INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 21 AND 22 JUNE 2019

The M/T "San Padre Pio" Case
(Switzerland v. *Nigeria), Provisional Measures*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

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TENUES LES 21 ET 22 JUIN 2019

Affaire du navire « San Padre Pio »
(Suisse c. Nigéria), mesures conservatoires

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Minutes of the Public Sittings held on 21 and 22 June 2019

Procès-verbal des audiences publiques tenues les 21 et 22 juin 2019

PUBLIC SITTING HELD ON 21 JUNE 2019, 10 A.M.

Tribunal

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

Switzerland is represented by:

Ambassador Corinne Cicéron Bühler,
Director of the Directorate of International Law, Federal Department of Foreign Affairs,

as Agent;

and

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

Professor 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, United Kingdom,

as Counsel and Advocates;

Dr Solène Guggisberg,
Faculty of Law, Economics and Governance, Utrecht University, The Netherlands,

Mr Cyrill Martin,
Swiss Maritime Navigation Office, Directorate of International Law, Federal Department of Foreign Affairs,

Dr Flavia von Meiss,
Directorate of International Law, Federal Department of Foreign Affairs,

Mr Samuel Oberholzer,
Directorate of International Law, Federal Department of Foreign Affairs,

Dr Roland Portmann,
Directorate of International Law, Federal Department of Foreign Affairs,

as Counsel.

Nigeria is represented by:

Ms Chinwe Uwandu, BA, LLM, FCIMC, FCIArb,
Yale World Fellow, Director/Legal Adviser, Ministry of Foreign Affairs,

Ambassador Yusuf M. Tuggar,
Head of Nigeria Mission, Berlin, Germany,

as Co-Agents;

and

Professor 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,

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

as Counsel and Advocates;

Ms Theresa Roosevelt,
Associate at Foley Hoag LLP, Washington D.C., United States of America,

Dr Alejandra Torres Camprubi,
Associate at Foley Hoag LLP, Paris, France,

Mr Peter Tzeng,
Associate at Foley Hoag LLP, Washington D.C., United States of America,

as Counsel;

Ambassador Mobolaji Ogundero,
Deputy Head of Mission, Berlin, Germany,

Rear Admiral Ibikunle Taiwo Olaiya,
Nigerian Navy, Abuja,

Commodore Jamila Idris Aloma Abubakar Sadiq Malafa,
Director, Legal Services, Nigerian Navy, Abuja,

Mr Ahmedu Imo-Ovba Arogha,
Economic and Finanical Crimes Commission, Abuja,

Lieutenant Iveren Du-Sai,
Nigerian Navy, Abuja,

21 June 2019, a.m.

Mr Abba Muhammed,
Economic and Financial Crimes Commission, Abuja,

Mr Aminu Idris,
Economic and Financial Crimes Commission, Abuja,

Dr Francis Omotayo Oni,
Assistant Director, Federal Ministry of Justice,

as Advisors;

Ms Kathern Schmidt,
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Ms Anastasia Tsimberlidis,
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as Assistants.

AUDIENCE PUBLIQUE TENUE LE 21 JUIN 2019, 10 H 00

Tribunal

Présents : M. PAIK, *Président* ; M. ATTARD, *Vice-Président* ; MM. JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, MME CHADHA, MM. KITTICHAISAREE, KOLODKIN, MME LIJNZAAD, *juges* ; M. MURPHY, MME PETRIG, *juges* ad hoc ; M. GAUTIER, *Greffier*.

La Suisse est représentée par :

Ambassadeur Corinne Cicéron Bühler,
Directrice de la Direction du droit international public, Département fédéral des affaires étrangères,

comme agent ;

et

M. Lucius Caflisch,
professeur émérite à l'Institut de hautes études internationales et du développement, Genève,

Mme Laurence Boisson de Chazournes,
professeur à la faculté de droit, Université de Genève,

Sir Michael Wood,
membre du barreau d'Angleterre et du Pays de Galles, Twenty Essex Chambers, Londres, Royaume-Uni,

comme conseils et avocats ;

Mme Solène Guggisberg,
faculté de droit, d'économie et de gouvernance, Université d'Utrecht, Pays-Bas,

M. Cyrill Martin,
Office suisse de la navigation maritime, Direction du droit international public, Département fédéral des affaires étrangères,

Mme Flavia von Meiss,
Direction du droit international public, Département fédéral des affaires étrangères,

M. Samuel Oberholzer,
Direction du droit international public, Département fédéral des affaires étrangères,

M. Roland Portmann,
Direction du droit international public, Département fédéral des affaires étrangères,

comme conseils.

Nigéria est représenté par :

Mme Chinwe Uwandu, BA, LLM, FCIMC, FCIArb,
Yale World Fellow, Directrice/Conseillère juridique, Ministère des affaires étrangères,

Ambassadeur Yusuf M. Tuggar,
Chef de la mission nigériane, Berlin (Allemagne),

comme co-agents ;

et

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

M. Andrew Loewenstein,
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M. Derek Smith,
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comme conseils et avocats ;

Mme Theresa Roosevelt,
collaboratrice au cabinet Foley Hoag LLP, Washington (Etats-Unis d'Amérique),

Mme Alejandra Torres Camprubi,
collaboratrice au cabinet Foley Hoag LLP, Paris (France),

M. Peter Tzeng,
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comme conseils ;

Ambassadeur Mobolaji Ogundero,
Chef de mission adjoint, Berlin (Allemagne),

Contre-amiral Ibikunle Taiwo Olaiya,
marine nigériane, Abuja,

Commodore Jamila Idris Aloma Abubakar Sadiq Malafa,
Directrice, Services juridiques, marine nigériane, Abuja,

M. Ahmedu Imo-Ovba Arogha,
Commission contre les délits économiques et financiers, Abuja,

Lieutenant Iveren Du-Sai,
marine nigériane, Abuja,

M. Abba Muhammed,
Commission contre les délits économiques et financiers, Abuja,

M. Aminu Idris,
Commission contre les délits économiques et financiers, Abuja,

M. Francis Omotayo Oni,
Directeur assistant, Ministère fédéral de la justice,

comme conseillers ;

Mme Kathern Schmidt,
Foley Hoag LLP, Washington (Etats-Unis d'Amérique),

Mme Anastasia Tsimberlidis,
Foley Hoag LLP, Washington (Etats-Unis d'Amérique),

comme assistantes.

Opening of the Oral Proceedings

[ITLOS/PV.19/C27/1/Rev.1, p. 1–3; TIDM/PV.19/A27/1/Rev.1, p. 1–3]

THE PRESIDENT: Good morning. The Tribunal meets today pursuant to article 26 of its Statute to hear the Parties' arguments in the *M/T "San Padre Pio" Case* between the Swiss Confederation and the Federal Republic of Nigeria.

