:47, "*Capitan David"* told "*Heroic Idun*," "[n]ow we have orders to escort the ship to Malabo". Any discussion of potentially boarding the vessel took place only after the order to proceed to Malabo, at 14:34. You see here the various references to a boat potentially being used for boarding. So the decision to apprehend had nothing to do with difficulty or impracticality in boarding. Quite simply, the orders from Malabo were to apprehend, not to board.

Second, Equatorial Guinea should have engaged with the Marshall Islands on any piracy suspicion in respect of the "*Heroic Idun*." You have heard this from Sir Daniel. This was owed to the Marshall Islands under Article 100 of the Convention.

Anti-piracy cooperation applies to all parties of UNCLOS, not just between Equatorial Guinea and Nigeria. This duty was also owed to the Marshall Islands under Article 103 and 105 of UNCLOS. This is because Article 105 limits seizure to pirate vessels, not vessels vaguely suspected of piracy on the basis of some strained interpretation.

Article 103 describes pirate vessels as vessels "intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101".

Equatorial Guinea did not, in the 60 hours that they had available to do so, seek to establish with the Marshall Islands, as the flag State, if the persons in dominant control of the *"Heroic Idun"* were somehow engaged in piracy.

To conclude on this aspect, I give you the summary of our position on piracy: (a) on the evidence, there was nothing warranting an anti-piracy operation; (b) if there was a reasonable suspicion of piracy, in the circumstances of this case, the vessel should not have been seized; and (c), in any case, under Article 106, Equatorial Guinea has to compensate the Marshall Islands because the seizure was ultimately without adequate grounds.

Mr President, Members of the Special Chamber, I now turn to Equatorial Guinea's unlawful exercise of prescriptive jurisdiction.

Just as in its Rejoinder, Equatorial Guinea did not say anything at all to address the arguments of the Marshall Islands. All that we have heard from Counsel for Equatorial Guinea is that the CEMAC Code is important.[14]

I will therefore confine myself to one preliminary observation and then draw your attention to two points concerning where prescriptive jurisdiction fits within the structure of our submissions and of your deliberations.

[11] ITLOS/PV.25/C32/8, p. 24, line 32.
[12] ITLOS/PV.25/C32/8, p. 24, lines 20-23.
[13] ITLOS/PV.25/C32/7, p. 4, line 38.
[14] ITLOS/PV.25/C32/9, p. 13-14.

The preliminary consideration is as follows. Equatorial Guinea claims that it interdicted the *"Heroic Idun"* upon Nigeria's request.[15] But it does not dispute that it then conducted its own investigations for alleged breaches of its own laws, detained the vessel and crew during those investigations, and ultimately fined the *"Heroic Idun"* and the Master for breaches of its own laws.

Now, I turn to my two points.

The first point is that tribunals constituted under UNCLOS have the authority to determine "whether, in enacting or implementing its laws, a State Party has acted in conformity with the Convention".[16] Accordingly, you may either declare that the laws invoked by Equatorial Guinea are themselves contrary to UNCLOS – making all the measures adopted under them, including the fine, the investigations, the detention, the charges – unlawful; or you can find that those laws were implemented by Equatorial Guinea in a manner contrary to UNCLOS. In that case, your ruling would concern only the measures, not the laws themselves. The Marshall Islands would be content with this latter approach, which is precisely what ITLOS did in "*SAIGA" (No. 2)* and in "*Norstar"*.

My second point is that the breach concerning prescriptive jurisdiction is an additional, separate ground on which the Marshall Islands contends that Equatorial Guinea violated freedom of navigation and exclusive flag State jurisdiction. This is a ground that is independent of, and entirely unaffected by, the answer that you give to the question of whether the interdiction of the *"Heroic Idun"* was lawful. Even if you were to find that the *"Heroic Idun"* was lawfully brought into Luba, Equatorial Guinea still exercised prescriptive jurisdiction unlawfully.

"Norstar" is authority for this. In that case, Italy neither arrested the vessel on the high seas nor requested Spain to do so. The vessel was, in fact, lawfully in the port of Palma de Mallorca, having entered the port voluntarily. Yet, Italy was found to have breached Article 87 by targeting, through its domestic laws, activities of the "*Norstar"* on the high seas, and then by detaining and sanctioning the vessel and its crew on the basis of those laws. The activity in question in "*Norstar"* was bunkering.

Here, the activity targeted by Equatorial Guinea is navigation of the "*Heroic Idun*", the quintessential law of the sea freedom. So, by investigating, detaining, criminally charging, and fining the Master for alleged breaches of Equatoguinean legislation that targeted the navigation of the *"Heroic Idun"* in Equatorial Guinea's EEZ, Equatorial Guinea breached, independently, Articles 87, 89 and 92 of UNCLOS. It did so for the entire period during which it exercised jurisdiction over the vessel – the 92 days you have heard about. To the point that even the handover document to Nigeria refers to violations in the EEZ of Equatorial Guinea committed, allegedly, by the *"Heroic Idun"*.[17] The Marshall Islands is entitled to damages accordingly.

These include not only recovery of the fine, but all consequential damages that stemmed from the unlawful detention, investigations and charging.

Thank you, Mr President and Members of the Chamber, this concludes my presentation.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Dr Busco for his statement.

I believe this is an appropriate time for the Special Chamber to withdraw for 30 minutes, a 30-minute break. So the hearing will resume at 11:50. That is 10 minutes to 12:00. The hearing will resume. Thank you.

(Adjourned at 11.18 a.m. to 11.50 a.m.)

[15] ITLOS/PV.25/C32/9, p. 13, lines 11-16.
[16] *M/V "Virginia G" (Panama* v. *Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014,* at para. 227
[17] REG – 050.

THE PRESIDENT OF THE SPECIAL CHAMBER: I now invite Ms Nevill to make a statement.

STATEMENT OF MS NEVILL
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/11/Rev.1, p. 21–25]

Mr President, Members of the Special Chamber, I will address you on the Marshall Islands' claim concerning Article 225, the IMO treaties and notification of the flag State, including on the jurisdictional and applicable law aspects of these claims.

What underpins all of these claims is safety of life at sea, preservation of the marine environment, and safeguards.

Two central and related facts underpin both the Article 225 and IMO treaties claims: Equatorial Guinea detained the vessel for over three months in an unsuitable location for a VLCC of its dimensions and caused the vessel to be unsafely manned.

Article 225 is in section 7 of Part XII of the Convention, under the heading "Safeguards".

If you underman a large VLCC carrying bunkers so that it cannot avoid collisions or accidents and detain it in a busy anchorage unsuitable for the vessel, you endanger the safety of navigation and expose the marine environment to a serious threat. That is obvious.

Equatorial Guinea tries to avoid this by saying that this is a tricky legal argument.[1] To the contrary, it is quite simple. How do we assess whether unsafe manning goes to a breach of Article 225? Principles of treaty interpretation take us to two points of reference. The context of the provision, which the VCLT tells us is other provisions of the treaty, that is, Article 94 and Article 217, and any relevant rules of international law applicable in the relations between the parties. Both take us to the safe manning regime under the IMO treaties. For the purposes of Article 225, we don't need to say whether the IMO treaties impose obligations on the port State (although we say they do): we simply need to know what their safe manning requirements are, and the safe manning requirements of this vessel. Instead of plucking this out of thin air, we go to the law where this is set out.

Equatorial Guinea also says that no concerns were raised with the Equatoguinean authorities regarding the safety of the vessel during its stay in Luba Bay.[2] This is not true. The evidence references are on the slides, displayed by Ms Grafton earlier.

In this, as in many of its other arguments, Equatorial Guinea seeks to simply wash its hands of responsibility for its actions.

Turning now to the IMO treaties claim. I will first address Equatorial Guinea's central contention that the safe manning provisions of SOLAS, the STCW and COLREGS, together with the first article of each of these treaties, "cannot form the basis of claims against coastal or port States" because they impose obligations only on flag States.[3]

Essentially, Equatorial Guinea is saying that, as a party to SOLAS, the STCW and the COLREGS, it has no obligations to ensure that a vessel detained by it for over three months is safely manned, because, it says, these obligations fall on the flag State, even though it was undermanned because of Equatorial Guinea's actions.

This is yet another instance of Equatorial Guinea attempting to wash its hands of responsibility.

Turning to the detail of its submissions, Equatorial Guinea says that the Marshall Islands' submission is "that the general obligation" in Articles 1 of SOLAS, the STCW and the COLREGS "may be violated without reference to the specific provisions" of those treaties and that this is not a correct interpretation.[4]

[1] Rejoinder, paras. 231, 237.
[2] ITLOS/PV.25/C32/9, p. 2, lines 2-4.
[3] ITLOS/PV.25/C32/9, p. 24, lines 36-37.
[4] ITLOS/PV.25/C32/9, p. 25, lines 13-14, 21-24.

The Marshall Islands' submissions are, and always have been, tethered to the safe manning obligations. True, those provisions impose obligations on the flag State. The Marshall Islands has never said otherwise.

But the Marshall Islands does not accept that these treaties, properly interpreted in accordance with the rules of treaty law, are incapable of addressing the situation where it is the port or coastal State party which is responsible for the unsafe manning. Article 1(b) of SOLAS, Article I(2) of the STCW, and Article 1 of the COLREGS mean what they say: State Parties are required to take all necessary steps to give effect to the provisions of these treaties. Removing crew from the vessel below its safe manning requirements and refusing repeated safe manning requests is the opposite of that: it is actively preventing implementation.

The scenario where a State party to a treaty is prevented from meeting its obligations under that treaty by another State party to that treaty is not unknown. Other international courts and tribunals have had to grapple with it. For example, in *Ilaşçu v Moldova*, the European Court of Human Rights had to address the situation where Moldova was unable to meet its obligations under the Convention because Russia had control over its territory, and it held that both parties had obligations.[5] The Court there was addressing the concept of "jurisdiction" under the Article 1 of the European Convention, but the underlying reasoning resonates here. When a State Party has detained a vessel under its custody and control, the prevention of the flag State's compliance with its safe manning obligations engages the former State Party's liability under SOLAS, the STCW and the COLREGS.

If you are not with us that State Parties' obligations under those treaties include an obligation not to actively prevent the safe manning of a vessel, the Marshall Islands refers to Equatorial Guinea's obligation under Article 87(2) to have due regard for the interests of the Marshall Islands as flag State in meeting its safe manning obligations under Articles 94 and 217 of the Convention, and its interest in maintaining implementation of the safe manning regime. Equatorial Guinea is also obliged by Article 2(3) to exercise sovereignty in the territorial sea subject to the Convention and other rules of international law.

I turn now to Equatorial Guinea's oral submissions on Article 297(1)(c) as the basis of the Chamber's jurisdiction over the IMO treaties,[6] and the gateway provisions in Articles 2, 56, 58 and 87 of the Convention.

Before doing so, I want to make one general observation. Equatorial Guinea does not address the careful arguments on applicable law and jurisdiction made by the Marshall Islands in its written pleadings in respect of each of the alleged breaches, but instead addresses each separate treaty article reference as if the Marshall Islands had argued it was a standalone basis of jurisdiction, applicable law or claim.[7] The Marshall Islands invites the Chamber to have careful regard to the Marshall Islands' written pleadings, where the bases on which it is invoking or relying on a specific treaty provision are set out.

On Article 297(1)(c), Equatorial Guinea "accepts that what the text of the Article allows for are determinations in relation to breaches of the external rules but in cases of disputes under UNCLOS."[8] There is here a dispute under UNCLOS over which the Chamber has jurisdiction under Article 288(1); therefore, Article 297(1)(c) allows determinations of breach by this Chamber by reference to external rules. This is what has been established in jurisprudence under the Convention, and Equatorial Guinea has not invited you to depart from it.

[5] *Ilaşçu and others v Moldova and Russia* (GC), Application no. 48787/99, judgment, 8 July 2004, paras. 314-315, 317.
[6] ITLOS/PV.25/C32/7, p. 15, lines 18-37.
[7] ITLOS/PV.25/C32/7, p. 19, line 33 to p. 20, line 41.
[8] ITLOS/PV.25/C32/7, p. 15, lines 35-37; ITLOS/PV.25/C32/9, p. 24, lines 20-24.

As to the gateway provisions, which are also referred to as the rules of reference in the jurisprudence of the Tribunal, Equatorial Guinea last week raised the spectre that the Marshall Islands' approach would bring in "any question of international law". That is not the case.

The Marshall Islands' approach lies squarely within the approach established by Part XV jurisprudence. Principles of humanity, seafarers' human rights and safe manning obligations are as quintessential to the territorial sea, EEZ and the high seas, as the fishing rights applied under Article 2(3) in the *South China Sea* and the *Chagos Marine Protected Area* arbitrations.[9] It may be a question of fact and degree in each case as to whether a particular rule of international law is an applicable rule for the purpose of a particular gateway provision, but in this case, based on the Part XV jurisprudence, we squarely fall within the scope of the provisions. Just as the claimants' fishing rights imposed limitations on the respondents' sovereignty in the territorial sea in *South China Sea* and the *Chagos Marine Protected Area* arbitrations, the rights of the flag State, seafarers' human rights, considerations of humanity, and the IMO treaties impose limitations on the exercise of enforcement powers against vessels in the high seas, EEZ and territorial sea.

They are also rights and interests of the flag State to which the other parties must have due regard under Articles 56(2) and 87(2).

As to Equatorial Guinea's attempt to dismiss the Marshall Islands' reliance on the gateway provisions by reference to "*Norstar*",[10] the Marshall Islands addressed this in its Memorial.[11] The basic point is that the rules of reference which are relevant in a particular instance – high seas rights, EEZ or the territorial sea – will turn on the legal basis relied on for the exercise or assertion of jurisdiction in issue.

I turn now to Equatorial Guinea's response to the Marshall Islands' notification claim.

Equatorial Guinea did not address the substance of our arguments concerning the existence of a customary obligation to notify the flag State of enforcement measures in several respects, and I say the same in respect of our arguments on a general principle.

In terms of what it did say on Saturday, Equatorial Guinea said, referring to the list of 25+ treaties and instruments containing notification provisions that we listed as evidencing the existence of the rule or principle, that these "are limited to notifications and provisions for notifications found in sectoral instruments",[12] and that "the Marshall Islands cannot extrapolate them to claim the existence of a rule ... which would apply across the board to all enforcement measures adopted by every State in all circumstances."[13]

We listed treaties and instruments regulating shipping, fisheries, maritime security instruments, consular obligations involving shipping, marine pollution and the exercise of jurisdiction in the territorial sea and maritime labour law.[14] It is difficult to understand what sectors Equatorial Guinea might have in mind that are not – and, it would follow from their argument, ought not to be – covered by an obligation to notify the flag State of enforcement measures, given the purpose and function of a notification obligation.

Equatorial Guinea then argues that "if States Parties to the Convention had intended to include a general obligation to notify flag States ... one might reasonably expect to have been expressly included" in its text.[15]

Judge Kittichaisaree grappled with this head-on in his declaration in "*Norstar*," referenced by the Marshall Islands in its pleadings. He raised the question as to whether

[9] ITLOS/PV.25/C32/7, p. 1, lines 4-7.
[10] ITLOS/PV.25/C32/7, p. 19, lines 16-21.
[11] Memorial, paras. 172-178.
[12] ITLOS/PV.25/C32/9, p. 15, lines 32-36.
[13] ITLOS/PV.25/C32/9, p. 15, lines 40-42.
[14] Maritime Labour Convention, Standard A 5.2.1.6.
[15] ITLOS/PV.25/C32/9, p. 16, lines 36-39.

“besides the obligations specifically imposed by Articles 27 and 73, paragraph 4, the State taking enforcement measures against a foreign vessel has a general obligation to promptly notify the flag State of the vessel” and he expressly and explicitly hoped that the Tribunal would have an opportunity to directly address this important issue “so that the balance between the rights and obligations of State parties” to UNCLOS “can be duly safeguarded”.[16]

We are not here inviting the Chamber to use Article 293 to create new obligations where none exist, as Equatorial Guinea alleges, but to apply a rule of international law not incompatible with the Convention which we say exists applying the rules for identification of an international rule or principle.

Equatorial Guinea’s arguments, in essence, amount to a rogue’s charter:[17] if I behave unlawfully without a legal basis of the Convention, I am subject to less restraints than if I act lawfully, because the drafters did not address when States act outside the law without a legal basis. This cannot be right.

We accept that the Convention may not impose an obligation to notify the flag State of the vessel of certain actions taken under Part VII to seize a pirate vessel. However, in the circumstances of this case, we say that there was an obligation to notify, as was explained by Dr Busco. We also say that the general obligation applied in respect of enforcement measures taken after the seizure.

