INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2019

6 July 2019

List of Cases:
No. 27

THE M/T "SAN PADRE PIO" CASE

(SWITZERLAND *v.* NIGERIA)

Request for the prescription of provisional measures

ORDER

Present: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc MURPHY, PETRIG; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the "Notification under Article 287 and Annex VII, Article 1, of UNCLOS and Statement of Claim and Grounds on which it is based" (hereinafter "the Statement of Claim"), dated 6 May 2019, addressed by the Swiss Confederation (hereinafter "Switzerland") to the Federal Republic of Nigeria (hereinafter "Nigeria"), instituting arbitral proceedings under Annex VII to the Convention in respect of a dispute concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew and cargo,

Having regard to the request for provisional measures contained in the Statement of Claim submitted by Switzerland to Nigeria, pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Makes the following Order:

1. On 21 May 2019, Switzerland submitted to the Tribunal a Request for the prescription of provisional measures (hereinafter "the Request") under article 290, paragraph 5, of the Convention in a dispute between Switzerland and Nigeria concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew and cargo. The case was entered in the List of Cases as Case No. 27 and named *The M/T "San Padre Pio" Case*.

2. On the same date, the Deputy Registrar transmitted copies of the Request electronically to the Minister of Foreign Affairs of Nigeria and to the Ambassador of Nigeria to the Federal Republic of Germany.

3. In a letter dated 9 May 2019, addressed to the Registrar, transmitted together with the Request, the Federal Councillor for Foreign Affairs of Switzerland notified

the Tribunal of the appointment of Ambassador Corinne Cicéron Bühler, Director of the Directorate of International Law of the Federal Department of Foreign Affairs, as Agent for Switzerland.

4. Since the Tribunal does not include upon the bench a member of Swiss nationality, Switzerland, in its Request, pursuant to article 17, paragraph 3, of the Statute, chose Ms Anna Petrig to sit as judge *ad hoc* in the case.

5. On 22 May 2019, a certified copy of the Request was transmitted to the Ambassador of Nigeria to the Federal Republic of Germany.

6. In accordance with article 24, paragraph 3, of the Statute, the Registrar notified the States Parties to the Convention of the Request by a note verbale dated 22 May 2019.

7. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request by a letter dated 22 May 2019.

8. On 28 May 2019, pursuant to articles 45 and 73 of the Rules, the President of the Tribunal held consultations by telephone with the Agent of Switzerland and Ms Stella Anukam, Director, International Law and Comparative Law, Federal Ministry of Justice of Nigeria, to ascertain the views of Switzerland and Nigeria with regard to questions of procedure.

9. By Order dated 29 May 2019, the President, pursuant to article 27 of the Statute and articles 45 and 90, paragraph 2, of the Rules, fixed 21 and 22 June 2019 as the dates for the hearing. The Order was communicated to the Parties on the same date.

10. By letter dated 31 May 2019, the Solicitor-General of the Federation and Permanent Secretary, Federal Ministry of Justice of Nigeria, notified the Registrar of the appointment of Ms Stella Anukam, Director, International and Comparative Law,

Federal Ministry of Justice, Mr Yusuf Maitama Tuggar, Ambassador of Nigeria to the Federal Republic of Germany, and Ms Chinwe Philomena Uwandu, Director of Legal Services, Ministry of Foreign Affairs, as Agents for Nigeria. By electronic communication of the same date, Ms Stella Anukam informed the Tribunal that she would act as Agent for Nigeria and Ambassador Tuggar and Ms Uwandu would be Co-Agents.

11. Since the Tribunal does not include upon the bench a member of Nigerian nationality, Nigeria, by letter dated 3 June 2019, pursuant to article 17, paragraph 3, of the Statute, chose Mr Sean David Murphy to sit as judge *ad hoc* in the case.

12. On 17 June 2019, Nigeria filed with the Registry its Statement in Response, a copy of which was transmitted electronically to the Agent of Switzerland on the same day.

13. On 20 June 2019, Switzerland submitted four additional documents and Nigeria submitted one additional document to the Tribunal. Copies of these documents were transmitted to the Agents of the respective other Party on the same day. Neither Party objected to the admission of the additional documents.

14. On the same date, the Registrar sent a letter to the Agent of Nigeria requesting the submission of more legible versions of two of the annexes attached to the Statement in Response. The requested documents were submitted by Nigeria on 29 June 2019.

15. Since no objection to the Parties' choice of judges *ad hoc* was raised by the respective other Party and no objection appeared to the Tribunal itself, Ms Petrig and Mr Murphy were admitted to participate in the proceedings as judges *ad hoc*, after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 20 June 2019.

16. In accordance with article 68 of the Rules, the Tribunal held initial deliberations on 20 June 2019 concerning the written pleadings and the conduct of the case.

17. Pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, Switzerland and Nigeria submitted the required information to the Tribunal on 20 June 2019.

18. On the same day, in accordance with article 45 of the Rules, the President held consultations with the Agent of Switzerland and the Co-Agent of Nigeria with regard to questions of procedure.

19. Pursuant to article 67, paragraph 2, of the Rules, copies of the Statement in Response and documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings.

20. Oral statements were presented at a public sitting held on 21 and 22 June 2019 by the following:

On behalf of Switzerland: Ambassador Corinne Cicéron Bühler, Director of the Directorate of International Law, Federal Department of Foreign Affairs,

as Agent,

Mr Lucius Caflisch, Professor Emeritus, Graduate Institute of International and Development Studies, Geneva,

Ms Laurence Boisson de Chazournes, Faculty of Law, University of Geneva,

Sir Michael Wood, Member of the Bar of England and Wales, Twenty Essex Chambers, London,

as Counsel and Advocates;

On behalf of Nigeria: Ms Chinwe Uwandu, Director/Legal Adviser, Ministry of Foreign Affairs of Nigeria,

as Co-Agent,

Mr Dapo Akande, Professor of Public International Law, University of Oxford, United Kingdom,

Mr Andrew Loewenstein, Partner, Foley Hoag LLP, Boston, Massachusetts, United States of America,

Mr Derek Smith, Partner, Foley Hoag LLP, Washington D.C., United States of America,

as Counsel and Advocates.

21. In the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors.

22. On 21 June 2019, at the request of the Tribunal, the Registrar sent a letter to the Agent of Nigeria requesting the submission of additional documents. The Agent of Nigeria submitted the requested documents on 24 June 2019.

23. On 21 June 2019, the Registrar communicated to the Parties a list of questions which the Tribunal wished them to address during the second round of the oral proceedings on 22 June 2019.

24. During the hearing on 22 June 2019, both Parties responded orally to the questions referred to in the preceding paragraph.

25. On 22 June 2019, Switzerland submitted additional documents, copies of which were transmitted to Nigeria on the same day. Nigeria objected to the introduction of these documents. By a decision of the same date, the Tribunal authorized the production of the additional documents submitted by Switzerland, pursuant to article 71, paragraph 2, of the Rules.

* *

26. In paragraph 45 of the Statement of Claim, Switzerland requests the arbitral tribunal to be constituted under Annex VII to the Convention (hereinafter “the Annex VII arbitral tribunal”) to adjudge and declare that:

(a) Nigeria has breached Switzerland's rights under UNCLOS as follows:

i. By intercepting, arresting and detaining the *"San Padre Pio"* without the consent of Switzerland, Nigeria has breached its obligations to Switzerland regarding the freedom of navigation as provided for in article 58 read in conjunction with article 87 of UNCLOS.
ii. By intercepting the *"San Padre Pio"*, by arresting the vessel and her crew and by detaining the vessel, her crew and cargo without the consent of Switzerland, Nigeria has breached its obligations to Switzerland regarding the exercise of exclusive flag State jurisdiction as provided for in article 58 read in conjunction with article 92 of UNCLOS.
iii. By arresting the *"San Padre Pio"* and her crew, by detaining the vessel, her crew and cargo without the consent of Switzerland and by initiating judicial proceedings against them, Nigeria has breached its obligations to Switzerland in its own right, in the exercise of its right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR [International Covenant on Civil and Political Rights] and the MLC [Maritime Labour Convention], and under customary international law.

(b) The aforementioned breaches of UNCLOS constitute internationally wrongful acts entailing Nigeria's international responsibility.

(c) These internationally wrongful acts entail legal consequences requiring Nigeria to:

i. cease, forthwith, the internationally wrongful acts continuing in time;
ii. provide Switzerland with appropriate assurances and guarantees that all the internationally wrongful acts referred to in subparagraph (a) above will not be repeated;
iii. provide Switzerland full reparation for the injuries caused by all the internationally wrongful acts referred to in subparagraph (a) above.

27. In paragraph 53 of its Request, Switzerland requested the Tribunal to prescribe the following provisional measures:

Nigeria shall immediately take all measures necessary to ensure that all restrictions on the liberty, security and movement of the *"San Padre Pio"*, her crew and cargo are immediately lifted to allow and enable them to leave Nigeria. In particular, Nigeria shall –

(a) enable the *"San Padre Pio"* to be resupplied and crewed so as to be able to leave, with her cargo, her place of detention and the maritime areas under the jurisdiction of Nigeria and exercise the freedom of

navigation to which her flag State, Switzerland, is entitled under the Convention;

(b) release the Master and the three other officers of the *"San Padre Pio"* and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria;

(c) suspend all court and administrative proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

28. At the public sitting held on 22 June 2019, the Agent of Switzerland made the following final submissions:

Switzerland requests the Tribunal to prescribe the following provisional measures:

Nigeria shall immediately take all measures necessary to ensure that the restrictions on the liberty, security and movement of the *"San Padre Pio"*, her crew and cargo are immediately lifted to allow them to leave Nigeria. In particular, Nigeria shall:

(a) enable the *"San Padre Pio"* to be resupplied and crewed so as to be able to leave, with her cargo, her place of detention and the maritime areas under the jurisdiction of Nigeria and exercise the freedom of navigation to which her flag State, Switzerland, is entitled under the Convention;

(b) release the Master and the three other officers of the *"San Padre Pio"* and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria;

(c) suspend all court and administrative proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

29. At the public sitting held on 22 June 2019, the Co-Agent of Nigeria made the following final submissions, which reiterate the submissions contained in paragraph 4.1 of the Statement in Response: "The Federal Republic of Nigeria respectfully requests that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation's requests for provisional measures."

* *

30. The factual background underlying the Request which has been submitted to the Tribunal can be summarized as follows. On 23 January 2018, the Nigerian navy intercepted and arrested the *M/T "San Padre Pio"*, a motor tanker flying the flag of Switzerland, while it was "engaged in one of several ship-to-ship ('**STS**') transfers of gasoil." The gasoil "was intended to supply the Odudu Terminal", an oil installation located within Nigeria's exclusive economic zone and operated by the company Total. According to Switzerland, at the time of the arrest, the vessel "was approximately 32 nautical miles from the closest point of Nigeria's coast" and within the exclusive economic zone of Nigeria. Switzerland adds that the ship-to-ship transfers took place "outside any safety zone that Nigeria could have established in accordance with UNCLOS … and well beyond the 200-metre area around installations to which Nigeria purports to extend its civil and criminal law."

31. According to Nigeria, the Nigerian naval vessel *NNS "Sagbama"* "encountered the *San Padre Pio* at the Odudu Oil Field at approximately 20:00 on the night of 22 January 2018, where it was bunkering a vessel." When the *NNS "Sagbama"* requested the *M/T "San Padre Pio"* to produce "regulatory approvals", it was presented with the bill of lading and a navy certificate, but "other required permits – the DPR Permit and the NIMASA [Nigeria Maritime Administration and Safety Agency] Certificate – were not shown." According to the report from the Nigerian navy, "the vessel had no proof of payment of the 3 per cent Import levy, sea protection and offshore oil reception facility levies at the point of arrest." Nigeria states that "[s]ubsequent investigation revealed that the NIMASA Certificate was obtained on 24 January 2018, that is, *after* the *San Padre Pio* had been arrested."

32. Switzerland states that "[b]efore entering into the EEZ of Nigeria, the vessel obtained a Naval Clearance from the Nigerian Navy dated 12 January 2018" and had all the necessary import permits and documents. It further refers to a letter of 6 February 2018 from the NIMASA to the Nigerian navy stating that "from the records available to our office, **MT SAN PADRE PIO** has conducted International voyages only and has complied with the payment of NIMASA Statutory Levies viz: 3% Levy, Sea Protection Levy and Offshore Waste Reception Levy" and that the navy "may therefore release her."

33. After the arrest, the Nigerian navy ordered the *M/T "San Padre Pio"* to proceed to Port Harcourt, Bonny Inner Anchorage, a Nigerian port, where the vessel, together with its crew members and cargo, was detained on 24 January 2018. According to Switzerland, on 9 March 2018, the vessel and the crew members were handed over to the Economic and Financial Crimes Commission of Nigeria (hereinafter "the EFCC") for preliminary investigation. On that day, the 16 crew members were moved to a prison. On 12 March 2018, the EFCC brought charges against the crew members and the vessel. According to Nigeria, they "were charged with conspiring to distribute and deal with petroleum product without lawful authority or appropriate license, and with having done so with respect to the petroleum product onboard."

34. On 19 March 2018, the charges were amended to apply only to the Master, three officers and the vessel. The amended charges read as follows:

> **AMENDED CHARGE**
>
> *That you **VICTOR** **VASKOV ANDRIY, GARCHEV MYKHAYLO, SHULGA VLADYSLAV, ORLOVKYI LVAN AND MT. SAN PADRE PIO*** on or about the 23rd day of January, 2018 at Odudu Terminal in Bonny area within the jurisdiction of this Honorable Court did conspire among yourselves to commit felony to wit: without lawful authority or appropriate licence distributes or deal with petroleum product and thereby committed an offence contrary to Section 3(6) and punishable under section 1(17) both of the Miscellaneous Offences Act CAP M17 of the Revised Edition (Law of the Federation of Nigeria) Act 20007.
>
> ***COUNT 2***
>
> *That you **VICTOR** **VASKOV ANDRIY, GARCHEV MYKHAYLO, SHULGA VLADYSLAV, ORLOVKYI LVAN AND MT. SAN PADRE PIO a.k.a EX TORM HELENE*** on or about the 23rd day of January, 2018 at Odudu Terminal in Bonny area within the jurisdiction of this Honorable Court did without lawful authority or appropriate licence distributes or deal with petroleum product to wit: about 4998.343 Metric Tons of Automotive Gas conveyed (A.G.O) in **MT. SAN PADRE PIO** and thereby committed an offence contrary to section 1(17)(a) and punishable under Section 1(17) both of miscellaneous Offences Act CAP M17 of the Revised Edition (Law of the Federation of Nigeria) Act 2007.

According to Switzerland, the other crew members were released from prison and returned to the vessel on 20 March 2018, while the Master and the three officers "stayed in prison for a total of five weeks" before they were released from prison and returned to the vessel upon the provision of bail on 13 April 2018.

35. The bail had been granted by an order of the Federal High Court of Nigeria issued on 23 March 2018. The order states, *inter alia*, the following:

> 4. That the … Defendants shall deposit their International Passport with the Registry of this Court.
> 5. That the … Defendants shall not travel outside Nigeria without the prior approval or order of this Court.

36. Nigeria states that "[a]fter bail was granted, the master and officers were released, subject only to the requirement that they remit their passports". Nigeria further states that the Nigerian navy was informed that "the crew should be allowed to disembark and board the *San Padre Pio* at will."

37. On 15 April 2019, an armed attack against the *M/T "San Padre Pio"* took place at Bonny Inner Anchorage. According to Switzerland, "[t]he robbers were armed with machine guns, there was shooting, and one of the Nigerian Navy guards was wounded." Nigeria states that the armed guards deployed by its navy on board the vessel "successfully prevented" the attack.

38. On 24 April 2019, new charges were brought before the Federal High Court of Nigeria "against the Master, the vessel and the charterer regarding the accuracy of documents handed over to the Navy in January 2018."

39. On 18 June 2019, the Ministry of Foreign Affairs of Nigeria sent a note verbale to the Embassy of Switzerland in Abuja, in which it provided its assurance to Switzerland that "under the terms of their bail, the defendants in the aforementioned criminal proceedings are not required to remain onboard the M/T San Padre Pio but rather may disembark and board the M/T San Padre Pio at their pleasure and are at liberty to travel and reside elsewhere in Nigeria."

40. During the hearing, Switzerland stated that "the terms of bail are not respected in the real world, where the Master and officers are confined to the vessel" and "are not free to move." It further stated that they "have not been able to disembark to attend legal proceedings against them" and that they "have not been

allowed to disembark to receive urgent medical care". With respect to the assurance contained in Nigeria's note verbale, Switzerland stated that "[t]hat so-called 'assurance' adds nothing; and it commits Nigeria to nothing."

41. At the hearing held on 22 June 2019, the Co-Agent of Nigeria stated that "the Federal Republic of Nigeria, including the Ministry of Foreign Affairs, the Nigerian navy, the Economic and Financial Crimes Commission and all of the governmental actors are committing to abide by the terms of the bail of the four individual defendants" and reiterated the assurance in its note verbale.

I. *Prima facie* jurisdiction

42. Article 290, paragraph 5, of the Convention provides:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea … may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

43. Switzerland and Nigeria are States Parties to the Convention, having ratified the Convention on 1 May 2009 and 14 August 1986, respectively. Upon ratification of the Convention, Switzerland made the following declaration pursuant to article 287, paragraph 1, of the Convention: "The Tribunal for the Law of the Sea has been designated as the only competent organ for disputes concerning law of the sea matters." Nigeria has not made a declaration pursuant to article 287, paragraph 1, of the Convention.

44. The Tribunal notes that Switzerland, by the Statement of Claim dated 6 May 2019, which included a request for provisional measures, instituted proceedings under Annex VII to the Convention against Nigeria in a dispute concerning "the interception of the *"San Padre Pio"* in Nigeria's exclusive economic zone …, the arrest of the vessel and her crew and the continuing detention of the vessel, her crew

and cargo in Nigeria." The Tribunal further notes that, on 21 May 2019, after the expiry of the two-week time-limit provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Switzerland submitted the Request to the Tribunal.

45. The Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded, but need not definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it (see *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 343, para. 60; *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 36).

Existence of a dispute concerning the interpretation or application of the Convention

46. Switzerland invokes articles 286 and 287 of the Convention as the basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded. The question the Tribunal has to address is whether the dispute submitted to the Annex VII arbitral tribunal is a "dispute concerning the interpretation or application of this Convention" referred to in those articles.

47. Switzerland alleges that "there undoubtedly is a dispute" between the Parties "within the definition given by the Permanent Court of International Justice in the *Mavrommatis* case and confirmed by the International Court of Justice in the *East Timor* case." It states that it "repeatedly objected to Nigeria's conduct" whereas "Nigeria responded with a deafening silence." Switzerland further states that Nigeria "was aware of Switzerland's position, yet refused to modify its conduct", for which "one can easily infer that the dispute existed, and continues to exist between the two States."

48. Switzerland claims that the dispute between Switzerland and Nigeria relates

> to the interpretation or application of the provisions of UNCLOS with respect to the rights and obligations of coastal States in their EEZ, and notably the asserted right to arrest and detain vessels flying the flag of a third State, as well as their crew and cargo.

It further claims that the "dispute concerns in particular the interpretation and application of Parts V and VII of UNCLOS, including articles 56, paragraph 2, 58, 87, 92 and 94."

49. Switzerland contends that "the Annex VII arbitral tribunal will have *prima facie* jurisdiction over Switzerland's claim based on the International Covenant on Civil and Political Rights and also the Maritime Labour Convention." It refers, in this regard, to article 56, paragraph 2, of the Convention, which states:

> In 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 and duties of other States and shall act in a manner compatible with the provisions of this Convention.

50. According to Switzerland, "the rights and duties of other States" are not limited to the provisions of the Convention but may include those under the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") and the Maritime Labour Convention (hereinafter the "MLC"). It argues in this context that "Nigeria has made it impossible for Switzerland, the flag State of the "*San Padre Pio*", to discharge toward the crew its duties resulting from the International Covenant on Civil and Political Rights and the Maritime Labour Convention", and adds that "[s]ome of these duties also result from customary law."

51. In response to the argument that, in its exchange with Nigeria regarding the dispute, Switzerland had "never raised issues concerning rules of international law other than those of the Convention", Switzerland claims that "in its aide-mémoires [it] actually had referred to such other rules of international law."

52. In its Statement in Response, Nigeria states that "[a]t the present stage of the proceedings, [it] does not challenge the *prima facie* jurisdiction of the Annex VII

arbitral tribunal over Switzerland's first and second claims." Nigeria does, however, "challenge the Annex VII arbitral tribunal's *prima facie* jurisdiction over Switzerland's third claim" on Nigeria's alleged breach of its obligations to Switzerland relating to the ICCPR and the MLC.

53. In this respect, Nigeria notes that "[t]he Annex VII arbitral tribunal may have jurisdiction over Switzerland's third claim only if, *inter alia*, the alleged dispute 'concern[s] the interpretation or application of [the] Convention'" and states that

> [t]he alleged dispute [regarding Switzerland's third claim] does not concern the interpretation or application of UNCLOS but rather the interpretation and application of the ICCPR and the MLC. It thus falls outside of the jurisdiction of the Annex VII arbitral tribunal.

54. Nigeria adds that "[a]rticle 56(2) does not grant Annex VII arbitral tribunals the jurisdiction to determine violations of instruments outside of UNCLOS."

55. Nigeria also states that "a further reason why the Annex VII tribunal would not have *prima facie* jurisdiction over the third claim is that at the time of the institution of the Annex VII arbitral proceedings, no dispute had crystallized between the Parties over this claim." In this context, Nigeria contends that no reference was made to article 56, paragraph 2, of the Convention, the ICCPR, or the MLC in the diplomatic exchanges between Switzerland and Nigeria.

* *

56. Article 288, paragraph 1, of the Convention provides that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part." The Tribunal accordingly has to determine whether, on the date of the institution of arbitral proceedings, a dispute appears to have existed between the Parties and, if so, whether such dispute concerns the interpretation or application of the Convention.

57. Although Nigeria did not respond to Switzerland's position that the interception, arrest and detention of the *M/T "San Padre Pio"* constituted a violation of the provisions of the Convention, its view on this question may be inferred from its conduct. As the International Court of Justice (hereinafter the "ICJ") stated in *Land and Maritime Boundary between Cameroon and Nigeria*:

> [A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.
> (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 315, para. 89;
> see also *M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 69, para 100; and *Detention of three Ukrainian naval vessels* (*Ukraine* v. *Russian Federation*), *Provisional Measures, Order of 25 May 2019*, para. 43)

58. The fact that the Nigerian authorities intercepted, arrested and detained the *M/T "San Padre Pio"* and commenced criminal proceedings against it and its crew members indicates that Nigeria holds a different position from Switzerland on the question whether the events that occurred on 22-23 January 2018 gave rise to the alleged breach of Nigeria's obligations under the Convention.

59. The Tribunal is thus of the view that a dispute appears to have existed between the Parties on the date of the institution of arbitral proceedings.

60. The Tribunal is further of the view that at least some of the provisions invoked by Switzerland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded.

61. The Tribunal accordingly considers that a dispute concerning the interpretation or application of the Convention *prima facie* appears to have existed on the date of the institution of the arbitral proceedings.

Article 283 of the Convention

62. The Tribunal will now proceed to determine whether the requirements under article 283 of the Convention relating to an exchange of views have been met.

63. Article 283, paragraph 1, of the Convention reads:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

64. Switzerland states that since 13 March 2018 it "has made regular and repeated attempts, through a range of channels and at various levels, to exchange views with Nigeria for the settlement of the dispute concerning the interception of the vessel, the arrest of the vessel and her crew and the detention of the vessel, her crew and cargo." Switzerland further states that it "has made it clear that Nigeria's actions were in breach of UNCLOS."

65. Switzerland maintains that it submitted several diplomatic notes and four *aide-mémoires* to the Nigerian authorities, which indicate that "the actions of Nigeria in respect of the "*San Padre Pio*" characterize violations of the law of the sea" and also demonstrate "Switzerland's willingness to resolve the dispute." In this context, Switzerland draws the attention of the Tribunal to the *aide-mémoire* of 25 January 2019, which was handed over by the Minister of Foreign Affairs of Switzerland to the Minister of Industry, Trade and Investment of Nigeria. In it, Switzerland stated:

> So far, efforts by Switzerland to solve this dispute through diplomatic means have been unsuccessful. In case no diplomatic resolution can be reached very shortly, Switzerland considers submitting the dispute to judicial procedure under the UN Convention on the Law of the Sea.

66. As regards its claims relating to rights under the ICCPR and the MLC contained in paragraph 40(c) and (d) of its Statement of Claim, Switzerland points out that, in its *aide-mémoires*, it made reference to rules of international law other than those of the Convention.

67. According to Switzerland, "[t]here has been no substantive response by the Nigerian authorities to the Swiss attempts to find a solution to the dispute through negotiations and to exchange views regarding the settlement of the dispute." Switzerland states that "[i]t is clear that no settlement has been reached by recourse to section 1 of Part XV and that the obligation to exchange views has been met."

68. Nigeria contends that "there had only been exchanges between the Parties concerning articles 58, paragraph 1, and 87 of UNCLOS, which concern the freedom of navigation." It refers, in this regard, to the first and second *aide-mémoires* of Switzerland which "each specify the same two provisions" indicated above. Nigeria adds that "[t]he third and fourth do not specify any provisions of UNCLOS."

69. Nigeria states that "[n]one of the *aide-mémoires*, nor any of the other exchanges between the Parties prior to the institution of arbitral proceedings, mention the International Covenant on Civil and Political Rights or the Maritime Labour Convention." Nigeria further states:

> [T]he Tribunal recently affirmed … [that] the dispute in question needs to have crystallized "as of the date of the institution of arbitral proceedings", and, when the dispute arose, the Parties must have "proceed[ed] expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".