At the outset I would like to note that Judges Ndiaye and Kelly are prevented from participating in this case for reasons duly explained to me.

On 21 May 2019, Switzerland submitted to the Tribunal a Request for the prescription of provisional measures pending the constitution of an arbitral tribunal in a dispute with Nigeria concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew and cargo. The Request was made pursuant to article 290, paragraph 5, of the United Nations Convention on the Law of the Sea. The case was named "*The M/T "San Padre Pio" Case*" and entered in the List of cases as Case No. 27.

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

LE GREFFIER : Merci Monsieur le Président. Le 21 mai 2019, copie de la demande en prescription de mesures conservatoires a été communiquée au Gouvernement du Nigéria. Par ordonnance du 29 mai 2019, le Président a fixé les dates de la procédure orale aux 21 et 22 juin 2019. Le 17 juin 2019, le Nigéria a soumis son exposé en réponse à la demande de la Suisse.

Je vais à présent donner lecture des conclusions des Parties.

(Continued in English) The Applicant requests that the Tribunal 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.

The Respondent requests:

> that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation's requests for provisional measures.

Mr President.

THE PRESIDENT: Thank you, Mr Registrar.

At today's hearing, both Parties will present the first round of their respective oral arguments. Switzerland will make its arguments this morning until approximately 1 p.m. with a break of 30 minutes at around 11.30 a.m. Nigeria will speak this afternoon from 3.00 p.m. until approximately 6.00 p.m. with a break of 30 minutes at around 4.30 p.m.

Tomorrow will be the second round of oral arguments, with Switzerland speaking from 10.00 until 11.30 a.m. and Nigeria speaking from 4.30 to 6.00 p.m.

I note the presence at the hearing of Agents, Co-Agents, Counsel and Advocates of the Parties.

I now call on the Agent of Switzerland, Ms Corinne Cicéron Bühler, to introduce the delegation of Switzerland.

MS CICÉRON BÜHLER: Mr President, distinguished Members of the Tribunal. It is a signal honour for me to appear before your Tribunal to represent the Swiss Confederation.

Allow me, Mr President, to introduce the Swiss delegation. My name is Corinne Cicéron Bühler. I am Ambassador and Director of the Division of Public International Law of the Federal Department of Foreign Affairs. I am the Agent of Switzerland in the case before us today.

By my side as Counsel and Advocates are Professors Lucius Caflisch and Laurence Boisson de Chazournes, and also Sir Michael Wood. In our team, and in their role of Counsel, are also present here today Flavia von Meiss and Solène Guggisberg and Messrs Roland Portmann, Cyrill Martin and Samuel Oberholzer.

Thank you, Mr President.

THE PRESIDENT: Thank you, Ms Cicéron Bühler.

We have been informed that the Agent of Nigeria, Ms Stella Anukam, will not be present at the hearing. I therefore call on the Co-Agent of Nigeria, Ms Chinwe Uwandu, to introduce the delegation of Nigeria.

MS UWANDU: Mr President, honourable Members of the Tribunal, it is an honour to appear before you today as Co-Agent of the Federal Republic of Nigeria.

It is my privilege to introduce the members of the Nigerian delegation: Ambassdaor Yusuf M. Tuggar, Head of Nigeria's Mission to Germany, is a Co-Agent. His Deputy, Ambassador Mobolaji Ogundero, joins us as an Adviser. We are also advised by distinguished officials from the Nigerian Navy, the Economic and Financial Crimes Commission and the Federal Ministry of Justice. From the Navy we are joined by Rear Admiral Ibikunle Taiwo Olaiya, Commodore Jamilla Idris Aloma Abubakar Sadiq Malafa and Lieutenant Commander Iveren Du-Sai.

From the Economic and Financial Crimes Commission we have Mr Ahmedu Imo-Ovba Arogha and Mr Abba Muhammed. And from the Federal Ministry of Justice we are advised by Dr Francis Omotayo Oni. Professor Dapo Akande of Oxford University, Mr Andrew Loewenstein and Dr Derek Smith of Foley Hoag LLP are Counsel and Advocates.

As Counsel we also have Ms Theresa Roosevelt, Dr Alejandra Torres Camprubi, Mr Peter Tzeng, and the team is assisted by Kathern Schmidt and Anastasia Tsimberlidis.

Finally, I wish to acknowledge our counterparts representing the Government of Switzerland and convey our warm greetings to them.

Thank you, Mr President.

THE PRESIDENT: Thank you, Ms Uwandu.

I now invite the Agent of Switzerland, Ms Cicéron Bühler, to begin her statement.

Premier tour : Suisse

EXPOSÉ DE MME CICÉRON BÜHLER
AGENT DE LA SUISSE
[TIDM/PV.19/A27/1/Rev.1, p. 3–15]

Monsieur le Président, je vous remercie. Avec la permission du Tribunal, je vais maintenant introduire l'affaire. C'est la première fois qu'un Etat sans littoral se trouve devant vous. C'est donc un plaisir pour moi d'être issue de ce groupe d'Etats explicitement reconnus dans la Convention des Nations Unies sur le droit de la mer.

Le différend à l'origine de la présente affaire porte sur l'interception, le 23 janvier 2018, du « San Padre Pio », un navire battant pavillon suisse, dont la photo est dans vos classeurs et devrait être sur vos écrans[1]. Au moment des faits, il se trouvait dans la zone économique exclusive du Nigéria, à 32 milles marins de la côte nigériane. Le Nigéria accusait le « San Padre Pio » de ne pas avoir respecté les règles de droit interne relatives au commerce du pétrole, ce qui a toujours été vigoureusement démenti. Suite à cette interception, le navire a été saisi par les autorités nigérianes, et son équipage arrêté. Depuis lors, le navire et sa cargaison sont immobilisés. Le capitaine, Andriy Vaskov, ainsi que trois officiers, Mykhaylo Garchev, Vladyslav Shulga et Lvan Orlovskyi sont maintenus en détention dans ce pays depuis près de 17 mois.

Les faits concernant les activités du navire et leur légalité au regard de la législation nigériane sont contestés, comme vous l'entendrez certainement de la part de nos interlocuteurs de l'autre côté de la barre. Je me permettrai dans quelques instants de brièvement réfuter la description faite par le Nigéria de ces faits.