If it were otherwise, that would mean that flag States have the right to be notified, and that vessels and crews are safeguarded, when vessels are detained for alleged fisheries or marine pollution violations, but not where the allegation is piracy. That is simply unprincipled.

Mr President, Members of the Special Chamber, that concludes my submissions before you. I now invite you to call on Dr Casas.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Ms Nevill for her statement, and I give the floor to Dr Casas.

You have the floor, sir.

[16] At paras. 20-24.

[17] ITLOS/PV.25/C32/9, p. 16, lines 38-39.

STATEMENT OF MR CASAS
COUNSEL OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/11/Rev.1, p. 25–33]

Mr President, Members of the Special Chamber, my presentation will be divided in three parts: the first two will deal with material damages; the third with non-material damages. For reasons of time, on the other issues I refer the Special Chamber to our written and oral submissions.

Last week you heard from Counsel to Equatorial Guinea that data without context is a dot. Last Saturday, you got a dot. So I would like to start by inviting the Chamber to step back and look, in context, at what's happened in these proceedings on this particular issue.

Step 1: The Marshall Islands made a claim in its Memorial for material damages.

Step 2: In its Counter-Memorial, Equatorial Guinea criticized the Marshall Islands for not providing supporting documents for its claim. Pausing there, for context, that criticism related to the smaller claims, the 14 per cent of the claims that I mentioned last week. It did not relate to the big ticket items: loss of hire, fine, and the plea bargain.

Step 3: In its Reply, the Marshall Islands provided documentary evidence to support those remaining claims. To clarify two points:

First, as we said on Wednesday, we have been thorough. Perhaps we have been too thorough. We have presented entire suites of the underlying documents. These include raw, unprocessed data that supports the Marshall Islands' claims. There are, in this raw batch, what we could call surplus documents. For instance, in some cases, because of how an invoice has been issued, it will cover many topics. We are, of those topics, perhaps only claiming for one or two, but the entire invoice is there. In other cases, an invoice is presented as part of a string of invoices. We are only relying on one, but we have presented the string because that was how they were stored in the vessel's manager's systems. These surplus documents are there because we kept the original version.[1]

Yet, the existence of surplus documents does not mean that we are claiming for all the invoices included in the documents we presented. That is not – and has never been – the case. Our position is that we are claiming for the specific heads of damages, as set out in our Reply in detail.[2] The documents in the annexes support, we say, those claims. That is very different from saying that we are claiming for all the invoices in the annex. We are not. And doing so, assuming that, is letting the annex tail wag the Reply heads of claim dog. And you can test the point this way: If you add up all the invoices we have attached, the total number there considerably exceeds the Marshall Islands' claims.

Step 4: In its Rejoinder, Equatorial Guinea challenged the Marshall Islands' entitlement to damages. There, it also criticized the Marshall Islands for not providing a detailed granular breakdown of how its claim was supported by the individual documents.

Step 5: We responded to that criticism during the first round of oral argument. We provided a detailed series of tables that included a granular breakdown, by sub-issue, and provided annex and page references to the specific documents that we are relying on. That information, in our submission, that level of detail, goes beyond what is normally expected in these types of proceedings; specifically, it answers the who, the when, and the what, and on the on what basis of our claim. With that, Equatorial Guinea and, importantly, the Chamber can see what documents we are relying on – and, importantly, on which ones we are not.

Step 6: Despite having received that information, Equatorial Guinea argued before the Chamber on Saturday that the Marshall Islands was claiming for things that we are not claiming. In doing so, they cast aspersions on our credibility. We must say, with great respect,

[1] ITLOS/PV25/C32/6, Transcript, page 14, lines 21-22.
[2] Reply, paragraphs, 285, 293, 295, 298, 301, 308, 314 and 316.

that we consider that to have been disingenuous. Had Equatorial Guinea taken some time to check the tables, Equatorial Guinea would have realized that we are not pursuing many of the claims it says we are pursuing.

Now, between Wednesday morning and Saturday, Equatorial Guinea had over 60 hours with the tables. We know by this point that 60 hours is enough time to interdict a vessel in the high seas. We also know that, we say, it is enough time to cooperate with a flag State.

Two points of clarification are necessary.

First, there has been no serious criticism of the Marshall Islands' largest claim for material damages: the claim for loss of hire. You have heard earlier today from Sir Daniel, the problem with the counterfactual scenario posited by our friends across. Leaving that aside, Equatorial Guinea only runs one argument, that the Charter was novated. Despite having had Mr Horne's report since December 2023, Saturday was the first time this point has ever been raised. In fact, it is the only argument made on this point, but it is not a good one. There was no change in the hire provisions. This is easily verified from the contemporaneous invoices. I already took the Tribunal to them.[3] You have them on the screen. And those invoices apply the calculations of the hire rate, as I explained when I took the Tribunal through what I would call the nuanced calculation methodology in the charter.

But, in any event, the Marshall Islands has the novated charter. It changes the name of the owner of the vessel. We would be more than happy to produce this document, if the Chamber so requested.

Equatorial Guinea also made a passing remark as to how the calculations we presented on Wednesday for loss of hire after the vessel finished being detained was not aligned with the calculations of our expert.[4] That is incorrect. We are applying the daily rate that Mr Horne calculated for that period. That is marked Period C in his report. And, as we expressly said, we are applying that rate to a conservative estimate of how long the vessel would have required to change crew, to go to drydock,[5] and to then restart operations. And all that that requires is applying the daily rate and multiplying it by a number of days; it's quite basic arithmetic.

Second, there is a fundamental, inherent difference between having presented surplus documents and the serious allegation that we are making claims that we are not entitled to make. The Chamber should not be led astray by the existence in the record of surplus invoices for which we are not claiming.

The Marshall Islands has put forward claims for material damages that we believe we are entitled to recover. Insofar as the Chamber disagrees, we invite you to decide accordingly.

With that in mind, and as Sir Daniel anticipated last Wednesday,[6] and also earlier today, as part of our revised final submission, we will be setting out a revised – and easily comprehensible – damages claim. A reason we are doing so is to avoid any argument – any argument – that we are seeking to recover loss, damage and injury caused by Nigeria.

You have on screen the new temporal limitation that we are pursuing. You also have on screen what we say is the loss, damage and injury caused by Equatorial Guinea that was – and I invite the Chamber to pay attention to this formulation – visible and quantifiable during the 92 days of detention. We then also have on screen the loss, damage and injury that was a direct consequence of Equatorial Guinea's conduct, but that only crystallized or became quantifiable after this period, and that is our claim, we say, for the period between 27 May to 24 July 2023. On those slides, the Chamber has the specific line items that we are claiming; it has the documents that we are relying on to do so.

[3] Memorial, Vol. II, Annex TH/-4, pages 645, 648, 652 and 655.
[4] ITLOS/PV25/C32/10, Transcript, page 3, lines 43-44.
[5] ITLOS/PV25/C32/5, Transcript, page 11, lines 6-8.
[6] ITLOS/PV25/C32/5, page 25, lines 10-33.

We also have, since Saturday afternoon, reviewed again in detail all the documents we relied on and that were referred to in our table. There are two points, neither of which our friends across have picked up, but which we want to address, in line with our objective of being entirely forthright.

The first one is a mistake. It is a mistake which we admit, and for which we apologize. It regards the smallest of the two claims for sick wages of $29,000. That should not have been included. In in any event, it is now moot.

The second one is our claim for $190,000 in agency costs during the the vessel's call to Cape Town. Now, we are entitled to claim for this; however, unlike the supporting documents for our other claims, which are generally straightforward, the invoices for this are a matter of some complexity. Given the challenges of assessing this claim, we have concluded that we would simply withdraw it.

Now, our friends across will surely pounce on this. They will say our case is shifting. That would be somewhat odd. Through our time, we have never increased our claim. Respondents tend to appreciate when the claims made against them are reduced. And, again, this is a complex case and we are just trying to be as careful and as responsible as possible.

Moving on to the second part of my submissions. Having made those clarifications, Mr President, Members of the Chamber, our friends across mentioned on Saturday 12 examples aimed at sowing doubt on our credibility on the basis that we are making improper claims. Again, this is based on the implied allegation that we are claiming for every invoice that was included in the annexes, and we are simply not. I will need to take the Chamber to each to explain why that criticism is unjustified. You have on the screen a summary showing why each of those 12 criticisms is unfounded.

First, you were taken to invoices showing cash disbursements made to the Master.[7] This was characterized as unexplained, as mysterious.

The first one is at Annex VII, page 77. That is an invoice from Wilhemsen. They are shipping agents. That claim is based on a string of invoices from Wilhemsen. If you look at the table, you will see that we are relying on the document at Annex VII, page 55, and that the total amount that we are claiming for is $8,700. We are relying on one invoice in the string of invoices. We are not relying on that invoice claiming cash to the Master.

The second one is Annex VIII, page 120, and that shows a $20,000 cash disbursement to the Master. Now, that is a supporting document for the head invoice from Sharaff Shipping Agency at Dubai. We have that at Annex VIII, page 27, up on the slide. You will see there, in the zoomed-in part, highlighted, that there is, in fact, $20,000 in cash advanced to the Master. There is also a $400 handling charge for that. Below, you will see, third line from the bottom, the grand total of $46,000. You will then see a deduction for the cash and the handling fee, and the balance due of $26,600.

If we go to the table, and this is what we showed you last week, and what Sir Daniel referred to, you will see, on the last line on the left, that when we refer to that document, we describe it, the Sharaff Shipping Agency invoice, and we say, in brackets, ("excl. 20k cash to Master").

Second, claims for beverages.[8] Under OSM policy, the Manager's policy, those claims were a valid expense. The Chamber may legitimately take issue with that. We would not contest that point. If the Chamber is inclined to exclude them, it could do so, for example, by applying a percentual discount to each line item for travel. In any event, our streamlined claim excludes many of those.

[7] ITLOS/PV25/C32/10, Transcript, page 7, lines 38-41.
[8] ITLOS/PV25/C32/10, Transcript, page 7, line 43 to page 8, lines 1-2.

Third, a claim for the air conditioning and TV and pressure cooker on the *"Heroic Idun"*.[9] Pausing there, those items were, in fact, damaged during detention. However, out of an abundance of caution, one month before this hearing we dropped some of our claims, and that included the claim for miscellaneous repair expenses,[10] as you see in paragraph 3(b) of our letter. Our slide for repairs of the vessel presented last week does not include claims for those items.

I will then group together some of the examples which we have never claimed – we have not claimed then, we are not claiming now. For example, a lot of these concern alleged claims for medical expenses. Whether we were indeed making those claims could be verified by checking the claims based on medical issues and the documents that we rely on for doing so. We have that on the table.[11] We were relying on, at that point, on 20 documents. Now, it is perhaps not exhilarating to check whether those documents are the ones that we were referring to, but it is something that could be checked quite quickly, in a matter of minutes.

Now, grouping these claims together, we have claim number 4, for prescription glasses.[12] We are not claiming that.

Number 6, a mention, without a reference, to claims of medical costs of children and people not on the vessel.[13] We are not claiming that. Pausing there, the Chamber did hear last week the impact that the detention had on the crew and the family, including children.

Number 7, an invoice from Gard for 9 August.[14] Alleged evidence of claim for pre-detention conduct. We are not claiming that then, we are not claiming that now.

Number 8, an invoice for medical services in India dated 11 August 2022.[15] Same point. Not claiming then, not claiming now.

Number 9, claims for medical tests conducted before the interdiction for people who were not on board the vessel.[16] And this includes claims from Seabird Medical Centre and Balaji Medical Centre, in India. We are not claiming for those. For good order, we were claiming some invoices from those hospitals. Those are the claims at Annex IV, pages 343, 386 and 387. Those were listed in our table presented last week. And those specific invoices are for the treatment post-release of the crew, for injuries suffered during detention.

Number 10, claims for provisions and cigarettes before going to Nigeria.[17] Again, not claiming then, not claiming now.

Number 11, Annex VII-A, page 323[18] regarding payments to people not on the vessel. Not claiming then, not claiming now.

As to the rest. Number 5, the alleged claim for unidentified and unknown people in Colombo.[19] This goes to the "who". Volume IV, and the Chamber was referred to pages 149, 153, 614 and 618. They say we are claiming for the mysterious Captain Harsha Perera, whose name is highlighted on the invoice on the left. We were relying on this invoice as part of our claim for the costs that the Owners incurred to travel to Sri Lanka for discussions and support of the crew's family. You have heard the impact of the detention, and Owners took several trips to discuss with them in person.

[9] ITLOS/PV25/C32/10, Transcript, page 8, lines 4-7.
[10] RMI, Letter to the Registry dated 10 September 2025, p. 2.
[11] Annex IV, pages: 76, 183, 188, 193, 217, 343, 357, 386-388, 390-391, 407-408, 443-445, 446-448, 449-451, 452-454, 455-474, and 476-478.
[12] ITLOS/PV25/C32/10, Transcript, page 8, lines 9-11.
[13] ITLOS/PV25/C32/10, Transcript, page 9, lines 14-16.
[14] ITLOS/PV25/C32/10, Transcript, page 9, lines 27-30.
[15] ITLOS/PV25/C32/10, Transcript, page 9, lines 32-34.
[16] ITLOS/PV25/C32/10, Transcript, page 9, lines 36-39.
[17] ITLOS/PV25/C32/10, Transcript, page 9, lines 41-44.
[18] ITLOS/PV25/C32/10, Transcript, page 10, lines 1-3.
[19] ITLOS/PV25/C32/10, Transcript, page 9, lines 8-11.

Now, if we go three pages up, we go to page 146;[20] that is right before the reference you were given, and you have it on the right hand of the screen. It is an invoice for hotel and accommodation. It is charged to Ceyline Shipping, addressed to Captain Harsha Perera of OSM, the vessel's managers. If you then look below, you see that the invoice is for the hotel costs of Messrs Ramaswamy, Sverre Jacob and Sekkesater, all of them Owner's representatives who went to meet the family of the crew.

Finally, number 12, you were taken to two documents: Annex IV, pages 839 and 844, and then you were also taken to Annex VII, page 150.[21]

You see there the reference in our table from last week to Annex IV, page 839. We are claiming for two items in total worth approximately $8,000. Moving forward, we have the invoice from OSM. We see that it is a compound invoice, with many things. We see that there is a $24,000 entry for travel expenses, of which we are only claiming a part. We are not claiming for the other elements in that invoice.

Turning to Annex VII, page 150, this is an invoice from Sharaf, the agency in Dubai, and this includes costs for the visa stamps for $300 for the crew involved in taking the vessel to drydock. We are claiming for that, and we say fairly so.

Mr President, Members of the Chamber, I am sorry to have had to spend some time taking you through clerical documents. I hope that having done so, this dispels the criticism we were subject to.

Third part. Non-material damages. Last week, I argued that three of the four criteria that the ICJ had relied on in *Diallo* were applicable here.[22] The fourth and last criteria that was not present was the expulsion of Mr Diallo from the country. Much was made of that. But, on reflection, and reasoning by analogy, or by parity of reasoning, that factor has also been satisfied here. The Chamber has heard and read about the impact of the detention and how that affected the crew's employment. These were men of the sea, and, for all practical purposes, they have been expelled from life at sea,[23] being forced, many of them, to taking lower paying jobs ashore.

Our friends across have made much about a paragraph about the conditions of detention in the *Arctic Sunrise* case.[24] Some of those conditions, admittedly, were worse than the conditions here. What our friends across don't mention, however, are the differences between those cases, and there are many factors where our facts are worse. I will briefly mention five.

First, the underlying facts are significantly different. The crew of the "*Arctic Sunrise*" were deliberately engaging in high-risk protest activities.[25] They were trying to board, without permission, an oil platform in the Arctic. They had been warned several times – in fact, a surprising number of times – not to do that.

Second, the "*Arctic Sunrise*" crew was charged with specific offences two working days after they had been detained.[26] After some weeks of detention, they were released on bail,[27] despite the public prosecutor trying to contest that release.

Third, the "*Arctic Sunrise*" crew had access to lawyers.[28] They had access to lawyers when investigations on the vessel and other interactions with the authorities were taking place. Here, in contrast, the Chamber has heard how the Master was interrogated, at one point for 11 hours, without any access to lawyers. The Chamber, on Tuesday of last week, also heard

[20] Annex IV, page. 146.
[21] ITLOS/PV25/C32/10, Transcript, page 10, lines 5-11.
[22] ITLOS/PV25/C32/5, Transcript, page 17, lines 6-7.
[23] ITLOS/PV25/C32/2, Transcript, page 18, lines 1-13; ITLOS/PV25/C32/3, Transcript, page 17, lines 16-18.
[24] *Arctic Sunrise*, Award on Compensation, para. 76.
[25] *Arctic Sunrise*, Merits Award, paras. 81-99.
[26] *Arctic Sunrise*, Merits Award, paras. 104-106 and 109.
[27] *Arctic Sunrise*, Merits Award, para. 126.
[28] *Arctic Sunrise*, Merits Award, paras. 110.

the Master's evidence on how he felt after this.[29] I will not give details as to respect the *in camera* proceedings.