* *

70. The Tribunal notes that Switzerland made repeated attempts to exchange views with Nigeria regarding the settlement of the dispute concerning the arrest and detention of the vessel, its crew and cargo, in particular by sending four *aide-mémoires* to the Nigerian authorities. In its *aide-mémoire* of 25 January 2019, transmitted at the ministerial level, Switzerland stated that "[i]n case no diplomatic solution can be reached very shortly, Switzerland considers submitting the dispute to judicial procedure" under the Convention.

71. In the view of the Tribunal, for the purpose of addressing the requirements under article 283 of the Convention, it is not relevant whether Switzerland referred to

any specific claim or rights under the ICCPR and the MLC in its communications with Nigeria regarding the settlement of the dispute.

72. The Tribunal observes that Switzerland received no response from the Nigerian authorities to its various communications relating to the alleged breach of the Convention and other rules of international law and that Nigeria therefore did not engage in an exchange of views with Switzerland. Under these circumstances, the Tribunal considers that Switzerland could reasonably conclude that the possibility of reaching agreement was exhausted.

73. In this regard, the Tribunal recalls that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" (*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60; "*ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 71; *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 247, para. 76; *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 87).

74. The Tribunal further recalls that "the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute" (*M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016,* p. 44, at p. 91, para. 213; *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 88).

75. Accordingly, the Tribunal is of the view that these considerations are sufficient at this stage to find that the requirements of article 283 of the Convention were satisfied before Switzerland instituted arbitral proceedings.

* * *

76. In light of the foregoing, the Tribunal concludes that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it.

II. Urgency of the situation

Plausibility of rights asserted by the Applicant

77. The power of the Tribunal to prescribe provisional measures under article 290, paragraph 5, of the Convention has as its object the preservation of the rights of the Parties pending the constitution and functioning of the Annex VII arbitral tribunal. Before prescribing provisional measures, the Tribunal therefore needs to satisfy itself that the rights which Switzerland seeks to protect are at least plausible (see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 158, para. 58; *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84; *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 91).

78. Switzerland maintains that the rights it seeks to protect are "the right to freedom of navigation and other internationally lawful uses of the sea, including bunkering, the exercise by Switzerland of its exclusive jurisdiction as a flag State and the rights of the crew, whose protection is incumbent on Switzerland as the flag State."

79. Switzerland states that at this stage of the proceedings

> [w]hat is required is something more than assertion but less than proof; in other words, the party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged [by the Tribunal] to apply to that party's case.

According to Switzerland, the existence of the rights invoked by it, their applicability to the facts of the present case and their violation "are more than 'plausible', they are indisputable."

80. Switzerland claims that "Nigeria has violated Switzerland's right to freedom of navigation and other internationally lawful uses of the sea related to this freedom in the EEZ under article 58 of UNCLOS, read in conjunction with article 87, including but not limited to the right to carry out STS [ship-to-ship] transfers between vessels."

81. In this respect, Switzerland maintains that,

> by intercepting the *"San Padre Pio"* in its exclusive economic zone, about 32 nm off the coast and outside any safety zone which Nigeria could have established under article 60, paragraph 4, of the Convention, Nigeria hampered the freedom of movement of the vessel. Accordingly, it infringed Switzerland's freedom of navigation.

82. Switzerland further maintains that Nigeria "hinders the possibility for the vessel to carry out bunkering activities, which … have been recognized by [the] Tribunal as being part of the freedom of navigation."

83. Switzerland argues that "[t]he essential idea embodied in the principle of freedom of navigation is that of non-interference with the freedom of movement of the vessel in question." It further argues that, in the *M/V "Norstar" Case,* the Tribunal "added … the possibility of carrying out bunkering activities provided they are not connected with fishing."

84. Switzerland also claims that "Nigeria has violated Switzerland's right to exercise exclusive flag State jurisdiction over its vessels under article 58 of UNCLOS, read in conjunction with article 92." In this respect, it argues that article 92 of the Convention "is applicable in the exclusive economic zone by virtue of article 58, paragraph 2".

85. Switzerland contends that,

> whether it be the interception of the vessel, its detention, the detention of its cargo, or the detention of its crew, at no time did Nigeria seek to obtain

> the consent of Switzerland as the flag State. Nigeria has therefore not only disregarded the exercise by Switzerland of its exclusive jurisdiction as the flag State, but continues to disregard it.

86. In Switzerland's view, "there was no basis in international law for Nigeria to exercise enforcement jurisdiction against the vessel, her crew and cargo in respect of domestic laws in its EEZ and outside any safety zone established in accordance with international law."

87. With regard to Nigeria's invocation of article 56 of the Convention as a basis for its exercise of jurisdiction, Switzerland contends that "Nigeria's interpretation of article 56 has no basis in the Convention and cannot be used to rebut Switzerland's arguments on freedom of navigation and the bunkering related thereto." Switzerland adds that,

> even if the "*San Padre Pio*"'s activities were to be associated with the extraction of resources from the seabed and subsoil within Nigeria's EEZ … that would still not authorize Nigeria to exercise enforcement jurisdiction. This is because although Part V relating to the exclusive economic zone contains a special provision, namely article 73 … such a provision for non-living resources is absent from Part V on the exclusive economic zone and from Part VI on the continental shelf.

88. With regard to Nigeria's invocation of articles 208 and 214 of the Convention as a basis for its exercise of jurisdiction, Switzerland argues that "[t]he provisions invoked are not applicable in this case, and even if they were, *quod non*, Nigeria would not have fulfilled its obligations as laid down in article 220, paragraphs 3, 6 and 7, article 228, paragraph 1, article 230 and article 231." Switzerland adds that "Nigeria has never previously mentioned protection of the environment as part of the charges filed by its authorities and courts against the "*San Padre Pio"*, the crew or the charterer."

89. Switzerland also claims that "Nigeria has failed, in breach of article 56(2) of UNCLOS, to have due regard to Switzerland's obligations under article 94, including its duties under the 2006 Maritime Labour Convention **('MLC')** towards seafarers on ships flying its flag."

90. In addition, Switzerland claims:

> Nigeria has failed to have due regard, in breach of article 56(2) of UNCLOS, to
>
> i. the right of persons to liberty and security and the right not to be arbitrarily detained, as reflected in Article 9(1) of the 1966 International Covenant on Civil and Political Rights **('ICCPR')** and customary international law;
>
> ii. the other rights of persons in connection with criminal proceedings, as reflected in Article 9 of the ICCPR and customary international law.

91. Switzerland emphasizes that "[t]his does not in any way imply … that Switzerland seeks to apply this Convention to individuals." In its view, Switzerland, "through Nigeria's conduct, … has been deprived of its right as the flag State to ensure respect of its rights." Switzerland adds that it "is not … exercising diplomatic protection"; rather, "[w]hat Switzerland can and does do is protect its own rights, as a flag State".

92. According to Nigeria, none of the rights whose protection Switzerland seeks "are plausible in the present case because they are not applicable to the situation at hand." In this connection, Nigeria states that

> a right is "plausible" only if it is applicable to the factual situation at hand. This does not mean that the Tribunal needs to examine the facts underlying the merits of the claim. But the Tribunal does need to undertake the limited examination of the facts that purport to establish the applicability of the right to the situation at hand.

93. Nigeria contends that,

> [a]s regards to the first two rights alleged by Switzerland under Article 58 of the Convention, they are not plausible because Nigeria has the sovereign right and obligation under Articles 56(1)(a), 208 and 214 of the Convention to exercise its enforcement jurisdiction over the bunkering incident in question. With respect to the rights alleged under the ICCPR and the MLC, they are also not plausible because Switzerland does not allege facts that constitute a breach of the rights specified in these conventions.

94. Nigeria maintains that "Switzerland's asserted right regarding the freedom of navigation and other internationally lawful uses of the sea is not 'compatible with [these] other provisions of the Convention' [and] is thus not applicable in the present

case and is therefore not a plausible basis upon which Switzerland can assert claims against Nigeria."

95. Nigeria states that it "does not dispute that, in general, these freedoms apply to Nigeria's EEZ". It emphasizes, however, that "article 58 expressly provides that in the EEZ they are 'subject to the relevant provisions of this Convention'."

96. Nigeria further states that it "was exercising its sovereign right to enforce its laws and regulations concerning the conservation and management of the non-living resources in its EEZ when it arrested and initiated judicial proceedings against the *San Padre Pio* and its crew."

97. Nigeria contends that

> the exercise of the freedom of navigation and other internationally lawful uses of the sea in Nigeria's EEZ is subject to the rules set out in Article 56(1)(a) of the Convention, which grants Nigeria, as the coastal State, the right to enforce its laws and regulations concerning the management of the natural resources in its EEZ.

In Nigeria's view, "[t]his encompasses the enforcement activities that Nigeria took against the *San Padre Pio* and its crew."

98. Nigeria contends that "[t]he "*San Padre Pio*" was bunkering facilities involved in the extraction of natural resources from the seabed and subsoil within Nigeria's exclusive economic zone." It argues that article 56, paragraph 1(a), of the Convention "makes clear that Nigeria, as a coastal State, has sovereign rights to exploit, conserve and manage the natural resources of the EEZ" and that "[t]his includes enforcement jurisdiction".

99. Nigeria emphasizes that article 56, paragraph 1(a), of the Convention "applies to *both* living and non-living resources" and that "[a]s a result, the coastal State's competence – including its 'right to take the necessary enforcement measures' – extends to the management of non-living resources in its EEZ." Nigeria further emphasizes that article 56, paragraph 1(a), of the Convention "contains no specific

limitations" and that article 73 "makes no mention of, and does not affect, enforcement related to non-living resources."

100. Nigeria further contends that articles 208 and 214 of the Convention "impose on Nigeria the obligation to enforce its laws and regulations concerning pollution from seabed activities in its EEZ, and as such, they serve as an independent basis for Nigeria to take the enforcement actions it did against the *San Padre Pio* and its crew." Nigeria emphasizes in this regard that "bunkering carried out in connection with seabed activities is a major source of pollution of the marine environment."

101. According to Nigeria, "the principle of exclusive flag State jurisdiction does not apply in the present case." It argues that, "[i]f it did, then the sovereign and exclusive rights of the coastal State enshrined in Part V of the Convention could never be enforced against foreign flagged vessels without the consent of the flag State" and that "[t]his would make law enforcement in an environment like the Gulf of Guinea impossible."

102. Nigeria further argues that articles 58 and 92 of the Convention "grant the flag State exclusive jurisdiction over the ship, but not if there is a provision in the Convention providing otherwise."

103. With regard to Switzerland's claim relating to the MLC and the ICCPR, Nigeria states that "[e]ven if there were *prima facie* jurisdiction with respect to Switzerland's ICCPR and MLC claims, the rights asserted by Switzerland are not plausible because they are not applicable to the present case." It emphasizes that "UNCLOS contains no 'right to seek redress' of breaches of other treaties."

104. Nigeria further contends that "there is no question that the arrest, detention, and initiation of judicial proceedings against the crew of the *San Padre Pio* were not arbitrary or unlawful." It also argues that "Switzerland does not cite to any specific right enshrined [in the MLC] that is called into question in the present proceedings" and that, "[i]ndeed, no such right is applicable to the present case."

* *

105. At this stage of the proceedings, the Tribunal is not called upon to determine definitively whether the rights claimed by Switzerland exist, but need only decide whether such rights are plausible (*Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 95; see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84).

106. The first two rights Switzerland seeks to protect are rights to the freedom of navigation and other internationally lawful uses of the sea related to this freedom in the exclusive economic zone under article 58 of the Convention, and rights to exercise exclusive flag State jurisdiction over its vessels under article 92 of the Convention, which applies to the exclusive economic zone by virtue of article 58, paragraph 2.

107. The Tribunal notes that Switzerland claims that bunkering activities carried out by the *M/T "San Padre Pio"* in the exclusive economic zone of Nigeria are part of the freedom of navigation and that it has exclusive jurisdiction as the flag State over the vessel with respect to such bunkering activities. The Tribunal further notes that Nigeria argues that it has sovereign rights and obligations under articles 56, paragraph 1(a), 208 and 214 of the Convention to exercise its enforcement jurisdiction over the bunkering activities in question in its exclusive economic zone.

108. In the Tribunal's view, taking into account the legal arguments made by the Parties and evidence available before it, it appears that the rights claimed by Switzerland in the present case on the basis of articles 58, paragraphs 1 and 2, and 92 of the Convention are plausible.

109. The third right Switzerland seeks to protect concerns Nigeria's obligation to have due regard to rights and duties of Switzerland in the exclusive economic zone of Nigeria under article 56, paragraph 2, of the Convention. Switzerland claims that those rights and duties include "its right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR and the MLC", and its "obligations under

article 94, including its duties under the 2006 Maritime Labour Convention ('**MLC**') towards seafarers on ships flying its flag."

110. The Tribunal considers that the question of whether the third right asserted by Switzerland is plausible would have required the examination of legal and factual issues which were not fully addressed by the Parties in the proceedings before it. Having established that the first and second rights asserted by Switzerland are plausible, the Tribunal, therefore, does not find it necessary to make a determination of the plausible character of the third right at this stage of the proceedings.

Real and imminent risk of irreparable prejudice

111. Pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if the urgency of the situation so requires. Accordingly, the Tribunal may not prescribe such measures unless there is a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal (see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 87). The Tribunal therefore has to determine whether there is a risk of irreparable prejudice to the rights of the Parties to the dispute and whether such risk is real and imminent (*Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 100).

112. Switzerland contends that the requirement of urgency under article 290, paragraph 5, of the Convention is met in respect of the provisional measures requested by Switzerland. It explains that urgency under this provision "means that the party requesting provisional measures needs to show that there is a real and imminent risk that irreparable prejudice may be caused before the constitution and functioning of the Annex VII arbitral tribunal."

113. Switzerland underlines that what matters for the provisional measures proceedings under article 290, paragraph 5, of the Convention is "whether a risk will emerge between now and the time when the Annex VII arbitral tribunal is constituted

and is itself operational and able to prescribe provisional measures." It denies the requirement of an exceptional level of urgency under that provision. In response to the argument of Nigeria that there is no urgency because of the time which had passed before Switzerland instituted proceedings, Switzerland states that "the Swiss Government cannot be blamed for having, assiduously and in good faith, sought a negotiated settlement and attempted to engage Nigeria in a discussion on how to settle this dispute", while "[t]hese two steps are formally required by the Convention."

114. Switzerland claims that serious prejudice has already been caused to its rights and that there is a real and imminent risk that further serious or irreparable prejudice will be caused to its rights until such time as the Annex VII arbitral tribunal has been constituted and is ready to exercise its functions. It further claims that "[a]s at the date of the present Request for Provisional Measures, the vessel, her crew and cargo are still detained, and have been for 16 months" and that "[t]his is causing serious risks to the vessel, her crew and cargo" whereas "[t]hese risks are real and imminent."

115. Switzerland argues that the ongoing detention of the *M/T "San Padre Pio"* denies Switzerland "the right to freedom of navigation in respect of a vessel flying its flag, and the right to exercise jurisdiction over its vessel." According to Switzerland, the denial of those rights "is not capable of purely monetary reparation." Switzerland also argues that "[f]urther prolonging that detention would add to the continuing and irreparable injury that Switzerland is suffering." It states that the ongoing detention "puts the vessel at a severe risk" that it may soon be unseaworthy "due to the impossibility to continue the highest levels of maintenance required." Switzerland adds that "[t]he forced detention does indeed create risks for the vessel in terms of collision and in the event of rough weather conditions."

116. Switzerland states that the Master and the three other officers "have been and continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under Nigeria's jurisdiction." It further states that "[t]he damage suffered by the Master and the three other officers … is clearly irreparable, as every day spent in detention is irrecoverable." According to Switzerland, the ongoing detention puts at risk the safety and security of the Master

and the three other officers, who "remain at constant risk of being kidnapped, injured or even killed."

117. In this context, Switzerland draws attention to a "piratical attack" against the *M/T "San Padre Pio"*, which took place on 15 April 2019. It states that it is conceivable that such an attack will be repeated and that this may happen "at any time before the Annex VII arbitral tribunal is in a position to act." Switzerland further states that "[t]his permanent risk of physical and psychological harm to the crew underlines the gravity of the situation and the urgent need for provisional measures." It adds that "in light of the piratical attacks in the region, a permanent risk exists that the vessel, together with her cargo, will be hijacked, with serious consequences for the persons concerned."

118. Switzerland argues that the ongoing detention of the vessel also puts its cargo at risk, and that, "[i]n light of the recent extension of the charges to the charterer, the cargo appears at risk of being imminently seized." According to Switzerland, the cargo is deteriorating and at risk of being lost since the vessel has been forced to use it for its own functioning. In addition, the "preservation of its quality cannot be guaranteed".

119. Switzerland maintains that, "as a consequence of the actions taken by Nigeria in connection with the interception, arrest and detention of the *"San Padre Pio"*, persons involved or interested in the operation of that vessel have suffered and continue to suffer damages of a personal and economic nature."

120. Nigeria contends that "Switzerland's request for provisional measures should … be rejected because it does not comply with the conditions of urgency and risk of irreparable harm required by article 290(5) of UNCLOS." It states that this provision should "only be resorted to in … extremely urgent circumstances when the alleged irreparable prejudice will likely materialize in the time between the request for provisional measures and the constitution and functioning of the Annex VII arbitral tribunal, which ordinarily only takes a few months." For this reason, it alleges that "[p]rovisional measures under article 290, paragraph 5, are even more exceptional than ordinary provisional measures under article 290, paragraph 1."

121. Nigeria maintains that "[t]he absence of urgency is clear" because it took Switzerland almost sixteen months from the arrest of the vessel to institute arbitral proceedings and request provisional measures.

122. Nigeria contends that "Switzerland has also failed to establish that urgent measures are needed to prevent harm to the vessel and its cargo." As to the vessel, it states that its condition "will not materially change in the few months it will take to form the Annex VII arbitral tribunal" and that "the time required for repair of the vessel will remain materially unchanged between the present time and the composition of the Annex VII arbitral tribunal".

123. Nigeria argues that "any alleged harm to the vessel, to the cargo, and to their owners is, or rather would be, economic only" and that "[r]eparation for any such harm, were it to occur, can easily be provided through the award of monetary compensation by the Annex VII tribunal." It adds that "any loss that might be caused by damage to the vessel or the cargo … cannot justify the indication of provisional measures by the Tribunal."

124. With respect to the cargo, Nigeria is of the view that "there can be no situation of urgency … since the Nigerian court has already issued an interim forfeiture order and authorized that it be sold and its economic value preserved, pending the hearing and determination of the charges." In response to Switzerland's argument concerning deterioration of the cargo, Nigeria states that such harm is "purely economic" and that "the Nigerian authorities have sought to take steps to prevent any economic damage".

125. Nigeria contends that "Switzerland has failed to establish that the rights of the officers and crew … are currently exposed to a risk of imminent irreparable prejudice." It maintains that "[t]he current presence of the officers and crew on the vessel is voluntary" and that "the officers who are currently subject to criminal proceedings in Nigeria received bail, under the sole requirement that they do not leave the country."

126. Nigeria maintains that "the conditions on the vessel are the same as the normal working conditions of those who man the vessel in its ordinary seafaring activities." It further maintains that "the vessel is fully supplied with food, water and other necessities." Nigeria adds that "there are no restrictions on the ability of the crew to communicate with persons not on board the vessel nor have the Nigerian authorities impeded medical professionals from visiting or scheduling appointments with the crew."

127. Nigeria emphasizes that "[t]he vessel is under the protection of the Nigerian Navy, which has deployed armed guards on board the vessel since it was arrested." As to the pirate attack of 15 April 2019, it contends that it was those armed guards that successfully prevented it and that "[s]ince that incident, the Nigerian Navy has increased the number of guards on the vessel and has stationed a gun boat in close proximity to the vessel."

* *

128. The Tribunal notes that in the present case the *M/T "San Padre Pio"* was arrested and detained for bunkering activities it carried out in the exclusive economic zone of Nigeria. The Tribunal considers that, in the circumstances of the present case, such arrest and detention could irreparably prejudice the rights claimed by Switzerland relating to the freedom of navigation and the exercise of exclusive jurisdiction over the vessel as its flag State if the Annex VII arbitral tribunal adjudges that those rights belong to Switzerland. In the Tribunal's view, there is a risk that the prejudice to the rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit – may not be fully repaired by monetary compensation alone.

129. The Tribunal notes that the *M/T "San Padre Pio"* has not only been detained for a considerable period of time but also that the vessel and its crew are exposed to constant danger to their safety and security. In this regard, the Tribunal takes note of the armed attack against the *M/T "San Padre Pio"* that took place on 15 April 2019, endangering the lives of those on board the vessel. The Tribunal further notes the report on piracy and armed robbery against ships (1 January – 31 March 2019) of

the International Chamber of Commerce-International Maritime Bureau, which states that the Gulf of Guinea accounts for 22 of 38 incidents of piracy and armed robbery against ships for the first quarter of 2019 and that 14 incidents are recorded for Nigeria. Thus, despite the measures to strengthen the security of the vessel taken by the Nigerian authorities following the armed attack, the Tribunal is of the view that the vessel and the crew and other persons on board appear to remain vulnerable. The Tribunal, accordingly, considers that the risk of irreparable prejudice is real and ongoing in the present case.

130. The Tribunal also considers that the threat to the safety and security of the Master and the three officers of the *M/T "San Padre Pio"*, and the restrictions on their liberty and freedom for a lengthy period, raise humanitarian concerns.

131. In light of the above circumstances, the Tribunal finds that there is a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of the Annex VII arbitral tribunal. The Tribunal accordingly finds that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention.

III. Provisional measures to be prescribed

132. In light of the above conclusion that the requirements for the prescription of provisional measures under article 290, paragraph 5, of the Convention are met, the Tribunal may prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute", as provided for in article 290, paragraph 1, of the Convention.

133. The Tribunal notes in this regard that, in accordance with article 89, paragraph 5, of the Rules, it may prescribe measures different in whole or in part from those requested.

134. Switzerland requests the Tribunal to prescribe provisional measures requiring Nigeria to immediately: enable the *M/T "San Padre Pio"* to be resupplied and crewed

so as to be able to leave, with its cargo, its place of detention and the maritime areas under the jurisdiction of Nigeria; release the Master and the three other officers of the *M/T "San Padre Pio"* and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria; and suspend all court and administrative proceedings and refrain from initiating new ones.

135. Nigeria requests the Tribunal to reject Switzerland's requests for provisional measures. It argues that "granting the first measure requested by Switzerland would impermissibly require this Tribunal to prejudge the merits of this dispute." As to the second measure, Nigeria contends that an order requiring it "to permit the four persons presently free on bail who are on trial for violations of Nigeria's criminal laws to depart the country … would irreparably harm Nigeria's sovereign right to enforce its laws against persons legally prosecuted for violations of Nigerian criminal law". In Nigeria's view, "custody of the defendants is essential for the successful continuation of those proceedings and Switzerland, not being the State of nationality or of residence of the Master and officers, nor their employer, is not in a position to assure their return to face the criminal charges in Nigeria."

136. Switzerland contends that "[t]he grant of the prescribed measures does not in any way constitute a pre-judgment on the merits" since they are "not the same as the requests on the merits." It underlines that, with the granting of its request, the "rights of both Parties would be protected" as Nigeria will retain its ability to prosecute and enforce its laws and Switzerland will continue to enjoy its rights under the Convention until such time as the arbitral tribunal gives its final decision. In addition, Switzerland states that

> the release of the four officers … would allow the preservation of the rights of both Parties to the proceedings because if Switzerland's case is not upheld on the merits, it will always be possible for Nigeria to resume its criminal proceedings against the Ukrainian officers.

* *

137. The Tribunal is of the view that, under article 290 of the Convention, it may prescribe a bond or other financial security as a provisional measure for the release

of the vessel and the persons detained (see *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013,* p. 230, at p. 250, para. 93). The Tribunal notes in this regard that the release of a vessel upon the posting of bond is an option available under the "administrative procedure" in Nigeria, as stated by Counsel for Nigeria during the hearing in response to a question put by the Tribunal.

138. Having examined the measures requested by Switzerland, in order to preserve the rights claimed by it, the Tribunal considers it appropriate under the circumstances of the present case to prescribe provisional measures requiring Nigeria to release the *M/T "San Padre Pio"*, its cargo and the Master and the three officers upon the posting of a bond or other financial security by Switzerland and that the vessel with its cargo and the Master and the three officers be allowed to leave the territory and maritime areas under the jurisdiction of Nigeria.

139. The Tribunal determines, taking into account the respective rights claimed by the Parties and the particular circumstances of the present case, that the bond or other financial security should be in the amount of US$ 14,000,000, to be posted by Switzerland with the competent authority of Nigeria, and that the bond or other financial security should be in the form of a bank guarantee, issued by a bank in Nigeria or a bank having corresponding arrangements with a bank in Nigeria. This bond is without prejudice to the amount posted under the terms of bail fixed by an order of the Federal High Court of Nigeria issued on 23 March 2018.

140. The issuer of the bank guarantee should undertake to pay Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew by Nigeria do not constitute a violation of the Convention and, following that, if required by a final decision of the relevant domestic court in Nigeria, such sum up to US$ 14,000,000 as may be determined by the relevant domestic court in Nigeria or by agreement of the Parties, as the case may be. The payment under the guarantee should be made promptly after receipt by the issuer of a written demand by the competent authority of Nigeria accompanied by certified copies of the decisions of the Annex VII arbitral tribunal and of the relevant domestic court in Nigeria.

141. The Tribunal is of the view that Nigeria needs to be assured unequivocally through an undertaking that the Master and the three officers will be available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T* "*San Padre Pio",* its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention. In this regard, the Tribunal considers that posting of a bond, whilst effective, may not afford sufficient satisfaction to Nigeria. The Tribunal, therefore, decides that Switzerland shall undertake to ensure the return of the Master and the three officers to Nigeria if so required in accordance with the decision of the Annex VII arbitral tribunal, and that, for this purpose, the Parties shall cooperate in good faith in the implementation of such undertaking. The Tribunal recalls in this regard that the Parties have maintained close cooperation in various areas, including in the area of mutual legal assistance in criminal matters. The Tribunal also notes that, during the hearing, Counsel for Switzerland, in a response to a question put by the Tribunal, referred, *inter alia*, to mutual legal assistance in criminal matters as a means to secure the return of the Master and the three officers. The Tribunal considers that the undertaking to ensure the return of the Master and the three officers to Nigeria will constitute an obligation binding upon Switzerland under international law.