La Suisse maintient que les mesures prises par le Nigéria envers le « San Padre Pio », son équipage et sa cargaison sont contraires à la Convention sur le droit de la mer, convention à laquelle tant la Suisse que le Nigéria sont parties. En effet, l'exercice par le Nigéria de sa compétence d'exécution à l'encontre du navire, de sa cargaison et de son équipage est dénué de tout fondement en droit international. Comme il sera mentionné plus en détail, lors de l'exposé sur la plausibilité des droits invoqués par la Suisse, l'interception et la détention du « San Padre Pio », ainsi que l'arrestation de son équipage, contreviennent aux droits de la Suisse comme Etat du pavillon. Sont en jeu, en particulier, certains principes fondamentaux du droit de la mer, tels que la liberté de navigation et la compétence exclusive de l'Etat du pavillon sur ses navires.

La Convention, à l'article 90, est explicite sur le fait que « [t]out Etat, qu'il soit côtier ou sans littoral, a le droit de faire naviguer en haute mer des navires battant son pavillon ». Ainsi, les droits des Etats qui, comme la Suisse, n'ont pas un accès direct à la mer sont reconnus et doivent être respectés.

Selon le Nigéria, les droits invoqués par la Suisse ne sont pas applicables au cas d'espèce, ils n'atteindraient même pas le niveau de plausibilité requis par votre Tribunal. Les présentations de ce matin vous démontreront le contraire, que cela soit au niveau des faits ou du droit.

Monsieur le Président, je me permets de faire un aparté pour noter que le Nigéria ne semble pas s'intéresser, en vérité, à la question de la plausibilité des droits. Une grande partie de son argumentation en vérité relève plutôt de la procédure au fond. Ainsi, les contours précis

[1] Voir onglet 1 du classeur des juges, Photo du navire *« San Padre Pio »*, également annexée à la *Notification de la Confédération suisse faite au titre de l'article 287 et de l'article premier de l'annexe VII de la Convention des Nations Unies sur le droit de la mer*, 6 mai 2019 (ci-après *notification*), (annexe NOT/CH-1). La *notification* est elle-même annexée à la *Demande en prescription de mesures conservatoires présentée par la Confédération suisse*, 21 mai 2019 (ci-après *demande*).

du cadre juridique applicable aux activités de soutage et de l'exploitation des ressources non vivantes dans la zone économique exclusive (ou ZEE) d'un Etat côtier n'appartiennent pas à la phase actuelle. Le Nigéria accuse la Suisse de demander au Tribunal de préjuger le fond, ce qui n'est en aucun cas correct. De son côté, la Suisse sait que le Tribunal aura à cœur de prendre en compte la phase de procédure dans laquelle nous nous trouvons actuellement. Tel que présenté plus tard, les droits invoqués par la Suisse sont clairement plausibles.

Face à l'interception du « San Padre Pio » et à la détention du navire et de son équipage, la Suisse a tenté à maintes reprises, et je développerai ce point plus loin dans ma présentation, de trouver une solution à l'amiable avec le Nigéria. Nous entretenons de manière générale des relations bilatérales de qualité avec ce pays. Notre collaboration est fructueuse, y compris dans des dossiers sensibles, tels que la migration ou encore la restitution des avoirs mal-acquis volés par le clan de l'ancien président nigérian Sani Abacha. Il en est de même dans le domaine multilatéral où nous menons une coopération étroite et constructive. En effet, par exemple, la co-présidence du groupe de travail « Etat de droit » que nous exerçons conjointement avec le Nigéria depuis deux ans dans le cadre du Forum global de lutte contre le terrorisme nous avait habitués à des discussions ouvertes et approfondies, orientées vers des résultats concrets. Nous pensions dès lors qu'il serait possible de faire de même dans le cas présent et de mettre un terme au différend qui nous oppose. En vain.

Les prises de contact de la Suisse s'inscrivent dans la longue tradition de notre pays d'œuvrer pour la paix et la sécurité internationales, en favorisant le règlement pacifique des différends. Les qualités de la Suisse dans ce domaine sont connues et reconnues au niveau international. Il convient de souligner que la Suisse applique ces mêmes principes à la gestion de ses propres différends.

Dans l'affaire qui nous occupe, Monsieur le Président, la Suisse regrette de devoir reconnaître que, au vu de la nature unilatérale de ses démarches, restées quasi sans réponse, une solution négociée s'est révélée impossible. Le 6 mai 2019, la Suisse a donc été obligée d'engager une procédure devant le tribunal arbitral constitué au titre de l'annexe VII de la Convention. Elle sollicite aujourd'hui des mesures conservatoires auprès du Tribunal international du droit de la mer afin d'éviter que des dommages irréparables ne soient causés à la Suisse avant que le tribunal arbitral ne soit constitué et pleinement opérationnel. Tel qu'il sera démontré plus tard, un risque réel et imminent existe bel et bien, en raison des actions menées par le Nigéria à l'encontre du « San Padre Pio », de son équipage et de sa cargaison.

La Suisse a non seulement le droit de défendre son navire, mais aussi l'équipage et la cargaison qui s'y trouvent. En effet, comme votre jurisprudence l'indique clairement, comme par exemple dans l'affaire « Virginia G », un navire doit :

> être considéré comme une unité et [...], par conséquent, le « Virginia G » [ou ici, le « San Padre Pio »], son équipage et sa cargaison, ainsi que son propriétaire et toute personne impliquée dans son activité ou ayant des intérêts liés à cette activité doivent être traités comme une entité liée à l'Etat du pavillon.[2]

Afin d'éviter que des dommages irréparables ne soient causés à cette unité représentée par le navire, la Suisse prie donc votre Tribunal de prescrire, en application de l'article 290, paragraphe 5, de la Convention, les mesures conservatoires suivantes :

> Le Nigéria prendra immédiatement toutes les mesures nécessaires pour que les restrictions imposées à la liberté, à la sécurité et à la circulation du « San Padre Pio », de son équipage et de sa cargaison soient immédiatement levées pour leur permettre de quitter le Nigéria.

[2] *Navire « Virginia G » (Panama/Guinée-Bissau), arrêt, TIDM Recueil 2014*, p. 48 par. 127.

EXPOSÉ DE MME CICÉRON BÜHLER – 21 juin 2019, matin

Monsieur le Président, avec votre permission, notre équipe va expliquer pourquoi ces mesures conservatoires sont nécessaires afin d'éviter un dommage irréparable aux droits de la Suisse. Elle démontrera que toutes les conditions prévues pour la prescription des mesures conservatoires au titre de l'article 290, paragraphe 5, de la Convention sont remplies.

Les plaidoiries de ce matin sont organisées comme suit :

Premièrement, je vais présenter, de manière plus approfondie, les faits. Après quoi, je vous demanderai d'appeler à la barre Monsieur le Professeur Lucius Caflisch qui évoquera certaines questions de compétence liées à notre demande.