Fourth, the *"Arctic Sunrise"* crew were given an amnesty; the criminal prosecution was dropped.[30]

Fifth, and most importantly, after two months of detention, the crew of the *"Arctic Sunrise"* went home.[31]

Here, as we all well know by now, the crew did not go home. After three months of being detained, the crew, despite having been told that they would be released and that they would be allowed to go home, were renditioned to a third State. This profound stress cannot be underestimated. We have heard much about impressive hotels. We have heard less about the crippling uncertainty they endured during the final days of their detention in Equatorial Guinea. The Chamber has seen, on Thursday and earlier today, that all contemporaneous communications between Owners, Managers, insurers, lawyers and crew, and including, critically, from Equatorial Guinea's own witness, the agent, and those contemporaneous communications show that they were all led, or perhaps it would be better to say misled, to believe that the vessel and the crew would be released to go home on the payment of the fine.[32] Of course, all of those contemporaneous documentations are now simply, we are told, the basis of a misunderstanding.

Also, the Chamber heard from Equatorial Guinea's witness[33] and how he suggested that the crew were happy to stay in Equatorial Guinea. Out of respect for the *in camera* proceedings, I will only quote for the Tribunal's attention, three words: crying, tourism and scandal. The references to the *in camera* transcript are in my footnotes.[34]

In reality, the evidence the Tribunal has heard from the witnesses of both sides is that the crew were absolutely terrified at the prospect of being unlawfully transferred to Nigeria, *manu militari*. Dr Permann-Kerr explained in her report "the levels of fear and uncertainty when EG decided to hand over the vessel to Nigeria" was one of the factors that "compounded the initial traumatic experience".[35]

Ultimately, it is for the Chamber to appreciate those circumstances, appreciate the equities, and their impact.

Mr President, Members of the Chamber, I thank you for your kind attention. I invite you to call the agent, Ms Kirby, to the podium.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Dr Casas for his statement.

I understand that the Agent of Marshall Islands, Her Excellency Ms Kirby, will make some closing remarks and present the final submissions of the Marshall Islands.

In this regard, I wish to recall that pursuant to Article 75(2) of the Rules of the Tribunal, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's Final Submissions. A copy of the written text of the submissions, signed by the Agent, shall be communicated to the Special Chamber and transmitted to the other Party.

I now invite the Agent, Ms Kirby, to take the floor for her closing statement.

[29] ITLOS/PV25/C32/3, Transcript, page 13, lines 31-34.
[30] *Arctic Sunrise*, Merits Award, paras. 130-132.
[31] *Arctic Sunrise*, Merits Award, para. 126.
[32] ITLOS/PV25/C32/6, Transcript, page 32, lines 30-34.
[33] ITLOS/PV25/C32/6, Transcript, page 32, lines 30-34.
[34] ITLOS/PV25/C32/9, Transcript, page 11, lines 37-39.
[35] Annex RMI/-38, para. 37.

STATEMENT OF MS KIRBY
AGENT OF THE MARSHALL ISLANDS
[ITLOS/PV.25/C32/11/Rev.1, p. 33–37]

Thank you. Mr President, Members of the Special Chamber, before I read the Republic of the Marshall Islands' Final Submissions, with your indulgence I would like to make some very brief closing submissions.

As the official who had the handling of this matter from the very outset for the Marshall Islands' Registry, who, with my colleagues, sought to reach out time and again to those in Equatorial Guinea to express our flag State interests, on each occasion drawing no response, I can attest to the careful and considered attention that the Marshall Islands gave to these issues before bringing this case.

This is the first contentious case before ITLOS in which we have been involved, and we did not bring it lightly. As the Attorney General and I both said in our opening remarks last Monday, the Marshall Islands brought this case because of the fundamental importance of the rules and principles of law that are at stake.

As the third largest open Registry in the world, and the largest in terms of energy, with a fleet of almost 6,000 ships, we are acutely aware of the importance of safeguarding freedom of navigation rights and exclusive flag State jurisdiction.

We are also exercised to ensure and contribute to robust anti-piracy cooperation and measures, as well as minimum safe manning commitments, seafarers' rights, considerations of humanity, and other rules and principles that stand at the heart of UNCLOS.

We brought these proceedings – no small thing to do – because we were, and are, deeply concerned that the acts of Equatorial Guinea on 12 August 2022, and for the three months that followed, had scant regard for the rules. In such circumstances, the global shipping community becomes vastly more vulnerable. Equatorial Guinea failed in its most basic and fundamental obligations to the Marshall Islands, as flag State, to the vessel and to the crew and their families. The task which you are entrusted with in these proceedings will require your solemn deliberation and wise judgement. We wish you courage as well as wisdom. We look forward to your judgment in due course.

Mr President, Members of the Special Chamber, may I take the opportunity at these closing remarks to thank the Registry and all those at the Tribunal who have extended to us their welcome, their courtesy and their assistance. We are very grateful. We are grateful also to the interpreters and to the court reporters.

I would also like to extend our appreciation to our colleagues opposite, the esteemed Agent of Equatorial Guinea and his diplomatic team and his counsel team. We have appreciated their professional and courteous demeanour and the positive spirit with which they engaged in these proceedings.

I would like also to thank those who are with me and alongside me, even if not here in Hamburg. We have been fortunate in the support that we have been given in this endeavour from the crew of the *"Heroic Idun"* and from its Owners, as well from others, foremost amongst whom have been Gard, the P&I insurers.

I would also like to thank our counsel, both for the advice that they have given to us and for their arguments over the past week.

Lastly, Mr President, Members of the Special Chamber, but certainly not least, I would like to thank you, Members of the Special Chamber, and the Registrar, for your courtesy and attention, and for all the work still to come.

With that, Mr President, having regard to Article 75(2) of the Tribunal's Rules, I will now read the Marshall Islands' Final Submissions.

Pursuant to Article 75(2) of the Rules of the Tribunal, having regard to its written and oral submissions, the Republic of the Marshall Islands requests the Special Chamber to adjudge and declare as follows:

1. The Special Chamber has jurisdiction in respect of each of the claims of the Republic of the Marshall Islands and the claims are admissible.

2. By its conduct in intercepting the *"Heroic Idun"* on 12 August 2022 in the exclusive economic zone of São Tomé and Príncipe, by forcing it to divert course to Luba anchorage, and by detaining the *"Heroic Idun"* at Luba anchorage, the Republic of Equatorial Guinea acted in breach of the Republic of the Marshall Islands' Flag State freedom of navigation rights and/or exclusive flag State jurisdiction with respect to the *"Heroic Idun"*, contrary, *inter alia*, to Articles 87(1), 90, 92(1) of UNCLOS, having regard to Article 58(2) of UNCLOS.

3. By detaining the *"Heroic Idun"* and her crew, by criminally charging the Master, and by levying a fine of €2,000,132.00 on the Master, without any basis in and contrary to UNCLOS, the Republic of Equatorial Guinea acted in breach of Articles 56(1), 58(2), 87(1), 89 and 92(1) of the Convention and/or Article 300 read with Part V of UNCLOS.

4. All measures adopted by the Republic of Equatorial Guinea subsequent to its detention of the *"Heroic Idun"* in Luba anchorage, including but not limited to its extra-judicial hand-over of the *"Heroic Idun"* and her crew to the Federal Republic of Nigeria on 11 November 2022, were without basis in international law and, accordingly, in breach of general principles of legality in international law.

5. Insofar as the Republic of Equatorial Guinea is alleging that it was undertaking an anti-piracy operation vis-à-vis the *"Heroic Idun"*:

(a) There was no credible basis for the contention that the Republic of Equatorial Guinea was undertaking an anti-piracy operation vis-à-vis the *"Heroic Idun"*.

(b) In addition or in the alternative to 5(a) above, by its conduct in intercepting the *"Heroic Idun"* on 12 August 2022 in the exclusive economic zone of São Tomé and Príncipe, by forcing it to divert course to Luba anchorage and by detaining the *"Heroic Idun"* at Luba anchorage, the Republic of Equatorial Guinea failed to cooperate with the Republic of the Marshall Islands in its capacity as Flag State of the *"Heroic Idun"* contrary, *inter alia*, to Article 100 of UNCLOS, having regard, on the facts of this case, to the ample opportunity to do so before the Republic of Equatorial Guinea took steps to seize the *"Heroic Idun"*, including:

i. by failing to inform the Republic of the Marshall Islands of allegations regarding the conduct of the *"Heroic Idun"*, and/or

ii. by failing to seek the cooperation of the Republic of the Marshall Islands in its capacity as Flag State with regard to the investigation of the *"Heroic Idun"* and her crew.

(c) Having regard to the right of visit pursuant to Article 110 of UNCLOS:

i. the Republic of Equatorial Guinea had no reasonable ground for suspecting that the *"Heroic Idun"* was engaged in piracy;

ii. in the alternative, insofar as the Republic of Equatorial Guinea can establish that it had reasonable grounds to suspect the *"Heroic Idun"* was engaged in piracy, the Republic of Equatorial Guinea failed to undertake the verifications, checks and examinations on board the *"Heroic Idun"* with all possible consideration in breach of Article 110 of UNCLOS.

(d) In addition or in the alternative to 5(c) above, by its conduct in seizing the *"Heroic Idun"*, the Republic of Equatorial Guinea acted in breach of Article 105 of UNCLOS, having regard to Article 103 of UNCLOS and having failed to establish that the persons in dominant control of the *"Heroic Idun"* intended to use the vessel for the purposes of committing any act of piracy, including for the reason that, on the facts of this case, the Republic of Equatorial

Guinea did not seek to assess, including with the Republic of the Marshall Islands as Flag State, whether the persons in dominant control of the Vessel intended to use the Vessel for the purposes of committing any act of piracy.

6. In addition or in the alternative to the preceding:

(a) By failing to notify the Marshall Islands, *inter alia*, of the interception, diversion and detention of the *"Heroic Idun"* and her crew, of the imposition of a criminal charge and fine on the Master of the Vessel, and of the transfer of the Vessel to the Federal Republic of Nigeria, the Republic of Equatorial Guinea breached its duty to notify the Republic of the Marshall Islands as the Flag State of enforcement measures adopted in respect of its Vessel.

(b) Having regard, *inter alia*, to the Convention on Safety at Life at Sea and its protocols, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers at Sea, and the Convention on the International Regulations for Preventing Collisions at Sea, the Republic of Equatorial Guinea:

i. failed to have due regard for and frustrated the exercise of the rights, duties and responsibilities of the Republic of the Marshall Islands as Flag State of the *"Heroic Idun"* under, *inter alia*, Articles 94 and 217, in breach of Article 2(3) and 87(2) of UNCLOS.

ii. breached its obligations under Article 1(b) of the Convention on Safety of Life at Sea, Article I(2) of the International Convention on the Standards of Training, Certification and Watchkeeping for Seafarers at Sea, and Article 1 of the Convention on the International Regulations for Preventing Collisions at Sea, by failing to take necessary steps to enable the conventions to be given full and complete effect, thereby preventing the Republic of the Marshall Islands from exercising its rights, duties and responsibilities thereunder.

(c) Having regard to the matters in paragraph 6(b) and by, *inter alia*, requiring the *"Heroic Idun"* to be anchored in an unsuitable location where it was at significant risk of collision and by the unsafe manoeuvring of its naval vessel *"Wele Nzas"* on 26 September 2022, Equatorial Guinea breached Article 225 of UNCLOS.

(d) Having regard to the detention and treatment of the crew of the *"Heroic Idun"* in the period 12 August 2022 to 11 November 2022, the Republic of Equatorial Guinea acted in breach of considerations of humanity and UNCLOS, including Articles 2(3) and 87(1).

(e) By failing to engage with the Republic of the Marshall Islands in respect of the *"Heroic Idun"* and her crew, and by handing over the vessel and her crew to the Federal Republic of Nigeria on 11 November 2022, the Republic of Equatorial Guinea acted in breach of the general obligation not to aggravate the dispute with the Republic of the Marshall Islands.

7. Having regard to the preceding alleged breaches, as well as, *inter alia*, to Article 106 and 110(3) of UNCLOS, the Republic of the Marshall Islands requests the Special Chamber to order the payment of reparations by the Republic of Equatorial Guinea to the Republic of the Marshall Islands in the following amounts:

(a) Loss, damage and injury caused by the Republic of Equatorial Guinea that was visible and quantifiable within the period of 12 August 2022 to 11 November 2022 including: i. EUR 2,000,132, being the amount of the fine improperly levied by the Republic of Equatorial Guinea to release the *"Heroic Idun"* and her crew; ii. USD 7.628 million for material loss, damage or injury sustained by the *"Heroic Idun"* in the period 12 August 2022 to 11 November 2022; iii. USD 4.784 million for non-material loss, damage or injury sustained by the crew of *"Heroic Idun"* in the period 12 August 2022 to 11 November 2022.

(b) Loss, damage or injury that was a direct consequence of Equatorial Guinea's conduct within the period 12 August 2022 to 11 November 2022 but only crystallized after this period or only became quantifiable after this period, specifically: USD 3.339 million for material loss and damage to the *"Heroic Idun"* that was a direct consequence of Equatorial

Guinea’s conduct within the period 12 August 2022 to 11 November 2022 but was only quantifiable in the period 27 May 2023 to 24 July 2023, namely, loss of hire, cost and expenses to repatriate the crew, and costs and expenses to repair the Vessel.

(c) Loss, damage or injury to the *“Heroic Idun”* and her crew in the period 11 November 2022 to 27 May 2023 in consequence of the Republic of Equatorial Guinea’s extra-judicial rendition of the *“Heroic Idun”* and her crew to the Federal Republic of Nigeria that is sufficiently proximate to that rendition and is properly traceable to Equatorial Guinea, in an amount to be determined by the Special Chamber.

(d) An award of interest on the sums specified above, as appropriate.

(e) An award of such other sums as the Special Chamber may consider appropriate.

(f) Order the Republic of Equatorial Guinea to acknowledge its wrongful conduct in respect of the Republic of the Marshall Islands and provide an assurance and guarantee of non-repetition.

Finally, an award of the costs of the Republic of the Marshall Islands in these proceedings, subject to assessment in the case of dispute.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Her Excellency, Ms Kirby, for her statement, her closing statement, and for reading the Republic of the Marshall Islands’ final submissions.

This concludes the second round of oral argument of the Marshall Islands as well as this morning’s sitting. The hearing will be resumed tomorrow, 14 October 2025 at 3 p.m., to hear the second round of oral arguments of Equatorial Guinea.

This sitting is now closed.

(The sitting closed at 12.51 p.m.)

PUBLIC SITTING HELD ON 14 OCTOBER 2025, 3 P.M.

Special Chamber

Present: *President* HOFFMANN; *Judges* INFANTE CAFFI, BROWN; *Judges* ad hoc EIRIKSSON, COUVREUR; *Registrar* HINRICHS OYARCE.

For the Marshall Islands: [See sitting of 11 October 2025, 10 a.m.]

For Equatorial Guinea: [See sitting of 8 October 2025, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 14 OCTOBRE 2025, 15 HEURES

Chambre spéciale

Présents : M. HOFFMANN, *Président* ; Mmes INFANTE CAFFI, BROWN, *juges* ; MM. EIRIKSSON, COUVREUR, *juges* ad hoc ; Mme HINRICHS OYARCE, *Greffière*.

Pour les Îles Marshall : [Voir l'audience du 11 octobre 2025, 10 heures]

Pour la Guinée équatoriale : [Voir l'audience du 8 octobre 2025, 10 heures]

THE PRESIDENT OF THE SPECIAL CHAMBER: Good afternoon. The Special Chamber will now continue its hearing in *The M/T "Heroic Idun" (No. 2) Case*. We will hear the second round of oral argument of Equatorial Guinea.

I therefore invite Mr Haeri to the podium to make his statement.

You have the floor, Sir.

Second round: Equatorial Guinea

STATEMENT OF MR HAERI
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/12/Rev.1, p. 1–8]

Thank you, and good afternoon, Mr President, distinguished Members of the Special Chamber.

Mr President, Members of the Special Chamber, over the course of the last week, we have heard the very many grievances of the Marshall Islands. Its frustration is palpable and, to some extent at least, understandable – the owners and insurer of the *“Heroic Idun”* have incurred many expenses.