142. The Tribunal does not consider it necessary to require Nigeria to suspend all court and administrative proceedings and refrain from initiating new proceedings. However, the Tribunal considers it appropriate to order both Parties to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

143. The Tribunal notes that, in accordance with article 290, paragraph 5, of the Convention, the Annex VII arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal.

144. Pursuant to article 95, paragraph 1, of the Rules, each Party is required to submit as soon as possible a report and information on compliance with any provisional measures prescribed. Moreover, it may be necessary for the Tribunal to

request further information from the Parties on the implementation of the provisional measures prescribed and it is appropriate in this regard that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules. In the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention that the Parties also submit reports and information to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise.

145. The present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the admissibility of Switzerland's claims or relating to the merits themselves, and leaves unaffected the rights of Switzerland and Nigeria to submit arguments in respect of those questions.

IV. Operative provisions

146. For these reasons,

THE TRIBUNAL,

(1) By 17 votes to 4,

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

(a) Switzerland shall post a bond or other financial security, in the amount of US$ 14,000,000, with Nigeria in the form of a bank guarantee, as indicated in paragraphs 139 and 140;

(b) Switzerland shall undertake to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T* "*San Padre Pio",* its cargo and its crew and the exercise of jurisdiction by Nigeria in

relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention. Switzerland and Nigeria shall cooperate in good faith in the implementation of such undertaking;

(c) Upon the posting of the bond or other financial security referred to in (a) above and the issuance of the undertaking referred to in (b) above, Nigeria shall immediately release the *M/T* "*San Padre Pio*", its cargo and the Master and the three officers and shall ensure that the *M/T "San Padre Pio"*, its cargo and the Master and the three officers are allowed to leave the territory and maritime areas under the jurisdiction of Nigeria.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, PAWLAK, YANAI, HOFFMANN, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc MURPHY; PETRIG;

AGAINST: *Judges* LUCKY, KATEKA, GAO, BOUGUETAIA.

(2) By 19 votes to 2,

Decides that Switzerland and Nigeria shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, PAWLAK, YANAI, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc MURPHY, PETRIG;

AGAINST: *Judges* LUCKY, KATEKA.

(3) By 19 votes to 2,

Decides that Switzerland and Nigeria shall each submit the initial report referred to in paragraph 144 not later than 22 July 2019 to the Tribunal, and *authorizes* the President to request further reports and information as he may consider appropriate after that report.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, PAWLAK, YANAI, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc MURPHY, PETRIG;

AGAINST: *Judges* LUCKY, KATEKA.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this sixth day of July, two thousand and nineteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Switzerland and the Government of Nigeria, respectively.

(signed)

Jin-Hyun PAIK
President

(signed)

Philippe GAUTIER
Registrar

Judges Cabello and Chadha append a joint declaration to the Order of the Tribunal.

Judge Kittichaisaree appends a declaration to the Order of the Tribunal.

Judge Kolodkin appends a declaration to the Order of the Tribunal.

Judge Heidar appends a separate opinion to the Order of the Tribunal.

Judge *ad hoc* Murphy appends a separate opinion to the Order of the Tribunal.

Judge *ad hoc* Petrig appends a separate opinion to the Order of the Tribunal.

Judge Lucky appends a dissenting opinion to the Order of the Tribunal.

Judge Kateka appends a dissenting opinion to the Order of the Tribunal.

Judge Gao appends a dissenting opinion to the Order of the Tribunal.

Judge Bouguetaia appends a dissenting opinion to the Order of the Tribunal.

JOINT DECLARATION OF JUDGES CABELLO AND CHADHA

1. The Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded and the urgency of the situation so requires.

2. We concur with the Tribunal's finding that *prima facie* the Annex VII arbitral would have jurisdiction over the present dispute and there is a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of that tribunal; and urgency of the situation requires the prescription of provisional measures.

3. We have voted in favour of operative paragraph 1, although we have reservations about some elements of operative paragraph 1(c), as it has been drafted on the basis of the "vessel, cargo and crew as a unit" principle.

4. The Tribunal, in granting provisional measures, has to ensure that the rights of the two parties are equally preserved. Therefore, provisional measures may not be granted where they will cause irreparable harm to the rights of the party against which the measures are directed.

5. While being fully sensitive to considerations of humanity, in our opinion, the provisional measure prescribed in the Tribunal's Order that the Master and three officers of the vessel, who are currently on bail, be allowed to leave the territory and maritime areas under the jurisdiction of Nigeria, does not sufficiently protect the interests of Nigeria.

6. If the Annex VII tribunal rules in favour of Nigeria, it will be difficult for Switzerland to guarantee the presence of the accused in Nigeria for successful conduct of the prosecution as they are not Swiss nationals.

7. The undertaking stipulated by the Tribunal enjoining Switzerland to ensure that the Master and three officers are available and present in Nigeria, if the Annex VII

tribunal finds that Nigeria has jurisdiction, in our view, is not sufficient in this case. Switzerland, despite its best efforts and good faith, may not succeed in securing the presence of the four accused persons before the Nigerian courts as it is not their State of nationality, or, as far as we are aware, their State of residence.

8. In this regard the Tribunal had addressed a specific question to Switzerland requesting it to elaborate its counsel's assertion that "procedures exist for securing the return of the Ukrainian officers". However Switzerland in its response failed to provide a satisfactory answer. In our view the involvement of a third State, which is not a party to the dispute, in any mutual legal assistance agreement, at the moment does not seem to have any legal basis.

9. In view of the above, in the present provisional measures proceedings, the ordering of the release of the indicted Master and the three officers would not equally preserve the rights of the Parties and may cause irreparable prejudice to Nigeria's rights to enforce its laws through criminal proceedings, as the presence of the defendants is essential for the successful continuation of those proceedings.

10. In our opinion, alternative measures were available before this Tribunal which would have preserved the rights of both Parties in a more balanced manner. The Tribunal could have ordered the release of the vessel and its cargo against the payment of a bond and the four indicted officers to remain in Nigeria in a safe location as the condition of their bail allows them to reside anywhere in Nigeria. This would have ensured their presence before the courts conducting criminal proceedings and also addressed the safety and security concerns.

(signed) Oscar Cabello

(signed) Neeru Chadha

DECLARATION OF JUDGE KITTICHAISAREE

1. In voting in favour of this Order, I wish to make some observations.

2. First, the event in this case concerned ship-to-ship ("STS") transfer of gasoil in Nigeria's exclusive economic zone. Although STS transfer operations and offshore bunkering have some similarities, there are a number of significant distinctions between the two, in particular with regard to their different purposes. In the case of offshore bunkering, the bunkering vessel transfers hydrocarbon to another vessel to be used as fuel for the recipient vessel's propulsion and operation. By contrast, hydrocarbon transferred in STS operations are received by the recipient vessel for the hydrocarbon to be carried further as cargo or stored offshore.[1] Some legal scholars contend that STS operations were not foreseen by the draftsmen of the 1982 United Nations Convention on the Law of the Sea ("the Convention"), and that they should, therefore, be covered by article 59 of the Convention,[2] which stipulates:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

3. Despite the aforesaid differences between offshore bunkering and STS operations, the Parties in the present case have not resorted to article 59 of the Convention as a basis for their claims, preferring to formulate their arguments on the basis of this Tribunal's case law on offshore bulking instead of venturing into the relatively unknown and unexplored terrain of article 59 of the Convention. The

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[1] Rainer Lagoni, "Offshore Bunkering in the Exclusive Economic Zone", in *Law of the Sea, Environmental Law and the Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Tafsir Malik Ndiaye and Rüdiger Wolfrum eds., Leiden, 2008), pp. 613-627, at p. 615; David Testa, "Coastal State Regulation of Bunkering and Ship-to-Ship (STS) Oil Transfer Operations in the EEZ: An Analysis of State Practice and of Costal State Jurisdiction under LOSC", *Ocean Development and International Law* (2019), pp. 1-24, at pp. 2, 15-16.

[2] E.g., Testa, above n. 1, at pp.16-17; Richard Collins, "Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS issues its ruling in the *M/V 'Norstar'* Case, *EJIL Talk!* (4 June 2019), available at <https://www.ejiltalk.org/delineating-the-exclusivity-of-flag-state-jurisdiction-on-the-high-seas-itlos-issues-its-ruling-in-the-m-v-norstar-case/#more-17250>, accessed 5 July 2019; cf. Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* , Online edition 2017, pp. 452-3.

Tribunal has, therefore, confined itself to the provisions under the Convention as invoked by each of the Parties in relation to the activities of the *M/T "San Padre Pio"* in Nigeria's exclusive economic zone and reached the conclusion in paragraph 108 of this Order.

4. Second, according to Nigeria,

> [a]t the present stage of the proceedings, Nigeria does not challenge the *prima facie* jurisdiction of the Annex VII arbitral tribunal over Switzerland's first and second claims. Nigeria does, however, challenge the Annex VII tribunal's *prima facie* jurisdiction over Switzerland's third claim.[3]

This concession by Nigeria with respect to the *prima facie* jurisdiction of the Annex VII arbitral tribunal over Switzerland's first and second claims is sufficient for this Tribunal to proceed to consider whether to prescribe provisional measures as requested by Switzerland, as affirmed in paragraphs 60, 71 and 76 of this Order.

5. It is true that Nigeria does challenge the plausibility of all three claims of Switzerland. As regards the first two rights alleged by Switzerland under article 58 of the Convention, Nigeria submits that they are not plausible because Nigeria has the sovereign right and obligation under articles 56, paragraph 1(a), 208 and 214 of the Convention to exercise its enforcement jurisdiction over the bunkering incident in question. With respect to the rights alleged under the International Covenant on Civil and Political Rights and the Maritime Labour Convention, Nigeria argues they are not plausible because Switzerland does not allege facts constituting a breach of the rights specified in these treaties, and the 1982 Convention contains no right to seek redress of breaches of other treaties.[4] However, having established that the first and second rights asserted by Switzerland are plausible, the Tribunal has, in paragraph 110 of this Order, correctly found it unnecessary to make a determination of the plausible character of the third right asserted by Switzerland at this stage of the proceedings.

[3] Nigeria's Response, para. 3.45.
[4] Response, para. 3.9; ITLOS/PV.19/C27/2, p. 3, ll. 13-15 and p. 21, ll. 45-46.

6. Third, the dividing line between the judges in the majority and the dissenting judges regarding the provisional measures to be prescribed in this case reflects their respective perceptions of what the appropriate balance between the protection to be accorded to the plausible rights of Switzerland *vis-à-vis* the rights of Nigeria as the coastal State exercising enforcement jurisdiction in its exclusive economic zone should be. This must also be seen in the context of complicated situations, including the fact that the Master and the three officers are of Ukrainian nationality and Ukraine does not extradite its own nationals. Indeed, the rights of both Parties must be preserved, without also prejudging the merits of the dispute, since it will take several months from the date of this Order for the Annex VII arbitral tribunal to be constituted and discharge its mandate. The Tribunal also recognizes, in paragraph 128, that there is a risk that the prejudice to the rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit – may not be fully repaired by monetary compensation alone.

7. In paragraph 141 of this Order, the Tribunal considers that the undertaking by Switzerland as ordered by the Tribunal "will constitute an obligation binding upon Switzerland under international law". The Tribunal thus follows the Annex VII arbitral tribunal in *"Enrica Lexie" Incident (Italy* v*. India)*.[5] It should be noted that the said arbitral tribunal has added that once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.[6] This Tribunal has gone even further than the Annex VII arbitral tribunal in *"Enrica Lexie" (Italy* v*. India)*, and rightly so, by requiring, in paragraph 141, that both Switzerland and Nigeria shall cooperate in good faith in the implementation of such undertaking.

(signed) Kriangsak Kittichaisaree

[5] *"Enrica Lexie" Incident (Italy* v. *India)*, Order of 29 April 2016 (Provisional Measures), para. 129.
[6] Ibid., para. 130, citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 147, at p. 158, para. 44.

DECLARATION OF JUDGE KOLODKIN

1. I share the findings of the Tribunal that *prima facie* the Annex VII arbitral tribunal which is to be constituted would have jurisdiction, and that the rights claimed by Switzerland in the present case on the basis of articles 58, paragraphs 1 and 2, and 92 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") are plausible.

2. I recognize that there is a risk of harm to these rights, involving the humanitarian and security concerns, which is behind the prescription that the four officers, together with the vessel and the cargo, be allowed to depart Nigeria. However, I am not totally convinced that the evidence is sufficient to satisfy the assertions that the risk is real and imminent and that the harm to these rights may be irreparable.

3. The measures prescribed by the Order reflect substantive efforts made by the Tribunal to preserve, as required by article 290, paragraph 1, of the Convention, the rights of both Parties. At the same time, I am not sure that these measures, prescribing in particular that Nigeria immediately release the four officers and ensure that they are allowed to leave its territory and maritime areas under its jurisdiction, even under the conditions established by the Order, sufficiently protect the right of Nigeria as a coastal State to exercise its criminal jurisdiction concerning the crimes allegedly committed by those officers in its exclusive economic zone (hereinafter "EEZ").

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4. To demonstrate that "the risk of irreparable prejudice is real and ongoing" the Tribunal points in particular to "the armed attack against the *M/T "San Padre Pio"* that took place on 15 April 2019, endangering the lives of those on board the vessel".[1] However, this attack was repelled by the

[1] Order, para. 129.

Nigerian armed guards, and Nigeria thereafter undertook the necessary measures to strengthen the protection of "*San Padre Pio"* and those on board.

5. The Tribunal further notes the recent report on piracy and armed robbery against ships of the International Chamber of Commerce-International Maritime Bureau, which states that the Gulf of Guinea accounts for 22 of 38 incidents of piracy and armed robbery against ships for the first quarter of 2019 and that 14 incidents are recorded for Nigeria.[2] There is no reason to doubt these statistics. However, the dangers to which they point obviously have not prevented those involved in the management of the vessel to continuously employ it for "ship-to-ship transfers" or "bunkering" activities in the area.

6. Even if damage to the vessel and the cargo occurs within the relatively short period before the constitution and functioning of the Annex VII arbitral tribunal, it is hard to imagine that it would be irreparable by adequate financial compensation.

7. The humanitarian and security concerns with respect to the four officers are, of course, to be taken seriously. However, it must be noted that under the bail imposed by the Nigerian court, they are free to leave the vessel and move around the country. If doubts existed in this regard, they have been dispelled by the governmental assurances confirmed by Nigeria during the final round of oral pleadings.[3] Nothing prevents the flag State or the shipowner from assisting the accused, who are not restricted in communication and contacts with those not on board the vessel, in finding appropriate accommodation for these officers ashore in Nigeria.

8. The Tribunal considers, in the circumstances of the present case, that arrest and detention of *"San Padre Pio"* for bunkering activities it carried out in the EEZ of Nigeria

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[2] Ibid.
[3] ITLOS/PV.19/C27/4, pp. 16-17.

> could irreparably prejudice the rights claimed by Switzerland relating to the freedom of navigation and the exercise of exclusive jurisdiction over the vessel as its flag State if the Annex VII arbitral tribunal adjudges that those rights belong to Switzerland.

It is of the view, that "there is a risk that the prejudice to the rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit – may not be fully repaired by monetary compensation alone".[4]

9. I wonder whether in the present case there are arguments that are strong enough to support this view. In addition, just three months ago, in its Judgment in *The M/V "Norstar" Case*, the Tribunal, having ascertained the breach of article 87, paragraph 1, of the Convention and the violation of the right of the flag State to the freedom of navigation, repaired it with monetary compensation only.[5]

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10. In my view, the coastal State's prerogative to enforce its sovereign rights for the purpose of exploiting, conserving and managing the non-living resources of its EEZ, asserted by Nigeria in particular under article 56, paragraph 1, of the Convention, are in this case no less plausible than the rights asserted by Switzerland under articles 58, paragraph 1, 87 and 92 thereof to exercise freedom of navigation and exclusive flag State jurisdiction in the EEZ of Nigeria. In accordance with article 290, paragraph 1, of the Convention, they must be appropriately protected by the provisional measures alongside the rights of Switzerland.

11. It is somewhat doubtful that the measures indicated by the Tribunal will adequately protect the right of Nigeria to exercise its criminal jurisdiction. The requirement of a bond or other financial guaranty to be posted by Switzerland and of an undertaking to be issued by it prior to the departure of the vessel,

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[4] Order, para. 128.
[5] *The M/V "Norstar" Case (Panama v. Italy), Judgment of 10 April 2019.*

cargo and crew, including the four accused, does not legally guarantee that the accused, who are not Swiss nationals, will be available to Nigeria's courts and law enforcement authorities for ongoing prosecution. Thus, the rights of Switzerland seem to be protected to some extent at the expense of Nigeria.

12. Meanwhile, even if prescribing the release of the vessel and the cargo, the Tribunal could have indicated other measures in respect of the officers that would have taken into account, on the one hand, the humanitarian and security concerns, and, on the other, the plausible right of Nigeria to exercise its criminal jurisdiction in respect of the accused. For example, the Parties could have been prescribed to cooperate in order to safely accommodate, without delay, the officers accused at an appropriate location ashore in Nigeria pending the criminal proceedings. Regretfully, the opportunity to preserve the respective rights of both Parties in a more balanced way has been missed.

(signed) Roman A. Kolodkin

SEPARATE OPINION OF JUDGE HEIDAR

1. I have voted in favour of the Order. I support its findings that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it and that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention. In my view, however, the provisional measures prescribed in the Order do not equally preserve the rights claimed by the Parties and alternative measures were available that would have better fulfilled that objective.

2. According to article 290, paragraph 1, of the Convention, a court or tribunal "may prescribe any provisional measures *which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute* …" [*emphasis added*]. This applies equally to proceedings under article 290, paragraph 5, of the Convention, and the Tribunal has underlined this objective of provisional measures in all such proceedings.[1]

3. The Tribunal has moreover: (a) stated that "the Order must protect the rights of both Parties"; (b) rejected submissions for provisional measures that "[would] *not equally preserve the respective rights of both Parties* until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention"; and (c) found that those submissions were therefore not "appropriate" [*emphasis added*].[2] It has also been stated that, "in prescribing provisional measures, the Tribunal should preserve the rights of both parties to the dispute,

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[1] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 295, para. 67; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 108, para. 63; *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 22, para. 64; *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 74; *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 248, para. 82; *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015,* p. 182, at p. 196, para. 75; *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 114.

[2] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 203, paras 125-127.

rights which may subsequently be adjudged by the Annex VII arbitral tribunal to belong to 'either' party."[3]

4. The provisional measures prescribed in paragraph 146(1) of the Order call for the release of the *M/T "San Padre Pio"*, its cargo and the Master and the three officers upon (a) the posting of a bond or other financial security and (b) the issuance of an undertaking by Switzerland to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria if the Annex VII arbitral tribunal finds that the arrest and detention of the vessel, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention.

5. In my opinion, these measures go too far in protecting the rights claimed by the Applicant, Switzerland, as the flag State, and do not sufficiently preserve the rights claimed by the Respondent, Nigeria, as the coastal State. The measures therefore do *not equally preserve the respective rights of both Parties*. If Switzerland is prepared to give the undertaking in question, and if the Annex VII arbitral tribunal finds in favour of Nigeria, it is of course to be expected that Switzerland will make every effort to ensure that the Master and the three officers will return to Nigeria to attend the criminal proceedings against them. However, there is no certainty that Switzerland would be able to do so, especially in light of the fact that these individuals are not Swiss nationals. Their absence from Nigeria could render the criminal proceedings without object and, therefore, meaningless. Thus, the provisional measures prescribed in the Order do not sufficiently preserve the rights claimed by Nigeria, including the right to exercise criminal jurisdiction over the Master and the three officers for the alleged violations of Nigerian law. This runs counter to the very objective of provisional measures referred to above.

6. In this context, it should be recalled that

> [e]xercise of criminal jurisdiction is a duty of the State. It is indispensable to the maintenance of law and order, a fundamental basis of any society, which no State can take lightly if it is not to neglect its duty as a State. In

[3] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Declaration of Judge Paik, ITLOS Reports 2015*, p. 211, para. 2.

> exercising criminal jurisdiction, obtaining the custody of the accused is crucial. Criminal proceedings without obtaining and maintaining the custody of the accused would be largely a fiction. Thus the question of the custody of the accused should be approached with utmost caution.[4]

7. In my view, alternative measures were available that would have preserved the rights of both Parties in a more equal manner. I would have preferred that only the *M/T "San Padre Pio"* and its cargo be ordered to be released, upon the posting of a bond or other financial security, and that the Master and the three officers remain in Nigeria. Such measures would have ensured that the Master and the three officers were no longer located on the vessel in its current dangerous location and instead located at a safe place in Nigeria while, at the same time, ensuring their attendance in the criminal proceedings against them. These measures would have been more balanced and proportionate and would have better achieved the objective of provisional measures set out in article 290, paragraph 1, of the Convention.

(signed) Tomas Heidar

[4] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Declaration of Judge Paik, ITLOS Reports* 2015, p. 213, para. 6.

SEPARATE OPINION OF JUDGE *AD HOC* MURPHY

I. Introduction

1. The Tribunal's Order for the prescription of provisional measures seeks to balance the rights claimed by both Parties pending the constitution and functioning of the Annex VII arbitral tribunal for this dispute.[1]

2. For the Swiss Confederation (hereinafter "Switzerland"), the Tribunal has ordered that the *M/T "San Padre Pio"* (hereinafter "the vessel"), its cargo, and the Master and three officers of the vessel (hereinafter "four officers"), be allowed to depart from the Federal Republic of Nigeria (hereinafter "Nigeria").[2]

3. For Nigeria, the Tribunal has not agreed to Switzerland's request that the Tribunal suspend Nigerian court and administrative proceedings relating to the incident that occurred in January 2018, or refrain from initiating new ones.[3] Further, the Tribunal has ordered that – before the vessel, cargo and four officers depart from Nigeria – two measures must be in place. First, a very substantial bond or financial security, in the form of a bank guarantee, must be issued in Nigeria's favour.[4] The amount of that bank guarantee extends beyond the value of the vessel and cargo, so as to include an amount to be available if the four officers do not return to Nigeria for the criminal proceedings against them. Second, the Tribunal has ordered that Switzerland must make a legally binding undertaking to Nigeria ensuring the return of the four officers for the Nigerian criminal proceedings.[5] Both measures are designed, notwithstanding the departure of the vessel, cargo and four officers from Nigeria, to protect Nigeria's rights if it prevails before the Annex VII arbitral tribunal.

4. While I can agree overall with the balancing approach taken by the Tribunal, I write to express my views regarding certain aspects of the Tribunal's Order. I first

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[1] *M/T "San Padre Pio" (Switzerland* v. *Nigeria), Provisional Measures, Order of 6 July 2019* (hereinafter "Tribunal Order").
[2] *Ibid.*, paras. 138, 146, para. 1(c). Since the crew (other than the four officers) is not being detained in Nigeria, the Court's provisional measure does not order its release.
[3] *Ibid.*, para. 142.
[4] *Ibid.*, paras. 139-140, 146, para. 1(a).
[5] *Ibid.*, paras. 141, 146, para. 1(b).

address the Tribunal's determination that, at this stage in the proceedings, Switzerland's first and second claims appear to be plausible, but that the Tribunal is unwilling to make such a determination with respect to Switzerland's third claim (Section II). While I agree with the Tribunal's conclusions, I wish to explain in greater depth why that is so. I then indicate my views on the question as to whether the urgency of the situation requires the prescription of provisional measures (Section III). Finally, I consider whether the measures prescribed by the Tribunal are appropriate to preserve the rights of the Parties (Section IV). With respect to this issue, I believe that it would have been more appropriate to fashion a provisional measure that kept the four officers in Nigeria, leaving the Annex VII arbitral tribunal to decide, at a later time, whether to prescribe further measures in that regard. Whatever urgency may exist, addressing it does not appear to require that the officers be allowed to depart Nigeria and, notwithstanding the two important measures fashioned by the Tribunal to protect Nigeria's rights, such departure appears to prejudice unnecessarily those rights.

5. I wish to stress that the views below in no way prejudge any question that may come before the Annex VII arbitral tribunal, including the question of its jurisdiction to deal with the merits of the case, or any question relating to the admissibility of the claims or to their merits. My views are solely based on the very limited pleadings made to the Tribunal and the very limited nature of this stage of the proceedings.

II. Requirement of urgency: Are Switzerland's claims plausible?

6. Article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") grants authority to the Tribunal to prescribe provisional measures of protection if it considers that (a) *prima facie* the Annex VII arbitral tribunal would have jurisdiction over this dispute, (b) the urgency of the situation so requires, and (c) the measures are appropriate to the circumstances to preserve the rights of the Parties pending the final decision of the Annex VII arbitral tribunal.[6] I

[6] Article 290 of the Convention, paras. 1 and 5.

concur with and do not see a need to address further the reasoning of the Tribunal with respect to (a), other than to note the Tribunal's "view that *at least some* of the provisions invoked by Switzerland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded."[7]

7. With respect to (b), although not identified as an express requirement in article 290 of the Convention, the Tribunal's jurisprudence on provisional measures of protection has evolved so as to include an assessment, first, of whether the rights being advanced by an applicant are at least "plausible,"[8] and then of whether there is urgency in protecting those rights. If the rights are not plausible, then the extraordinary step of ordering provisional measures should not be taken to protect the asserted rights. The exact contours of the concept of "plausibility" of rights is somewhat illusive; it would seem to require something more than a simple assertion, but something less than full proof. [9] In essence, the party must show that there is a reasonable possibility that the right which it claims exists as a matter of law and that the tribunal at the merits phases will view the right as being relevant to the facts of the case.