Madame la Professeure Boisson de Chazournes expliquera ensuite le lien entre les mesures conservatoires et les demandes au fond de cette affaire. Elle mettra en évidence la plausibilité des droits invoqués par la Suisse.

Finalement, Sir Michael Wood démontrera l'urgence et la nécessité de prescrire les mesures conservatoires demandées afin d'éviter qu'un dommage irréparable ne soit causé aux droits de la Suisse.

Monsieur le Président, Mesdames et Messieurs les Juges, j'en viens maintenant aux faits de cette affaire.

Le « San Padre Pio » est un navire-citerne battant pavillon suisse. Ce navire est de taille moyenne et a été construit en 2012. Comme illustré par le schéma sur vos écrans[3], il est géré par la compagnie suisse *ABC Maritime*, l'armateur, et est affrété par *Argo Shipping and Trading*, une entreprise associée à la compagnie *Augusta Energy*, qui est également basée en Suisse. Nous ferons référence à cette dernière compagnie sous la mention d'affréteur.

Quand il a été intercepté et arrêté par la marine nigériane le 23 janvier 2018, le « San Padre Pio » était engagé à fournir du gasoil à *Anosyke*, la compagnie nigériane avec laquelle un contrat d'approvisionnement avait été conclu. Dans ce but, le navire s'est approvisionné à Lomé, au Togo, comme il est courant de le faire dans cette région, et s'est mis en route le 18 janvier 2018 en direction de la ZEE du Nigéria. La carte sur vos écrans illustre ce voyage[4]. Une fois arrivé à destination, le « San Padre Pio » a transféré ce gasoil à d'autres navires de transport.

Le Nigéria argue que les faits seraient tout autres. Il sous-entend que les opérations du « San Padre Pio » sont teintées d'illégalité, à tous les niveaux. Comme je l'ai déjà mentionné, ces éléments appartiennent au fond, et non à la phase actuelle. Cependant, je souhaite répondre à certains éléments particulièrement choquants de leur description, à la fois erronée et dénuée de preuve.

Ainsi, le gasoil à bord serait le produit de vols au Nigéria, de même que, semble-t-il, tout le commerce de matières premières passant par Lomé. Aucune preuve n'est apportée pour étayer ces graves insinuations, l'une contre un navire et l'autre contre le Togo, un Etat-tiers. Le *Clearance Certificate* sur lequel figure le sceau des autorités togolaises contredit, de manière officielle, la version du Nigéria[5]. Plus généralement, certains des centres de stockage de pétrole les plus importants de la région se trouvent au Togo.[6] Cela va également à l'encontre des sous-entendus du Nigéria quant à l'illicéité des activités originaires de ce pays.

Deuxièmement, d'après le Nigéria, le « San Padre Pio » n'était pas en possession des permis nécessaires, en particulier, les *Navy Certificates* et le permis du Département des ressources pétrolières. Une telle allégation nous a surpris à deux égards. Tout d'abord, il ne revient pas au navire de se procurer de tels documents, mais à l'importateur, chose qu'il avait

[3] Voir onglet 2 du classeur des juges, Schéma (relations liées à la propriété et au commerce de la cargaison), également annexé à la *notification*, (annexe NOT/CH-2).

[4] Voir onglet 3 du classeur des juges, Carte (route du « San Padre Pio » *de Lomé vers l'Odudu Terminal*), également annexée à la *notification* (annexe NOT/CH-5).

[5] Voir onglet 4 du classeur des juges, certificat d'autorisation du 18 janvier 2018.

[6] Voir onglet 5 du classeur des juges, brochure du dépôt « Compel ».

faite[7]. On peut également se demander pourquoi les autorités nigérianes ont accepté de délivrer les permis pour des activités impliquant le « San Padre Pio » si, comme le Nigéria l'affirme, sa marine soupçonnait, de longue date, le navire d'exercer des activités illicites. Là encore, d'ailleurs, aucune preuve ne vient étayer cette allégation.

Troisièmement, le Nigéria affirme que le « San Padre Pio » se trouvait en certains points à certaines dates. Or ces lieux et ces dates ne correspondent en rien aux données officielles dont nous disposons. Bien que la charge de la preuve leur revienne, nous nous permettons de vous référer, Mesdames et Messieurs les Juges, aux éléments de preuve fournis par la Suisse. Comme vous le voyez sur l'écran[8], le « San Padre Pio » aurait dû se trouver, par exemple, le 10 juin 2017, au *Brass Oil Field*, au Nigéria, alors qu'il était en réalité près de Lomé au Togo, deux points qui sont distants d'environ 310 milles marins l'un de l'autre. Le Nigéria soutient également, sans fournir de preuves ou d'exemple concret, que l'AIS, l'*Automatic Identification System* du navire, a été éteint à plusieurs reprises. Cela est démenti formellement par le capitaine. Peut-être que le Nigéria n'a pas toutes les informations à sa disposition ? Cela semble plus que vraisemblable si on prend en compte que l'un des actes d'accusation identifiait le « San Padre Pio » comme ayant auparavant porté le nom d'un navire dont le tonnage enregistré était plus de dix fois supérieur au sien.[9] Il se pourrait donc que le Nigéria associe au « San Padre Pio » des informations qui se rapportent à un autre navire.

Mesdames et Messieurs les Juges, permettez-moi de revenir sur ce qui s'est réellement passé en janvier 2018. C'est lors du troisième transfert de navire à navire que le « San Padre Pio » a été intercepté et saisi par la marine nigériane. Comme vous pouvez le voir sur la carte qui s'affiche à l'écran[10], le « San Padre Pio » se trouvait, au moment des faits, à environ 32 milles marins du point le plus proche de la côte nigériane. Les transferts de navire à navire ont donc eu lieu dans la zone économique exclusive du Nigéria. Un point important à noter – et relevé sur la nouvelle carte qui s'affiche sur vos écrans[11] – est que le navire se trouvait à plus de deux milles marins de l'installation la plus proche. Le « San Padre Pio » était donc en dehors de toute zone de sécurité que le Nigéria aurait pu établir en application de la Convention.

Au cours d'une opération de transfert, qui n'avait rien de différent de celles ayant eu lieu précédemment, la marine nigériane est intervenue. Le 24 janvier 2018, elle a donné l'ordre au navire de se rendre à Port Harcourt, au port nigérian de *Bonny Inner Anchorage*, situé en haut à gauche de la carte sur vos écrans[12]. Le « San Padre Pio » n'a pas eu d'autre choix que d'obéir et a été escorté à Bonny Inner Anchorage, où le navire est immobilisé depuis lors. Les 16 membres de l'équipage ont pour leur part été arrêtés avant d'être placés en détention sur le navire.