In this context, the Marshall Islands has gone so far as to accuse Equatorial Guinea of presenting “alternative truths”,[1] of making a “sham” defence,[2] a term that implies fraud.

Mr President, Members of the Special Chamber, we know that the owners of the *“Heroic Idun”*, separately from these proceedings, also brought an arbitration dispute against the insurers. The outcome of that arbitration, which the owners lost, is publicly reported. So what did the owners have to say about this issue in those arbitration proceedings? We can see it here from a public source accessible to the Special Chamber under Article 71(5) of the ITLOS Rules:

> The Owners relied on the following alleged facts: *“Heroic Idun”* was captured and detained as part (or in the context of) West African States’ fight against piracy and maritime crime; the capture, transfer and detention of *“Heroic Idun”* was effected by two foreign states in cooperation....[3]

So, in the arbitration, the owners’ position was that Equatorial Guinea acted in cooperation with Nigeria to interdict the *“Heroic Idun”* in the fight against piracy. By contrast, in these proceedings, the suggestion that piracy was at issue is a sham, a dissembling fiction that was cooked up. The clear contradiction may be expedient, but that doesn’t make it right.

Nor is the so-called “sham” defence the only accusation the Marshall Islands unfairly levels at Equatorial Guinea. The Marshall Islands claims that Equatorial Guinea treated the crew in a manner that violated the prohibition on inhumane treatment in international human rights law. It flits around the suggestion that torture, one of the most serious crimes in international law, may be at issue here. If the Special Chamber has some difficulty understanding how such suggestions could possibly be made in light of the facts of this case, it is not alone. They bear no scrutiny and deserve no credence.

Nonetheless, in presenting its case, the Marshall Islands simply goes too far. Its overreach can be summarized in six key areas.

First, the inadmissibility objection of *Monetary Gold*.

Second, the inadmissibility objection of the exhaustion of local remedies and the issue of notification.

Third, the gateway provisions.

Fourth, the reasonable suspicion of piracy.

Fifth, the treatment of the crew.

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[1] ITLOS/PV.25/C32/11, p. 1 (lines 42-43) (Bethlehem).
[2] ITLOS/PV.25/C32/5, p. 24 (line 5) (Bethlehem).
[3] Thomessen, “The Heroic Idun case: No war risk cover for detenion [sic] as part of law enforcement - perceived piracy is not a war peril”, 13 October 2025, available at: https://www.thommessen.no/en/news/the-heroic-idun-case-no-war-risk-cover-for-detenion-as-part-of-law-enforcement-perceived-piracy-is-not-a-war-peril (last accessed 14 October 2025).

Sixth, causation and remedies.

I will be addressing you on the first point concerning *Monetary Gold*. Then, Ms Lavaud will address you on the second point concerning exhaustion of local remedies and the issue of notification. Professor Akande will thereafter take the floor on the misuse of the Marshall Islands' gateway provisions before moving on to address the issue of piracy under UNCLOS. I will then conclude our submissions with reference to the fifth point on the treatment of the crew and the sixth, and final point, on causation and the remedies sought.

Mr President, Members of the Special Chamber, I will start my submissions by addressing the centrally important admissibility issue of the principle of *Monetary Gold* or indispensable third party.

The principle of *Monetary Gold* cuts incisively and with terminal effect in this case on claims of the Marshall Islands relating to the interdiction and return of the *"Heroic Idun"* to Nigeria – namely, on freedom of navigation and exclusivity of flag State jurisdiction.

If the Chamber is with us on this principle, what remains to be addressed separately is only the fine and arguments of alleged mistreatment.

In the opening submissions of the Parties, the Parties agreed that the main point of divergence between them on *Monetary Gold* was not the test for the principle, but its application, particularly regarding what is the "very subject matter" or the "vital issue". The Chamber will recall that I explained in opening submissions the respective positions of the Parties on the subject-matter test. The Marshall Islands argued that the very subject matter at issue is Article 110 of UNCLOS. Equatorial Guinea's position is that this is artificially narrow and that the subject matter is, rather, the interdiction and return of the *"Heroic Idun"* to Nigeria, corresponding with claims concerning freedom of navigation and exclusivity of flag State jurisdiction.

The Marshall Islands didn't come back in its closing to try to defend Article 110 as being the "very subject matter" or "vital issue", perhaps understandably. Indeed, Equatorial Guinea's position is that such a stance, earlier taken, is undefendable. As such, the disagreement on what is the "very subject matter" or "vital issue" appears now to be undisputed: it is the interdiction and return of the *"Heroic Idun"* to Nigeria, corresponding with claims concerning freedom of navigation and exclusivity of flag State jurisdiction. This, of course, is what the Marshall Islands has repeatedly called the "core" and the "heart" of its case,[4] as Equatorial Guinea observed in opening submissions, a point to which the Marshall Islands did not return.

So as the main issue of divergence between the Parties was reconciled, what arguments did the Marshall Islands maintain in its closing submissions on this? The Marshall Islands focused on two things, firstly that Equatorial Guinea could be individually responsible without Nigeria necessarily being responsible. And secondly, that the Marshall Islands didn't specifically claim Nigeria was responsible. But neither of those arguments is of any assistance to the Marshall Islands, as we shall see.

Mr President, Members of the Special Chamber, the principle of indispensable third party, as is well accepted, is not a question of State responsibility. That States can have individual responsibility for actions that are taken jointly, is uncontroversial, even elementary. However, that is not the point of this inadmissibility objection. The principle of indispensable third party is not a point of State responsibility.

Let us consider the commentary to Article 16 of the International Law Commission's Articles on State Responsibility, which very clearly explains this. This article, of course, deals with the situation of "aid or assistance" in the commission of an internationally wrongful act.

[4] ITLOS/PV.25/C32/3, p. 32 (line 8) (Busco); ITLOS/PV.25/C32/5, p. 23 (lines 39-41) (Bethlehem).

That, as I explained in opening submissions and was addressed in Equatorial Guinea's written pleadings, is the case at issue. Equatorial Guinea was providing aid and assistance to Nigeria. That is why the hand doesn't clap on its own here.

The hand that doesn't clap, nevertheless, points. And it points, in particular, to the commentary to Article 16 of the ILC Articles on State Responsibility, which explains the difference between State responsibility – the focus for the Marshall Islands – and the indispensable third party principle – the issue here. These are, of course, different things.

The Commentary to Article 16 could not be clearer on that, and I quote from it:

> Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. The International Court of Justice has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness" of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle. That principle may well apply to cases under Article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, upon the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of Article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such.[5]

Allow me, please, to repeat the last sentence: "The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such."

The Marshall Islands is well aware of what is said here, namely, the difference between the principle of *Monetary Gold* and State responsibility. That is why they have tried to avoid the characterization of Equatorial Guinea's conduct as "aid" or "assistance", because they know its implication is that their claims on freedom of navigation and exclusive flag State jurisdiction are inadmissible in this case. That isn't a point of State responsibility, it is a procedural principle of general international law applicable in inter-State proceedings and to the present situation.

Let's consider what the Marshall Islands said on this in their written pleadings.

In its Reply, the Marshall Islands stated that it "could have decided to seek the determination of Equatorial Guinea's responsibility in aiding and abetting a possible wrongful act by Nigeria – which may have required the prior logical determination of Nigeria's rights and obligations".[6] As I noted in opening submissions, the Marshall Islands has thus acknowledged that if Equatorial Guinea was aiding and assisting Nigeria, there would be a requirement of the prior logical determination of Nigeria's rights and obligations which would make their claims inadmissible,[7] but "aid" and "assistance" is exactly what happened here.

The Marshall Islands denies that "aid" and "assistance" is relevant because of the way that it has "calibrated its submissions".[8] But that submission goes too far. There are limits to

[5] Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 67.
[6] Reply of the Marshall Islands, p 24, footnote 121.
[7] ITLOS/PV.25/C32/7, p. 31 (lines 17-23, 31-38) (Haeri).
[8] Reply of the Marshall Islands, p. 24, footnote 121.

the elevation of form over substance and there is a firm limit here. The Marshall Islands has notably failed to explain at any point, including in its opening or closing submissions, why the relationship is not one of aid and assistance. As the Tribunal held in *"Norstar"*, the relevant fact-based test is whether the circumstance actually "fits into a situation of aid or assistance".[9] On the clear relevance of *"Norstar"* to this important issue, the Marshall Islands has and offers no response.

Mr President, Members of the Special Chamber, the Marshall Islands tries to dismiss the evident relevance of *"Norstar"* on inadmissibility by calling its explanation a "counter-counter" hypothesis.[10] But again, labelling is no substitute for analysis. The nomenclature of the Marshall Islands fails to do what it hopes, namely, to throw off the scent.

Simply put, the Marshall Islands fails to explain why Equatorial Guinea should not be considered in a similar position to Spain in *"Norstar"*.

Equatorial Guinea provided assistance to Nigeria in accordance with the Yaoundé Code, containing similar obligations to the Strasbourg Convention.[11]

Similar to Italy's Decree of Seizure in "*Norstar*", Nigeria's request was the only reason for the interception of the *"Heroic Idun"*. Like Spain in *"Norstar"*, Equatorial Guinea's position in relation to the *"Heroic Idun"* was secondary, and facilitative of that State – here, Nigeria – which ordered the interdiction and return of the vessel. As it was for Spain in *"Norstar"*, the correct characterization of Equatorial Guinea's assistance to Nigeria was that it was just that – assistance.[12]

The Tribunal noted in *"Norstar"* that: "The present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State".[13] This points to the critical issue of relevance from *"Norstar"*: like Spain, Equatorial Guinea's interdiction of a vessel was done only to assist another State, whose request is necessarily implicated and forms the subject matter of the claim.

Nor has the Marshall Islands responded to the point made by Equatorial Guinea in written submissions, and again last week in its opening, that Nigeria's legal rights and interests fall for prior temporal and logical assessment regarding the Marshall Islands' claims on the interdiction and return of the *"Heroic Idun"* to Nigeria. That is because it has no good answer.

Temporally, Nigeria's request for aid and assistance preceded Equatorial Guinea's subsequent giving of that aid and assistance. So, too, as a matter of logic, the subject matter of claims by the Marshall Islands concerning the principles of freedom of navigation and exclusive flag State jurisdiction directly concern Nigeria's rights and interests. To find that Equatorial Guinea had contravened the Convention by responding to Nigeria's request to apprehend the vessel would necessarily require assessment – as a matter of prior logical and legal necessity – of Nigeria's rights and interests, including its right to have made such a request. That is, for Equatorial Guinea's action to be unlawful, the preceding request by Nigeria must also have been unlawful.

As the International Court of Justice held in *East Timor*, in terms that were echoed and affirmed in the arbitration of *Larsen v. Hawaiian Kingdom*, it "could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the

[9] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016,* p. 44, 4 November 2016, para 166.
[10] ITLOS/PV.25/C32/11, p. 8 (line 39) (Bethlehem).
[11] 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.
[12] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 167.
[13] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, 4 November 2016, para. 166.

conduct of another State which is not a party to the case".[14] A finding that Equatorial Guinea breached obligations relating to freedom of navigation and exclusivity of flag State jurisdiction would, to use the language of the Court, "imply an evaluation" of the lawfulness of Nigeria's conduct on that very same subject matter and conduct which it – Nigeria – had requested. That is so whether Nigeria is mentioned in this regard or not.

The Marshall Islands says they are unclear on what rights and obligations of Nigeria are at issue. But that has already been explained by Equatorial Guinea. For example, in its Rejoinder, Equatorial Guinea set out at paragraph 116 the rights and obligations of Nigeria that would be implicated by any finding on the interdiction and return to Nigeria of the *"Heroic Idun"*, however directed to Equatorial Guinea and without any reference to Nigeria.

That includes Nigeria's rights and, indeed, duty under Article 100 of UNCLOS to cooperate in the repression of piracy by requesting assistance from Equatorial Guinea for the interdiction and return to Nigeria of the *"Heroic Idun"*. It also includes Nigeria's obligations not to unlawfully exercise jurisdiction by requesting the interdiction and return of a vessel on the high seas without a lawful basis to do so under UNCLOS.

Mr President, distinguished Members of the Special Chamber, it's respectfully submitted that these points are compelling on the inadmissibility of the Marshall Islands' claims relating to freedom of navigation and exclusivity of flag State jurisdiction. There is no good answer to them in this case, nor has one been offered up in response.

The Marshall Islands' communications with Nigeria leave beyond any possible doubt that the "very subject matter" for which it impugns Equatorial Guinea applies equally to Nigeria and would, if determined against Equatorial Guinea, "imply an evaluation of the lawfulness" of Nigeria's conduct. That is impermissible.

I have addressed a number of communications between the Marshall Islands and Nigeria on this point in the opening submissions. Tellingly, the Marshall Islands offers no response at all on this correspondence. No orchestra. Not even a tuning fork.

In the interests of time, let us look at one of these letters – the note verbale from the Marshall Islands to Nigeria dated 11 November 2022, which couldn't be any clearer for its implied evaluation of the lawfulness of Nigeria's conduct.

Now, the first thing to note about this letter is that the Marshall Islands has misnamed it. They call it, and this has been renamed here to be accurate, but it was called, when it was submitted, on the first page, note verbale from the Marshall Islands to Equatorial Guinea, whereas, in fact, it is to Nigeria, as correctly stated there. In a way, this mistake may be considered understandable. After all, as we shall see, the Marshall Islands puts the same case to Nigeria in the letter that it now puts to Equatorial Guinea in these proceedings.

The letter states in clear terms that: "The Nigerian Navy has confirmed that the arrest and detention of *M/T HEROIC IDUN* occurred at the behest of the Nigerian authorities and that they intend to unlawfully bring the *M/T HEROIC IDUN* and her crew into the custody and control of Nigerian authorities, including for purposes of prosecution".[15]

The Marshall Islands' letter then asserts that: "The Republic of the Marshall Islands considers 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".[16]

[14] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, 30 June 1995, para. 29.
[15] Note verbale with covering letter from the Marshall Islands to Equatorial Guinea, SA 27.
[16] Note verbale with covering letter from the Marshall Islands to Equatorial Guinea, SA 27 (emphasis added).

Mr President, Members of the Special Chamber, for Nigeria in that letter just substitute Equatorial Guinea, as the Marshall Islands itself did, and the rest is the same as in this case. The signal note is the same.

There is, therefore, we respectfully submit, no remaining question of whether a finding on the very same subject matter would "imply an evaluation" of Nigeria's conduct: it necessarily would in this case. The Marshall Islands has already put its case against Nigeria in the very same terms as the one it advances here in these proceedings against Equatorial Guinea. For this reason, there could be no clearer or more compelling case on the engagement of the critically important principle of *Monetary Gold*. The principle renders inadmissible the Marshall Islands' claims in these proceedings on freedom of navigation and exclusivity of flag State jurisdiction.

Mr President, Members of the Special Chamber, yesterday, the Marshall Islands asserted, in final submission 5(b), that Equatorial Guinea is in breach of its obligation to cooperate with the Marshall Islands under Article 100 of UNCLOS. By claiming that Equatorial Guinea has breached that obligation to the Marshall Islands, the Marshall Islands leaves no doubt that the *Monetary Gold* doctrine is squarely engaged.

The Marshall Islands makes a request to this Chamber to hold that Nigeria did not have a right to receive the cooperation that Equatorial Guinea gave it, under Article 100 of UNCLOS, because, in the Marshall Islands' view, that would be inconsistent with the Marshall Islands' own rights under that provision.

Thus, there can be no doubt that the principle of *Monetary Gold* is engaged, rendering inadmissible the Marshall Islands' claims in these proceedings on freedom of navigation and exclusivity of flag State jurisdiction.

Mr President, Members of the Special Chamber, this concludes my submissions on the indispensable third party. I would respectfully request the Special Chamber to invite Ms Lavaud to make her submissions on the inadmissibility objection, on the exhaustion of local remedies, and the issue of notification.

Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Mr Haeri.

I now call upon Ms Lavaud to make her statement.

You have the floor, Madam.

STATEMENT OF MS LAVAUD
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/12/Rev.1, p. 8–11]

Mr President, distinguished Members of the Special Chamber, good afternoon.

Today, I will address the second admissibility objection raised by Equatorial Guinea and the obligation of notification.

Starting with admissibility, it is striking how little attention the Marshall Islands has given to the exhaustion of local remedies throughout these proceedings. Yesterday was no exception.

Instead of engaging with this objection, it has chosen to shift its case – once again by amending its submissions. However, as I will demonstrate, this shift does not change the conclusion that the claims related to the crew are inadmissible.