8. Switzerland's claims, as set forth in the "relief sought" at the end of Switzerland's Notification and Statement of Claim (hereinafter "Statement of Claim"),[10] are that Nigeria has violated Switzerland's rights under the Convention by infringing:

(1) Switzerland's right to freedom of navigation (articles 58 and 87 of the Convention) (hereinafter "claim 1");

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[7] Tribunal Order, para. 60 (emphasis added).
[8] *Ibid*., para. 77.
[9] See *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, *Provisional Measures, Order of 8 March 2011, Declaration of Judge Greenwood, I.C.J. Reports 2011*, at p. 47, para. 4; *Questions Relating to Seizure and Detention of Certain Documents (Timor-Leste* v. *Australia)*, *Provisional Measures, Order of 3 March 2014, Dissenting Opinion of Judge Greenwood, I.C.J. Reports 2014*, at p. 195, para. 4; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, *Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, I.C.J. Reports 2006,* p. 141, para. 11.
[10] *M/T "San Padre Pio" (Switzerland* v. *Nigeria), Provisional Measures,* ITLOS, Switzerland Notification and Statement of Claim, 6 May 2019, para. 45 (hereinafter "Statement of Claim"); see also Tribunal Order, para. 26.

(2) Switzerland's right to exercise exclusive jurisdiction over its flag vessels (articles 58 and 92 of the Convention) (hereinafter "claim 2"); and

(3) Switzerland's

> right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the [International Covenant on Civil and Political Rights (hereinafter "ICCPR")] and the [Maritime Labour Convention (hereinafter "MLC")], and under customary international law [hereinafter "claim 3"].

Switzerland explains elsewhere in its Statement of Claim that this claim concerns a breach of Nigeria's obligation under article 56, paragraph 2, of the Convention to have due regard to Switzerland's rights and duties, including, with respect to the MLC, Switzerland's "obligations" under article 94.[11]

9. The Tribunal determines that Switzerland's claims 1 and 2 are plausible,[12] but does not make such a determination with respect to claim 3.[13] I agree with the Tribunal's approach, but wish to elaborate on why it is correct.

A. Plausibility of Switzerland's claims 1 and 2

10. The heart of Switzerland's claim 1 concerns the right to freedom of navigation in Nigeria's exclusive economic zone pursuant to articles 58, paragraph 1, and 87 of the Convention. Switzerland's claim 2 is closely allied to claim 1, but focuses on Switzerland's right to exclusive enforcement over its flag vessels pursuant to articles 58, paragraphs 1 and 2, and 92 of the Convention. Such freedoms and rights, however, are "subject to the relevant provisions of this Convention" (article 58, paragraph 1) and must be "compatible with the other provisions of this Convention" (article 58, paragraph 2).

[11] Statement of Claim, para. 40(c) and (d).
[12] Tribunal Order, para. 108.
[13] *Ibid.*, para. 110.

11. Those "other provisions" of the Convention include Nigeria's sovereign right to exploit and manage the non-living resources of the seabed and its subsoil (article 56, paragraph 1(a)), rights that are to be exercised in accordance with Part VI of the Convention (article 58, paragraph 3). Nigeria also has jurisdiction to establish and use artificial islands, installations and structures in its exclusive economic zone, and to protect and preserve its environment (article 56, paragraph 1(b)). Other important rights are also accorded to Nigeria as a coastal State, notably in article 60 on artificial islands, installations and structures, and in articles 208 and 214 concerning pollution from seabed activities. It is noted that the Tribunal has found that the coastal State's "sovereign rights" encompass "all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, *including the right to take the necessary enforcement measures*,"[14] while an Annex VII arbitral tribunal has held that the coastal State's right to enforce its laws in relation to non-living resources within the exclusive economic zone "is clear."[15]

12. In assessing the plausibility of Switzerland's claims 1 and 2, the question before the Tribunal is whether, on the facts as they are currently understood, there is no reasonable possibility that the rights Switzerland advances exist as a matter of law and would be viewed by the Annex VII arbitral tribunal as being relevant to the facts of Switzerland's case. The difficulty that arises in saying that no such possibility exists concerns: (a) the lack of a developed factual record at this stage in the proceedings; and (b) the lack of an express treatment of such rights in the Convention or associated jurisprudence as between the coastal State and the flag State, in relation to the facts as they are currently understood.

13. With respect to the factual record, it appears that, in January 2018, the vessel engaged in two ship-to-ship transfers (hereinafter "STS transfer") of fuel in the vicinity of Nigeria's Odudu Oil Field, which is operated by Total E & P Nigeria Ltd.

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[14] *M/V "Virginia G" (Panama/Guinea-Bissau)*, *Judgment*, *ITLOS Reports 2014*, p. 4, at p. 67, para. 211 (emphasis added).
[15] *Arctic Sunrise Arbitration (Netherlands* v*. Russian Federation),* Annex VII Arbitral Tribunal, PCA Case No. 2014-02, Award on the Merits of 14 August 2014, para. 284 (hereinafter "*Arctic Sunrise Arbitration,* Merits Decision").

and is located in Nigeria's exclusive economic zone.[16] It also appears that the two vessels to which the fuel was transferred may have then transported the fuel a short distance for a further transfer to the facilities at Odudu Oil Field, where the fuel was then used. The Parties, however, did not develop in any detail the exact nature of such transfers or use of the fuel, making it difficult to assess whether the situation is best approached as simply an STS transfer, which normally is understood as a transfer of cargo between two seagoing vessels, or is best approached as offshore "bunkering," which normally is understood as the replenishment by one vessel of a second vessel's fuel bunkers with fuel intended for the operation of the second vessel's engines. On the facts presented, the situation appears to be a hybrid of the two types of operation, but with the added phenomenon of the fuel being used for the operation of an oil installation; thus, the facts may suggest an STS transfer closely connected with a "bunkering" of an oil installation.

14. A clearer picture as to the factual situation would have then allowed a better assessment by the Tribunal of the Parties' legal arguments and of the relevant law relating to claims 1 and 2. At this stage of the proceedings, the Parties tended to take very broad positions as to their respective rights, rather than attempt to clarify exactly how those rights apply to the facts at hand. Thus, Switzerland's legal argument may be that a transfer of cargo between two ships in an exclusive economic zone is part of Switzerland's freedom of navigation (or other internationally lawful uses of the sea) under article 58, paragraph 1, which cannot be regulated by the coastal State regardless of how or when that cargo is further transferred. Alternatively, Switzerland's legal argument may be that a transfer of cargo between two ships, in an exclusive economic zone, that then "bunkers" an oil platform cannot be regulated by the coastal State because the transfer is not related to exploitation of living resources, and hence entails lesser coastal State enforcement rights.

15. Nigeria's legal argument may be that neither STS transfers nor offshore bunkering are themselves "navigation" and perhaps not even an "other international lawful use of the sea" related to navigation. Further, Nigeria's legal position may be

[16] *M/T "San Padre Pio" (Switzerland* v. *Nigeria), Provisional Measures,* ITLOS, Nigeria Statement in Response to the Request for the Prescription of Provisional Measures, 17 June 2019, paras. 2.1, 2.12 (hereinafter "Nigeria Response").

that an STS transfer of fuel in its exclusive economic zone for the express and immediate purpose of supplying fuel to an oil installation is an activity directly related to the exploitation of the resources of the zone, which can be regulated as part of the coastal State's sovereign rights under article 56, paragraph 1, to manage such resources (and perhaps also regulated under article 60).

16. In the absence of the full development of these or other legal arguments, it is difficult to conclude that the rights advanced by Switzerland with respect to claims 1 and 2 are not plausible. There is nothing in articles 56, 58, 59 or 60 of the Convention that expressly addresses STS transfers or bunkering relating to vessels or installations in the exclusive economic zone. Further, neither Party in this proceeding elaborated on State practice under the Convention with respect to coastal State regulation of STS transfers or bunkering in the exclusive economic zone, as might be found in national laws or in the consent by States to other relevant treaties or guidelines.

17. Both Parties referred at times to international jurisprudence that has applied the Convention, but none of the cases cited appear to be directly on point with the facts of this case, at least as they are currently understood. The *M/V "Norstar"* case supports the general proposition that bunkering of leisure vessels on the high seas is part of the freedom of navigation under article 87 of the Convention.[17] The *M/V "Virginia G"* case supports the general proposition that the bunkering of fishing vessels in an exclusive economic zone can be regulated and enforced against by the coastal State.[18] At the same time, the *M/V* "*SAIGA" (No. 2)* case stands the proposition that, in such a circumstance, the coastal State cannot apply its customs laws and regulations, though it can do so with respect to artificial islands, installations and structures.[19] The *Duzgit Integrity* case supports the general proposition that an archipelagic State may regulate and enforce against STS oil transfers in archipelagic waters.[20] Some of the separate opinions, declarations or

[17] *M/V "Norstar" Case (Panama* v. *Italy)*, ITLOS, Judgment of 10 April 2019, para. 219.
[18] *M/V "Virginia G" (Panama/Guinea-Bissau)*, *Judgment, ITLOS Reports 2014*, p. 4, at p. 69, para. 217.
[19] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea*), Judgment, ITLOS Reports 1999, p. 10, at p. 54, para. 127.
[20] *Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)*, Annex VII Arbitral Tribunal, PCA Case No. 2014-07, Award of 5 September 2016.

dissenting opinions of judges or arbitrators in those cases have touched upon issues that may be relevant to this case. For example, Judge Anderson's separate opinion in the *M/V* "*SAIGA" (No. 2)* case indicated that offshore bunkering of a vessel in the exclusive economic zone that, immediately prior to and after receiving fuel, exercises its right of freedom of navigation "could well amount to" an internationally lawful use of the sea related to freedom of navigation.[21]

18. That the legal arguments of the Parties were not framed in greater specificity is understandable given the abbreviated nature of the proceedings before the Tribunal. That the international jurisprudence does not squarely fit to the facts as currently understood is also understandable, given that case law relating to the Convention remains relatively limited. Yet such factors made it difficult to conclude in these proceedings that there is no reasonable possibility that the rights that Switzerland advances under claims 1 and 2 exist as a matter of law or would be adjudged by the Annex VII arbitral tribunal to apply to Switzerland's case.

B. Switzerland's claim 3

19. While Switzerland's claims 1 and 2 are plausible, the Tribunal "does not find it necessary to make a determination of the plausible character of the third right at this stage of the proceedings."[22] The Tribunal's reluctance to make such a determination in the absence of a much fuller treatment of the facts and law is understandable, for reasons set forth below.

1. Switzerland's "right to seek redress"

20. Switzerland's claim 3, as set forth in the "relief sought" in its Statement of Claim, asserts that Nigeria's actions in seizing the vessel, its crew and its cargo, and in conducting the Nigerian criminal proceedings, violated the Convention, by failing to give due regard, under article 56, paragraph 2, of the Convention to Switzerland's "right and duties." The Swiss "right" at issue is framed as Switzerland's exercise of its "right to seek redress on behalf of crew members and all persons involved in the

[21] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999, Separate Opinion of Judge Anderson*, p. 10, at p. 137.
[22] Tribunal Order, para. 110.

operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR and the MLC, and under customary international law."[23]

21. While Switzerland has pleaded a violation of a provision of the Convention (article 56, paragraph 2) and has asserted the denial of a "right to seek redress" in that context, the facts of this case as currently understood do not appear to have any relationship to such a right. Nigeria's seizure of the vessel, crew and cargo does not have any apparent connection with a denial of Switzerland's right to seek redress on behalf of the crew or any other persons, whether based on the Convention, on other treaties, or on customary international law. Nothing about Nigeria's actions precludes Switzerland from seeking redress, whether by espousal of the claims of persons or otherwise, in accordance with whatever rules and procedures are available to Switzerland under international law. Indeed, the filing of Switzerland's claim under the Convention would appear to demonstrate that Nigeria's actions do not have any connection with or preclude Switzerland's ability to seek redress for the events at issue in this case.

22. Switzerland's Statement of Claim also makes reference to Nigeria's obligation under article 56, paragraph 2, "to have due regard to Switzerland's obligations under article 94" of the Convention.[24] Article 94, which concerns duties of the flag State, does not include any provision on a flag State's "right to seek redress" for persons associated with its flag vessels.

23. Since there does not appear, at this time, to be a reasonable possibility that such a right of redress will be viewed as being relevant to the facts of this case, Switzerland's claim 3 as framed in its Statement of Claim does not appear to be plausible.

[23] Statement of Claim, para. 45(a)(iii).
[24] *Ibid.*, para. 40(c).

2. Switzerland's "duties" relating to article 94, the ICCPR or the MLC

24. At oral argument, counsel for Switzerland framed the Swiss "right" at issue differently than it appears in the Statement of Claim. Counsel for Switzerland said that "Nigeria has made it impossible for Switzerland … to discharge toward the crew its duties resulting from the" ICCPR, MLC and customary international law.[25] Counsel for Switzerland also made reference to article 94 of the Convention,[26] which, as noted above, concerns the "duties of the flag State."

25. On this framing of claim 3, the "right" at issue that must be protected by provisional measures is not Switzerland's right to seek redress but, rather, something that appears not to be a "right" at all. Instead, what the Tribunal is being asked to protect through provisional measures are Switzerland's "duties" owed to the crew under article 94 of the Convention, the ICCPR, the MLC and customary international law, to which Nigeria allegedly has failed to give due regard under article 56, paragraph 2. Yet article 290 of the Convention contemplates that a tribunal may prescribe provisional measures to preserve the respective "rights" of the parties to the dispute pending the final decision; it says nothing about protecting a party's "duties" or "obligations." Nor is it obvious what it means to provide such protection. As such, the "right" being advanced by Switzerland with respect to claim 3 at this time does not appear to be plausible.

26. If this hurdle could be overcome, one issue of debate between the Parties was whether the "duties of other States" at issue in article 56, paragraph 2, are only duties arising under the Convention (and perhaps more specifically, such duties of other States as they exist in the coastal State's exclusive economic zone).[27] Presumably article 56, paragraph 2, is not referring to *all* duties that a flag State may have, such as those arising under the flag State's national law, about which the coastal State may have no knowledge. Yet even if, for the present purposes, it is assumed that the duties of other States referred to in article 56, paragraph 2, extend

[25] ITLOS/PV.19/C27/1, p. 16, ll. 1-4.
[26] *Ibid.*, p. 23, l. 28.
[27] Compare *ibid.*, p. 15, ll. 39-45, and ITLOS/PV.19/C27/3, p. 5, ll. 17-24, with ITLOS/PV.19/C27/4, p. 5, ll. 28-39.

beyond duties arising under the Convention, there does not appear to be any connection between the facts as currently understood in this case and the duties identified by Switzerland, as discussed at paragraphs 28 to 30 below.

27. Another issue of debate between the Parties concerned whether article 293 of the Convention on "applicable law" accords to an Annex VII arbitral tribunal jurisdiction regarding the interpretation or application of "other rules of international law not incompatible with" the Convention. Yet, again, even if for the present purposes it is accepted that there is *prima facie* jurisdiction over Switzerland's claim 3 regarding a violation of articles 56, paragraph 2, and 94, and further that a tribunal may apply rules of international law other than the Convention when interpreting those articles, there still does not appear to be any connection between the facts as currently understood in this case and the duties identified by Switzerland under that other law.

28. The reason that there does not appear to be any connection is as follows. To the extent that the "duties" at issue concern the duty of Switzerland to respect the right of persons on its flag vessels not to be subject to arbitrary arrest or detention (article 9 of the ICCPR), there does not appear to be anything in the present facts indicating that Switzerland has been prevented from respecting such rights, as Switzerland has not arrested or detained anyone. Nor does there appear to exist any duty of Switzerland to ensure such rights in relation to persons who are within the territory and subject to the jurisdiction of another State (see article 2, paragraph 1, of the ICCPR).

29. Likewise, to the extent that the "duties" at issue concern the duty of Switzerland to respect the rights of persons on its flag vessels to have a safe and secure workplace, or to respect social rights such as to health protection or medical care (article IV of the MLC), there does not appear to be anything on the facts before this Tribunal indicating that Switzerland has been prevented from respecting such rights. To the extent that the "duties" at issue concern the duty of Switzerland to implement and enforce such rights (article V of the MLC), there does not appear to be anything in the present facts indicating that Switzerland has been prevented from implementing or enforcing such rights as required under the MLC, which of course

does not authorize a State to take enforcement measures in another State. Simply put, at present Nigeria does not appear to have prevented Switzerland from upholding such duties or similar duties arising under the treaties referred to above or under customary international law.

30. Since there does not appear, at present, to be any reasonable possibility that a right exists which provisional measures can protect, nor that a duty of Switzerland exists that is of relevance to the facts of this case, it is difficult to determine that Switzerland's claim 3 as reformulated during oral argument is plausible.

31. Whether Nigeria, by its conduct, has failed to respect rights of the crew is a different matter, but any such duty is owed under international law by Nigeria not by Switzerland, and thus does not implicate article 56, paragraph 2, of the Convention. Further, if assessing Nigeria's conduct for purposes of dispute settlement under the Convention, any reference to other treaties or customary international law would need to be for the purpose of interpreting specific obligations of Nigeria under the Convention, not Nigerian obligations arising directly under that other law.[28]

III. Requirement of urgency: Is there a real and imminent risk of irreparable prejudice?

32. Given the plausibility of Switzerland's claims 1 and 2, the Tribunal then considers whether "there is a real and imminent risk that irreparable prejudice could be caused to the rights of the parties to the dispute pending" the establishment and functioning of the Annex VII arbitral tribunal.[29] If so, then the "urgency" requirement for prescribing provisional measures has been met.

[28] *Arctic Sunrise Arbitration*, Merits Decision, para. 198.
[29] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 July 2015, ITLOS Reports 2015*, p. 176, at p. 197, para. 87 (hereinafter "*Enrica Lexie*, Provisional Measures"); see Tribunal Order, para. 111.

A. The action at issue in this case that may cause irreparable prejudice

33. In paragraphs 128-129 of the Tribunal's Order, the Tribunal concludes that there exists a real and ongoing risk of irreparable prejudice to the rights of Switzerland to freedom of navigation and to exclusive flag State jurisdiction from the arrest of the vessel and its detention for a lengthy period at a particular location: Port Harcourt, Bonny Inner Anchorage.

34. In my view, the Tribunal's language at paragraphs 128-129 might have been clearer in identifying the action at issue in this case that could cause "irreparable prejudice" and why that prejudice was "real and imminent." The "irreparable prejudice" at issue in these paragraphs is not the mere fact that Nigeria arrested and detained a vessel, and its cargo and crew, who were in Nigeria's exclusive economic zone, nor that such prejudice remains "real and ongoing" today solely by virtue of a continued detention. Such a conclusion would not be consistent with the Convention, which does not apply "prompt release" requirements except with respect to the enforcement of coastal State laws and regulations relating to *living* resources (articles 73, paragraphs 1 and 2, and 292 of the Convention). Further, such a conclusion would be inconsistent with the Tribunal's jurisprudence. For example, in the *"Enrica Lexie"* case, India detained an Italian vessel and its crew in its exclusive economic zone, but the Tribunal still declined to order that a member of the crew (a marine) be allowed to return to Italy even after years of detention. Indeed, the Tribunal's *jurisprudence constante* has envisaged a provisional measure of protection as an extraordinary measure to be taken only in exceptional situations, not as a routine matter to be invoked whenever one State asserts that its rights to freedom of the seas or to exclusive flag State jurisdiction in another State's exclusive economic zone have been violated.

35. Instead, paragraphs 128 and 129 of the Tribunal's Order are indicating that, "in the circumstances of the present case,"[30] there is a risk of irreparable prejudice to Switzerland's rights. Those circumstances are not just the arrest and detention of the

[30] Tribunal Order, para. 128.

vessel, but the detention of the vessel and its cargo for a lengthy period at Port Harcourt, Bonny Inner Anchorage, where the vessel and its crew "are exposed to constant danger to their security and safety."[31] Further, that risk of irreparable prejudice is "real" and not just "imminent" but "ongoing," since the vessel currently remains at that location.

B. Is there a real and imminent risk of irreparable prejudice?

36. Having identified the action at issue in this case that may cause irreparable prejudice, the question then becomes whether there is a real and imminent risk of irreparable prejudice from that action. One difficulty in concluding that there is a real and imminent risk of irreparable prejudice to Switzerland with respect to the detention of the vessel and its cargo at Port Harcourt, Bonny Inner Anchorage, is that economic loss from harm to the vessel or to the cargo is clearly not "irreparable." To the extent that such loss occurs and is the result of an internationally wrongful act by Nigeria, then compensation can be paid to make Switzerland and its nationals whole. There is no need for a provisional measure protecting Switzerland's rights in this regard.

37. Another difficulty with this conclusion is that the conduct by the shipowner and charterer casts doubt on their belief that the vessel and cargo face a real and imminent risk of irreparable harm. Over the past eighteen months, the shipowner apparently has not sought to post a bond with the Nigerian courts to secure the release of the vessel.[32] If there was a belief that the vessel was at imminent risk of harm at some point during this period, it would seem natural for the shipowner to seek its release, if at all possible, from Nigerian courts. When queried about this by the Tribunal at the hearing, the Agent for Switzerland stated that "[a]ccording to our information, the possibility of posting a bond only exists in civil proceedings" or when a victim is recovering a property in criminal proceedings.[33] By contrast, Nigerian counsel represented that Nigerian courts have inherent power to take such a step,

[31] *Ibid*., para. 129.
[32] Nigeria Response, para. 2.19.
[33] ITLOS/PV.19/C27/3, p. 4, ll. 1-18 (interpretation from French).

including in criminal proceedings.[34] In any event, the fact that the shipowner has not sought any release of the ship and has provided no explanation as to why it has not done so, perhaps through a statement from its local Nigerian counsel, raises a serious question as to whether the shipowner perceives a risk of irreparable harm to the vessel.

38. As for whether there is, at present, an imminent risk of irreparable harm to the cargo, the Nigerian Economic and Financial Crimes Commission petitioned the Nigerian High Court in May 2018 to allow the cargo to be sold and the proceeds to be placed in an interest-bearing account, for ultimate disposition after the Nigerian criminal proceedings were concluded.[35] The purpose of this motion was not to remove the cargo from some imminent danger, but to "avoid spill and possible pollution" and because of a "high flight risk."[36] Rather than support removal of the cargo from its current location in this manner, which would seem reasonable if there was imminent danger of harm to the cargo, the charterer of the vessel appeared in Nigerian courts (first before the Nigerian High Court and currently before the Federal Court of Appeal) to oppose the sale and escrow of funds, preferring that the cargo remain on the vessel.[37] (As for whether there is any risk of harm to the marine environment from spillage of the cargo, Switzerland says that it is not, at the present stage, seeking provisional measures to prevent any such harm,[38] and the charterer has maintained before the Nigerian courts that any "concerns of oil spillage or pollution is inconsequential."[39])

39. The Tribunal's decision in this regard is not based on the risk of irreparable harm to the vessel or its cargo but, rather, the following factors: (a) the vessel, cargo and crew must be considered as constituting "a unit" when considering irreparable prejudice;[40] (b) for the vessel to be kept in safe and good order, the shipowner has decided to maintain a crew on the vessel which changes composition over time as

[34] ITLOS/PV.19/C27/4, p. 4, ll. 14-21.
[35] Statement of Claim, para. 21; Nigeria Response, paras. 2.23-2.26.
[36] Statement of Claim, Annex 36, paras. 12 and 13.
[37] Statement of Claim, Annex 38.
[38] ITLOS/PV.19/C27/1, p. 31, ll. 43-45.
[39] Statement of Claim, Annex 38, Affidavit in Support of Motion on Notice, p. 8, para (s).
[40] Tribunal Order, para. 128.

Nigeria has imposed no restrictions in this regard,[41] except for the four officers; (c) the crew both works and lives on the vessel full-time; (d) the location of the vessel at Port Harcourt, Bonny Inner Anchorage, exposes *the crew* to a real and imminent risk of irreparable harm; and (e) therefore, the best solution is to order Nigeria to allow the vessel and its cargo to depart Nigeria, so that there will not be a crew at that location. In other words, the risk of imminent harm is not so much with respect to the vessel or its cargo, but to the crew that remains on board the vessel.

40. This line of reasoning is very accommodating to the choices made by the shipowner and charterer, as indicated above. It also is predicated on a view that the current location of the vessel is a place where the crew is, at present, facing a real and imminent risk of harm. The evidence presented by Switzerland in this proceeding regarding such harm was relatively minimal, consisting of no statements or declarations by the current or former crew members, by the shipowner or charterer, by their local agents or lawyers, or by the Swiss Embassy or Consulate in Nigeria. Rather, the evidence presented by Switzerland principally consists of: (a) general reports that piracy and armed robbery occur in the Gulf of Guinea; (b) information that an armed robbery was attempted against the vessel on 15 April 2019, which was repulsed by Nigerian navy guards; (c) information that another vessel anchored off Bonny Island was attacked a week later; and (d) an assertion at oral argument that recently a nearby, unmanned vessel twice drifted into the vessel.[42]

41. Against such evidence should be weighed that presented by Nigeria, consisting principally of a sworn declaration from the commander of the Nigerian navy's Forward Operating Base Bonny (hereinafter "FOB Bonny"), which is approximately one nautical mile from the location of the vessel.[43] From the date of its arrest, the vessel has been under the protection of the Nigerian navy, with two armed guards from FOB Bonny placed on the vessel.[44] For some 18 months, there

[41] Nigeria Response, para. 2.17. As previously noted, since the crew (other than the four officers) is not being detained by Nigeria, the Court's provisional measure does not order its release.
[42] Switzerland Request for Provisional Measures, 21 May 2019, paras. 42-43; ITLOS/PV.19/C27/1, p. 10, ll. 10-17.
[43] Nigeria Response, Annex 8, para. 9.
[44] *Ibid.*, Annex 8, paras. 7-8.

has been no act of violence against the vessel other than the attempted armed robbery on 15 April 2019. After that incident, the number of armed guards on the vessel from FOB Bonny was increased and a Nigerian naval gunboat was stationed in close proximity to the vessel at night.[45] Since that time, there have been no further attempts at armed robbery against the vessel.[46]

42. In light of the information set forth above, it does not seem to me that Switzerland has demonstrated that the vessel and crew are, at their present location, necessarily facing real and imminent harm. At the same time, a majority of the Tribunal has found persuasive that a risk of such harm exists, based on the attempted armed robbery of the vessel in April 2019 and on general information concerning incidents of piracy or armed robbery of vessels located in Nigerian waters in the first quarter of 2019.[47] Given the limited factual record, reasonable minds might differ as to the possibility of a further attempt of armed robbery against the vessel, such that I am willing to support the majority's conclusion that there is a real and imminent risk that another armed robbery of the vessel may be attempted, which might result in death or injury to the crew.