Six semaines plus tard, soit le 9 mars 2018, le navire, avec son équipage, a été remis par la marine à la Commission nigériane contre les délits économiques et financiers, commission qui est aussi connue par l'abréviation de son nom en anglais, EFCC. Le but annoncé était que l'EFCC allait instruire l'enquête préliminaire. Le même jour, les membres de l'équipage ont été transférés dans une prison à terre où les conditions de détention étaient très dures, notamment du fait de la surpopulation carcérale.

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[7] Voir onglet 6 du classeur des juges, permis du DPR et certificat de la marine.

[8] Voir onglet 7 du classeur des juges, données AIS.

[9] Voir annexe NOT/CH-23.

[10] Voir onglet 8 du classeur des juges, carte marine (présentation générale de la côte du Nigéria), également annexée à la notification (annexe NOT/CH-11).

[11] Voir onglet 9 du classeur des juges, carte marine (zone de développement), également annexée à la notification (annexe NOT/CH-6).

[12] Voir onglet 8 du classeur des juges, carte marine (présentation générale de la côte du Nigéria), également annexée à la notification (annexe NOT/CH-11).

EXPOSÉ DE MME CICÉRON BÜHLER – 21 juin 2019, matin

Le Nigéria cherche à minimiser l'expérience dans ses prisons. Cependant, la gravité du problème a été reconnue par de nombreuses instances indépendantes. Les conditions dans les prisons du Nigéria ont par exemple été évaluées par les Nations Unies en 2018 dans l'examen périodique universel du Conseil des droits de l'homme, et le résultat confirme toutes les craintes. « Les conditions de détention demeuraient extrêmement dures et mettaient la vie en danger. Elles se caractérisaient par une surpopulation et une insuffisance de soins médicaux, de nourriture et d'eau. »[13]

Les conditions dans la prison de Port Harcourt où l'équipage a été détenu ne semblent pas être meilleures que celles du reste du pays, loin de là ; le Vice-président du Nigéria, le Professeur Yemi Osinbajo a en effet informé la presse, dans un article qui s'affiche sur vos écrans[14], des résultats d'une enquête sur les conditions carcérales dans le pays. Il a mentionné en particulier la surpopulation de cette prison spécifique construite pour 800 personnes et en accueillant presque 5 000.

Ainsi, pour l'équipage du « San Padre Pio », l'infrastructure carcérale laissait à désirer – et cela par tous les standards. Mais c'est aussi du point de vue psychologique que cette détention a mis les marins à rude épreuve : c'est lors de cette période qu'ils ont rencontré des compatriotes ukrainiens, également marins, qui languissaient en prison depuis des années, sans perspective de libération. Ces personnes étaient prises dans les rouages du système et laissées pour compte par l'armateur et l'Etat du pavillon du navire sur lequel elles travaillaient. La rencontre entre les marins du « San Padre Pio » et leurs compatriotes les a grandement perturbés et leur a fait craindre de subir le même sort. Heureusement, dans l'affaire qui nous a amenés ici, l'armateur s'est comporté de manière différente. C'est grâce à l'engagement de cette entreprise suisse que les conditions de détention des marins ont pu être quelque peu améliorées.

Comme cela a été mentionné dans la notification[15], c'est également à la suite d'interventions des avocats locaux de l'armateur que 12 membres de l'équipage ont pu sortir de prison et ont été reconduits au navire le 20 mars 2018. Ils y sont cependant restés sous surveillance armée sans pouvoir quitter le Nigéria. Les quatre autres membres de l'équipage, à savoir le capitaine et les trois officiers, sont, quant à eux, restés en prison pendant cinq semaines. Ils n'ont pu regagner le navire que le 13 avril 2018. Ils s'y trouvent depuis, sous surveillance armée permanente, et ne pouvant aller à terre sans autorisation préalable.

Alors que le premier acte d'accusation incluait les 16 membres d'équipage, il a été modifié le 19 mars 2018 pour ne viser plus que les quatre officiers. Néanmoins, ce n'est que 6 mois après leur arrestation et 4 mois après que les accusations contre eux aient été abandonnées que les 12 membres d'équipage ont été autorisés à quitter le pays. Ce dénouement heureux, évoqué dans la notification[16], n'est d'ailleurs pas venu de lui-même : l'armateur a dû œuvrer durant des mois pour négocier le départ de ces 12 hommes.

Les 12 marins ont été remplacés par un nouvel équipage, qui est lui-même changé à intervalles réguliers. En effet, un navire comme le « San Padre Pio » a besoin d'un équipage sur place pour en assurer l'entretien journalier et respecter les prescriptions de sécurité. Bien que ces marins n'aient rien à voir avec l'affaire en cours, ils se voient obligés, par les autorités nigérianes, de demander eux aussi une autorisation préalable à tout débarquement. S'agissant

[13] Rapport du Haut-Commissariat des Nations Unies aux droits de l'homme, Compilation concernant le Nigéria, A/HRC/WG.6/31/NGA/2 (août 2018), par. 31.

[14] Voir onglet 10 du classeur des juges, article de presse du 2 février 2018, publié dans *This Day* et librement accessible en ligne, « Port Harcourt Prison Has 5,000 Inmates Instead of 800, Says Osinbajo », https://www.thisdaylive.com/index.php/2018/02/02/port-harcourt-prison-has-5000-inmates-instead-of-800-says-osinbajo/.

[15] Notification, p. 5, par. 19, et annexes NOT/CH-26 et 27.

[16] Notification, p. 5, par. 19, et annexes NOT/CH-28 et 29.

du capitaine et des trois autres officiers, ils n'ont pas été autorisés à quitter le Nigéria et continuent de se trouver sur le navire sous surveillance armée permanente.

Le Nigéria affirme, dans ses observations écrites et à nouveau dans une note diplomatique reçue il y a seulement deux jours, que les marins, capitaine et officiers compris, sont libres de leurs mouvements et peuvent quitter le navire à souhait. La seule restriction imposée aux quatre officiers serait de ne pas pouvoir quitter le pays. Cependant, quoique les conditions de la mise en liberté sous caution puissent dire, les hommes qui se trouvent sur le navire, et les quatre officiers en particulier, ne sont pas libres de leurs mouvements. Ils sont en fait détenus. Ils doivent en effet demander une autorisation afin de pouvoir débarquer et cette autorisation est régulièrement refusée, sans aucune raison, parfois dans des circonstances dignes d'un roman de Kafka. Un exemple particulièrement choquant est celui des 25 et 26 juin 2018, lorsque les quatre officiers se sont vus, à plusieurs reprises, refuser par la marine le droit de débarquer afin d'assister aux audiences les concernant eux-mêmes. La *Federal High Court of Nigeria* a dit de cette situation *(continue en anglais)* : « The conduct of the Nigerian Navy in refusing the defendants permission to disembark from the fifth defendant is in flagrant violation of the order of this court admitting the defendants to bail. »[17]

(reprend en français) Avoir accès à des soins médicaux n'a pas été plus facile. Les demandes de débarquer pour voir un professionnel de santé n'ont en effet souvent pas été acceptées. Si ces hommes n'ont pas pu débarquer pour participer aux procédures judiciaires menées à leur encontre ou pour bénéficier de soins de santé urgents, il ne peut sérieusement être affirmé qu'ils sont libres de leurs mouvements.