I will make two points in this regard, but, before doing so, let me briefly respond to what we heard yesterday from Counsel for the Marshall Islands regarding the futility exception. We were told that their remarks on this point reflected “diplomatic restraint”.[1] With respect, we disagree.

What we heard does not come close to establishing futility: a passing comment and a single report simply are not enough. Indeed, Mr Moro Nve Obono laid out very clearly the remedies that the crew could, but decided not to, pursue in Equatorial Guinea.[2] And the Marshall Islands has not shown that pursuing these remedies would have been futile.

As we have said before, the rule of exhaustion does not require pursuing every possible step, but it does require taking reasonable steps.[3] Here, no steps at all were taken. Likewise, despite what was suggested yesterday, Equatorial Guinea did address the jurisdictional link last week. On this point, I will just say that we stand by our submissions.[4]

Mr President, distinguished Members of the Special Chamber, I now turn to my first point.

To support our position that the claims concerning the crew are separate from those advanced concerning injury to the flag State, I invite the Chamber to refer to the Marshall Islands’ final submissions.

Despite having amended those submissions – not once, but twice – the Marshall Islands still presents its claim related to the crew separately from those relating to injury to the flag State. Indeed, as you can see in your Judges’ folder, at tab 16, paragraph 6(d) makes that clear. It states: “Having regard to the detention and treatment of the crew of the *‘Heroic Idun’* in the period 12 August 2022 to 11 November 2022, the Republic of Equatorial Guinea acted in breach of considerations of humanity and UNCLOS, including Articles 2(3) and 87(1).”

Now, yes – the Marshall Islands has removed the reference to human rights treaties. But it has been replaced with “considerations of humanity” under general international law. These are cosmetic changes. The substance has not changed. This is still a standalone claim, which is essentially a repackaged version of its previous submission set out in paragraph 333(f) of its Reply.[5]

[1] ITLOS/PV.25/C32/11, p. 9 (line 12) (Bethlehem).
[2] ITLOS/PV.25/C32/8, pp. 8-11 (lines 10-42).
[3] James Crawford and Thomas D Grant, “Local Remedies, Exhaustion of” (January 2007*) Max Planck Encyclopaedia of Public International Law* para. 20, citing Restatement (Second) of Foreign Relations Law of the United States § 207 comment. b (*Am. Law Inst. 1965*). See also ILC Draft Articles on Diplomatic Protection, Commentary to Article 15, para. 4.
[4] ITLOS/PV.25/C32/8, p. 13 (lines 6-33) (Lavaud).
[5] ITLOS/PV.25/C32/1, p. 34, lines 19-26 (Bethlehem); ITLOS/PV.25/C32/1, p. 34, lines 33-35 (Bethlehem).

What makes these claims independent from those related to injury to the flag State is as follows: if this Chamber were to find that the Marshall Islands' claims as flag State concerning freedom of navigation and exclusive flag State jurisdiction are inadmissible under the *Monetary Gold* principle, or, alternatively, if it were to find that Equatorial Guinea did not violate flag State's rights under UNCLOS, the only claims that would remain are private claims. And without exhaustion of local remedies, those are inadmissible. This is consistent with the position taken by President Hoffmann in *"Virginia G"*.[6]

So, Equatorial Guinea respectfully asks that this Chamber apply to this independent set of claims the relevant tests under international law, including the preponderance test, to determine whether the members of the crew were, indeed, required to exhaust local remedies.

This leads me to my second point, which is that, despite how the Marshall Islands has framed its case, these claims are not about the rights of the flag State – they are about the crew. That is clear from the nearly $5 million now being claimed in non-material damages – almost a third of the Marshall Islands' total damages claim.

Now, Equatorial Guinea accepts that, in limited circumstances, this Tribunal has allowed flag States to seek compensation for harm to crew members. But those were exceptions – narrow exceptions – to the rule of exhaustion of local remedies. And for good reason, this Tribunal has departed from that rule only sparingly.

Here, the Marshall Islands' claims do not fit within that jurisprudence. In fact, its Counsel admitted as much in the first round of submissions when she said, "to [our] knowledge, an UNCLOS tribunal has not yet faced claims of the kind made today".[7] On this point, we agree.

Unlike in prior cases, the Marshall Islands is not asking this Chamber to award non-material damages on behalf of the crew on the basis that these damages – and I quote from *"SAIGA" (No. 2)* – "arise from direct violations of the rights" of the flag State.[8] Instead, the Marshall Islands argues that the detention and the alleged mistreatment of the crew independently breached Articles 2(3) and 87(1) of UNCLOS. This, we submit, is a very different proposition.

The unprecedented nature of the Marshall Islands' claims doesn't only relate to the legal framing – it also relates to its scale. In *"SAIGA" (No. 2)*, non-material damages made up less than five per cent of the total claim. In *"Virginia G"*, just 1.6 per cent. And in *"Norstar"*, less than one per cent. Here? Nearly 30 per cent. This is a major departure.

As we said in the first round, if there is a threshold below which individual claims can be assessed as part of a broader inter-State case, the Marshall Islands has gone way beyond that threshold. Even after amending its submissions, as it did yesterday, the Marshall Islands still goes too far.

In sum, Equatorial Guinea is not asking this Chamber to "go back to the past", as was suggested yesterday by our friends on the other side.[9] Instead, we are asking this Chamber to apply the law as it stands; to stay true to the Tribunal's jurisprudence and to give full effect and meaning to Article 295 of UNCLOS.

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[6] ITLOS, *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Joint Dissenting Opinion of Vice- President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014*, p. 4, 14 April 2014, para. 6.
[7] ITLOS/PV.25/C32/4, p. 21 (lines 22-23) (Grafton).
[8] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment,* 1 July 1999, para. 99.
[9] ITLOS/PV.25/C32/11, p. 10 (line 14) (Bethlehem).

This is an opportunity for this Chamber to ensure that this provision does not become "meaningless", as Judge Wolfrum warned,[10] but to apply the rule of exhaustion of local remedies, consistent with the intent of the drafters of UNCLOS.

For all these reasons, Equatorial Guinea submits that the Marshall Islands' claims concerning the crew are independent from its flag State's claims. Because they relate preponderantly to the crew, they are subject to the rule of exhaustion and are therefore inadmissible before this Chamber.

Mr President, distinguished Members of the Special Chamber, I now turn to the obligation of notification. I will be brief on this point, not because this claim is not important, but because, once again, the Marshall Islands has failed to demonstrate the existence, let alone the breach, of any obligation of notification in this case.

Indeed, we have already explained why the Marshall Islands has not established the existence of any general obligation to notify – whether under UNCLOS, customary international law, or general principles.[11] And the same goes for its claim relating to a general obligation of prompt release, which, notably, was withdrawn yesterday.

It is worth pausing here. Both claims – the obligation to notify and the obligation for prompt release – were based on the same reasoning, the same elements, applied as we heard from Counsel for the Marshall Islands last week "*mutatis mutandis*".[12] Yet, only one of those two claims was withdrawn. That is surprising, given that they both suffer from the same defect. On this point, Equatorial Guinea rests on its submissions.[13]

Now, from a factual standpoint, the Marshall Islands also presents an incomplete picture. It points to unanswered correspondence,[14] but conveniently omits several meetings of its representatives that took place on the ground with the authorities in Equatorial Guinea.[15] As such, when the Marshall Islands suggests that there was no effort to notify or cooperate, it is a selective presentation of the facts. Professor Akande will come back on this point.

Yesterday, Counsel for the Marshall Islands also raised a concern: that if the Chamber finds no obligation to notify, States acting unlawfully under UNCLOS would somehow be subject to less restraint.[16] For one, this is a mischaracterization of our position. Second, this concern is, of course, unwarranted: if the Tribunal has jurisdiction, a State will be held accountable for its unlawful conduct. The question is entirely separate from whether a notification obligation exists.

Equatorial Guinea's point is very simple: the Marshall Islands cannot rewrite the Convention. UNCLOS provides for notification obligations in specific provisions, under specific circumstances. None of those apply here. And the fact that, perhaps, other rules may apply elsewhere does not warrant rewriting the Convention.

Mr President, distinguished Members of the Special Chamber, this concludes my submission. I thank you for your kind attention, and I would request that you kindly call Professor Akande to the podium to continue our submissions on the gateway provisions and the reasonable suspicion of piracy.

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[10] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Separate Opinion of Vice-President Wolfrum, 1 July 1999, para. 51.

[11] Counter-Memorial, paras. 257-270; Rejoinder, paras. 295-309; ITLOS/PV.25/C32/9, pp. 14-18 (lines 17-14) (Lavaud).

[12] ITLOS/PV.25/C32/4, p. 35 (line 22) (Nevill).

[13] Counter-Memorial, paras. 257-270; Rejoinder, paras. 295-309; ITLOS/PV.25/C32/9, pp. 14-18 (lines 17-14) (Lavaud).

[14] ITLOS/PV.25/C32/11, p. 3 (lines 25-28) (Bethlehem).

[15] See e.g., First Witness Statement of William Gallagher, 17 December 2023 ("Gallagher-1"), para. 31 (Annex RMI/-30). First Witness Statement of Stephen Askins, 14 December 2023, para. 21 ("Askins-1"), para. 21 (Annex RMI/-3).

[16] ITLOS/PV.25/C32/11, p. 25 (lines 1-4) (Nevill).

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Ms Lavaud, and I now call upon Mr Akande for his statement.

You have the floor, sir.

STATEMENT OF MR AKANDE
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/12/Rev.1, p. 11–19]

Mr President, Members of the Special Chamber, good afternoon.

My first task this afternoon is to respond to some of the arguments that you heard yesterday with regard to your jurisdiction and in relation to the law that is applicable to this case. In this regard, I will mainly address the issues that relate to the human rights claims of the Marshall Islands, and its claims under the IMO treaties. After that discussion, I will address arguments that were made with respect to the key issues that divide the Parties in relation to the merits of the claimed breaches. However, in the time available, it will not be possible to address all the claims made by the Marshall Islands. I will focus on the central point that, since Equatorial Guinea was acting in accordance with its obligation to repress piracy, this means that it could not be in breach of most of the provisions that the Marshall Islands accuses it of violating. I wish to underline that a failure to deal, this afternoon, with all the points that have been raised by the other side, is not because we resile from the arguments that we made. On those issues, the ones we do not mention this afternoon, we rest on the arguments we made last week and in our written pleadings.

Before I turn to the specific issues, I would like to start by making the point that, while this is a relatively straightforward case about interception and seizure of a vessel, the approach of the Marshall Islands has been very expansive, and this in two respects. First, the Marshall Islands has thrown at you, perhaps at us, a whole host of treaty provisions and legal rules in the hope that at least some of them will stick. Second, with respect to these provisions, they adopt interpretations which are often at odds, and sometimes by its own admission at odds, with what the provisions say. The impression that one is left with is that, when the Marshall Islands does not like what the Convention says, it comes up with a different rule that it would prefer. The approach the Marshall Islands adopts is one which unpicks the care with which UNCLOS is drafted. It ignores specific considerations that underpin particular provisions with a real risk of unravelling careful compromises that are embodied in the Convention.

For example, although the Convention indicates specific instances when notification must be made to the flag State, as my colleague, Ms Lavaud, has just been addressing you on, you were told that you can ignore this and, instead, what you ought to do is to construct a rule of customary international law or a general principle of law, the effect of which is to make certain provisions of the Convention redundant. Similarly, though it is not denied that Articles 94 and 217 relate only to the flag State, the Marshall Islands claims that they are context for the interpretation of Article 225, and so, should be regarded as imposing obligations on port States too. And, as for the IMO instruments, Counsel stated that the Marshall Islands does not accept that these treaties are incapable, on a proper interpretation, of addressing the situation where it is the port or coastal State Party which is responsible for the unsafe manning of the vessel.[1] The Marshall Islands may not like this, it may not wish to accept it, but the drafters of these very detailed instruments took care to distinguish between the obligations of the flag State and those of the port State.

Members of the Chamber, let me now turn to some of the specific points made in relation to your jurisdiction and the law applicable to this case. The Marshall Islands has adjusted its final submissions in significant ways. Some of those amendments, which I will turn to shortly, are to be welcomed. However, the Marshall Islands still improperly seeks to expand the jurisdiction of the Chamber to any question of international law, and you will see this in paragraph 4 of its revised submissions, which you have in the Judges’ folder.

[1] ITLOS/PV.25/C32/11, p. 22 (lines 19-22).

With regard to its human rights claims (if I can even still call them that), the Marshall Islands has adjusted its final submissions and deleted all references to the human rights treaties which it had asked you to find violations of. That's welcome. It now reframes its human rights more clearly as breaches of UNCLOS.

However, in the submissions of yesterday, you heard nothing which responds to our argument that, if these claims relate to the breaches of the UNCLOS provisions that were cited, the interference with human rights must relate to matters at sea. There is still the reference in the submissions to the detention of the crew being in breach of Article 87 relating to freedom of navigation on the high seas and of Article 2(3) in relation to the territorial sea. It is important to stress that this part of the Marshall Islands' submissions – paragraph 6(d) – relates to the conditions of detention and treatment of the crew. Their argument, and here I repeat what my colleague, Ms Lavaud, said, is that, quite apart from any claim in relation to the interception of the vessel, the manner in which the crew were treated is a breach of those provisions. In other words, the argument implies that, even if we, Equatorial Guinea, are right that there is a valid basis for the interception and the seizure of the vessel, the subsequent treatment of the crew on land is a breach of Article 87 obligations in relation to freedom of navigation. It is hard to see that that is a claim about freedom of navigation on the high seas.

Article 87 relates to interference on the high seas, and if that interference is lawful, then the subsequent action on land cannot make the actions on the high seas unlawful.

With regard to the claim, which remains, once one disposes of Article 87, the claim that the conditions of detention are in breach of Article 2(3), we have three points.

First, you heard no response to our argument that Article 2(3) does not allow you to import all of international law into this provision.

Second, this claim clearly excludes all claims relating to detention on land.

And, third, the Marshall Islands has still not explicitly argued or shown that any conduct, in fact, took place in the territorial sea of Equatorial Guinea, rather than in the internal waters of Luba Bay.

Members of the Chamber, let me say a few words, or a few more words, about the IMO instruments. I have pointed to how the Marshall Islands seeks to render irrelevant the careful distinctions made in these treaties regarding obligations of port States and flag States. I also mentioned last week how the Marshall Islands' approach to the general obligations would render the entire rest of the treaty irrelevant.

The Marshall Islands now seems to suggest that you have jurisdiction over these treaties because there is a dispute regarding the interpretation and application of UNCLOS. What provisions of UNCLOS do they point to? Again, Articles 87 and 2(3).[2] But these are not "get out of jail free" cards. It is imperative to see whether they actually apply. The Marshall Islands' claims regarding the IMO instruments relate to matters that occurred while the vessel was in Luba Bay, or the Bay of San Carlos, as it's also known. This was neither the high seas nor does the Marshall Islands explain how it was territorial sea rather than the internal waters of the Bay. Without the conduct taking place within those zones or interfering with activity that takes place in those zones, Articles 87 and 2(3) simply do not apply. The claim is that Equatorial Guinea did not have due regard to the rights of the Marshall Islands. But Article 87(2) is not a generalized reference to other rules of international law. It is an obligation to have due regard for "the interests of other States in their exercise of freedom of the high seas". Moreover, Article 2(3) is not a due regard provision.

Members of the Chamber, this is not treaty interpretation, this is treaty invention. Our friends opposite have accused us of making up a piracy defence as we go along, while they

[2] ITLOS/PV.25/C32/11, p. 22 (lines 40-47).

have been rewriting the law where the actual positive law just happens to be inconvenient or unhelpful to their case.

Mr President, Members of the Chamber, the core of the claim that the Marshall Islands makes is that, by intercepting and seizing the vessel, Equatorial Guinea acted in breach of the principle of freedom of navigation and the principle of exclusive flag State jurisdiction. In what you heard yesterday, there was no dispute that, if the interception was justified on grounds of piracy, there will not be a breach of those principles. What you heard instead was an unseemly attempt to impugn the credibility of those who were at the centre of the actions, and you heard legal arguments, which, as I will explain, do not stand up to scrutiny. Worse, if those legal arguments actually were to be accepted, they would have, without putting too fine a point on it, devastating policy implications for maritime security. If anything smells here, it's the smell of desperation.

What are the issues that divide the Parties with respect to Equatorial Guinea's argument that it acted in accordance with its obligations under UNCLOS to cooperate in the repression of piracy? There are five points that divide the Parties:

First, was there in fact a suspicion of piracy?

Second, was that suspicion reasonable and was it reasonable for Equatorial Guinea to respond to Nigeria's request?