IV. Are the Tribunal's provisional measures appropriate under the circumstances to preserve the respective rights of the Parties?

43. I turn now to whether the Tribunal's provisional measures are appropriate under the circumstances to preserve the respective rights of the Parties, as is also required by article 290 of the Convention.

44. The Tribunal has decided, correctly in my view, not to accept Switzerland's request that Nigeria be ordered to suspend all court and administrative proceedings and refrain from initiating new proceedings.[48] Consequently, Nigeria can continue

[45] *Ibid.*, para. 8.
[46] *Ibid.*
[47] Tribunal Order, para. 129. The general information cited by the Tribunal derives from Statement of Claim, Annex 53.
[48] *Ibid.*, para. 142.

such proceedings and initiate new ones as necessary for the exercise of its national jurisdiction relating to the facts of this case.

45. With respect to the release of the vessel and crew, the Tribunal has required that there first be posted a bond or other financial security in the amount of US$ 14,000,000 with Nigeria in the form of a bank guarantee.[49] It is not clear whether this posting will be made by Switzerland or by some other entity, such as the shipowner, but the amount of the guarantee appears sufficient to cover the present value of the vessel and its cargo. As such, if the Annex VII arbitral tribunal finds that the arrest and detention of the vessel, its cargo and its crew by Nigeria do not constitute a violation of the Convention, and if a Nigerian court in the exercise of Nigeria's jurisdiction issues a fine against the vessel, Nigeria should be in no worse position in securing payment of that fine than it would be if the vessel and its cargo remained in Nigeria.

46. The provisional measure, however, has been crafted so as to order Nigeria also to allow the four officers charged with violating Nigerian criminal law to leave the country. In my view, the provisional measure should not have extended this far. Once the vessel and cargo are allowed to leave Nigeria, there is no longer any need for the four officers to locate themselves on the vessel in waters that the Tribunal regards as dangerous. Instead, they may reside anywhere they wish in Nigeria. To the extent that Switzerland is concerned for the safety of the four officers residing in Nigeria, there is no reason it could not assist in identifying safe accommodations for them, as it no doubt does for its own diplomatic and consular personnel. A provisional measure by the Tribunal might even have called upon Nigeria to cooperate with Switzerland in identifying such accommodation, if necessary.

47. Yet instead the Tribunal has included in the provisional measure that Nigeria allow the four officers to leave Nigeria. The Tribunal does not explain why the provisional measure extends this far.

[49] *Ibid.*, paras. 139-140, 146, para. 1(a).

48. Presumably the reason for allowing the four officers to depart Nigeria is not because a coastal State's refusal to allow an individual who is under criminal indictment to leave its territory is, *ipso facto*, a different form of imminent and irreparable harm, nor that officers of a vessel must always stay with it as "a unit." If that were the case, then the Tribunal would have ordered in the *"Enrica Lexie"* case that an Italian marine, who had been kept in India for more than three years, be allowed to return to Italy, yet it did not.[50] Moreover, that reasoning would mean that any coastal State exercising criminal jurisdiction in territorial waters, or in waters where it has sovereign rights, cannot keep in its territory a crew member from a foreign-flagged vessel charged with violating the coastal State's criminal law. Rather than automatically ordering departure from the coastal State's territory, previously the Tribunal appears to have only ordered departure under certain circumstances, such as when the immunity of a warship and its crew are being denied[51] or when the absence of the respondent in the proceedings has resulted in uncertainty as to the status and condition of persons being held in detention.[52]

49. Alternatively, the reason for crafting the provisional measure in this way might be the nature of the criminal charges brought by the coastal State and their associated penalties. In *"Enrica Lexie"*, the allegation was of murder in the exclusive economic zone, not criminal activity relating to non-living resources. Yet if such gravity in the charges is the reason for this part of the Tribunal's provisional measure, then the vast majority of reasons as to why a coastal State might exercise criminal jurisdiction over its maritime areas might be insufficient for keeping an indicted person in its territory. If the reason relates to something specific about Nigerian law in this regard, neither Party advanced arguments before the Tribunal along those lines.

50. A third reason may be one advanced by Switzerland during the hearing. According to the Agent of Switzerland,

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[50] *Enrica Lexie*, Provisional Measures, p. 176, at p. 204, para. 132.
[51] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at pp. 348-49, paras. 93-100; *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation)*, Provisional Measures, Order of 25 May 2019, at paras. 110-13.
[52] *"Arctic Sunrise" (Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at pp. 242-43, paras. 49-50, 54-55, 57.

> the four men on land would face a very worrying security situation. As regards Port Harcourt, armed confrontation takes place regularly, and travelers are explicitly advised not to travel to the coastal area close to the "*San Padre Pio*." *The situation is in fact no better in the rest of the country*.[53]

Here the argument would be that the four officers cannot reside anywhere in Nigeria because the entire country is unsafe. There should be doubts about this as the explanation for the scope of the Tribunal's provisional measure, given the geographic size of Nigeria and the large numbers of foreigners currently living in Nigeria, including those working for foreign companies and in the diplomatic and consular community. In any event, no evidence was placed before the Tribunal indicating that the four officers faced a real and imminent risk of harm *everywhere* in Nigeria, let alone faced such a risk even if accorded assistance from Switzerland.

51. By contrast, Nigeria has explained to the Tribunal in some depth why it is of critical importance to Nigeria to be able to regulate and enforce against complex criminal activity it currently faces with respect to the theft, illegal refinement and unlicensed sale of oil products in Nigeria and its maritime zones.[54] To that end, Nigeria has presented to the Tribunal through sworn affidavits[55] and Nigerian court documents[56] the circumstances and reasons for the arrest of the vessel and its crew and the basis for the charges against them. While Switzerland has raised questions about the speed with which the Nigerian criminal proceedings have advanced, Nigeria appears to have acted reasonably in withdrawing criminal charges against most of the vessel's crew and in allowing the four officers to be released from prison on bail pending their trial. In short, Nigeria has demonstrated in good faith that it faces a serious threat of criminal activity and that, in its view, the actions taken against the vessel and its crew were part of an ongoing effort to respond to that threat.

52. If Switzerland fails to persuade the Annex VII arbitral tribunal that its right to freedom of navigation or to exclusive jurisdiction over its flag vessels, or that Switzerland's duties to the crew of one of its flag vessels, were infringed by Nigeria,

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[53] ITLOS/PV.19/C27/1, p. 9, ll. 45-48 (interpretation from French) (emphasis added).
[54] Nigeria Response, paras. 2.1-2.10; Annex 2.
[55] *Ibid.,* Annexes 2, 6, and 22.
[56] See, for example, *ibid.*, Annexes 7 and 9.

then Nigeria's right to regulate and enforce against the vessel and its crew will be irrefutable. Such enforcement includes Nigeria's right to pursue criminal proceedings in its courts against the four officers. By issuing a provisional measure that results in the four officers departing the country, Nigeria may be unable to proceed with a trial of the four officers, and will be unable to incarcerate the four officers if convicted at trial, unless the four officers return to Nigeria. Thus, if the four officers do not return, the Tribunal will have failed to preserve the rights of Nigeria.

53. The Tribunal has attempted to protect Nigeria's rights in this regard by requiring certain measures, but has had to do so without specific proposals from or consultations with the Parties. At the hearing, counsel for Switzerland intimated to the Tribunal that unspecified "procedures exist for securing the return of Ukrainian officers."[57] When questioned by the Tribunal as to what those procedures might be, the answer by a different counsel was that the matter might be pursued: (a) with Nigerian authorities; (b) with Ukrainian authorities; and (c) by having the four officers "give some form of formal undertaking to the court to return under certain circumstances in light of the outcome of the arbitration."[58] For its part, Nigeria did not make any proposals, and stood by its view that the four officers should not be allowed to depart Nigeria.

54. In the absence of any specific proposals from or consultations with the Parties, the Tribunal on its own has decided to adopt two measures that must be in place before the four officers may depart Nigeria. First, the bond or financial security discussed above (paragraph 45) is set at a level that exceeds the value of the vessel and its cargo, thereby creating a financial incentive for the return of the four officers, as well as an ability of Nigeria – if they do not return – to levy a fine that can be satisfied as against the bond or financial security. Second, Switzerland must undertake to ensure to Nigeria that the four officers will return for the criminal proceedings.[59] The Order expressly provides that this unilateral act by Switzerland vis-à-vis Nigeria is to be a legally binding obligation;[60] as such, a breach of the

[57] ITLOS/PV.19/C27/1, p. 25, ll. 1-2 (interpretation from French).
[58] ITLOS/PV.19/C27/3, p. 11, ll. 30-40.
[59] Tribunal Order, paras. 141, 146, para. 1(b).
[60] *Ibid*., para. 141 ("The Tribunal considers that the undertaking … will constitute an obligation binding upon Switzerland under international law."); see *Guiding Principles Applicable to Unilateral*

undertaking will constitute an internationally wrongful act by Switzerland for which Nigeria may seek reparation.

55. While the establishment of these two measures goes some distance in protecting the rights of Nigeria, doing so without the active participation of the Parties presents serious questions as to how exactly these measures will work. There are no actual procedures yet in place to ensure the return of the four officers to Nigeria. The bond or financial security may provide a financial incentive to see that the four officers return, but it remains unclear who will be paying the bond or financial security, and what control that payer will have over the four officers if the officers do not wish to return to Nigeria. The undertaking by Switzerland imposes a serious international obligation upon it, but the four officers are Ukrainian not Swiss nationals, so it is not clear what authority, if any, Switzerland will have over their movements. The Ukrainian government is not a party to these proceedings and, if the four officers return to Ukraine, it appears that Ukraine does not extradite its own nationals.

56. In my view, it would have been better for the Tribunal not to have ordered that the four officers be allowed to depart Nigeria at this time, as there appears to be no urgency that they do so once they relocate from the vessel to accommodations in Nigeria. If Switzerland could demonstrate such urgency to the Annex VII arbitral tribunal, that tribunal could have developed an appropriate provisional measure, based on specific proposals from the Parties as to how the return of the four officers to Nigeria could be ensured.

57. As such, I do not think that the Tribunal has adequately protected Nigeria's rights in allowing the four officers to leave Nigeria. Had the Tribunal crafted its *dispositif* so as to allow judges to vote on individual aspects of the provisional measure, I would have voted against this aspect of the Tribunal's Order.

(signed) Sean David Murphy

Declarations of State Capable of Creating Legal Obligations, Report of the International Law Commission on the Work of Its Fifty-Eighth Session. UN Doc. A/61/10, at 367 (2006).

SEPARATE OPINION OF JUDGE *AD HOC* PETRIG

1. I have voted in favour of the Provisional Measure Order. Nevertheless, I consider it necessary to clarify my position on the various elements which constitute the provisional measure prescribed in paragraph 146, sub-paragraph (1).

Release of the vessel, its cargo, and the Master and the three officers

2. I consider the release of the vessel, its cargo, *and* the Master and the three officers to be an appropriate measure. I adhere to the reasoning set out in paragraphs 128 to 130 of the Order demonstrating that the requirement of a real and imminent risk of irreparable prejudice is met in the present case. A further argument, which finds its basis in the Convention itself, should be added.

3. Article 56, paragraph 2, of the Convention stipulates that in exercising its rights under the Convention in the exclusive economic zone, the coastal State "shall act in a manner compatible with the provisions of this Convention". Article 225 of the Convention, entitled "Duty to avoid adverse consequences in the exercise of the powers of enforcement", is one of these provisions and reads:

> 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. (emphasis added)

4. Even though the provision is located in Part XII of the Convention on the Protection and Preservation of the Marine Environment, it must also be observed when enforcement powers are exercised by the coastal State under Part V of the Convention. This accrues from the words "under this Convention", which indicate a broader scope of application than the words "under this Part" used in other safeguard provisions of Part XII (for example, in articles 224 and 227 of the Convention). The interpretation that article 225 of the Convention is of general application – and thus applies to enforcement powers exercised on the basis of Part V of the Convention – has already been confirmed by the Tribunal in *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014,* p. 4, at

p. 105, para. 373. The obligation of the coastal State not to bring an arrested vessel to an unsafe anchorage is formulated in an absolute fashion.

5. During the hearings, both Parties referred to the fact that the Gulf of Guinea is plagued by piracy and armed robbery against ships.[1] Paragraph 129 of the Order makes reference to the Report on Piracy and Armed Robbery Against Ships (1 January – 31 March 2019) by the International Chamber of Commerce-International Maritime Bureau, according to which 14 of the 38 incidents of piracy and armed robbery against ships worldwide took place in Nigerian waters. As regards the place of detention specifically, the International Chamber of Commerce-Commercial Crime Service notes on its website that "there has been a noticeable increase in attacks/hijackings/kidnapping of crews" off Bonny Island and Port Harcourt and "[v]essels are advised to take additional measures in these high risk waters."[2] As noted in paragraph 129 of the Order, the risk materialized on 15 April 2019, when the *M/T "San Padre Pio"* came under armed attack, endangering the lives of those on board the vessel. Furthermore, Switzerland pointed to another source of risk, which is collisions. It stated that on 5 June 2019, "the *"M/V Invictus"* dragged its anchor and collided twice with the *"San Padre Pio"*" and that "[t]he inspection report indicates that the *"M/V Invictus"* was without crew and had been detained by the Nigerian authorities for over three years."[3] This evidence allows for the conclusion that Bonny Inner Anchorage, where the *M/T "San Padre Pio"* is detained, cannot be considered a safe place for anchorage.

6. Article 225 of the Convention prohibits bringing ships to an unsafe anchorage because doing so may have "adverse consequences" for the vessel – as accrues from the title of the provision. The provision thus rests on the assumption that anchorage in an unsafe area *as such* implies a risk of adverse consequences for the vessel and crew. *A fortiori* there is a real and imminent risk of irreparable prejudice present in situations where specific security risks of an unsafe anchorage have

[1] See, *inter alia*, ITLOS/PV.19/C27/1, p. 9, ll. 14-21, and ITLOS/PV.19/C27/2, p. 8, ll. 38-41, and p. 9, ll. 7-10.
[2] International Chamber of Commerce-Commercial Crime Service, Piracy & Armed Robbery Prone Areas and Warnings, <www.icc-ccs.org/index.php/piracy-reporting-centre/prone-areas-and-warnings> (last viewed 5 July 2019).
[3] ITLOS/PV.19/C27/1, p. 31, ll. 33-38.

already materialized – as in the case at hand. Hence, the requirement of real and imminent risk of irreparable prejudice is clearly fulfilled.

7. The situation in which the detained vessel finds itself is a direct result of the alleged violation by Nigeria of both the freedom of navigation and the exclusive flag State jurisdiction. This situation exposes the crew of the *M/T "San Padre Pio"* to an imminent and real risk to their health, life and liberty. With the release of the vessel, its cargo, and the Master and the three officers, the Tribunal recognizes "the human realities behind disputes of states" (Rosalyn Higgins, *Interim Measures for the Protection of Human Rights*, 36 Columbia Journal of Transnational Law 91 (1998), p. 108) – a reality that raises humanitarian concerns in the case at hand.

Bond or other financial security

8. Since "the Order must protect the rights of both Parties" (*"Enrica Lexie" (Italy* v. *India), Order of 24 August 2015, ITLOS Reports 2015,* p. 182, at p. 203, para. 125), the release of the vessel, its cargo, and the Master and three officers must be counterbalanced by means that sufficiently preserve the rights asserted by Nigeria. In my view, the *quid pro quo* package put together by the Tribunal is not entirely satisfactory, but it represents a formula receiving support from a solid majority of judges.

9. Even though the bond has not been adopted within the framework of prompt release proceedings, there is no reason to depart from the principle adhered to in this type of proceedings that the bond should be reasonable, because it is the reasonableness of the bond which ensures that the interest of the flag State in the release of the vessel, cargo and crew are reconciled with the interest of the coastal State in preserving its asserted rights.

10. In the case at hand, the Tribunal opted for a bond or other financial security in the form of a bank guarantee in the amount of US$ 14,000,000. It has been estimated that, as of 8 December 2017, the value of the vessel was

US$ 10,500,000.[4] However, the value must be assumed to be lower today, not only owing to the vessel's immobilization and lack of full maintenance, but also to the mere passage of time (the estimation relates to the value of the vessel 19 months ago). Switzerland states that at the time of the arrest, the vessel had a remaining cargo of 5,075.056 metric tons of gasoil, valued at around US$ 3,060,000.[5] The value of the vessel and the cargo is, of course, not the only factor to be taken into account when fixing the amount of the bond; another component is certainly a sum to ensure the return of the Master and the three officers should the Annex VII arbitral tribunal find that Nigeria has jurisdiction over them. Still, in light of the figures mentioned above and compared with other decisions of the Tribunal (even taking into account that they were rendered some years ago), the amount of the bond is rather high. This holds all the more true as release has been made dependent upon the fulfilment of a further condition, to which I turn now.

Undertaking to ensure return

11. As per paragraph 146, sub-paragraph (1)(b),

> Switzerland shall undertake to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention.

12. It seems important to clarify the legal nature of this undertaking and to point to some of the practical and legal limitations inherent in this measure.

13. I do agree with the finding in paragraph 141 of the Order that such undertaking "will constitute an obligation binding upon Switzerland under international law." Indeed, the International Court of Justice held that:

> The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (…). It is not merely hortatory or

[4] Statement of claim, Annex PM/CH-51.
[5] Statement of claim, para. 10.

> purposive. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, at p. 111, para. 162).

14. However, it is equally important to stress that the notion "undertake to ensure" does not entail an obligation of result, but an obligation of conduct. The Seabed Disputes Chamber has had a chance to interpret the notion of "responsibility to ensure" contained in article 139, paragraph 1, of the Convention. It first clarified that in the context of this provision, the term "responsibility" means "obligation" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 30, para. 65). It then went on to interpret the concept of "responsibility to ensure" (which is, as just seen, equal to an "obligation to ensure") and stated:

> The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an *obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result*. To utilize the terminology current in international law, this obligation may be characterized as an *obligation "of conduct"* and not "of result", and as an *obligation of "due diligence"*. (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, para. 110) (emphasis added).

This interpretation was endorsed by the Tribunal in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015,* p. 4, at pp. 38-40, paras. 125-129.

15. The case law of the International Court of Justice provides some clarification as to what "parameters operate when assessing whether a State has duly discharged" an obligation of conduct. It has held that the first parameter "is clearly the capacity to influence effectively" the factual situation at hand and specified:

> The State's capacity to influence must also be assessed by legal criteria, since *it is clear that every State may only act within the limits permitted by international law*; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

> *(Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 221, para. 430) (emphasis added)

16. Finally, the International Court of Justice has clarified the circumstances under which a State, upon which an obligation of conduct is incumbent, engages its international responsibility:

> A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State *manifestly* failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 221, para. 430) (emphasis added)

17. In light of this case law, paragraph 146, sub-paragraph (1)(b), should be read as follows:

(a) The undertaking by Switzerland to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria is an obligation of conduct – not of result. From this it follows that Switzerland will have duly discharged its obligation if it deploys adequate means, and exercises its best possible efforts to obtain the return of the Master and three officers for legal proceedings in Nigeria.

(b) To assess whether Switzerland has done so, it is necessary to take into account, *inter alia*, the two parameters set out by the International Court of Justice:
(i) Switzerland must have the "capacity to influence effectively" the factual situation; and (ii) Switzerland "may only act within the limits permitted by international law", notably those set by international human rights law. The capacity to influence effectively the factual situation and respect for international law in discharging the obligation are, to a great extent, intertwined. Since Switzerland can only act within the limits of international law, its capacity to effectively influence the return of the Master and three officers may be limited. For example, depending on concrete circumstances as they may present themselves in the future, Switzerland may not be able to forcibly keep the Master and the three officers in Switzerland – notably owing to the rights enshrined in the International Covenant on Civil and Political Rights, to which Switzerland and Nigeria are both parties, specifically the right to leave any

country granted by virtue of article 12. As a consequence, Switzerland may lose, at least to a large extent, its capacity to influence effectively the return of the Master and the three officers. Furthermore, should they remain in Switzerland, the principle of *non-refoulement* may (unless sufficient assurances are provided by Nigeria) prohibit the return of the Master and the three officers to Nigeria. Overall, abiding by international law may, in specific circumstances, imply that Switzerland does not have the capacity to influence effectively the factual situation – that is, to achieve the return of the Master and the three officers to Nigeria.

(c) Lastly, Switzerland will not incur liability simply because the return of the Master and three officers can ultimately not be achieved, but rather only for having "manifestly failed" to take all measures to achieve their return. Such "manifest failure" will clearly be absent if Switzerland is unable to ensure the presence and ultimate return of the Master and the three officers because it is abiding by international law, notably international human rights law.

18. Overall, this cursory assessment demonstrates that international law may limit Switzerland's legal and practical leeway ("*marge de manœuvre*") quite considerably. In my view, paragraph 146, sub-paragraph (1)(b), ought to have made explicit that the return of the Master and the three officers must comply with international law. While such qualification of the undertaking is not necessary – for reasons explained above – it would have made the limits inherent in this undertaking more transparent. Furthermore, it would have placed this component of the measure more clearly within the broader context of international law, notably international human rights law.

(signed) Anna Petrig

DISSENTING OPINION OF JUDGE LUCKY

Introduction

1. I have found it difficult to concur with all the findings of the majority of the Tribunal. Consequently, I feel obliged to cast a negative vote on the operative part of the Order.

The Request

2. On 21 May 2019 the Swiss Confederation ("Switzerland") filed an action for the prescription of provisional measures in the dispute between Switzerland and the Federal Republic of Nigeria ("Nigeria") concerning the *M/T "San Padre Pio"* (the *"San Padre Pio"*), her crew and cargo.

3. In the Notification of the Request, which is also set out in its final submission, Switzerland requests the Tribunal to prescribe the following provisional measures:

> Nigeria shall immediately take all measures necessary to ensure that the restrictions on the liberty, security and movement of the "San Padre Pio", her crew and cargo are immediately lifted to allow them to leave Nigeria. In particular, Nigeria shall:
>
> (a) enable the "San Padre Pio" to be resupplied and crewed so as to be able to leave, with her cargo, her place of detention and the maritime areas under the jurisdiction of Nigeria and exercise the freedom of navigation to which her flag State, Switzerland, is entitled under the Convention;
>
> (b) release the Master and the three other officers of the "San Padre Pio" and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria;
>
> (c) suspend all court and administrative proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

4. The final submission of Nigeria is as follows:

> The Federal Republic of Nigeria respectfully requests that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation's requests for provisional measures.

Factual background

5. The *"San Padre Pio"* ("the vessel") is a motor tanker flying the flag of Switzerland. It is managed by ABC Maritime ("the owner") and chartered by Argo Shipping and Trading Company, which is linked to Augusta Energy SA, which is based in Switzerland.

6. On 23 January 2018, while the vessel was engaged in a ship-to-ship ("STS") transfer of gasoil, it was intercepted and arrested by the Nigerian navy. Switzerland submits that the arrest took place about 32 nautical miles from the Nigerian coast, within Nigeria's exclusive economic zone ("EEZ").

7. On 24 January, the Nigerian navy ordered the vessel to proceed to Port Harcourt and the Nigerian port of Bonny Inner Anchorage, where the 16 members of the crew were arrested and detained on board the vessel.

8. On 9 March 2018, the vessel and crew were handed over to the Nigerian Economic and Financial Crimes Commission ("the EFCC") for further investigation. On that day the crew members were relocated to a prison, where it is alleged that the detention conditions were "dire". (In support of this allegation Switzerland referred to an article of 2 February 2018, published in "This Day" in which the Vice President, Professor Yemi Osinbago, revealed that the prison was overcrowded.).

9. On 12 March 2018, the EFCC brought charges against the 16 crew members and the vessel for conspiring to distribute and deal in petroleum products without lawful authority or appropriate licence, and with having done so with respect to the petroleum product on board.

10. On 19 March 2018, the charges were amended to apply only to the Master and three officers of the vessel. The charges against the other 12 members of the crew were dropped.

11. On 20 March 2018, the 12 members of the crew were allowed to leave prison and return to the vessel. According to Nigeria "upon the crew's release they were at

liberty to go anywhere of their choice without restraint", their passports were returned and they were allowed to leave Nigeria.

12. On 21 March 2018, the Master and officers applied to the Federal High Court for bail. The EFCC did not oppose the application; it asked that bail be granted on conditions that would make the defendants attend their trial.

13. On 23 March 2018, the Federal High Court granted bail with the following conditions: that the defendants deposit N10, 000,000 (approximately US$ 28,000) and provide a reliable security that could enter into a bond of an equivalent amount and swear to an affidavit of means. Nigeria submitted that the court imposed no restrictions on where the defendants could travel, other than requiring that they "do not travel outside Nigeria without the prior approval or order of the Court". It appears to me that in the light of the foregoing, it was open to, and the right of, the Master and the three officers to apply to the Federal Court for leave to travel outside Nigeria. Apparently, to date, no such application was made to the Court in Nigeria.

14. Nigerian law permits arrested vessels to be released upon the posting of a bond. The owner did not seek to exercise that right. In fact, to date, an application for the release of the vessel has not been made to the Federal Court in Nigeria.