Le Nigéria met l'accent sur le fait que les quatre officiers ont choisi de retourner sur le bateau. Ce choix n'en est pas vraiment un, à tout le moins pas pour un capitaine et des officiers professionnels. On n'abandonne pas son navire. Le triste destin d'autres navires abandonnés dans la région ne fait que conforter cette réalité. Les officiers ne devraient pas subir de préjudices parce qu'ils prennent leurs responsabilités envers le navire sur lequel ils servent et font preuve d'une grande éthique professionnelle. En outre, lorsqu'ils ont fait ce choix, les quatre officiers ne connaissaient ni les restrictions évoquées plus haut, ni d'ailleurs la durée de leur séjour à bord.

Cela fait maintenant près de 17 mois que les quatre officiers sont détenus et qu'ils n'ont revu ni leurs familles, ni leur pays. Les conséquences humaines de cette situation sont dramatiques : elles s'étendent aux femmes, aux enfants ainsi qu'aux parents de ces quatre hommes, qui attendent avec anxiété, depuis bientôt un an et demi, le retour de leurs proches. Il est donc fondamental que le capitaine et les trois officiers soient autorisés à quitter le Nigéria. A ce stade, il s'agit de considérations d'humanité.

Cette situation, très sérieuse en soi, est rendue plus problématique encore par les dangers que présente la région. La piraterie et les vols à main armée en mer sont en effet endémiques dans le golfe de Guinée, comme le constate le bureau maritime international de la Chambre internationale du commerce. *(continue en anglais)* « As a region, the Gulf of Guinea accounts for 22 of the 38 incidents in the first quarter 2019. All first quarter kidnappings occurred in this region – with 21 crew kidnapped in five separate incidents. »[18]

(reprend en français) Les menaces qui pèsent sur la sûreté du « San Padre Pio » depuis qu'il se trouve à *Bonny Inner Anchorage* se sont récemment matérialisées. Une attaque a en effet été menée par des pirates contre le navire le 15 avril 2019, à 21 h 20 (heure locale). Cette

[17] Voir onglet 11 du classeur des juges, requête sur notification devant la Haute Cour fédérale du Nigéria du 26 juin 2018.

[18] Voir onglet 12 du classeur des juges, International Chamber of Commerce – International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships,* Report for the period 1 January - 31 March 2019, p. 19, également annexé à la notification (annexe NOT/CH-53).

attaque a mis en péril la vie de l'équipage et des autres personnes se trouvant à bord. Un tel événement n'est malheureusement pas rare dans cette zone.

Ainsi, détenus sur un navire immobilisé depuis près de 17 mois dans une région où sévissent les pirates, le capitaine et les trois autres officiers du « San Padre Pio », tout comme les autres personnes à bord de ce navire, courent le risque d'être enlevés, blessés, voire tués. La publicité autour de cette affaire n'est pas étrangère à cette situation.

Comme mentionné précédemment, le Nigéria prétend, dans une note diplomatique pour le moins récente, que les quatre hommes sont libres de leur mouvement au sein du Nigéria. Cela n'est pas vrai. Premièrement, la coïncidence temporelle avec les présentes audiences n'a rien de fortuit ; nos contradicteurs veulent vous démontrer que des mesures conservatoires ne seraient pas nécessaires pour les quatre officiers, alors que le contraire est vrai. Deuxièmement, le Nigéria présente les faits de manière sélective. Troisièmement ; il ne dit pas que les quatre hommes bénéficient de la liberté de mouvement, mais seulement que les conditions de libération sous caution envisagent une telle liberté. La réalité est tout autre.

Que le Nigéria argue, dans ses observations écrites, que le capitaine et les trois officiers peuvent se déplacer à leur guise au Nigéria est fallacieux. Au-delà de la responsabilité face au navire sous leur commandement, les quatre hommes feraient face, à terre, à une situation sécuritaire préoccupante. S'agissant de Port Harcourt, des affrontements armés ont lieu régulièrement et il est explicitement déconseillé aux voyageurs de se rendre dans la zone littorale proche du « San Padre Pio »[19]. La situation n'est d'ailleurs pas meilleure dans le reste du pays.

Au-delà de ces aspects humains très préoccupants, il convient de se rappeler que le navire et sa cargaison font eux aussi l'objet d'une immobilisation depuis près de 17 mois. Comme le démontrent les pièces de la procédure écrite[20], cela cause des dommages très sérieux au navire, à sa cargaison, et à toutes les personnes qui ont un intérêt à leur bon fonctionnement. Le navire, par exemple, n'a pas pu être maintenu au niveau des standards requis ; il n'est même plus en état de se déplacer et, d'après les estimations de l'armateur, il faudra un passage en cale sèche pour qu'il puisse être remis en état de marche. Même en l'absence d'attaques de piraterie, cette situation cause des dangers majeurs. L'immobilisation forcée crée en effet des risques pour le navire en matière de collision et en cas de condition météorologiques difficiles. Il y a de cela seulement deux semaines, un autre navire, le navire « Invictus », a heurté à deux reprises le « San Padre Pio », qui n'a pas été en mesure d'éviter ce navire à la dérive. Selon les informations de la garde armée à bord du « San Padre Pio », le « Invictus » est un navire saisi par les autorités nigérianes, ancré à *Bonny Inner Anchorage*, sans équipage, et qui se trouve là depuis 3 ans. Cette fois-ci, la collision n'a pas causé de dommages, mais il n'est pas certain que cela soit encore le cas si un évènement similaire venait à se reproduire. Cela démontre, une fois de plus, qu'un tel amarrage, surtout sur une période prolongée, est totalement inadéquat et dangereux.