Third, in responding to Nigeria's request, was there an obligation for Equatorial Guinea to first exercise the right to visit provided for in Article 110 before proceeding to seizure of the vessel under Article 105?

Fourth, if there was a suspicion of piracy, is there nonetheless an obligation to compensate the flag State under Article 106?

Fifth, and this is new, only divides the Parties as of yesterday, introduced in the final submissions you heard, was Equatorial Guinea in breach, towards the Marshall Islands, of its obligations to cooperate to repress piracy? And what effect, if anything, would this have on the Marshall Islands' claims regarding freedom of navigation and exclusive flag State jurisdiction?

I propose to take these points one by one.

So was there suspicion of piracy?

Was there a suspicion of piracy at the time when Equatorial Guinea took the actions that it did in August 2022? You heard the clear testimony of the witness – Captain Juan Esono Nchama. He is a man experienced in naval operations and in the fight against piracy in the Gulf of Guinea. We leave it to you to judge whether our friends' attempt to cast doubt on his credibility should be given any credence. We say that it was obvious that this was a man who knows what he was talking about.

Can I take you back to one part of his testimony which our friends focused on. It was said yesterday that "Captain Esono believed that allegations of committing a crime – any crime – is sufficient basis for interdicting a vessel on the high seas and bringing her ashore for investigations."[3] And you were provided in your Judges' folder with an extract of his testimony, which was said to confirm this. Members of the Chamber, he suggested no such thing. The small extract that was provided to you does not give an accurate impression of that part of his testimony. I would encourage you to look at the full quote of the question that was put to him and the full quote of the answer that he gave. It is not on screen, but it is in your folders. You will see that he does not say that committing any crime on the high seas is a basis for interdicting a vessel. He was speaking very specifically of investigation of crimes committed on the high seas and his point was that any such crimes – committed on the high seas – can only be investigated on land. You see him making that point in the second paragraph of his answer. You will also see that he is responding to the question that was put to him about

[3] ITLOS/PV.25/C32/11, p. 17 (lines 23-25).

investigations. You will also see in the later extract that he makes clear that when he was speaking earlier of the crimes at issue, he was referring to the link between fuel theft and piracy, and how this raised a suspicion of piracy.

This takes me to the next point, which is still on whether he had a suspicion of piracy. It was suggested that he could not have had a suspicion of piracy because Nigeria did not mention piracy. The Marshall Islands seems to be suggesting that, unless the word "piracy" was used, or perhaps a message which includes the picture of a man with a wooden leg, a patch over one eye, and a parrot on his shoulder, that there can't be a reference to piracy.

However, what is required is not the word, nor the pictures with skulls and bones, but suspicion of acts which, in fact, constitute piracy. Unlike our friends on the other side, Captain Juan was alive to the fact that piracy is not just constituted by illegal acts of violence, but that piracy also consists of acts of facilitation, and he was conscious of acts of piracy and the practice of piracy in the Gulf of Guinea, including bunkering, illegal fuel supply, including to pirates, and of use of mother ships.

Members of the Chamber, the second issue that divides the Parties is whether the suspicion of piracy was reasonable. And here, I can be brief. I have already mentioned the factual context of how piracy is conducted in the Gulf of Guinea, which Captain Juan also testified to, but which is well known. It is not just about small pirate skiffs, but also about the use of large vessels to extend the operation of pirates.

On Friday I put up news reports of VLCCs being used as mother ships, and that was in response to the suggestion on the other side that they couldn't possibly be used as mother ships. Yesterday, you were told that there is a difference between those cases and our case, because in those cases the vessels had been hijacked and were not being used as pirate vessels by the crew. I must confess to being somewhat at a loss as to how that fact would make any difference on the 12 August 2022, would make any difference to the reasonableness of the suspicion that this was a vessel involved in piracy. It is not as if, when those vessels were hijacked, they then raised the Jolly Roger – the flag of pirate vessels – and then continued along on their journey so that any approaching vessel would be clear that these were vessels being operated by pirates. We were told that in those cases, the vessels had raised an alarm of piracy. And what did the *"Heroic Idun"* do? It also raised an alarm of piracy.

I move to the third point that divides the Parties: the legal argument of the Marshall Islands that, under the Convention, Equatorial Guinea could not proceed to seizing the vessel under Article 105 of the Convention until it had first concluded investigations on board the vessel under Article 110.

Our friends on the other side have not been able to point to anything in the Convention that suggests that such a progression is a requirement. Article 110 specifies a right of visit, not a requirement to do so. And as I mentioned previously, such a requirement of boarding would be unworkable. With respect to the other side, paragraph 5(c)(ii) of their final submissions, which is in your Judges' folders, is simply misguided when it speaks of the Republic of Equatorial Guinea having failed to undertake the verifications, checks and examination on board the *"Heroic Idun"* with all possible consideration, "in breach of Article 110 of UNCLOS". It cannot be a breach of a provision not to exercise a right that the Article provides for.

The fourth point, and this is perhaps the most stunning of the arguments of the Marshall Islands on piracy. This is the claim that, even if there was a reasonable suspicion of piracy, there would still be an obligation to compensate the flag State of the vessel if it turned out in the end that, in actual fact, the vessel was not used for piracy. This argument is both flawed as a matter of law and would have very damaging policy implications were it to be correct.

I was taken to task, gently I'm sure, for not referring to Article 103 of the Convention. I did, in fact, speak of what constitutes a pirate ship, but it is true that I did not refer to

Article 103. Let me now correct that error. Let's look at Article 103 and consider what a pirate ship is. The provision states: "A ship or aircraft is considered a pirate ship if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of persons guilty of that act."

The key is that a pirate ship must be intended to be used for, or must have been used to, commit the acts referred to in Article 101. So let's go back to Article 101. And here we see again paragraph (c) – the act of facilitating the other acts that are described in subparagraphs (a) or (b). So a ship that is used for facilitating an act of piracy is a pirate ship.

This then takes us to two questions. First, what degree of certainty is required before seizure of a ship can take place? Our friends on the other side seem to suggest that, because a pirate ship is defined as a ship that has been used, or is intended to be used for committing acts of piracy, they seem to suggest that the warship must have certainty that this is the case at the time of seizure. They seem to suggest that reasonable suspicion does not suffice for seizure. But how could this be the case that certainty is to be required? This is to require that those exercising enforcement powers essentially undertake the judicial act of making final judgments. But we see in Article 105, it's in your folder, that the judicial act comes after the seizure, as it must.

Furthermore, Article 106 is clear that seizure is carried out on suspicion of piracy, where the seizure of a ship or aircraft, on suspicion of piracy, has been effected without adequate grounds. So seizure is carried out on suspicion of piracy; we accept that it must be a reasonable one.

The formulation of Article 106 then leads to the second question. The question of the grounds for compensation in case it turns out that a ship is not actually a pirate ship. What Article 106 provides for is that compensation will be paid if there are not adequate grounds. This itself confirms that the fact that the ship has turned out not to be a pirate ship does not mean that compensation must be paid. Instead, what one has to look for, or what one has to look at, is whether there were adequate grounds for seizure or for that suspicion of piracy. Our argument is that, in the light of the duty to cooperate in the repression of piracy, it was reasonable to respond to Nigeria's request, and that constitutes adequate grounds for seizure. In the alternative, we say, that where there is a reasonable suspicion of piracy and the ship has committed acts which justify that suspicion, then again there are adequate grounds for seizure. The suggestion that even if there is a reasonable suspicion and the ship has committed acts which justify such suspicion there would nonetheless be an obligation to pay compensation would have the most chilling effect on the repression of piracy were it to be adopted by this Chamber.

The Agent of the Marshall Islands, in her gracious statement that she made yesterday before reading the final submissions of the Marshall Islands, spoke of the risk that the global shipping community becomes vastly more vulnerable.[4] We all have a shared interest in making sure that that is not the case. This is why Equatorial Guinea is committed to maritime security in the Gulf of Guinea. However, an interpretation of Article 106 which tells those involved in such a fight for maritime security, that if they get their assessment wrong and even if they acted reasonably in getting it wrong, and even if they got it wrong because of what the vessel has done, the State has to bear the cost and has to pay up, that would do a lot to making the global shipping community vastly more vulnerable.

The policy implications of such a rule would be very far reaching and would put at risk the advances that we have seen in the fight against piracy, both in the Gulf of Guinea and globally.

[4] ITLOS/PV.25/C32/11, p. 33 (line 28).

The fifth point that now divides the Parties with regard to Equatorial Guinea's piracy defence is that the Marshall Islands, in the second round of these oral proceedings, asserts for the first time that Equatorial Guinea is in breach of its obligations to cooperate with the Marshall Islands under Article 100. Now this is quite some shift as, of course, this argument would only succeed because the Tribunal accepts that Equatorial Guinea is acting to repress piracy.

But what the Marshall Islands is trying to do here is to pit the obligations that Equatorial Guinea has towards Nigeria against duties that it says Equatorial Guinea has towards the Marshall Islands. The obligation to notify the flag State has now found a new home – it's embedded in the duty to cooperate in the repression of piracy. However, this argument does not go anywhere. It relies on mere form since the Marshall Islands was well aware of the detention of the vessel. The Marshall Islands paints a picture as if there was no contact between it and Equatorial Guinea on this matter, and my colleague Ms Lavaud mentioned this just a little while ago. Yesterday you were told that there was a good deal on which you heard nothing.[5] You were told that you heard nothing on Equatorial Guinea's failures to engage with the Marshall Islands. And then a slide was put up referring to unanswered correspondence, so letters or notes verbales that the Marshall Islands had sent. In reality, what you heard nothing about were the meetings which took place in September 2022, in Equatorial Guinea, between the representative of the Marshall Islands Maritime Administrator, a Captain Mustapha, and Equatorial Guinea's Director-General of Ports and, also, Equatorial Guinea's Attorney General.[6]

The idea that Equatorial Guinea, by engaging in further discussions with the Marshall Islands in relation to the investigation would have aided that investigation, is wholly unsubstantiated. Not a single suggestion was given of what the Marshall Islands would have done, could have done or would have added to the ongoing investigation.

We do not accept that Equatorial Guinea breached its obligations to the Marshall Islands. But even if this were correct, the argument still does not go anywhere. As long as Equatorial Guinea was acting on a reasonable suspicion of piracy and acting reasonably in responding to Nigeria's request, then it could not have been in violation of the principles of freedom of navigation or exclusive flag State jurisdiction, nor could it have breached the obligation to have due regard because this is a situation where there is an exception to these principles and Equatorial Guinea was acting in fulfilment of that exception, at least in relation to its obligations to Nigeria.

Now, in asserting that Equatorial Guinea, by breaching its obligations to the Marshall Islands, could not have been acting – or this seems to have been the suggestion – that Equatorial Guinea by breaching its obligations to the Marshall Islands could not have been acting in accordance with its obligations to Nigeria. If that's the assertion, then the Marshall Islands simply demonstrates that the *Monetary Gold* doctrine is squarely at issue. The Marshall Islands is in effect making a request to this Tribunal to hold that Nigeria did not have the right to receive the cooperation that Equatorial Guinea gave it because in the Marshall Islands' view that would be inconsistent with the Marshall Islands' own rights.

Mr President, Members of the Chamber, for all of these reasons we urge you to find that Equatorial Guinea was acting in accordance with its duty to repress piracy and that in so doing acted lawfully in intercepting and arresting the "*Heroic Idun*".

That concludes my submissions, and I am grateful to you for your kind attention.

Mr President, Professor Haeri will be up next but perhaps this would be a good time to take a break.

[5] ITLOS/PV.25/C32/11, p. 3 (lines 24-28).
[6] Memorial of the Marshall Islands, paras. 55 & 114.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Akande for his statement.

Indeed, I think this is time for a coffee break, so the Special Chamber will now withdraw for 30 minutes. The hearing will resume at 5 p.m.

(Adjourned at 4.28 p.m. to 5.00 p.m.)

THE PRESIDENT OF THE SPECIAL CHAMBER: We will now continue the hearing, and I give the floor to Mr Haeri again, please.

STATEMENT OF MR HAERI
COUNSEL OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/12/Rev.1, p. 19–30]

Thank you, Mr President, Members of the Special Chamber. I will now address you on the fifth point in our closing submissions concerning the treatment of the crew.

The Chamber will recall that the Marshall Islands has filed 28 witness statements from 26 crew members. Though the Marshall Islands chose to call only the Master and the Chief Officer to give evidence at the hearing, it seems to place great weight on the quantity of its witnesses. But to judge the quality of witness evidence, the credibility of witnesses must be carefully considered.

In its written pleadings, Equatorial Guinea noted that the rate of $2,000 per day, per crew member, for the 10-month time period is $578,000 for each crew member.[1] The Marshall Islands has not denied this.

On the contrary, during the opening submissions at this hearing, Counsel for the Marshall Islands confirmed that the crew "stand to gain from any award for non-material damage".[2]

Mr Hernández Martín and Captain Esono Nchama gave clear and honest evidence to the Special Chamber which goes to the credibility of their witness evidence.

A striking point on credibility was raised by the evidence of the Master that he did not know he needed a naval clearance or a clearance from the Nigerian National Petroleum Company to load oil, as he led a vessel the size of the Empire State Building into Nigerian waters.[3] If that were true, and it would be surprising, it still goes to credibility.

On credibility, Counsel for the Marshall Islands suggested yesterday that the Master stating that the next port of call was Ceiba, Equatorial Guinea, simply misunderstood my question, and that it was not put to him that this was untrue. My question was simple: whether the next port of call was in Equatorial Guinea and not in Nigeria. His answer was equally simple: correct. Counsel for the Marshall Islands chose not to conduct a redirect examination on the point, so it can hardly contend the witness was not given a chance to correct himself if he had misspoken.[4] We know, based on the Master's witness evidence, that, in fact, the next port of call was not Ceiba in Equatorial Guinea, but was, rather, Akpo Terminal in Nigeria.

So Counsel for the Marshall Islands has offered an alternative explanation for the exchange between the Master and the Nigerian Navy. When the Nigerian Navy asked the Master where the vessel was going, his answer was not the common sense one of, where are you going now, from drifting here outside the area of the Akpo Terminal, but rather about the vessel's future plans in the next iteration of its oil loading itinerary. In other words, the Master thought he was being asked about his prospective schedule some days in the future, rather than about where the vessel was actually heading at the moment of questioning. It is an elaborate, and I would suggest, implausible explanation offered by Counsel. On any analysis, it wouldn't help the credibility of the Master, as it would be a very unusual way to respond to the question put to him by the Nigerian Navy.

Credibility of witness evidence is particularly important in this case because there are clear areas of contradiction between the evidence of witnesses, such as between the Master and Mr Hernández Martín. In its closing, the Marshall Islands made a number of references and

[1] Rejoinder of Equatorial Guinea, para. 414.
[2] ITLOS/PV.25/C32/5, p. 18 (line 34) (Casas).
[3] ITLOS/PV.25/C32/3 (confidential), p. 18 (lines 43-50), p. 19 (lines 1-9) (Master); ITLOS/PV.25/C32/1, p. 17 (lines 33-34) (Bethlehem).
[4] ITLOS/PV.25/C32/3 (confidential), p. 22 (lines 39-42) (Master).

quoted freely, albeit on occasion quite misleadingly, from the witness testimony of this hearing. So let’s see some of the differences in evidence.

Mr President, Members of the Special Chamber, a number of the slides that I am going to address on the screen at least are redacted, but you do have at tab 16 of your Judges’ folder the unredacted versions, and if I might respectfully suggest, it might be more helpful to follow, if you wish, what I am about to address in your Judges’ folder. So it is available, if that’s useful to you. It is at tab 16 in your folder. And, in particular, from tab 16, it’s actually at slide 9. So it’s just after Article 106 of UNCLOS addressed by Professor Akande. So it’s tab 16, but it’s the ninth slide in that tab.

I apologize, I am corrected, it is 14 I am told now. Thank you. Thank you for that.

So it is tab 14 in the folder and it is the ninth slide where I am going to start, after Article 106 of UNCLOS addressed by Professor Akande, and it’s an exchange that I had with Mr Hernández Martín, where I began asking about did he ever witness and hear of any threats or intimidation. So if you are there, I will go through from there on a series of points relating to evidence.

Unlike the suggestion of mistreatment from the Marshall Islands’ witness, Mr Hernández Martín says that the Equatoguinean authorities always treated the crew right, that they were very polite. He also confirmed that they were never threatened or intimidated.[5] And we can see that on this slide, from the transcript.

You can turn, if you wish, to the next page, the next slide as it were, and here again, contrary to what was suggested by the Marshall Islands’ witness, the interviews conducted by Equatoguinean authorities were handled with care and transparency. And as Mr Hernández Martín testified, he assisted the crew with translation from Spanish to English. He read each declaration to the crew members being interviewed, and he conducted a line-by-line translation.