15. I will refer to the foregoing later in this opinion to show why the request for provisional measures set out above should not be granted.

16. On 24 April 2018, the charges against the officers and vessel were amended to include additional counts for having provided a false bill of lading and false cargo manifest; in particular, that each of those documents had falsely stated that the vessel carried 4,625,865 cubic meters (CBM) of petroleum product although the bill of lading from Lomé, Togo, discloses that the cargo actually contained 7,488,484 CBM. Switzerland does not agree with these figures.

17. After bail was granted, the Master and three officers were released subject only to the requirement that they remit their passports, which were given to the Deputy Chief Registrar of the Federal High Court for safekeeping. Nigeria submits

that the Master and officers were free to leave the vessel whenever they wished and travel within Nigeria. A physician would be permitted to attend to the officers. However, Switzerland did not agree, because there were problems in that on one specified occasion the physician was not allowed permission to visit the vessel and left after a long wait.

18. On 26 September 2018, the Nigerian High Court issued an order for forfeiture of the cargo on board the vessel. On 18 October 2018, an application by way of motion was filed with the Federal Court of Nigeria with respect to verification of the cargo on board the vessel; for temporary forfeiture of the cargo to evacuate it to avoid an oil spill; and to sell the cargo and hold the funds in an interest-bearing account until matters were finally determined. In each instance the defendants were allowed their right to be heard. Augusta Energy SA – the charterer of the vessel - moved for an order to extend the time within which discharge of the court order of 26 September 2018 could be sought and to discharge the order of the court for the forfeiture and sale. Augusta claimed it was the owner of the cargo. On 25 January 2019, after hearing arguments from both sides, the court found that there was no merit in the motion and rejected the application. On 12 April 2019, Augusta filed a notice of appeal with the Federal Court of Appeal of Nigeria, asking that the Federal High Court order be set aside (Augusta Energy SA *v.* Federal Republic of Nigeria (Notice of Appeal (Court of Appeal of Nigeria, 12 April 2019)).

19. On 14 May 2019, Augusta filed a motion seeking to enjoin the cargo's sale and an order staying the execution of the ruling of the Federal High Court. This motion is pending before the Federal Court of Appeal.

20. Notwithstanding the foregoing, Switzerland, the flag State of the vessel, commenced proceedings for provisional measures (set out above) substantially involving matters similar to those before the Nigerian courts and could be determined by the said courts.

21. In other words, the essence of the request for provisional measures is that the Tribunal should prescribe measures in a dispute where the domestic courts of Nigeria and a proposed Annex VII tribunal are being called upon to adjudicate in

similar circumstances. The Tribunal is being asked to interfere in the domestic judicial process of a sovereign State that recognizes the independence of the judiciary in its constitution.

The dispute

22. The dispute between Switzerland and Nigeria relates to the interception in Nigeria's EEZ of a vessel flying the Swiss flag, the arrest of the vessel and her crew and the continuing detention of the vessel, her crew and cargo in Nigeria.

23. Switzerland contends that the remaining four members of the crew and the vessel should be released because, *inter alia*, the safety of the vessel and crew ought to be given paramount consideration.

24. At 21:20 local time on 15 April 2019, the vessel was attacked by robbers armed with machine guns, shots were fired and one of the Nigerian navy guards was injured. Apart from that incident, the vessel was struck by another vessel which was drifting in the area, and the cargo on board was damaged. The consequent likelihood of harm being caused to the marine environment by a stationary vessel must also be considered.

25. Nigeria states that, since the incident, the navy has deployed more guards on board the vessel and has stationed a gunboat in close proximity to it. Switzerland contends that the vessel has to be maintained during the period of detention, otherwise it will depreciate in value. On the other hand, Nigeria submits that 12 seamen were replaced by a new crew, which is rotated on a regular basis. Further, although the Master and three officers are free to leave the vessel on condition that they remain in Nigeria, they have not made use of that condition. They prefer to remain on board. The question as to whether or not the Master and officers have access to medical examination is also disputed. Switzerland claims that a medical doctor was refused permission to board the vessel. Nigeria maintains that this allegation is not accurate.

26. It is also disputed whether Parts V and VII, including articles 56, 57, 87, 92 and 94 of the United Nations Convention on the Law of the Sea ("the Convention") are applicable and whether Nigeria has breached any of these articles. With respect to its third claim, Switzerland contends that articles 9 and 12 of the International Covenant on Civil and Political Rights ("the ICCPR") and the Maritime Labour Convention ("the MLC") were violated by Nigeria. Nigeria affirms that it is not violating the human rights of the officers and crew of the vessel. In any event the rights enshrined in the ICCPR and the MLC belong to individuals and not the State.

27. In my opinion a wide and generous interpretation of article 56, paragraph 2, of the Convention does not and cannot include the provisions of the ICCPR and the MLC. The Master and crew are not in jail, they are on bail subject to the condition mentioned earlier that they remain in Nigeria. Switzerland argues that the delay in hearing and determining criminal trials in the Nigerian courts causes psychological harm and distress. However, Nigeria submits that any delay is caused by the respective individuals' challenging court rulings before a superior court in Nigeria.

28. Switzerland argued that the request was urgent. Nigeria submits that in the light of the circumstances the matter is not urgent.

Attempts to resolve the dispute

29. It must be noted that before the request for provisional measures was filed at the Tribunal, diplomatic efforts were made to settle the dispute, even while cases and motions were pending before the domestic courts of Nigeria. The domestic proceedings involve applications for bail and hearings for criminal offences.

30. The methods used through diplomatic efforts and judicial proceedings are different. The former is based on negotiations and discussions; in judicial proceedings the relevant law is applied to the facts found by the judge or judges (the court), the end result is a judgment. It should be noted that the objective of judicial pronouncements and decisions may at times be at variance with the demands of diplomatic discourse.

31. In the instant case, negotiations were not successful. Switzerland sent diplomatic notes to its Nigerian counterparts, including the Director of the EFCC, the Ministry of Industry, Trade and Investment, the Ministry of Foreign Affairs and the Ministry of Justice. However Nigeria did not respond to the notes verbales.

32. The Master of the *"San Padre Pio"*, three crew members and the vessel itself had been charged and indicted. The cases and motions for dismissal were and still are pending before the Nigerian courts. Questions of bail, release of the vessel and crew, and withdrawal of proceedings are still *sub judice*. However, notwithstanding the foregoing, the Applicant filed this application for provisional measures before the Tribunal, comprising 21 judges, pending the establishment of an Annex VII arbitral tribunal consisting of between three and five members.

33. This is an instance where there is, in my view, a conflict between international law and municipal law and an international tribunal and a municipal court, as well as between the procedure at a tribunal and a municipal court. In my view, international law is not superior to municipal law: each is superior in its own sphere. Therefore, in my view, an international tribunal is not superior to a national court. Consequently, it seems apparent that in this case parallel systems are functioning.

34. The Tribunal is not an appellate court or a court of judicial review. It functions in accordance with its Statute and its Rules and determines matters accordingly.

Jurisdiction

35. It is accepted that

> the Tribunal may prescribe provisional measures under article 290 paragraph 5 of the Convention only if the provisions invoked by the Applicant prima facie appear to afford a basis on which the Annex VII arbitral tribunal could be founded, but need not satisfy itself that the Annex VII has jurisdiction over the dispute submitted to it
> [See *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 37; *"ARA Libertad" (Argentina* v. *Ghana) Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332 at p. 343, para. 60.]

36. In my view the significant words are:

> only if the provisions invoked by the Applicant prima facie appear to afford a basis on which the Annex VII arbitral tribunal could be founded, but need not satisfy itself that the Annex VII has jurisdiction over the dispute submitted to it.

37. This could only mean that there is no need for the Tribunal to satisfy itself on the question of jurisdiction. The threshold of proof in such circumstances is minimal or low. The words "need not satisfy itself" in this context could be superfluous if given an ordinary meaning but legally it may mean the Tribunal does not have to be convinced even in a limited way. Nevertheless, considering that the degree of satisfaction required is low and perhaps virtually non-existent, in my opinion, in view of the fact that the courts in Nigeria are seized of the proceedings and the cases are ongoing, the Annex VII tribunal would not have *prima facie* jurisdiction.

38. Nigeria stated that "at this stage of the proceedings Nigeria does not object to the jurisdiction of the Annex VII tribunal". This statement is not specific. In any event Nigeria raised an issue which, in my view, ought to be considered when the question of jurisdiction is determined. I agree that States seeking provisional measures generally support their request with testimonial evidence, often in the form of oral evidence or affidavits.

39. It will be convenient to consider similar applications for provisional measures determined by the Tribunal because the following cases were cited and referred to by both sides. The circumstances in each case differ but the applicable principles are the same.

Recent requests for provisional measures before the Tribunal

40. In the *Three Ukrainian naval vessels case*, Ukraine submitted a declaration by counsel for the captain of one of the detained vessels. Russia did not participate in the oral proceedings; therefore, there being no objection or statement to refute the contents, the statement was considered. In the *"ARA Libertad" Case*, the captain of the vessel made a declaration that was annexed to the request for provisional measures. In the "*Arctic Sunrise" Case, (Kingdom of the Netherlands* v*. Russian*

Federation (ITLOS Case No. 22, Provisional Measures), which was also cited in the instant case, the Applicant submitted a statement by the vessel's operator and presented oral evidence at the hearing. This evidence was not challenged because Russia did not participate in the hearing. Switzerland presented no evidence, either in written form, on affidavit or from witnesses. During the oral submissions, statements were made by counsel with respect to the vessel's owner, the charterer and the master. However, the statements or allegations mentioned by counsel were not supported by evidence. It is accepted that the submissions of counsel do not constitute evidence of facts. Where the need for evidence to support claims for such a request is "limited" and the threshold regarding the standard of proof "low", some supporting evidence would have been helpful. More so in the light of the evidence on affidavits submitted by Nigeria. The submissions of counsel though articulate are not evidence on matters of fact.

41. The "*Enrica Lexie"* case must be distinguished from the foregoing. In that case the marines were charged with murder, a non-bailable offence in India. However, the Supreme Court of India in those circumstances was indulgent in allowing one of the defendants, on special grounds, to return to Italy pending trial and the other to remain at the residence of the ambassador of Italy owing, among other things, to political and diplomatic intervention as well as the fact that the marines were also charged under Italian law. It is crucial to note that in the "*Enrica Lexie"* case*,* the Supreme Court of India maintained its jurisdiction and upon request made the orders. In the instant case the cases in the criminal courts of Nigeria are ongoing. The defendants applied for and received bail with conditions.

42. In the application of Ukraine (Case No. 26), the officers on the vessel were charged with criminal offences and the matters are pending before the Russian courts. There was no evidence of applications for bail before the Russian courts.

43. Another factor for consideration before we can arrive at a conclusion is the fact that the essence of Switzerland's claim is that the Tribunal should prescribe measures in a dispute where the Tribunal and an Annex VII tribunal and the domestic courts of Nigeria are being asked to adjudicate in this dispute.

44. More importantly, the Tribunal is being asked to interfere in the work and functioning of the Nigerian domestic process which, according to Nigeria – and I agree – "is engaged in the important task of maintaining law and order and combating a form of criminality that is dangerous to Nigeria as well as its neighbouring States in the Gulf of Guinea."

45. This case hinges on whether the Tribunal can make an order that interferes with the jurisdiction of a national court where judicial proceedings for criminal offences are pending and due to be heard and determined. The integrity of the Nigerian court system must be respected.

The evidence

46. Switzerland did not call any witnesses to testify and it provided no affidavits to support the contentions and allegations in the oral submissions. Switzerland submitted documentary evidence in 20 tabs which were given to the Tribunal and distributed to the judges for ease of reference during the oral submissions. Nigeria did not object to the submission of the documents.

47. Nigeria presented affidavits of Rear Admiral Ibikunle Taiwo Olaiya, Lieutenant Mohammed Ibrahim Hanifa, and Captain Kolawole Olumide Oguntuga.

48. In his affidavit, Admiral Olaiya referred to the route taken by the *"San Padre Pio"* and the fact that on that route vessels were engaged in "round tripping", a method of distributing illegally refined oil. Owing to a pattern of observed suspicious activity, including the switching-off of its automatic identification system ("AIS") signal and travel between sites associated with the illicit trade in petroleum products, the vessel was placed on a list of vessels of interest. The following paragraphs are important:

> 27. That upon being encountered by the NNS SAGBAMA Sagbama while undertaking bunkering at the Odudu Oil Field and requested to provide copies of the required permits, MT SAM PADRE PIO was unable to provide the necessary documentation and was arrested.

> 28. That the petroleum products that the MT SAN PADRE PIO was bunkering was subsequently determined by testing conducted by the Department of Petroleum resources to be sub standard.

49. It must be noted that Switzerland categorically denied that the vessel ever turned off its AIS. Counsel said that "the Master had in her terms denied having done so".

50. The submissions of counsel are not evidence. In any event, that they were told to counsel is a form of hearsay. I must add that the Master and officers could have given sworn affidavits to their lawyers to support the submissions of counsel. The Master and crew had given written statements to the legal officer. The proceedings reflect that the officers and crew and the owner and charterer were represented by counsel in the matters before the Nigerian courts.

51. In his affidavit Lieutenant Mohammed Ibrahim Hanifa stated, *inter alia*:

> 4. That on 22 January 2018 at about 1300, my ship the NNS SAGBAMA received an information from the headquarters, Falcon Eye Centre, informing us that the MT SAN PADRE PIO (the vessel with IMO No. 9610339) was in the vicinity.
>
> 5 That the NNS SAGBAMA encountered the vessel SAN PADRE PIOO at the Odudu Oil Field.
>
> 6. That when we arrived MT SAN PADRE PIO location that night on 22 January 2018 at about 2000 the vessel was conducting a ship-to-ship bunkering transfer with the MT LAHOMA.
>
> 7. That about o3.00 on 23 January 2018 MT LAHOMA disengaged from MT SAN PADRE PIOO and MT ENERGY SCOUT came alongside the SAN PADRE PIO and began a ship-to-shoo bunkering transfer.
>
> 8. That in order to engage in bunkering transfers in Nigeria's EEZ, Ships like the MT SAN PADRE PIO must have (1) a bill of lading; (2) the Nigerian Navy ship PATHFIMDER verification certificate to Receive/load/ and discharge Approved products (3) A Nigerian Maritime Administration and Safety Agency (NIMASA) cabotage trade licence; and a department of petroleum resources (DPR) licence.
>
> 10. That the Nigerian Navy Ship PATHFINDER Verification Certificate states that the operations are" to be conducted between Sunrise and Sunset "and that "if any of the vessels engaged is found violating the above conditions, it should be arrested and prosecuted.
>
> 11. That about 13.00 on 23 January 2018, without having received additional documentation, we escorted the MT SAN PADRE PIO to

> Forward Operating bas BONNY for furtherinvestigation.12. That on 24 January 2018 the SAN PADRE PIO was handed over to the Forward Operating base Bonny authorities.

52. Paragraph 13 states that the vessel was not boarded; and, paragraph 14 states that, when a vessel is boarded, a form is given to the captain for completion. No such form was given to the captain of the vessel.

53. I have set out the above because it is the evidence of an officer who was involved in the arrest of the vessel.

54. In a comprehensive and thorough affidavit, the legal officer of the EFCC set out the allegations giving rise to the arrest of the vessel: (1) it did not have the required approval licence from the NIMASA and Ministry of Resources; (2) the agent of the vessel presented the aforementioned certificate the day after the arrest of the vessel; (3) the manner and conduct relative to the arrest of the vessel and crew; (4) the Master of the vessel made both hand- and type-written statements; the other 15 members made written statements. Another important matter mentioned is the fact that the owners of the vessel did not at any time apply for the vessel's release. While the investigation was ongoing and charges filed in court against the Master and three other crew members, the law firm PUNUKA Attorneys informed the EFCC that it represented the charterers of the vessel and that the petroleum products on board the vessel were not of local origin but had been imported from abroad, and it appended correspondence relating to the matter. Among other relevant matters, it stated that, after the Master of the vessel and the officers had been granted bail, they returned to the vessel and voluntarily returned for court hearings; that on some occasions they stay in hotels of their choosing. The other 12 crew members were released on 18 March 2018 and their passports were returned through their lawyer.

Assessment of evidence

55. Jurisprudence of some national and international bodies provides that provisional measures (which are similar to injunctive relief in most national courts) are discretionary in nature and are only granted in exceptional and urgent circumstances specifically to guarantee, even temporarily, the rights of the applicant

party. When there is a request for provisional measures, the Tribunal will not and should not deal with the merits of the case; to do so would be to usurp the function of the Annex VII tribunal, and, in the instant case, the function of the Nigerian domestic courts. Further, in an application for provisional measures which is heard *inter partes*, the parties would not have had the time nor would they, as in this case, have been able to provide *all* the evidence to prove or to refute the allegations. Consequently, the Tribunal has to undertake a restricted examination of the facts presented to determine the applicability of the rights claimed and whether in applying a low threshold of proof, the rights are applicable and the measures requested should be granted.

56. Among the documents were photographs of the vessel and of an allegedly abandoned vessel, the "*Anuket Emerald"*, that Switzerland alleges was abandoned and drifted to shore. Referring to the photograph, Nigeria alleges that the vessel was not abandoned and lay at anchor. The other photograph is that of the *"San Padre Pio"*, apparently taken in 2016. It was referred to in the context of the vessel having overhead light for night-time STS bunkering.

57. It is accepted that the criteria for admitting photographs as persuasive evidence is that the photograph must be relevant. That of the *"San Padre Pio"* is not relevant to the date of arrest and detention. If it was taken about two years before its arrest, it could have had the equipment on board. Counsel for Nigeria did not object; in the circumstances it is admitted as evidence of the vessel's appearance at or about the time of its arrest. The photo of the "*Anuket Emerald"* has, in my view, two interpretations. Nigeria says that it shows an anchor chain leading into the water. Switzerland argues that it shows the vessel close to shore and apparently abandoned, such that it could have drifted into the *"San Padre Pio"*. In the absence of the photographer's evidence, I find it difficult to draw a conclusion one way or the other. As a result, the photo is not reliable and its weight in support of the contention of either side is negligible and is not proof of the allegation.

58. Switzerland did not provide any affidavits in response to those of Nigeria; nor did it ask leave to cross-examine the deponents, one of whom was in court for the hearing. Counsel asserts that the Tribunal should be cautious and consider that

declarations on affidavit are made by State officials, who may have an interest in the outcome of the proceedings. They should also consider whether the contents of the affidavits relate to the existence of the facts. In the absence of evidence to the contrary, it must be accepted that the proper method was used in taking the affidavits. Nevertheless, consideration of current jurisprudence suggests that in the absence of cross-examination and affidavits in evidence to refute what is deposed, the contents should still be carefully examined when evidential value is considered.

59. It is accepted that affidavits are a unique form of evidence, frequently used in common law jurisdictions (such as Nigeria). The evidence is given before a commissioner of affidavits or a notary public, as in the instant case, recorded by him/her in writing, and prepared in accordance with the principles of the national law of the deponent. In other words an affidavit is testimony in written form.

60. The deponents were clear and specific. Their accounts were of events that they personally observed. Realising that it is incumbent upon a judge to assess with caution and analyse the evidence carefully, I found that the evidence on affidavit substantially supported the submissions of counsel on the relevant issue. The deponents are officers of the Nigerian navy and administrative offices. They were the persons who were involved in the arrest and detention of the vessel and crew. Their depositions were taken in accordance with the law and the deponents would have been cautioned that, if their depositions were untrue, they could be charged with perjury. In my opinion the affidavits provide vital evidence contemporaneous with the period in question. Therefore, even if a high threshold of proof was applied, I am satisfied that they were truthful.

Urgency

61. Switzerland contends that there are several reasons why the situation is urgent. It maintains that

> By intercepting the “San Padre Pio” in its exclusive zone, about 32 m nm off the coast and outside any safety zone which Nigeria could have established under article 60 paragraph 4, of the Convention, Nigeria

> hampered the freedom of movement of the vessel. Accordingly it infringed Switzerland's freedom of navigation.

62. According to Switzerland, Nigeria hindered and is delaying the possibility for the vessel to carry out bunkering activities, which has been recognized by the Tribunal as being part of the freedom of navigation (see the *"Norstar" Case (Panama* v*. Italy)*); Nigeria did not obtain the consent of the flag State with respect to the detention of the cargo and crew, who are still detained; Nigeria has failed to have due regard under article 56, paragraph 2, of the Convention; and Nigeria never mentioned protection of the environment. Having regard to the foregoing and other reasons advanced, the rights claimed are plausible.

63. Nigeria disagrees and submits that none of the rights claimed by Switzerland are only plausible if applicable to the factual situation in question. Nigeria contends that it was exercising its right to enforce its laws and regulations concerning the conservation and management of the non-living resources in its EEZ when it arrested and initiated judicial proceedings against the vessel and its crew. These judicial proceedings are in progress.

64. According to Nigeria - and I agree - articles 208 and 214 of the Convention impose on Nigeria the obligation to enforce its laws and regulations concerning pollution from seabed activities in its EEZ. Switzerland contends that flag State jurisdiction is applicable. Article 94, paragraph 6 provides that:

> 6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised **may** report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action to remedy the situation. (my emphasis)

65. In my opinion, the word "may" gives a coastal State, in this case, Nigeria, discretion. It is not compulsory to inform the flag State. It will certainly depend on the circumstances. In this case, the coastal State had to act immediately. Nigeria submits, and I agree, that

> the principle of exclusive flag State jurisdiction does not apply in this case. If it did, then the sovereign and exclusive rights of the coastal State enshrined in Part V of the Convention could never be enforced against

> foreign flagged vessels without the consent of the flag State and that would make law enforcement in an environment like the Gulf of Guinea impossible.

66. The cases against the Master, the members of the crew and the vessel are pending. Counsel for Switzerland said in part:

> the proceedings instituted before the Nigerian courts against the vessel, its cargo and the crew are continuing. Furthermore, hearings have been postponed multiple times and apparently are set to be heard by the end of the year.

67. I find that the Nigerian courts are functioning in accordance with due process and the rule of law. Upon application, the Master and three crew members were granted conditional bail. In the circumstances, the owner can apply to the relevant court for bail for the vessel. The prosecutor applied to the court to seize the cargo, confiscate it and sell the cargo. If the application is granted, the funds will be placed in an interest-bearing account and will be disposed of in accordance with the order of the court at the end of the judicial proceedings. The owner has appealed. The appeal is pending. It is apparent that the proceedings against the vessel, its cargo and the crew are an integral part of the criminal proceedings and should be determined before the prosecution can proceed with the cases against the defendants. Therefore, in my opinion, the Nigerian courts are functioning in accordance with due process. In any event it seems as though the proceedings before the Nigerian courts would be completed before the Annex VII tribunal is established and commences functioning.

68. There is no evidence of delay in the criminal proceedings. It is accepted that, bearing in mind the principle that the prosecution must prove their case beyond reasonable doubt, and the presumption of innocence, proceedings before criminal courts require time.

69. Switzerland submits that the matter is urgent because the Master and three officers have been in custody pending trial. Although they have been granted bail, they are not permitted to leave Nigeria; they are not permitted visitors; they are deprived of being with their families; they are confined to the vessel in an area

fraught with danger from pirates; and the hearing in the national court is taking a long time.

70. The cargo on board is deteriorating and the cargo and vessel itself, if not removed and maintained, could cause damage to the environment.

71. Nigeria argues that since the vessel was attacked by pirates, more guards have been assigned to the vessel and a gunboat is always near it to safeguard the vessel and those on board. In this context, paragraph 129 of the Order refers to a report on piracy and armed robbery against ships. It reads:

> The Tribunal further notes the report on piracy and armed robbery against ships (1 January-31 March 2019) of the International Chamber of Commerce-International Maritime Bureau, which states that the Gulf of Guinea accounts for 22 of 38 incidents of piracy and armed (robbery) against ships for the first quarter of 2019 and that 14 incidents are recorded for Nigeria.

72. It is argued that, under the Rules of the Tribunal, the Tribunal may seek elucidation or clarification on an issue by referring to reports of recognized international organizations. The reference was considered after the close of proceedings and neither Switzerland nor Nigeria had an opportunity to comment or refute. Nigeria led evidence on affidavit that measures to strengthen the security of the vessel were taken by the Nigerian authorities by deploying extra guards and having a naval gunboat in the vicinity of the vessel. On the basis of the report and the evidence provided by Nigeria, with respect and regretfully, I must consider this report as speculation in relation to the facts in the case, specifically in relation to the vessel. In the circumstances, I am convinced that the *M/T "San Padre Pio"* its crew and cargo are not vulnerable.

73. The vessel is maintained because, since the 12 members were released, the crew has been changed regularly.

74. Any delay complained of is as a result of the appeals by the defendants. The defendants are on bail and can leave the vessel whenever they chose to do so as long as they do not leave Nigeria.

75. Under Nigerian law, a bail application can be made on behalf of the vessel. Further, it is accepted that it is the right of a defendant to apply to the court for a reduction of bail and to reconsider the condition applicable to the granting of bail.

76. For the above reasons I find that the matter is not urgent and the rights claimed by Switzerland are not plausible.

77. In order to summarize, for the above reasons, I find that having regard to the submissions of counsel, the legal arguments and the evidence presented, the rights claimed by Switzerland are not plausible; the absence of urgency is apparent because Switzerland took about sixteen months to initiate this application, during which time the Nigerian courts dealt with relevant applications to ensure fairness to all the Parties, whereby rights were preserved. Further, and most importantly, if the provisional measures are granted it would result in interference in the Nigerian judicial system and irreparable harm to Nigeria's sovereign right to enforce its laws against the defendants, who are lawfully charged and indicted and are currently being prosecuted for violation of Nigerian laws and regulations. In these circumstances the Request is declined.