La cargaison, quant à elle, subit simultanément deux types de dépréciations. Tout d'abord, elle est utilisée pour maintenir le fonctionnement du navire à hauteur d'environ 35 tonnes métriques par mois. Au prix d'environ 600 dollars des Etats-Unis par tonne métrique, cela représente une somme importante, qui continue d'augmenter. En outre, d'un point de vue qualitatif, la cargaison restante perd aussi de sa valeur, en raison des conditions non contrôlables de stockage. Une vérification précise de l'état du gasoil n'a malheureusement pas été possible, les experts n'ayant pas reçu l'autorisation de monter à bord pour ce faire. Cette perte de valeur de la cargaison restante n'est pas comprise dans le calcul engendré par la

[19] Voir onglet 13 du classeur des juges, conseils aux voyageurs pour le Nigéria, Déparement fédéral des affaires étrangères, librement accessible en ligne https://www.eda.admin.ch/eda/fr/dfae/ representations-et-conseils-aux-voyageurs/nigeria/conseils-voyageurs-nigeria.html.

[20] Voir en particulier la notification, p. 10, par. 32, et la demande, p. 9-12, par. 36-46.

détention du navire. Pourtant, les chiffres sont déjà impressionnants : chaque jour d'immobilisation du navire coûte environ 12 000 dollars des Etats-Unis à l'affréteur, la somme s'élevant, à ce jour, à plus de 6,2 millions de dollars.

Ces pertes, en augmentation constante, sont très regrettables et attribuables en totalité au Nigéria. A cela s'ajoute une crainte fondée sur un triste précédent, que nous espérons ne pas voir se reproduire en l'espèce. Il s'agit de la crainte de voir le « San Padre Pio » avoir le même triste sort que le navire « Anuket Emerald ». Ce navire a été confisqué par les autorités nigérianes et, à peine plus de six mois après la prise de contrôle définitive du navire par le Nigéria, il a littéralement brisé ses chaines et est allé s'échouer sur la plage de Elegushi vers Lagos, au Nigéria. Le destin probable de l'« Anuket Emerald » est de rouiller en paix, et de polluer l'environnement pour les décennies à venir – avec tous les risques sanitaires que cela implique pour la population locale. Nous espérons de tout cœur qu'il n'en sera pas de même avec le « San Padre Pio ».

Monsieur le président, Mesdames et Messieurs les juges, vous entendrez sans aucun doute le Nigéria argumenter qu'il ne fait qu'appliquer son droit de combattre des activités criminelles dans la région. Tel est sans aucun doute sa prérogative. Mais rappelons le, l'application du droit interne ne doit pas se faire au prix du respect du droit international. Ce principe a d'autant plus d'importance quand il s'agit des droits et obligations dans le cadre du droit de la mer, qui sont intrinsèquement liés les uns aux autres. Vous le savez mieux que nous tous, la Convention est le résultat d'un compromis global, le bien connu « package deal ». Le régime de la ZEE est le résultat de négociations complexes où la reconnaissance des intérêts des Etats côtiers dans des domaines spécifiques a été compensée par l'assurance que les intérêts des Etats de pavillon seraient protégés, en particulier la liberté de navigation et la compétence exclusive de cet Etat, hormis les cas où la Convention en a prévu autrement.

La Suisse reconnaît, et encourage, la lutte contre la criminalité, mais elle demande que cette lutte se déroule au sein du cadre légal pertinent. Rien n'aurait empêché le Nigéria de prendre contact avec l'Etat du pavillon et de lui demander d'enquêter sur les violations alléguées. Le Nigéria n'était en possession d'aucun élément pouvant le laisser penser que la Suisse ne répondrait pas.

Les actions unilatérales du Nigéria, que nous regrettons vivement, causent un préjudice direct aux personnes ayant un intérêt dans le « San Padre Pio ». Cette situation est rendue plus pénible encore par la manière dont les procédures administratives et judiciaires se déroulent au niveau interne. Elles ont été – et sont toujours – difficiles à suivre et, en tout cas à trois égards, se sont révélées problématiques.

Premièrement, la lenteur des procédures. Les poursuites engagées contre le navire et son équipage devant les tribunaux du Nigéria n'ont que très peu progressé depuis la première audience de libération sous caution, le 23 mars 2018. Les audiences ont été régulièrement ajournées pour divers motifs qui sont présentés plus en détail dans la notification[21].

Deuxièmement, le ministère public a changé fréquemment, et semble encore changer, la direction de ses poursuites. Comme le décrit la demande[22], les chefs d'accusation ont été modifiés à plusieurs reprises, sans que les procédures en cours sur les chefs d'accusation précédents ne semblent progresser.

Troisièmement, on ne peut que noter un manque certain dans les communications faites aux accusés potentiels. Par exemple, suite à la demande de confiscation de la cargaison dont je viens de faire état, l'affréteur a introduit une action en justice afin de surseoir à l'exécution de la décision. Un juge lui a donné raison, au motif que la demande originale était dirigée contre

[21] Notification, p. 5, par. 20, et annexes NOT/CH-31 à 34.

[22] Demande, p. 3-4, par. 12, et annexes NOT/CH-31 à 36, 39 ; annexe PM/CH-2.

la propriété de l'affréteur, sans que celui-ci fusse désigné comme défendeur dans l'affaire, ce qui l'a empêché de participer à la procédure et de se défendre.

La Suisse respecte pleinement la souveraineté du Nigéria et ne désire en rien porter préjudice à la réputation de ses institutions. Certains aspects des procédures en cours, cependant, nous étonnent. Il nous semble nécessaire de les mentionner ici. Tout d'abord les procédures, qui ont avancé lentement pendant plus d'un an, se sont soudainement accélérées à l'annonce, dans la presse, que la Suisse envisageait d'ouvrir une procédure sur le plan international. Cette information n'aurait pourtant pas dû être nouvelle pour le Nigéria. Il avait été en effet informé officiellement. Mais la coïncidence temporelle de cette accélération avec les articles de journaux des mois d'avril et mai doit être relevée. Depuis début mai, pas moins de dix dates d'audience ont été planifiées. Bien que certaines de ces audiences n'aient pas eu lieu, cela suggère néanmoins une accélération soudaine, impressionnante et étonnante, pour le moins qu'on puisse dire, de la procédure interne. On doit se demander si le Nigéria désire simplement rattraper son retard, ou si une volonté existe de prendre possession de la cargaison du navire avant une potentielle libération du navire, ou voire même de placer ce Tribunal devant un fait accompli.