At this point, the crew members could change what was written, and they did so. He also confirmed the crew members signed these statements willingly.[6] Again, we accept that there is a difference between the evidence presented by the respective parties, and so we do say that the issue of credibility is important in understanding what actually happened.

And I move on to the next slide, which is that, unlike the suggestion of appalling conditions from the Marshall Islands’ witness, Mr Hernández Martín described the accommodation facility as brand new, with air conditioning, bathrooms, showers, and tap water available.[7] It was good, he said. Again, we accept there is a conflict, if you like, of evidence on this issue. Was Mr Hernández Martín’s description correct, or was it not? Credibility is important on such matters, where witness evidence is contradictory.

Unlike the portrayal of the facility as lacking, from the Marshall Islands’ witness, Mr Hernández Martín listed all the items – and this is the next slide – all the items that Besora provided at the crew’s request. He also made clear he checked in with them regularly to make sure they had everything they required for a comfortable stay. This included material to play cricket, for example.[8] Is that correct? It’s for the Special Chamber to decide. Do they believe the veracity of Mr Hernández Martín’s evidence or not? Was he a credible, honest witness telling you the truth of things to which he was integrally involved and of which he had first-hand knowledge? Of course, he was the main contact point at Besora for the crew, and, with the Equatoguinean authorities, he was the primary contact.

And we come on to the next slide in your folder regarding food arrangements. Mr Hernández Martín referred to a request from an identified crew member who said that they

[5] ITLOS/PV.25/C32/6, p. 47 (lines 21-27) (Hernández Martín).
[6] ITLOS/PV.25/C32/6, p. 50 (lines 1-15) (Hernández Martín).
[7] ITLOS/PV.25/C32/6, p. 47 (lines 35-39) (Hernández Martín).
[8] ITLOS/PV.25/C32/6, p. 63 (lines 38-44) (Hernández Martín).

were "getting fat", so Besora was thereafter able to provide tailored meals in the Indian style from a chef of a good restaurant in Malabo.[9]

Does the Special Chamber accept Mr Hernández Martín's evidence on this, or does it think that this was made up, inaccurate or something else? That is a point of credibility. Now, that same individual – Mr Hernández Martín had identified him as having said that – gave evidence he was barely able to eat, didn't visit the second restaurant at Hotel Anda. In fact, expensed receipts for that individual showed that he visited the restaurant as many as six times in a single day, including both restaurants.[10] You have the reference there before you, REG-16.

Again, there is a contradiction of evidence. It is for the Special Chamber to decide what it thinks actually happened. It can't be both.

Mr President, Members of the Special Chamber, the Master's evidence that he didn't care about the comfort or facilities of the Hotel Anda, he just wanted to go home, is quite understandable. However, it is important to note that it essentially proves Equatorial Guinea's point. There was no mistreatment of the crew. However comfortable the conditions were was irrelevant for the Master, it wasn't the issue. The issue was he wanted to go home and not to Nigeria. However, there was a process between the governments of Nigeria and Equatorial Guinea for the return of the vessel to Nigeria which culminated in an agreement referred to by Captain Esono Nchama the day of the return of the vessel.[11]

Unlike the suggestion the crew were confined, isolated, deprived of basic amenities, Mr Hernández Martín left no doubt that Besora was able to assist them at all times. Any crew member could be reached by phone and request any amenities they wished. He could not remember a single instance in which Besora was unable to provide what the crew requested.[12] And we can see that on this slide.

The evidence of Mr Hernández Martín on the treatment and conditions of the crew is about as different as you can get from the report of Dr Perman-Kerr, who hasn't been called by the Marshall Islands to give oral evidence, who never went to Equatorial Guinea, and who appears to have relied largely on discussions that took place with crew members at the end of the 10 months, following their release from Nigeria. A focus in her report are the few days prior to the return of the vessel and crew to Nigeria in which crew members were clearly anxious of what was to come in Nigeria. As the Chief Officer said, he thought there would be repercussions of what had happened in Nigerian waters, and there were.[13] Captain Esono Nchama equally explained that crew members were crying and saying they wanted to stay in Equatorial Guinea, the first part of which was mentioned yesterday by Counsel for the Marshall Islands, who then omitted to mention the latter relevant part.[14] It is possible to be understanding of this situation, even sympathetic. But it simply does not follow to conclude from it and accuse Equatorial Guinea, quite wrongly, of "no-touch torture".

The Marshall Islands has suggested that the crew were misled into believing they would be released upon payment of the fine. Again, we have a slide on this, where Mr Hernández Martín clarified that this appears to have been a misunderstanding. He understood that the crew were going to be released from Equatorial Guinea.[15] One can perhaps understand the frustration of the owners, but a misunderstanding in communication does not mean that Equatorial Guinea committed an internationally wrongful act.

[9] ITLOS/PV.25/C32/6, p. 48 (lines 7-24) (Hernández Martín).
[10] Invoice, Hotel Anda China, 8 November 2022, REG-016, p 19.
[11] ITLOS/PV.25/C32/6, p. 32 (lines 14-17), p. 40 (lines 22-46) and p. 44 (lines 6-18) (Captain Esono Nchama).
[12] ITLOS/PV.25/C32/6, pp. 47-48 (lines 41-8), p. 49 (10-14) (Hernández Martín).
[13] ITLOS/PV.25/C32/2, p. 37 (lines 16-38); RMI-5, para. 39.
[14] ITLOS/PV.25/C32/6, p. 32 (lines 19-25) (Captain Esono Nchama).
[15] ITLOS/PV.25/C32/6, p. 62 (lines 3-10) (Hernández Martín).

Now, there was an insinuation that Mr Hernández Martín only provided testimony because he has to live and work in Equatorial Guinea. When the point was put to him, his answer was crystal clear: this was absolutely not the case.[16]

Again, Mr President, Members of the Special Chamber, it is for you to determine the credibility, the veracity of Mr Hernández Martín's evidence.

It was also put to Mr Hernández Martín that he had prepared the daily reports of his interactions with the crew at REG-036. He made clear that this document was contemporaneously prepared before the present case was brought. Reference was made to a date in the cover page of this document, but a cursory glance at this page clearly shows it is the date of the translation, not the date the document was produced.

To conclude, the evidence from Mr Hernández Martín differs in notable respects from that of witnesses who, to quote from the Marshall Islands, "stands to gain from any award for non-material damage".[17] Mr Hernández Martín's evidence is credible, though, it is consistent with the contemporaneous documents in the record, including those introduced by the Marshall Islands, and it shows beyond any reasonable doubt that the crew were treated in accordance with the principle of humanity at all times.

Mr President, Members of the Special Chamber, I finally move on to causation and to quantum where, again, the Marshall Islands goes too far. It is asking this Chamber to award damages for claims which do not have a direct, clear and unbroken causal link to any internationally wrongful act of Equatorial Guinea. There is not a single reference to a single provision of UNCLOS in either the Marshall Islands' written pleadings on damages or its submissions last week for any of the heads of losses claimed. The Marshall Islands asks the Chamber to award it damages in a void, with no link to Equatorial Guinea's specific acts allegedly violating specific obligations under UNCLOS.

As Equatorial Guinea demonstrated, the causal chain in the present case starts with, and flows from, the interaction between the *"Heroic Idun"* and the *NNS "Gongola"* on 8 August 2022. Any losses said to be suffered thereafter in Equatorial Guinea and subsequently in Nigeria are therefore consequences of the events starting in Nigeria. That is why the Marshall Islands' latest revision yesterday to its damages claim to remove various events occurring later in Nigeria doesn't assist it and simply reinforces that the causation chain started in Nigeria with the events of 8 August 2022. The only way to respect that causation chain is to pull the claim out at the roots in Nigeria, not just for events that occurred later in Nigeria.

I would like to take the Chamber back to the counter-factual scenario, where the vessel would have returned to Nigeria, in any case, to load oil later in August 2022. This is what the Marshall Islands says should have happened; the orange bar at the bottom, the counterfactual; the green bar at the top, the factual, being what actually happened. And as you can see, they end in the same place, in Nigeria. What difference does it make to the return to Nigeria that Equatorial Guinea aided and assisted Nigeria as compared to the voluntary return of the vessel as it says was its intention?

The vessel would have faced the same criminal proceedings, paid the same fine, and been prevented from operating. Plainly, this counterfactual scenario makes clear that the various losses suffered, or said to be suffered in Nigeria, were a consequence of the vessel's own actions, vis-à-vis the Nigerian authorities, not a causal consequence of any actions of Equatorial Guinea. Now, the Marshall Islands posited what it referred to as a "counter-counter" hypothesis, that "who knows" what things might have happened regarding Nigeria.[18] But the difficulty with conjecture on this point is that we do know exactly what happened when the vessel returned to Nigeria, because that's what happened.

[16] ITLOS/PV.25/C32/6, p. 51 (line 45) (Hernández Martín).
[17] ITLOS/PV.25/C32/5, p. 18 (line 34) (Casas).
[18] ITLOS/PV.25/C32/11, p. 8 (lines 44-49) (Bethlehem).

Turning now to quantum. Yesterday, we heard the fifth iteration of the Marshall Islands' quantum case, resulting in a reduction on the last day of the Marshall Islands' submissions in these proceedings of 70 per cent. It was hoped by Counsel for the Marshall Islands that this might help to crystallize the issues and hone the debate.

Even in the 24 hours Equatorial Guinea has had to review and respond to this shifting claim, irremediable flaws remain in the Marshall Islands' claims and documentation, which renders them unsafe.

We heard the admission of Counsel for the Marshall Islands that the Chamber was provided with "raw, unprocessed data" and that many of the 3,000 pages filed in these proceedings are what was repeatedly called "surplus".[19] This is a problem that Equatorial Guinea raised squarely, starting from its written pleadings: yet nowhere does the Marshall Islands attempt to reconcile the "raw data" it veritably dumped into the record with its claims.[20] How was the Special Chamber or Equatorial Guinea reasonably expected to guess which items were being claimed for in the absence of a reconciliation? And why were documents that the Marshall Islands now claims to be irrelevant to its damages claim submitted as evidence to support its damages claim in these proceedings? That rather puzzling question remains left unanswered.

Despite repeated complaints that Equatorial Guinea was requiring too "granular" an approach,[21] it is only because of the insistence that we have seen that the claims put forward by the Marshall Islands are riddled with mistakes, double-counting and inappropriate expenses.

The Marshall Islands, yesterday, sought to address examples of inappropriate expenses Equatorial Guinea had presented in the first round of proceedings. While it is right to acknowledge and seek to correct mistakes, I am afraid the issue is simply endemic. Even the 30 per cent of the damages case the Marshall Islands has retained remains plagued with irremediable issues, both evidential and otherwise.

The Marshall Islands has apparently come around to this realization of its own accord, albeit very belatedly. On 14 February 2025, Equatorial Guinea proposed to address the issue of compensation in a separate phase of proceedings following the judgment of the Special Chamber on liability, if required. The Marshall Islands replied on the 25 February 2025, stating: "This request is simply made far too late in these proceedings and is not justified in circumstances where the Marshall Islands has already submitted its written case". And yet, yesterday, in its final closing oral submissions, we heard the Marshall Islands propose bifurcation of proceedings on the very same matter, as a final effort to salvage what remains of its damages case. That is a complete reversal, considering its previous position. The Marshall Islands has had ample time to present its position on its own claim and should not be rewarded for its ever-shifting position. It is simply too late.

Even now, the Marshall Islands contends that it should recover amounts spent on "beverages",[22] quite the euphemism, and suggests that this Chamber apply a discount if it disagrees with the inclusion of various alcoholic drinks that are being claimed for from this Chamber. The Marshall Islands has not even bothered to suggest what this discount would be.

We saw the Marshall Islands maintaining this, yesterday, in addressing the "who" question. What it failed, it would seem, to have observed is that the expense highlighted was for liquor. What the Marshall Islands referred to as a "dot"[23] is, in fact, a point, and a rather serious one at that. What is it doing asking this Special Chamber to award it damages for beverages? Again, the Marshall Islands simply goes too far.

[19] ITLOS/PV.25/C32/11, p. 25 (lines 45-47) (Casas).
[20] ITLOS/PV.25/C32/11, p. 2 (lines 27-30) (Casas).
[21] ITLOS/PV.25/C32/11, p. 26 (lines 17-20) (Casas).
[22] ITLOS/PV.25/C32/11, p. 29 (line 6) (Casas).
[23] ITLOS/PV.25/C32/11, p. 25 (lines 29) (Casas).

As a preliminary point, before I turn to the detail, the Marshall Islands claimed in its closing statement that "[t]hrough [its] time, [it has] never increased [its] claim".[24] This is incorrect. In its Memorial, the Marshall Islands claimed a total of almost $40 million for material damages.[25] In its Reply, the total figure was increased to $43 million.[26] That is an increase for material damages of approximately $3.2 million. But, in any event, whether sands are building up in different iterations or receding, the main point is that they are shifting.

Turning now to address some of the detail of the fifth quantum case put forward by the Marshall Islands yesterday. It now advances a claim for $7.6 million based on loss, damage or injury from 12 August to 11 November 2022. The Marshall Islands now claims about $5.3 million for loss of hire. As set out during the first round of arguments, this amount is based on the charter party, which was novated. Mr Horne did not see the novated document, because he was not provided it, as he says in his report, and it has not been filed in these proceedings.[27] As such, we can place no weight on this calculation. The Marshall Islands suggests that the amounts calculated for this time period can be corroborated by reference to three invoices on the record. However, Mr Horne himself explains in his report, at paragraph 56, that some of these invoices were paid. For example, for the period between 1 August and 1 September, he calculates the amount of loss to be zero. You can see that on this slide and reference from his report. And, yet, the Marshall Islands claims $734,000 for this period. Again, we respectfully submit, it goes too far.

The Marshall Islands also claims for additional wages. Even if it was legally entitled to recover such additional wages, which it is not, as made clear in paragraph 439 of "*Virginia G*",[28] pages 71 and 72 of RMI-60 show that the amount claimed includes all of November. We can see for the period 2022, 11. So this is November 2022, and the number of days is 30 days. So the amount claimed is all of November, not just 11 days of it in Equatorial Guinea, and also all of December 2022.

Consider the Marshall Islands' case on the war risk premium. It is a curious one. It disappeared from its submissions last week, but a fraction of it was resurrected yesterday, or purportedly so. However, the first invoice listed in the table presented yesterday, at page 85 of RMI-65, shows that it relates to 7 and 8 August 2022. And as we set out last week, the Marshall Islands cannot possibly claim for losses allegedly incurred before Equatorial Guinea even knew about the existence of the "*Heroic Idun*". You can see the date there, the period from 7 August 2022 onwards.

The Marshall Islands still claims roughly $1 million for bunkers consumed during August and December (rather than November), yet another inconsistency. As supporting evidence, the Marshall Islands has provided 437 pages of logs,[29] or, as Counsel for the Marshall Islands called it, "raw unprocessed data".[30] The issue with expecting this Chamber and Equatorial Guinea to do the job of the Marshall Islands is that it is impossible to determine how the Marshall Islands has reached this number. The logs provided have a row, to be filled daily, dedicated to "fuel oil consumption". For the relevant time period, these rows are blank. How the Marshall Islands has calculated a million dollars based on these logs remains an incognita.

Finally the Marshall Islands claims $461,000 on wasted costs from the prompt release applications. The Marshall Islands has maintained this expense, despite the fact that it is no

[24] ITLOS/PV.25/C32/11, p. 28 (line 17) (Casas).
[25] Memorial, para. 439(a)(i)(1).
[26] Reply, paras. 284, 334(a).
[27] First Expert Report of Tim Horne including annexes, RMI 39, para. 8.
[28] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, para. 439 with reference to Reply of Panama, paras. 448, 450-453.
[29] Volume V, Additional documents submitted by the Marshall Islands, 11 September 2025, pp. 4-440
[30] ITLOS/PV.25/C32/11, p. 25 (line 46) (Casas).

longer asking this Chamber, in its revised prayer for relief yesterday, to make a determination on the prompt release proceedings. The Marshall Islands has not even tried to explain which alleged breach of UNCLOS it is now relying upon in an effort to recover these costs. That it is the Marshall Islands claiming wasted costs is rather ironic in the circumstances of this case.