(signed) Anthony Lucky

DISSENTING OPINION OF JUDGE KATEKA

1. I have voted against the operative provisions because I disagree with the Tribunal on the question of urgency. The Tribunal states that the rights claimed by the Applicant could be irreparably prejudiced and that this prejudice is real and ongoing.[1] I do not share this view. I shall explain. Before giving the reasons for my disagreeing with the majority, I shall deal with some preliminary important issues. I start with consideration of the requirements for the prescription of provisional measures. Then I express the view that the posting of a bond should not have been invoked in this case, which is on provisional measures. I explain below that the posting of a bond is more appropriate in prompt release cases. I also express my doubt about the workability of assurances which are part of the operative provisions.[2]

Requirements for provisional measures

2. Under the Convention, there are two procedures for the prescription of provisional measures. The first aspect of provisional measures is to be found in article 290, paragraph 1. Under that provision, a court or tribunal (including the International Tribunal for the Law of the Sea; hereinafter "the Tribunal") may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the rights of the parties to the dispute. The term "may" implies discretion for the court or tribunal as to whether or not such measures should be prescribed. The court or tribunal has to consider whether it is appropriate under the circumstances to prescribe the measures. The circumstances differ from case to case. Even when the requirements for the prescription of provisional measures are established - namely*, prima facie* jurisdiction, plausibility and urgency - judicial discretion and propriety have to be applied. Thus, in the ten provisional measures cases which have come before it, the Tribunal has prescribed measures in some cases while refraining from doing so in others. In some cases the Tribunal has exercised the provision of its Rules that gives it competence to prescribe measures different in whole or in part from those requested.

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[1] Para. 129 of the Order
[2] Para. 146, subpara. (1)(b).

3. The second aspect for applying provisional measures is under article 290, paragraph 5, which is the one that has been invoked by the Applicant in the present case. By this provision, the Tribunal may prescribe provisional measures if it considers that *prima facie* the Annex VII arbitral tribunal would have jurisdiction and that the urgency of the situation so requires. While paragraphs 1 and 5 of article 290 have to be read together, the two provisions have some differences. Under paragraph 1, a court or tribunal has competence to determine both *prima facie* jurisdiction for provisional measures and substantive jurisdiction for the merits of the dispute. Under paragraph 5, the Tribunal, as in the present case, can prescribe provisional measures in a dispute that has been submitted to an Annex VII arbitral tribunal. This calls for caution and judicial prudence, so as not to cause prejudice to the rights of either party or to prejudge the merits of the case. In my view, given the above understanding of the two paragraphs, the need for restraint in prescribing provisional measures is greater under paragraph 5 than under paragraph 1.

The posting of a bond

4. Regrettably, the Tribunal has reverted to the invocation of the posting of a bond for the second time in its case law. The first time was in the *"Arctic Sunrise"* case in 2013. This trend could lead to the permanent incorporation of prompt release mechanisms into provisional measures procedures. In my view it is a regrettable trend. This is because there are important differences between the two procedures. In this regard I wish to refer to the Separate Opinion of Judge Jesus in the *"Arctic Sunrise"* case. He expressed reservations as to the procedure, which was being invoked for the first time. He saw the release of a vessel upon the posting of a bond as "a back-door" prompt release remedy. I share this concern. In fact the Respondent State in the present case was prescient when it observed towards the end of its first round of oral argument that: "It may be worth noting in passing that this is not a prompt release case and thus not a case where the State has an obligation under the Convention to release the vessel and allow the crew to depart."[3]

[3] ITLOS/PV.19/C27/2, p. 32, ll. 44-46.

5. The posting of a bond is appropriate for prompt release cases under article 292 of the Convention. That article provides for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. It is a mandatory procedure which requires a State to release a detained vessel flying the flag of another State. In accordance with article 73, paragraph 3, of the Convention, imprisonment and corporal punishment are prohibited as penalties for fishing offences. Only monetary terms are envisaged for prompt release cases. Similar conditions apply in situations of marine pollution pursuant to articles 220 and 226 of the Convention. These requirements that only monetary penalties be imposed do not apply in provisional measures cases. In the present case, the Master and three officers accused of violating Nigeria's law may be sentenced to imprisonment. Thus, by ordering the release of the crew upon the posting of a bond, Nigeria's rights are prejudiced if the accused crew members of the *M/T "San Padre Pio*" do not return.

6. Another difference between prompt release and provisional measures proceedings is that the prompt release proceedings provided for in article 292 are not incidental to the merits as the proceedings for provisional measures set out in article 290 are. Prompt release proceedings are separate and independent. This important difference was spelled out in the first ITLOS case, that of the *M/V "SAIGA".*[4] When a court or tribunal undertakes a judicial function for provisional measures proceedings, it does so in an incidental manner subject to the merits being dealt with either by itself or by another court or tribunal, as is the case with our Tribunal.

7. The Tribunal states that, under article 290 of the Convention, it may prescribe a bond or other financial security as a provisional measure for the release of the vessel and the persons detained.[5] The Tribunal cites its Order in the *"Arctic Sunrise"* case. While it is doubtful that such broad competence exists under the article cited, at least in the *"Arctic Sunrise"* case the Netherlands had inquired from the Russian Federation whether the release of the vessel and its crew would be facilitated by the

[4] *Judgment, ITLOS Reports 1997*, p. 16, at p. 27, para 50.
[5] Para. 137

posting of a bond or other financial security. In the present case, no such request for the posting of a bond was made. The majority in the present case points out that the release of a vessel upon the posting of a bond is an option available under the Nigerian administrative procedure, as stated by counsel for Nigeria during the hearing in response to a question by the Tribunal.[6] It is true that counsel for Nigeria confirmed that a vessel can be released under the administrative procedure upon the posting of a bond. He added, however, that the owner of the *M/T* "*San Padre Pio*" decided not to pursue this avenue of obtaining the vessel's release upon the posting of a bond.[7]

Assurances

8. The majority is of the view that Nigeria needs to be assured unequivocally, through an undertaking, that the Master and the three officers will be available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the events of January 2018 do not constitute a violation of the Convention. The Tribunal prescribes that Switzerland "shall undertake to ensure that the Master and three officers are available and present at the criminal proceedings in Nigeria". Such an undertaking will "constitute an obligation binding upon Switzerland under international law".[8]

9. While I understand the majority to be well-intentioned in prescribing such assurances,[9] I wish to express my misgivings about the reality and practicability of such a step. Let me start by observing that the issue of assurances was invoked in the provisional measures phase in the *"Enrica Lexie"* case between Italy and India. In that case, the Tribunal placed on record assurances and undertakings which were given by both Parties during the hearing.[10] Also, in its Order on the request for the prescription of provisional measures of 29 April 2016, the Annex VII arbitral tribunal in the *"Enrica Lexie"* case ordered assurances similar to those ordered by the

[6] *Ibid*.
[7] ITLOS/PV.19/C27/4 p.4, ll 14-24.
[8] Para. 141.
[9] Para. 146, subpara. 1(b) of the *dispositif.*
[10] Para. 130.

Tribunal in the present case. However, the Parties to the arbitration had, before the arbitral tribunal took any action about assurances, given assurances to the arbitral tribunal that bail conditions for the marines would be relaxed. Furthermore, the arraigned marines would remain under the authority of the Supreme Court of India during the period before the relevant award. Italy had also offered and renewed the solemn undertaking for the return of the marines to India. Thus, in that case, there was a watertight arrangement between the Parties before the arbitral tribunal issued its order about assurances and undertakings.

10. Regrettably this is not the situation in the present case. Just as in the case of posting a bond, the Parties did not avail themselves of the opportunity provided by both the written and oral pleadings to reach an understanding on assurances. On the contrary, during the oral hearing, the Applicant downplayed the assurances which were given by the Respondent concerning bail. The Agent of the Applicant on the second day of the oral hearing accused Nigeria of

> not complying with bail conditions in the past … how can we have any confidence in their purported new assurances? This is the more true, given that the diplomatic note in which these purported assurances are to be found only arrived this week … Now the presumption of good faith is important, but it should not run counter to the facts.[11]

In clarification of a statement made by Switzerland on the first day of the oral hearing that "[I]f need be, certain procedures exist for securing the return of the Ukrainian officers",[12] counsel, in response to the Tribunal's third question, stated, on the second day of the oral hearing, that he had been quite cautious in his statement the previous day. He added that, if the Tribunal were minded to devise ways to ensure that the measures prescribed do not prejudice Nigeria's rights, it could explore the matter with the Nigerian authorities and perhaps with the State of nationality of the Master and three officers. Counsel for Switzerland added that bail conditions could be adjusted to allow for the departure of the Master and the three officers from Nigeria.

[11] ITLOS/PV.19/C27/3 p. 2, ll.13-19.
[12] ITLOS/PV.19/C/27/1 p. 25, ll. 1-2.

11. I have cited the above details to show the difficulty Switzerland faced during the oral pleading concerning the issue of assurances. The problem will still face the Applicant in the implementation of the measure prescribed in the *dispositif* concerning assurances about the return of the crew members to face trial should the Annex VII arbitral tribunal so determine. In spite of all the good faith on the part of Switzerland, it will be difficult to guarantee the availability of the four defendants. The main reason is that the four defendants are not Swiss nationals. They are nationals of Ukraine, which is not a party to the present proceedings before the Tribunal. The defendants are not even residents of Switzerland. It is difficult for Switzerland to ensure their return to face criminal charges in Nigeria. An understanding between the Parties prior to the Tribunal pronouncing itself on the provisional measures would have facilitated the smooth implementation of the assurances and undertakings. It is noted that the manner in which the majority has formulated the bond and assurances in the *dispositif* is not helpful. Paragraph 1 of the *dispositif* is a package consisting of the bond and the assurances to be given by Switzerland to Nigeria. Regarding the bond, it is not clear what amount is for the vessel, the cargo and the crew. This ambiguity could create problems. The assurances are a unilateral declaration by Switzerland. The Tribunal considers this undertaking to be an obligation binding upon Switzerland under international law. In this regard, it is hoped that the cooperation called for in the formulation and implementation of the undertaking between the Parties will materialize on the basis of the good relations between Nigeria and Switzerland.

Urgency

12. The majority finds that there is a real and imminent risk of irreparable prejudice to the rights of Switzerland pending the constitution and functioning of the Annex VII arbitral tribunal. They find that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention.[13] This finding is the main reason for my disagreement with the majority. I am of the view that there is no such imminent risk of irreparable prejudice.

[13] Para. 131.

13. Urgency is one of the two requirements for provisional measures provided for in article 290, paragraph 5, of the Convention. Urgency is defined as "the need to avert real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered."[14] Urgency is a cardinal requirement before provisional measures can be prescribed. While article 290, paragraph 5, of the Convention specifically spells out urgency, this is not the case under paragraph 1 of the same article. Nevertheless, by their very nature, provisional measures are urgent and thus they are implied under paragraph 1. This interpretation is buttressed by the practice of the International Court of Justice ("ICJ"). Even though the ICJ Statute does not specifically mention urgency, the Court has exercised the power to indicate provisional measures only when there is urgency. Thus if there is no urgency, a court or tribunal cannot prescribe provisional measures.

14. I am of the view that in the present case there is no urgency. Provisional measures under article 290, paragraph 5, of the Convention are prescribed only when there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal. In the present case the time frame for the constitution of the Annex VII tribunal commenced on 6 May 2019, when the Applicant submitted its Notification and Statement of Claim.[15] The arbitral tribunal will be established in the next few months. Owing to the short time frame involved there seems to be no urgency.

15. When it is considering the preservation of the rights of the requesting State, the Tribunal has to ensure that the rights of both parties are protected. In this regard I do not agree with the majority when it asserts that the arrest and detention of the *M/T* "*San Padre Pio*" and the exercise of criminal jurisdiction against the vessel and its crew by Nigeria could

[14] *Delimitation of the maritime boundary in the Atlantic* Ocean *(Ghana/Cote d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 156, para. 42.
[15] Article 1 of Annex VII to the Convention.

> irreparably prejudice the rights claimed by Switzerland relating to the freedom of navigation and the exercise of exclusive flag State jurisdiction over the vessel … there is a risk that the prejudice to the rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit – may not be repaired by monetary compensation alone.[16]

This is a serious assertion which goes to the merits of the case. It also overlooks the fact that, by deciding to release the four defendants, the majority has caused irreparable prejudice to Nigeria's rights. This prejudice is not compensable in monetary terms either. The sovereign right of Nigeria to exercise its criminal jurisdiction cannot be quantified in monetary terms.

16. On the contrary, the alleged harm to the vessel and the cargo is economic and can be wiped out by monetary compensation by an award of the Annex VII arbitral tribunal.[17] Here I wish to underscore my view that the release of the Master and the three officers constitutes an irreparable prejudice to Nigeria. There is no imminent risk to them because they are on board the vessel out of their own volition. The Nigerian Federal High Court released them on bail. They are free to stay anywhere in Nigeria. There is no detention of the Master and the three officers as the Applicant argues.[18] The surrender of their passports to Nigerian judicial authorities is a standard requirement that applies in many countries in the world. The Applicant also questions Nigeria's security situation and cites incidents of pirate attacks as reason for the request of release of the four defendants. This concern about the safety of the vessel and the crew has been taken care of by Nigeria's deploying armed guards on board the vessel since its arrest.[19] Hence there is no urgency.

17. In this regard I wish to stress my disagreement with the reasoning of the majority concerning the arrest and detention of the four defendants. The majority considers that the restrictions on the liberty and freedom of the Master and three officers for a lengthy period raise humanitarian concerns.[20] By this observation the majority seems to question the Nigerian legal system, which is functioning well. As

[16] Para. 128.
[17] Para. 123.
[18] Para. 116.
[19] Para. 127.
[20] Para. 130.

stated by Nigeria during the written and oral pleadings, the four defendants are getting a fair trial. They are currently free on bail. The Nigerian judiciary has ensured due process for the defendants. The Applicant has complained about the 16 months since the accused were first arraigned in the Federal High Court. It is worth pointing out that this time frame is normal in such cases. This period could be compared with that in the M/V *"Norstar"* case, where it took many years before the trial ended.

18. The questioning of the Nigerian legal system has also been linked with the security and safety situation in the Gulf of Guinea. The "piratical'" attack on the *M/T* "*San Padre Pio*" is cited as a danger to the crew.[21] The presence of the Nigerian navy officers on board the vessel, which ensured the failure of the attack, is not acknowledged. Instead, the Tribunal cites statistics from the International Chamber of Commerce's International Maritime Bureau describing incidents of piracy and armed attack against ships[22]. The majority uses these statistics in order to justify its contention that the vessel, the crew and others on board "appear to remain vulnerable". This is not justified by the situation on the ground. It is an unfortunate inference to conflate the existence of piracy and armed robbery in the Gulf of Guinea with the security situation in Nigeria. There are many complex problems in the real world. But they do not influence the determination of security and peace in different countries. It would be unfortunate if the existence of the twin problems of piracy and illegal, unreported and unregulated fishing - which is fuelled by the third emerging problem of illegal bunkering – in the Gulf of Guinea were to be used to judge the security and safety of the West African States. The comment about humanitarian concerns is misplaced and should be used with great care. It should apply in serious situations, such as those in the *M/V "Louisa"* case.

19. In conclusion, I wish to state that the majority has failed to follow its jurisprudence in prescribing provisional measures in the present case. The circumstances are such that the Tribunal should not have prescribed the measures requested by Switzerland. As I argued in this opinion, besides the lack of urgency, the measures prescribed will prejudice the merits. The Tribunal should not have

[21] Para. 129.
[22] *Ibid*.

prescribed the provisional measures in order not to touch upon issues related to the merits of the case.[23] By its action, the Tribunal has prejudiced the rights of Nigeria.

(signed) J. L. Kateka

[23] *"Enrica Lexie"*, para 132.

DISSENTING OPINION OF JUDGE GAO

1. I voted against paragraph 146(1) (a) (b) (c) of the operative part of the Order. These paragraphs deal with the posting of a bond, undertaking to ensure, and the release of the *M/T "San Padre Pio"* and the Master and three officers, respectively. The reasons for my dissent are explained in the following paragraphs.

2. The facts of the case and arguments of both the Swiss Confederation ("Switzerland") and the Federal Republic of Nigeria ("Nigeria") are as stated in the Order.

3. The *M/T "San Padre Pio"* is a vessel flying the flag of Switzerland, owned by a Swiss company San Padre Pio Schifffahrt AG, and chartered by Argo Shipping and Trading Ltd, the Dubai-based chartering arm of Augusta Energy AS, a company incorporated in Switzerland.

4. At the time of her arrest on 22 to 23 January 2018, the vessel was engaged in ship-to-ship ("STS") transfers of gasoil within the exclusive economic zone ("EEZ") of Nigeria.

5. When the *M/T "San Padre Pio"* was intercepted by the Nigerian naval ship *"Sagbama"* at 8 p.m. on 22 January 2018, it was in the process of bunkering a vessel. It then proceeded to commence another STS fuel transfer with a different vessel at 3 a.m. the next day.[1]

6. It was at this time that the vessel was arrested and escorted from the scene to a Nigerian port, Port Harcourt, where the vessel and her 16 crew members, together with the cargo on board, were detained and arrested.

[1] Affidavit of Lieutenant Mohammed Ibrahim Hanifa, Statement in Response, Vol. II, Annex 6, paras. 6-7.

7. Charges were subsequently brought by the Nigerian authorities against all 16 crew members and the vessel on 2 March 2018. The charges were amended on 19 March of the same year to apply only to the Master, three officers and the vessel.

8. One of the principal means by which the navy ensures that bunkering is carried out in a safe and responsible manner is by requiring vessels – prior to engaging in bunkering – to secure from the navy a special permit known as a verification certificate.[2]

9. This certificate allows the vessel to lawfully receive, load, supply and discharge approved products. The applicant is required to disclose the names of the vessels, the locations of the loading and discharge points, the type of product and its quantity.

10. The Nigerian permit imposes clear mandatory conditions, including an express prohibition on the "lifting of illegally refined crude oil products", and a requirement that bunkering must be "conducted between sunrise and sunset". Any vessel "found violating" these "conditions" will be "arrested and prosecuted".

11. Upon further investigation, it was discovered that information on various permits and documents submitted by the *"San Padre Pio'"*s agent and officers to the Nigerian authorities were falsified in material aspects, and the quantity and quality of the fuel carried by the *"San Padre Pio"* was different from what the ship master had declared to Nigerian officials. The ship was carrying more fuel than declared, and its quality was sub-standard, a tell-tale sign of illegally refined oil from Nigeria.[3]

12. These basic facts of the case are indisputable between the Parties. Switzerland candidly admits that the vessel was engaged in a ship-to-ship bunkering operation, transferring fuel for use in Total's oil-production operations.[4]

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[2] Nigerian Navy, Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/Load/Discharge Approved Products, para. 12(d), Statement in Response, Vol. II, Annex 5.
[3] Statement in Response, paras. 2.11-2.14.
[4] Statement of Claim, para. 7.

13. In their final submission, Switzerland requests the Tribunal to prescribe the following provisional measures:

> Nigeria shall immediately take all measures necessary to ensure that the restrictions on the liberty, security and movement of the "San Padre Pio", her crew and cargo are immediately lifted to allow them to leave Nigeria. In particular, Nigeria shall:
>
> (a) enable the "San Padre Pio" to be resupplied and crewed so as to be able to leave, with her cargo, her place of detention and the maritime areas under the jurisdiction of Nigeria and exercise the freedom of navigation to which her flag State, Switzerland, is entitled under the Convention;
>
> (b) release the Master and the three other officers of the "San Padre Pio" and allow them to leave the territory and maritime areas under the jurisdiction of Nigeria;
>
> (c) suspend all court and administrative proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.[5]

14. Nigeria requests "that the International Tribunal for the Law of the Sea rejects all of the Swiss Confederation's Request for Provisional Measures."[6]

15. In the present case, there appears to be a dispute between the two Parties on the jurisdiction over the *M/T "San Padre Pio"* and its bunkering operations in the EEZ of Nigeria. Further, the dispute concerns the interpretation and application of the United Nations Convention on the Law of the Sea ("UNCLOS" or "the Convention").

16. Switzerland and Nigeria made claims. Switzerland claims in its Statement of Claim and Request for Provisional Measures that bunkering activities carried out by the *M/T "San Padre Pio"* in the EEZ of Nigeria belong to the freedom of navigation and that it has exclusive jurisdiction over the vessel and its bunkering activities.

17. Nigeria contends in its Statement in Response that it has sovereign rights and jurisdiction under article 56, paragraph 1(a) to exercise its enforcement jurisdiction over the bunkering activities carried out by a foreign flagged vessel in its EEZ.

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[5] ITLOS/PV.19/C27/3, p. 14, lines 1-15.
[6] ITLOS/PV.19/C27/4, p. 17, lines 5-6.

18. After deliberation, the Tribunal prescribed the following provisional measures as requested by Switzerland in its Order of 6 July 2019:

> Upon the posting of the bond or other financial security referred to under (a) above and the issuance of the undertaking referred to under (b) above, Nigeria shall immediately release the *M/T "San Padre Pio"* and the Master and the three officers who have been detained and shall ensure that the M/T "San Padre Pio" and the Master and the three officers are allowed to leave the territory and maritime areas under the jurisdiction of Nigeria.[7]

19. In my view, the provisional measures prescribed by the Tribunal in the Order are flawed in a number of aspects.

20. Article 290, paragraph 1, of the Convention, concerning provisional measures provides: "[T]he court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances *to preserve the respective rights of the parties* to the dispute" (emphasis added).

21. In order to "preserve the respective rights of the Parties", the Tribunal needs, therefore, to examine whether the rights asserted by Switzerland and Nigeria would actually be applicable to the situation and facts of the dispute in the present case or, in other words, whether the respective rights claimed by both Parties are plausible.

22. As the Tribunal stated in *"Enrica Lexie" (Italy* v. *India)*:

> [B]efore prescribing provisional measures, the Tribunal does not need to concern itself with the competing claims of the Parties, and that it needs only to satisfy itself that the *rights which Italy and India claim and seek to protect are at least plausible*. (emphasis added)[8]

23. It is clear from the jurisprudence that the rights of both the applicant and respondent need to be confirmed as plausible before provisional measures can be prescribed.

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[7] *M/T "San Padre Pio" (Switzerland* v. *Nigeria), Provisional Measures, Order of 6 July 2019*, para. 146 (1)(c) (hereinafter Order).
[8] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 July 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84.

24. The test of plausibility is considered two-fold: successful presentation of the alleged right; and its applicability to the facts of the case, as Judge Greenwood opined in his separate opinion in the *Certain Activities* case before the International Court of Justice, that plausibility requires: "a reasonable prospect that a party will succeed in establishing that it has the right which it claims and that that right is applicable to the case".[9]

25. On the plausibility of rights asserted by Switzerland, the Tribunal states in the Order:

> In the Tribunal's view, taking into account the legal arguments made by the Parties and evidence available before it, it appears that the rights claimed by Switzerland in the present case on the basis of articles 58, paragraphs 1 and 2, and 92 of the Convention are plausible.[10]

26. Then, unexpectedly, the Tribunal stopped there, and failed to proceed to examine whether or not the rights asserted by the other Party are also plausible.

27. In the present case, the *M/T "San Padre Pio"* was bunkering facilities involved in the extraction of natural resources from the seabed and subsoil within Nigeria's EEZ. Nigeria has the sovereign right under article 56, paragraph 1(a), of the Convention to exercise its enforcement jurisdiction against the *M/T "San Padre Pio"* and its crew engaged in illegal bunkering activities.

28. Article 56, paragraph 1(a), of the Convention provides that:

> In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural re-sources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone …[11]

29. This important article of the Convention, although not addressed at all by Switzerland in either its written or its oral proceedings, makes clear that Nigeria, as a

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[9] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 6, Declaration of Judge Greenwood (emphasis added).
[10] Order, para. 108.
[11] UNCLOS, art. 56(1) (a).

coastal State, has sovereign rights to exploit, conserve and manage the natural resources in its EEZ.

30. This sovereign right includes enforcement jurisdiction, as expressly held by the Tribunal in the *M/V "Virginia G" Case*:

> The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures.[12]

31. In short, a coastal State's competence to take enforcement action against such bunkering "derives from the sovereign rights of coastal States to explore, exploit, conserve and manage natural resources",[13] as stipulated in article 56, paragraph 1(a).

32. In the present case, the *M/T "San Padre Pio"* and its crew were supplying fuel to a complex of installations built to extract petroleum from Nigeria's EEZ. Article 56, paragraph 1(a), grants Nigeria the sovereign right to regulate and take enforcement measures with respect to the management of the natural resources in its EEZ. Thus, the activities of the *M/T "San Padre Pio"* and its crew fall within the jurisdiction of Nigeria as the coastal State.

33. In my view, taking into consideration the facts of the case and the legal arguments made by the Parties, the rights asserted by Nigeria on the basis of article 56, paragraph 1(a), of the Convention are, beyond doubt, equally plausible, and indisputable.

34. That is to say, there exist two plausible rights of both the Applicant and Respondent in the present case.

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[12] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, para. 211 (emphasis added).
[13] *Ibid.,* para. 222.

35. In light of these circumstances, it would be difficult in the present case to consider plausible the rights alleged by Switzerland concerning the freedom of navigation and exclusive flag State jurisdiction because they are subject to the relevant provisions of the Convention, pursuant to which Nigeria was acting within her sovereign rights, as clearly recognized by the Convention.[14]

36. In this regard, it is beyond comprehension why the Tribunal shied away from following its own jurisprudence in the *M/V "Virginia G" Case* in upholding the rights of the coastal State under article 56, paragraph 1(a), in the present case; and why the lawful rights asserted by Nigeria under the Convention have not been dealt with on an equal footing and, thus, failed even to be tested in terms of their plausibility.

37. This part of the Order may be said to be flawed for a number of reasons. First, it does not conform to article 290, paragraph 1, of the Convention, which requires any provisional measures prescribed to "preserve the respective rights of the Parties".

38. Second, it has negated almost completely the rights asserted by the Respondent under the Convention, let alone for a test of plausibility.

39. Third, it fails the obligation that the rights of both Parties be unharmed equally.

40. Fourth, it would cause unnecessary and irreparable harm to the rights of Nigeria as clearly recognized in the Convention.

41. The next major task before the Tribunal, at this stage of proceedings, is to determine: whether there is a risk of irreparable prejudice to the rights of the Parties to the dispute, and whether such a risk is real and imminent, as required by article 290, paragraph 5, of the Convention.

42. The Parties hold differing views on the issue at hand. Switzerland claims that serious prejudice has already been caused to its rights. It further contends that "…the vessel, her crew and cargo ...have been detained for 16 months" and that "[t]his is

[14] Statement in Response, paras. 3.9-3.22.

causing serious risks to the vessel, her crew and cargo", and "[t]hese risks are real and imminent."[15]

43. Nigeria contends that "Switzerland's request for provisional measures should … be rejected because it does not comply with the conditions of urgency and risk of irreparable harm required by article 290(5) of UNCLOS."[16] It further argues that "[t]he absence of urgency is clear".[17]

44. It is quite obvious that whether there would be real and imminent risk to the *M/T "San Padre Pio"*, its crew and cargo is at the centre of the dispute between the Parties.

45. With regard to risk to the vessel, based on the facts and evidence from Nigeria and, not generally contested by Switzerland, "the vessel is fully supplied with food, water and other necessities",[18] and "the conditions on the vessel are the same as the normal working conditions of those who man the vessel in its ordinary seafaring activities."[19]

46. According to evidence available in the case, Nigeria's "law permits arrested vessels to be released upon the posting of a bond. However, the vessel's owner did not seek to exercise that right."[20], "[t]he vessel is under the protection of the Nigerian Navy, which has deployed armed guards on board the vessel since it was arrested."[21] Since the pirate attack against the vessel on 15 April 2019, "the Nigerian Navy has increased the number of guards on the vessel and has stationed a gun boat in close proximity to the vessel"[22] to protect the security and safety of the vessel.

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[15] Request, para. 36.
[16] Response, para. 3.36
[17] *Ibid*., para. 1.4.
[18] Response, para. 3.29.
[19] ITLOS/PV.19/27/2, p. 27, ll. 1-2.
[20] Response, para. 2.19
[21] Response, para. 3.30.
[22] *Ibid.*

47. Nigeria further maintains that, even if there were harm to the vessel and the cargo, not only is such harm only economic, and thus not irreparable, the harm is also not imminent.

48. With regard to risk to the cargo, according to the case materials, the Nigerian prosecutors applied for, and the Nigerian High Court granted on 26 September 2018,[23] an order for interim forfeiture of the cargo in order to preserve the economic value of the oil for the benefit of its owner. The money was to be placed in an interest-bearing account.

49. However, the charterers of the vessel have delayed, and continue to delay, this sale. First, they applied to the Nigerian courts for a stay of the execution of the order of 26 September 2018 on the grounds that they are the beneficial owner of the cargo and that they were not given notice of the application for forfeiture.

50. That application has been considered and was rejected, on 9 April of this year by the Nigerian court which found that the charterer had not, prior to the forfeiture order, disclosed that it has a beneficial interest in the cargo but, to the contrary, has asserted that the cargo belonged to another entity.[24]

51. The charterers have appealed this decision, again delaying the sale and preservation of the cargo.[25]

52. Nigeria, therefore, contends that, if there has been any depreciation in the value of the cargo, not only can such be remedied by monetary compensation, but such depreciation is entirely the result of the actions of those entities involved in the operation of the vessel.

53. With regard to risk to the crew, shortly after their arrest, the defendants received bail granted by an order of the Federal High Court of Nigeria on 23 March

[23] Request for the Prescription of Provisional Measures of the Swiss Confederation, Annex 35-38.
[24] Statement in Response of Nigeria, Annex 18.
[25] *Ibid*., annex 19.

2018. Under the terms of bail, the crew may reside anywhere in Nigeria, the only condition being that they do not travel outside the country without prior approval.[26]

54. In addition, as recognized by Switzerland in its Request, the large majority of the present crew is not the same as the personnel on board at the time of the events of 23 January 2018. The original crew had been replaced on 23 July 2018, upon the instruction of the ship owner, "by a new crew for the purpose of ensuring the necessary safety of the vessel."[27]

55. As a matter of fact, members of the current replacement crew remain free to leave the vessel and Nigeria at any time.[28]

56. According to Nigeria, the Master and the three officers are not confined to the vessel by the Nigerian authorities. They are free to travel elsewhere in Nigeria, as they apparently do from time to time. They are present on the vessel voluntarily or, more likely, at the direction of their employers.

57. More recently, Nigeria has formally extended reassurances to Switzerland in a note verbale from the Ministry of Foreign Affairs dated 18 June 2019, which was reconfirmed by the Co-Agent of Nigeria at the oral hearing held on 22 June 2019, that the Master and the three officers "under the terms of their bail, are not required to remain on board the *M/T "San Padre Pio"*, but rather may disembark and board the *M/T "San Padre Pio"* at their pleasure and are at liberty to travel and reside elsewhere in Nigeria."[29]

58. Although during the oral hearings, Switzerland stated that "the terms of bail are not respected",[30] and "[the] so-called 'assurance' adds nothing; and it commits Nigeria to nothing",[31] clearly, these statements are not supported by any evidence.

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[26] Statement of Claim, para. 17 and Annex NOT/CH-24; see also Request, para. 10.
[27] Request, para. 11, see also Notification, Annex NOT/CH-30.
[28] Statement in Response of Nigeria, para. 3.27.
[29] ITLOS/PV.19/C27/4, p. 16, l. 47- p. 17, l. 2.
[30] ITLOS/PV.19/C27/3, p. 13, ll. 3-4.
[31] ITLOS/PV.19/C27/3, p. 12, ll. 46-47.

59. In view of these circumstances, a number of observations can be offered on the assessment of any real and imminent risk in the case.

60. First, it is clear that, under article 290, paragraph 5, of the Convention, the time within which the irreparable harm that justifies the measure occurs is the period before the constitution and functioning of the Annex VII tribunal. It is only if harm occurs within that period that the request for provisional measures would be justified.

61. Second, the time-frame for assessing urgency and a real and imminent risk in this case is very short. Pursuant to article 7 of Annex VII, the maximum period for the constitution of the tribunal is 104 days from the receipt of the notification of the request for arbitration. The time period began on 6 May 2019 and will end on 17 August of the same year. So the short time period between the reading of the Order on day 62 of the process and the date of the constitution of the Annex VII arbitral tribunal is about 42 days.

62. Third, many of the Applicant's statements on real and imminent risk that caused irreparable prejudice to its rights under the Convention are of the nature of general allegations, and they have not been substantiated in detail.

63. Fourth, the allegation of violations by Nigeria of the rights of the crew is, generally speaking, not supported by evidence, witnesses and affidavits.

64. Fifth, the claim of imminent risk of irreparable harm does not appear convincing, because there is no evidence that the condition of the vessel and cargo will materially or significantly worsen in a short period of time before the constitution and functioning of the Annex VII tribunal.

65. Sixth, the applications for bail by the crew, for rotation of the crew members (except for the Master and the three officers) by the ship owner and for suspension of the order for interim forfeiture by the charterer have all been dealt with by Nigeria in a timely and efficient manner.

66. Seventh, the allegation against Nigeria's restrictions on the liberty, security and movement of the crew of the *M/T "San Padre Pio"* has not been sufficiently proven, as the facts of the case show that the Master and three officers have generally been free to leave and return to the vessel. Their liberty to travel and reside elsewhere in Nigeria has been officially assured. More importantly, most of the original crew have been replaced by a new team on a rotation basis. The new crew members are entirely free to leave the county at any time.

67. Eighth, the commencement of the trial was said to have been delayed, but by the application made by the crew themselves. In these circumstances, there is no reason to order suspension of the proceedings. So, generally speaking, there has been no delay in due process of law in this case.

68. Ninth, any alleged harm to the vessel, cargo and its owner is, or rather would be, economic only. Reparation for any such harm, were it to occur, can easily be provided through the award of monetary compensation by the Annex VII tribunal.[32]

69. Tenth, the enforcement measures against the *M/T "San Padre Pio"* and her crew and cargo for alleged violation of Nigerian law on offshore bunkering, and the subsequent domestic legal proceedings against the Master and officers conform to both domestic legislation and the relevant provisions of the Convention. The actions taken by Nigeria are not arbitrary and excessive, but reasonable and lawful.

70. In light of these facts and circumstances, it is generally appreciated that there has been no urgency, at least, with regard to the vessel and her cargo.

71. Humanitarian and security considerations with respect to the Master and officers has, of course, always been a very important issue at hand. There does exist a certain degree of urgency with regard to the Master and officers, but this urgency is more in the nature of humanitarian concerns, rather than real and imminent risks, as the Tribunal also opines in the Order: "[T]hat the threat to the safety and security,

[32] See, e.g., *Duzgit Integrity* (Malta v. São Tomé and Príncipe), PCA Case No. 2014-07, Award (5 September 2016), para. 342(d); *Arctic Sunrise* (Netherlands v. Russia), PCA Case No. 2014-02, Award on Compensation (10 July 2017), para. 128.

and restrictions on the liberty and freedom of the Master and three officers of the M/T "San Padre Pio" for a lengthy period *raise humanitarian concerns* (emphasis added)."[33]

72. Thus, there is little urgency or real and imminent risk of irreparable prejudice to the rights alleged by Switzerland under the Convention between now and the date of the constitution of the Annex VII arbitral tribunal.

73. Let us now deal with the issue of irreparable prejudice to the rights of the Respondent. As indicated, the assessment of irreparable prejudice should apply to the claimed respective rights of the Parties, that is to say, not only to the rights claimed by the Applicant, but also to those of the Respondent.

74. Under the provisional measures prescribed as requested by Switzerland, the *M/T "San Padre Pio"* and the Master and three officers will be allowed to leave Nigeria. Since the vessel and its officers will no longer be under the jurisdiction of Nigeria, the vessel would be able to resume exercising the freedom of navigation.

75. This is particularly likely given the fact that Switzerland is not their State of nationality, nor their State of residence or even their employer. There has been little genuine link between Switzerland and these crew members who are Ukrainian nationals. From a legal point of view, Switzerland is therefore not in a position to guarantee their return to Nigeria.

76. As a result, Nigeria would suffer irreparable harm because it may prove impossible to secure the presence of the released Master and officers, which is necessary for the successful conduct of the prosecution.

77. Such a result would irreparably harm the sovereign right of Nigeria to enforce its laws against the *M/T "San Padre Pio"* and its officers, who have been lawfully charged and are being prosecuted for violation of Nigerian law.[34]

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[33] Order, para. 130, p. 37.
[34] Statement in Response, paras. 3.42-3.44.

78. In the unfortunate event of such a development, Nigeria's rights to exercise her sovereign rights under article 56 of the Convention will be clearly impacted by the Order. In addition, it would also cause irreparable harm to its obligations to enforce its regulations on the protection of the marine environment from bunkering activities in connection with seabed exploration and exploitation activities under articles 56, paragraph 1(a), 208 and 214 of the Convention.

79. With respect to the issue of irreparable damage, it was well argued by the Applicant in its proceedings that "[t]he damage suffered by the Master and the three other officers … is clearly irreparable, as every day spent in detention is irrecoverable."[35]

80. The Tribunal also considers that the arrest of the *M/T "San Padre Pio"* and her crew and the exercise of criminal jurisdiction against them could irreparably prejudice the rights claimed by Switzerland to freedom of navigation and exclusive flag State jurisdiction, and "[t]he rights asserted by Switzerland, with respect to the vessel, cargo and crew – which constitute a unit –, may not be fully repaired by monetary compensation alone."[36]

81. Accordingly, the same logic should be applied equally to the rights claimed by Nigeria. Under the provisional measures prescribed as requested, Nigeria is ordered not only to release the Master and officers, but also to permit them to leave Nigeria, despite the fact that they are the subject of serious criminal charges under Nigerian law.

82. This would irreparably interfere with and prejudice the rights and obligations of Nigeria, including: the judicial right to enforce criminal law intended to maintain law and order and to combat criminality; sovereign rights and jurisdiction in the EEZ conferred by the Convention; and the international obligation to adopt laws to

[35] Request, para. 41.
[36] Order, p. 37, para. 128.

prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to its jurisdiction under the Convention.

83. Clearly, these rights are of precisely such a character that prejudice to them is not capable of being repaired and fully compensated by financial means.

84. Just as the Special Chamber of this Tribunal stated in the *Ghana* v. *Côte d'Ivoire case* "there is a risk of irreparable prejudice where … such modification cannot be fully compensated by financial reparations".[37] In short, violation suffered by Nigeria is not economic losses, and it is clearly irreparable, as each violation of its laws and obligations is irrecoverable.

85. We now proceed to the next issue of prejudging the merits. In the present case, the right to exercise freedom of navigation by the flag State is one of the central issues of the dispute in the merits phase. This is clear from Switzerland's Statement of Claim initiating proceedings before the Annex VII tribunal.

86. The first submission made to that tribunal is to adjudge and declare that

> By intercepting, arresting and detaining the "San Padre Pio" without the consent of Switzerland, Nigeria has breached its obligations to Switzerland regarding *freedom of navigation* as provided for in article 58 read in conjunction with article 87 of UNCLOS. (emphasis added)[38]

87. The Request for Prescription of Provisional Measures made by Switzerland to this Tribunal replicates the essence of the above submission in its first request, by which Switzerland requests this Tribunal to order Nigeria to

> [E]nable the "San Padre Pio" to be resupplied and crewed so as to be able to leave, with her cargo, her place of detention and the maritime areas under the jurisdiction of Nigeria and *exercise the freedom of navigation* to which her flag State, Switzerland, is entitled under the Convention. (emphasis added)[39]

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[37] *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2016,* p. 163, para. 89. Emphasis added.
[38] Statement of Claim of the Swiss Confederation, para. 45.
[39] Request for the Prescription of Provisional Measures of the Swiss Confederation, para 53(a).

88. Thus, this Tribunal's granting of the first measure requested by Switzerland touches upon issues related to the merits of the case,[40] since the merits of the dispute – namely, the right to exercise freedom of navigation, to be determined by the Annex VII arbitral tribunal – are prejudged at this stage of the proceedings, as the vessel and its officers would no longer be in the jurisdiction of Nigeria, and the vessel would be able to resume exercise of the freedom of navigation.[41]

89. Another issue which deserves our attention is the international efforts undertaken against maritime crimes in the region. The West African coast has recently been plagued by maritime crime and piracy, which poses a threat to the region's "peace, security and development".[42]

90. In this connection, the Secretary-General of the United Nations called upon States to address "maritime crime and piracy" "focusing on 'bolstering the operational capacity of maritime agencies to patrol their waters and strengthening the capacity of the criminal justice chain to detect, investigate and prosecute cases of piracy and maritime crime'."[43]

91. In 2007 Nigeria and Switzerland, together with 26 other States, as well as the African Union, the European Union, the International Maritime Organization and other intergovernmental organizations, signed the G7++ Friends of The Gulf of Guinea Rome Declaration on illegal maritime activity, which committed coastal States to "enhance capacities to achieve prosecutions and prevent all criminal acts at sea", and emphasized that the primary responsibility to counter threats and challenges at sea rests with the States of the region.[44]

92. In light of these international efforts, the proceedings of the present case should strive to make a contribution to the rule of law in promoting stability and

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[40] *Construction of a Road in Costa Rica along the River San Juan (Nicaragua* v. *Costa Rica), Order of 23 December 2013, I.C.J. Reports 2013*, p. 404, paras. 20 and 21.
[41] Statement in Response, para. 3.39.
[42] UN Secretary-General, Activities of the United Nations Office for West Africa and the Sahel, UN Doc. S/2018/1175, available at https://undocs.org/S/2018/1175 (28 December 2018) (last access: 16 June 2019), para. 21
[43] *Ibid.,* para. 65.
[44] G7++ Friends of the Gulf of Guinea, Rome Declaration (26-27 June 2017), paras. 9-10.

security in the Gulf of Guinea, and support Nigeria's efforts to combat maritime crime, including the recognition of Nigeria's sovereign rights and duty to regulate and exercise valid criminal jurisdiction over illegal activities associated with the extraction of resources from the seabed and subsoil within its EEZ.

93. Last but not least, Nigeria has vigorously defended, before this Tribunal, the case based on her sovereign right to exercise valid criminal jurisdiction over illegal activities associated with the extraction of resources from the seabed and subsoil within its EEZ, as recognized by the Convention.

94. For these reasons, the Order and the provisional measures do not seem to be reasonable and fair to Nigeria, which is a victim rather than a violator. Hence, they may be viewed by Nigeria as adding insult to injury.

95. The provisional measures prescribed by the Tribunal, which orders immediate release of the vessel as a unit from the jurisdiction of Nigeria, may potentially carry legal and political implications, and are likely to cause concerns by Nigeria as well as other coastal States in the region and beyond.

96. These States will be alarmed and compelled to ponder, in light of the provisional measures, as to how to exercise their sovereign rights and jurisdiction in the EEZ under article 56 of the Convention, and discharge their obligations to adopt and enforce laws and regulations to combat marine environment pollution arising from seabed activities subject to their jurisdiction under articles 208 and 214 of the Convention.

97. In conclusion, my differences with the majority views arise in the matters of application of the test of plausibility to the rights of the Parties, and assessment of the urgency of the situation in the case.

98. As observed, the plausibility of the rights alleged by the Applicant can hardly be established, owing to the relevant EEZ provisions of the Convention, and the absence of urgency in the case is also clear, owing to the lack of any real and imminent risk.

99. For these reasons, I do not agree that, by arresting and detaining the *M/T "San Padre Pio"* and her crew and cargo, as well as instituting proceedings against the defendant, Nigeria violated the freedom of navigation and the exclusive flag State jurisdiction enjoyed by Switzerland under articles 58 and 92 of the Convention. More importantly, I do not think that the respective rights of the Parties in this case are duly preserved as required under article 290, paragraph 1, of the Convention and I am consequently against the Order in favour of the Applicant.

(signed) Zhiguo Gao

[Translation by the Registry]

DISSENTING OPINION OF JUDGE BOUGUETAIA

1. Without affecting my solidarity with the Tribunal, with whom I am in agreement on the essential part of its course of action, I feel that the credibility of some passages of the Order could have been enhanced by sticking somewhat closer to reality and, in particular, taking account of the context of the case.

2. At first, I was inclined to be in favour of keeping the four crew members on Nigerian territory whilst awaiting the decision of the arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea. Certain aspects of the present case led me to review this position and follow the majority of the Tribunal in deciding that the *"San Padre Pio"*, its Master and the three officers should be released, and that they should be allowed to leave the territory and maritime areas under Nigerian jurisdiction.

3. Having served five weeks in prison (in conditions which were harsh, to say the least), the Master and three officers were freed and allowed to return to the vessel, on 13 April 2018, following the posting of bail. Their release on bail was granted by an order of the Federal High Court of Nigeria of 23 March 2018, which stated in particular:

> That the 1st, 2nd, 3rd and 4th Defendants shall deposit their International Passport with the Registry of this Court
> …
> That the 1st, 2nd, 3rd and 4th Defendants shall not travel outside Nigeria without the prior approval or order of this Court.

4. This so-called freedom or "extension" did not put an end to the crew members' suffering. Quite the contrary: this bail condition exposed them to other risks, considerably greater than those to which they might be exposed whilst in detention.

5. On 15 April 2019, the *"San Padre Pio"* was attacked by armed assailants in the port of Bonny Inner Anchorage. During the attack, a member of the Nigerian naval guard was injured.

6. The Tribunal itself noted, in paragraph 129 of its Order, that "the armed attack against the *M/T "San Padre Pio"* that took place on 15 April 2019, endanger[ed] the lives of those on board the vessel", underlining in paragraph 130 that the "threat to the safety and security, and restrictions on the liberty and freedom of the Master and three officers of the *M/T "San Padre Pio"* for a lengthy period raise humanitarian concerns."

7. It is owing to this constant insecurity, following the torments experienced by the Master and three crew members in detention, that have led me to follow the Tribunal in its decision to authorize them to leave the territory and maritime areas under Nigerian jurisdiction.

8. Admittedly, although this "humanitarian act" puts an end to the sufferings of the crew by allowing them to leave Nigeria, its prisons and the constant state of insecurity prevailing in that country, it does not guarantee the rights of Nigeria, which has no assurance that the four seamen will return if the Annex VII arbitral tribunal decides that Nigeria has jurisdiction to rule on its dispute with Switzerland.

9. Switzerland has no legal means of guaranteeing the return of Ukrainian nationals to Nigeria, if need be, and hence it cannot make any serious undertaking ensuring that they will return to face the Nigerian courts.

10. It can genuinely be considered that the US$ 14 million bond demanded by the Tribunal will be more than enough to cover the potential prejudice to which Nigeria makes reference; however, from the legal point of view, this "incomplete devolvement" (the defendants' failure to return) places the Tribunal in an awkward position from which it has not been able, or rather, did not know how, to extricate itself.

11. Thus, to that end, it resorts to an unfortunate fantasy in its drafting of paragraph 141 of the Order, in which it states:

> The Tribunal is of the view that Nigeria needs to be assured unequivocally through an undertaking that the Master and the three officers will be available and present at the criminal proceedings in Nigeria, if the Annex

> VII arbitral tribunal finds that the arrest and detention of the *M/T* "*San Padre Pio",* its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22-23 January 2018 do not constitute a violation of the Convention. In this regard, the Tribunal considers that posting of a bond, whilst effective, may not afford sufficient satisfaction to Nigeria. The Tribunal, therefore, decides that Switzerland shall undertake to ensure the return of the Master and the three officers to Nigeria, if so required in accordance with the decision of the Annex VII arbitral tribunal … The Tribunal considers that such undertaking will constitute an obligation binding upon Switzerland under international law.

– a pious and naïve vow hitherto alien to the rigour and realism of the Tribunal.

12. In order to underpin this "inconsistency", the Tribunal recalls the decision of the arbitral tribunal in the *"Enrica Lexie"* case (Order of 29 April 2016), omitting to cite its Order of 24 August 2015, whereby it ordered the return to Italy "of an Italian marine whilst waiting for the proceedings to continue". In such instances, each case is an "*uni cum*" and these two cases are not comparable. In the *"Enrica Lexie"*, the marine was an Italian national who, moreover, is subject to Italian authority, which is able to guarantee his return to appear before the Indian courts.

13. In the case at hand, the seamen are Ukrainian nationals and are not bound to any authority with any sovereign power. Nor can Switzerland exert any authority over these "free" seamen, who are not its nationals, nor can it avail itself of any judicial cooperation with Ukraine in the absence of a judicial cooperation agreement and, above all, the lack of any rules governing the extradition of Ukrainian nationals by their country.

14. Nigeria is well aware of this obstacle, which in fact the Tribunal mentions in paragraph 135 of its Order, when it underlines that, in Nigeria's view,

> custody of the defendants is essential for the successful continuation of those proceedings and Switzerland, not being the State of nationality or of residence of the Master and officers, nor their employer, is not in a position to assure their return to face the criminal charges in Nigeria.

15. Nevertheless, the Tribunal was concerned to uphold this obligation for Switzerland to "undertake to ensure the return of the Master and the three officers to Nigeria, if so required in accordance with the decision of the Annex VII arbitral

tribunal". The Tribunal considers that such "undertaking … will constitute an obligation binding upon Switzerland under international law" (Order, paragraph 141).

16. Knowing very well that Switzerland has no means of guaranteeing the Ukrainian seamen's return, the Tribunal has taken a hypothetical step by requesting Switzerland to "undertake to ensure the return of the Master and the three officers to Nigeria" to appear before the Annex VII arbitral tribunal "if so required".

17. The role of the Tribunal is to "order", i.e. to take mandatory decisions; its role is not to issue empty formulae, knowing that such utterances add nothing to the legal reasoning and provide panaceas which are rarely applicable; this is precisely the case in this instance, in which the Tribunal is asking Switzerland to guarantee the return of the seamen and their captain, if necessary, whilst it does not exert any authority over them and has no legal means of controlling their movements once they have been released. Again, in paragraph 141, the Tribunal adds that "the Parties shall cooperate … in the implementation of such undertaking", recalling in this regard that "the Parties have maintained close cooperation in various areas, including in the area of mutual legal assistance in criminal matters." This is highly interesting, apart from the fact that the close cooperation "including in the area of mutual legal assistance in criminal matters" between Switzerland and Nigeria is in no way binding on Ukraine, the country of which the Master and three officers are nationals; added to which, Ukraine does not extradite its nationals for lawsuits of this nature, hence the futility of the decision contained in paragraph 141 of the Order.

18. It would have been more judicious and more innovative for the Tribunal to seek a realistic and achievable solution which could have "guaranteed" the return of the seamen and their captain to Nigeria if so required by the arbitral tribunal.

19. What I find even more inappropriate is to include in the operative provisions of the Order Switzerland's undertaking to

> ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio",* its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which

> occurred on 22-23 January 2018 do not constitute a violation of the Convention. For this purpose, Switzerland and Nigeria shall cooperate to implement such undertaking.

20. I would have gladly voted in favour of the provision of paragraph 146, sub-paragraphs 1(a) and (c), but I failed in my attempt to have 1(b) appear in a second paragraph so as not to combine in a single obligation the posting of the bond (1(a)), the obligation for Nigeria to release the *"San Padre Pio",* its cargo and its Master and the three officers and ensure that they are authorized to leave the territory and maritime areas under Nigerian jurisdiction (1(c)), and Switzerland's undertaking (1(b)) to "ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria", if the arbitral tribunal so decides.

21. The Tribunal refused to separate the two obligations provided in (a) and (c) of paragraph 146(1) from a hypothetical "obligation", the implementation of which no one, neither Nigeria nor Switzerland and even less the Tribunal, is capable of ensuring. It is thus owing to this highly awkward and unconvincing package deal that I feel obliged to vote against this Order.

22. Only the eventual jurisdiction of the Annex VII arbitral tribunal will free our Tribunal of the obligation of having to prove that its "wishes" are nothing other than legal realism.

(signed) Boualem Bouguetaia