The Marshall Islands also presents a second claim for material damages, in this case allegedly incurred between 27 May and 24 July 2023. As set out already in causation, any such damages would not flow from the interdiction of the *"Heroic Idun"*, but rather from Nigeria's request for cooperation. However, in any event, and under any analysis, the plea bargain agreed by the owners of the vessel would break the chain of causation, as already explained, and as already implied by the Marshall Islands' removing of periods in Nigeria from its revised damages claim submitted yesterday. Moreover, examining the claims retained by the Marshall Islands under this head of claim, it shows that they are not recoverable for a number of further reasons.

For example:

The Marshall Islands claims roughly $2.4 million in loss of hire. However, other than the inscrutable calculations of Mr Horne to determine a daily rate, such calculations do not account for costs that the *"Heroic Idun"* would have also incurred, even if it had not been detained. For instance, the Marshall Islands wants payment for the 11 days it took to change the crew in its voyage from Nigeria to South Africa. Such a crew change would have been done anyway. It also claims for 20 days of travel to the UAE and nine days for time spent in repairs[31]. And yet, the Marshall Islands fails to show that the *"Heroic Idun"* was damaged in any way during its stay in Equatorial Guinea that, therefore, required repairs in the UAE compensable by Equatorial Guinea.

The Marshall Islands also claims the costs of these repairs, $438,000 for painting and for repairing Scanjet machines. There has not been a single allegation that Equatorial Guinea's actions somehow damaged the paint of the vessel or its Scanjet machines. In fact, the mentions to paint and pumps in the condition survey report filed by the Marshall Islands at EK-78, and we see it here on this slide, show that they were in "good condition".[32] The Marshall Islands cannot renovate the *"Heroic Idun"* and pass on the costs to Equatorial Guinea.

Similarly, the Marshall Islands claims for repatriation costs. Presumably, these would also have been incurred in the but-for world. This would include the almost $60,000 claimed as travel wages for the new crew, and another $60,000 for costs incurred in Cape Town. To the extent the Marshall Islands is claiming that some of these costs were a result of the detention, it has failed to show how. For example, the security escort was required as a result of which internationally wrongful act of Equatorial Guinea?

The third claim advanced is for $4.7 million in non-material damages. The Marshall Islands' claim is based on the factual circumstances of the alleged mistreatment of the crew. As I have demonstrated, the evidence from impartial witnesses, and there are two witnesses in this case who have no financial interest in it, the evidence from impartial witnesses firmly controverts these claims. It would be completely inappropriate in the circumstances of this case for any payment of non-material damages.

Alternatively, the Marshall Islands argues that this claim is justified, as the crew members are said to have suffered "severe reputational harm".[33] Yet, we heard from a witness last week that he continued his maritime career and was promoted to the rank of Master immediately following his departure from Nigeria on another vessel.[34] And you have the slide relating to that exchange in your folder.

[31] Table on "Loss of Hire following Detention", Presentation of the Marshall Islands, 13 October 2025, p. 384.
[32] Condition Survey Report, EK 78, p. 295.
[33] ITLOS/PV.25/C32/5, p. 18 (line 2) (Casas).
[34] ITLOS/PV.25/C32/2 (confidential), p. 17 (lines 4-7), p. 18 (lines 8-13) (Chief Officer).

As Mr Hernández Martín explained, honestly, and in detail to the Chamber, in terms that accord with the actual documentary record in evidence, there was no mistreatment of the crew and there can be no claim for non-material damages in the present case.

I come on, Mr President, distinguished Members of the Special Chamber, to the concluding remarks that I have to make.

We have heard from Counsel for the Marshall Islands that Equatorial Guinea's position is a "sham" and that it acted in a "wanton, baseless and perhaps malicious" way.[35] Enough is enough. The Marshall Islands' frustrations may be understandable, but its accusations are quite misplaced.

We have seen in the evidence that, in January 2023, the Marshall Islands' action against Nigeria was "nearly ready".[36] Then, in April 2023, the owners instead decided to enter into the plea bargain agreement in Nigeria, under which they paid $15 million.[37] The Marshall Islands then decided, perhaps unsurprisingly, not to bring that case against Nigeria under UNCLOS. However, it cannot be right for the Marshall Islands, instead, to purport to recover it costs from Equatorial Guinea as a backup. International law does not allow it.

In order to hopefully assist the Chamber, and as a conclusion, I would like to take you to some decision trees. In the first one, here on the slide, we have set out our position on jurisdiction and admissibility.

Concerning jurisdiction, this Chamber has jurisdiction over disputes related to the interpretation and application of UNCLOS, but such jurisdiction does not extend to instruments external to UNCLOS. This means that the claims concerning human rights and the IMO instruments fall outside of this Chamber's jurisdiction.

Turning to admissibility, the applicability of the *Monetary Gold* principle and Nigeria's absence in these proceedings means that the claims concerning the interception and detention of the vessel are inadmissible.

Finally, the failure of the Marshall Islands to exhaust local remedies renders its claims relating to the treatment of individuals inadmissible.

Should, in the alternative, the Chamber wish to determine issues on the merits, it can then turn to our second decision tree. This tree has four branches.

First, concerning the interception and detention of the vessel, this was done under the obligation to repress piracy, as a reasonable response to a request for cooperation and in light of a reasonable suspicion of piracy. If successful, this would be fatal to the claims concerning breaches of the principle of freedom of navigation, of exclusive flag State jurisdiction, of due regard, and of Article 225 of UNCLOS.

Second, turning to the human rights claims, insofar as they relate to UNCLOS, they must be restricted to acts at sea. Therefore, this only encompasses 12 and 13 August 2022, when no breach of human rights is alleged.

Third, turning to the IMO instruments, such claims relate to UNCLOS' provisions that are not relevant. They also improperly extend the general obligations under the IMO instruments, and relate to inapplicable obligations of flag States. As such, there can be no breach based on the IMO instruments.

Fourth, the Marshall Islands artificially generalizes specific obligations, such as reasonableness, notification, prompt release, and non-aggravation. In reality, these claims border on bad faith and it has been demonstrated that there can be no such breach.

Finally, and again, in the alternative – again, in the alternative, if the Chamber was to advance to matters of causation, the case of the Marshall Islands must equally fail at that stage. As shown on the slide, and this is the same slide we saw earlier when I addressed causation,

[35] (ITLOS/PV.25/C32/5, p. 24 (lines 5-7) (Bethlehem); (ITLOS/PV.25/C32/5, p. 17 (lines 25-26) (Casas).
[36] Email, 15 January 2023, 10:06, EK-69.
[37] Plea Bargain, SA 38.

the factual and counterfactual scenarios start from the same place. We see that in the red bar on the left-hand side. 10 August 2022, Nigeria requests that Equatorial Guinea interdict the "*Heroic Idun*", after it flees the *NNS "Gongola"* on 8 August 2022. That is where causation directly starts. That is the start of the chain of causation and the reason why events were not directly caused by Equatorial Guinea later.

Moreover, the factual and counterfactual scenarios also lead back to Nigeria. That is a second, separate point on causation; my first point being, causation starts with Nigeria. It is the start of the causation chain, not Equatorial Guinea. My second point here on causation is, in any event, on the Marshall Islands' case, the vessel would have returned to Nigeria and, therefore, Equatorial Guinea's interdiction did not change the consequences that occurred thereafter in Nigeria. So there are two separate causation points here. And as we have seen previously, the only material difference in the counterfactual is whether the investigations occurred firstly in Equatorial Guinea or in Nigeria. But, ultimately, you have Nigeria conducting its own investigations and the consequences that follow. This, again, we respectfully submit, shows that Equatorial Guinea cannot be said to have caused events in Nigeria that would have happened anyway, and did happen.

Mr President, distinguished Members of the Special Chamber, this brings me to the end of Equatorial Guinea's legal submissions. I thank you sincerely for your kind attention, and I respectfully request, Mr President, that you invite His Excellency, Mr Carmelo Nvono-Ncá, to take the floor in the concluding remarks of the Republic of Equatorial Guinea. Thank you.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank Mr Haeri for his statement.

And this brings us to the last stage of the oral argument of Equatorial Guinea.

I wish to recall that Article 75(2) of the Rules of the Tribunal, provides that, at the conclusion of the last statement made by a party at the hearing, its Agent, without recapitulation of the arguments, shall read the party's final submissions. A copy of the written text of these signed by the Agent shall be communicated to the Special Chamber and transmitted to the other party.

I now invite the Agent of Equatorial Guinea, His Excellency, Mr Carmelo Nvono-Ncá, to the podium to make some closing remarks and also present the final submissions of Equatorial Guinea.

You have the floor, sir.

STATEMENT OF MR NVONO-NCÁ
AGENT OF EQUATORIAL GUINEA
[ITLOS/PV.25/C32/12/Rev.1, p. 30–33]

Thank you very much. Thank you very much, Mr President.

Mr President, Honourable Members of the Special Chamber, Madam Registrar, members of the delegation of the Marshall Islands, good afternoon.

With this statement, I will be concluding the oral submissions of Equatorial Guinea for these proceedings. The Republic of Equatorial Guinea is a sovereign State, whose independence is based on full respect for the treaties that it has signed, as well as on strict compliance with the commitments and obligations it has undertaken under international law.

No State – and let me repeat this – no State acting unilaterally can – or ever will be able to – guarantee, on its own, maritime security or respect for international law of the sea. It is only through cooperation, regional coordination and collective support of international legal instruments, that it will be possible to preserve a just and safe maritime order.

Equatorial Guinea hereby reaffirms its strong commitment to continue cooperating actively with all regional and international actors, with the purpose of ensuring that the waters of the Gulf of Guinea remain a safe and stable area for all ships sailing those waters in accordance with international law and multilateral agreements in force.

I would like to take advantage of this occasion, on behalf of my Government and on behalf of the people of Equatorial Guinea, to thank you, Mr President, and the Members of this Special Chamber, for having afforded Equatorial Guinea the opportunity to present its case and to respond to the allegations put forward by our colleagues from the Marshall Islands during these proceedings, and I would also like to thank you for your diligence and kind attention throughout the entire proceedings.

I would also like to thank the International Tribunal for the Law of the Sea for its continued support to the Parties in addressing the present dispute. We have full trust in this Special Chamber, and we are pleased to have been able to submit this dispute for settlement, along with the Marshall Islands, via a Special Agreement. We hope that this will encourage all State Parties to call upon the Tribunal in light of the dispute settlement procedures provided for by the United Nations Convention of the Law of the Sea.

Thirdly, we would like to thank the Registry, the Registrar, and the staff for their assistance and their cooperation during these proceedings, and we’d also like to thank the interpreters for their translations throughout our submissions during this hearing, and we would like to thank all of those who have contributed to making this possible.

And, last of all, pursuant to Article 75(2) of the Rules of the Tribunal, I would now like to read to you the final submissions of Equatorial Guinea. A copy of the written text will be provided to the Registrar and transmitted to the Agent for the Marshall Islands.

Having regard to its written and oral submissions, Equatorial Guinea requests the Special Chamber to adjudge and declare as follows:

1. This Chamber does not have jurisdiction to make determinations regarding alleged breaches of treaties or rules of international law outside of the United Nations Convention on the Law of the Sea (“UNCLOS”).

2. The Marshall Islands’ claims alleging breaches of freedom of navigation and exclusive flag State jurisdiction are inadmissible, due to the *Monetary Gold* / indispensable third party principle.

3. The Marshall Islands has failed to exhaust local remedies as required by international law, rendering inadmissible those claims related to the treatment of individuals.

4. Equatorial Guinea's seizure of the *Heroic Idun* was lawful because it was carried out in accordance with Equatorial Guinea's obligation to co-operate to repress piracy under UNCLOS, and accordingly:

a) Equatorial Guinea did not breach its obligations to respect freedom of navigation on the high seas or in the exclusive economic zone, nor the principle of exclusive flag State jurisdiction on the high seas, including as set out in Articles 87(1), 90 and 92(1) of UNCLOS;

b) Equatorial Guinea did not breach its obligation to have due regard to the rights of other States, in particular of the Marshall Islands, under Articles 56(2), 58(3) and 87(2) of UNCLOS;

c) Equatorial Guinea did not breach any obligations owed to the Marshall Islands under Article 100 of UNCLOS;

d) Equatorial Guinea did not breach Article 300 of UNCLOS; and

e) to the extent that the Chamber finds, contrary to paragraph 1 above, that such matters fall within the jurisdiction of the Chamber, all measures adopted by Equatorial Guinea subsequent to the interception of the *Heroic Idun* are not in breach of other rules of international law.

5. Through the interception and seizure of the *Heroic Idun*, Equatorial Guinea did not violate Article 225 of UNCLOS or the principle of reasonableness.

6. In levying the Fine on the Master of the *Heroic Idun*, Equatorial Guinea acted pursuant to lawful prescriptive jurisdiction.

7. There is no general obligation to notify the flag State of enforcement measures, and in the alternative, Equatorial Guinea did not fail to comply with any obligation to notify the Marshall Islands of enforcement measures.

8. In addition, or in the alternative to paragraphs (1) and (3),

a) the Marshall Islands' human rights claims fall outside the Chamber's jurisdiction and the so-called "gateway provisions" do not allow for determination of human rights treaties or customary international human rights law; and

b) in any event, Equatorial Guinea acted in accordance with considerations of humanity toward the crew members of the *Heroic Idun*.

9. In addition, or in the alternative to paragraph (1), the obligations invoked by the Marshall Islands under the Convention for the Safety of Life at Sea ("SOLAS"), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers at Sea ("STCW"), or the Convention the International Regulations for Preventing Collisions at Sea ("COLREGS")

a) are either not applicable as pleaded;

b) cannot have been breached in isolation; or

c) were not breached by Equatorial Guinea.

10. Equatorial Guinea did not breach any obligations of the Marshall Islands as flag State of the *Heroic Idun* under Articles 94 and 212 of UNCLOS, under Articles 2(3) or 87(2) of UNCLOS.

11. Equatorial Guinea did not breach its obligation to preserve the rights of the Marshall Islands, nor any obligation, in so far as it exists, not to aggravate the dispute pending proceedings.

12. 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 non-material damages;

b) dismiss the Marshall Islands' request for satisfaction;

c) dismiss all of the Marshall Islands' requests for payment of interest; and

d) direct that each party should bear it own costs.

Mr President, allow me with all due respect to take advantage of this opportunity to thank you and the whole team of Equatorial Guinea, to thank all those present in this room and to thank all those who were not able to be here today, for their professionalism.

I would also like to express my gratitude to the delegation of the Marshall Islands and, in particular, to the Agent of the Marshall Islands – thank you, Madam – for their very kind treatment over these past days.

Mr President, Members of the Special Chamber, thank you very much for your attention.

This concludes the submissions of the Republic of Equatorial Guinea in these proceedings. Thank you very much.

THE PRESIDENT OF THE SPECIAL CHAMBER: I thank the Agent of Equatorial Guinea for his closing remarks and also for presenting the final submissions of Equatorial Guinea.

Closure of the Oral Proceedings
[ITLOS/PV.25/C32/12/Rev.1, p. 33-34]

THE PRESIDENT OF THE SPECIAL CHAMBER: We have now reached the end of the hearing. On behalf of the Special Chamber I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both the Marshall Islands and the representatives of Equatorial Guinea.

I would also like to take this opportunity to thank both the Agent of the Marshall Islands and the Agent of Equatorial Guinea for their exemplary spirit of cooperation.

I would now like to give the floor to the Registrar to address questions relating to documentation.

THE REGISTRAR: Thank you, Mr President.

Pursuant to Article 86, paragraph 4 of the Rules of the Tribunal, the Parties may under the supervision of the Tribunal correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. These corrections relate to the transcripts in the official language used by the party in question. In the case of statements made in the Spanish language by a witness, a correction could be marked in the English or French version of the transcript.

The Parties are requested to use for this purpose the verified versions of the transcripts and not those marked as unchecked. The correction should be submitted to the Registry as soon as possible and by Friday 24 October 2025 at 3 p.m. Hamburg time at the latest.

Mr President.

THE PRESIDENT OF THE SPECIAL CHAMBER: Thank you, Madam Registrar.

The Special Chamber will now withdraw for its deliberations on this case. The judgment will be read on a date to be notified to the Agents of the Parties. The Agents will be informed with sufficient notice of the precise date of the reading of the judgment.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Special Chamber in order to provide any further assistance and information that may be needed in its deliberations prior to the delivery of the judgment. The hearing is now closed.

(Concluded at 6.07 p.m.)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The M/T "Heroic Idun" (No. 2) Case (Marshall Islands/Equatorial Guinea).*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du navire « Heroic Idun » (No. 2) (Îles Marshall/Guinée équatoriale).*

Le 22 mai 2026
22 May 2026

Le Président de la Chambre spéciale
Albert J. Hoffmann
President of the Special Chamber

La Greffière
Ximena Hinrichs Oyarce
Registrar