Même les experts locaux s'interrogent sur les pratiques de la marine nigériane et la légalité des procédures en cours. Ainsi, par exemple, un avocat du Nigéria connu pour son engagement dans la lutte contre la corruption, maître Femi Falana, a récemment commenté, dans un article paru le 5 juin 2019 dans *The Cable*, l'affaire qui nous concerne et évoqué certaines problématiques connexes[23]. Le document auquel nous faisons référence est nouveau – il est postérieur à la date de la Demande. Les réflexions de maître Falana sont telles qu'elles méritent que je vous les lise dans leur langue originale *(continue en anglais)* :

> The navy arrested the Swiss vessel and the … crew aboard the vessel on January 23, 2018 for illegal entry and illegal fuel trade. … Since then the ship and the crew have been detained without trial.
>
> Why has the navy not completed investigation into the alleged crimes for almost one and a half years? Why should the navy expose the country to unwarranted international embarrassment? …
>
> Many more cases are going to be filed against the federal government in municipal and foreign courts due to the provocative impunity of the nation's naval authorities who are behaving as if they are above the law … From the information at my disposal, the Nigerian navy is detaining not less than 150 people without trial. Some have been incarcerated incommunicado for over two years.

(reprend en français) Mesdames et Messieurs les juges, en plus d'une communication très lacunaire dans le cadre de la procédure interne, des manquements similaires, et à certains égards encore plus graves, ont eu lieu au niveau interétatique. Le Nigéria a en effet omis de tenir la Suisse informée du déroulement des événements liés au « San Padre Pio ». A aucun moment il n'a jugé bon d'informer la Suisse, qui est l'Etat du pavillon. Des occasions, il y en a eu pourtant plusieurs lors ou à la suite des nombreuses actions et procédures engagées à l'encontre du navire, de son équipage et de sa cargaison. Il a fallu que la Suisse prenne contact avec les autorités nigérianes, et cela à plusieurs reprises, pour qu'une copie des premières accusations émises contre le navire et son équipage lui soit transmise. Le Nigéria a pris plus de deux mois pour transmettre à la Suisse des informations, somme toute très sommaires.

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[23] Voir onglet 14 du classeur des juges, article de presse du 5 juin 2019, publié dans *The Cable* et librement accessible en ligne, « Switzerland sues Nigeria over vessel detained by navy since 2018 », https://www.thecable.ng/switzerland-sues-nigeria-over-detained-vessel.

De plus, les difficultés de communication et d'accès à l'information n'ont fait que s'aggraver. La Suisse s'est engagée diplomatiquement à tous les niveaux avec le Nigéria afin de trouver une solution à l'amiable sur ce sujet de tension entre les deux pays. Ainsi que l'évoque en détail la notification[24], la Suisse a tenté à de multiples reprises et par divers moyens d'aborder la question du « San Padre Pio ». Elle a remis non moins de quatre versions d'un aide-mémoire à ses interlocuteurs nigérians, dont notamment le directeur de l'EFCC, le Ministre de l'industrie, du commerce et de l'investissement, et même les Ministres des affaires étrangères et de la justice.

Ces aide-mémoires présentaient la position de la Suisse : les actions du Nigéria envers le « San Padre Pio » sont qualifiées de violations du droit de la mer. Ils démontrent également la volonté de la Suisse de régler le différend. Le temps passant et le Nigéria n'engageant pas le dialogue, il a semblé de moins en moins probable que la voie diplomatique, à elle seule, allait aboutir. Face à cette impasse, la Suisse a réitéré une fois encore sa position dans l'aide-mémoire transmis au Nigéria le 25 janvier 2019 lors du *World Economic Forum* à Davos. Remis par le Ministre suisse des affaires étrangères lui-même, ce document indiquait que la Suisse envisageait, faute de progrès dans la recherche d'une solution, d'utiliser les procédures judiciaires prévues par la Convention. A cette occasion, le Nigéria a promis une réaction, que la Suisse a attendue, en vain, pendant plusieurs semaines, avant de réaliser que le manque de réponse n'était pas seulement dû à la phase de transition qui a suivi les élections nigérianes. Nous aurions en effet compris que cette situation politique cause des retards au plan interne et nous avons donc fait preuve de patience. Cela n'a malheureusement mené à rien. Pire, cela nous est reproché aujourd'hui.

La Suisse aurait considéré comme signe de progrès que le Nigéria entre en matière ou même qu'il donne une réponse sur la substance ou le règlement du différend. A la grande surprise et, honnêtement, à la grande déception de la Suisse, le Nigéria n'a jamais semblé accorder la moindre importance aux démarches de notre pays. Sauf en ce qui concerne la copie des accusations transmises par l'EFCC en mai 2018, un profond silence a fait suite à toutes les tentatives de discussion et de négociations, qu'il s'agisse de questions de substance ou du mode de règlement du différend. Même la seconde communication – et première note diplomatique – du Nigéria portant sur cette affaire, reçue, à souligner, le lendemain du dépôt de la demande en mesures conservatoires et qui s'affiche sur votre écran, ne dit rien de plus que *(continue en anglais)* « appropriate government agencies in Nigeria are seriously attending to the case.»[25].

(reprend en français) C'est donc sur cette base factuelle, et après de longues et infructueuses tentatives de régler ce différend directement, que la Suisse a dû envisager de recourir aux procédures prévues par la section 2 de la partie XV de la Convention. Elle a ensuite tenté d'engager le dialogue avec le Nigéria à ce sujet, puis, face à l'absence de réaction de celui-ci, s'est résolue à formellement entamer une procédure arbitrale. La Suisse se tourne maintenant vers vous, Monsieur le Président, Mesdames et Messieurs les juges, afin de préserver ses droits au fond en attendant que le tribunal arbitral puisse prendre le relais.

Je vous remercie, Monsieur le Président, Mesdames et Messieurs les juges. Je vous demande de bien vouloir appeler à la barre le professeur Lucius Caflisch, qui vous parlera de la compétence *prima facie* du tribunal arbitral.

THE PRESIDENT: Thank you, Ms Cicéron Bühler.

I now invite Mr Lucius Caflisch to make his statement.

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[24] Notification, p. 6-7, par. 24-25, et annexes NOT/CH-40 à 50.

[25] Voir onglet 15 du d classeur des Juges, note diplomatique 34/2019 de la République fédérale du Nigéria, datée du 22 mai 2019.

STATEMENT OF MR CAFLISCH
COUNSEL OF SWITZERLAND
[ITLOS/PV.19/C27/1/Rev.1, p. 14–20]

Mr President, Members of the Tribunal, it is an honour and a privilege to appear before you on behalf of the Swiss Confederation.

My task is to outline briefly the position of the Swiss Government on jurisdictional matters. Switzerland has accepted the jurisdiction of your Tribunal pursuant to article 287 of the Law of the Sea Convention; Nigeria has made no declaration under that article. In such situations, the subsidiary means to ensure the compulsory character of the Convention's jurisdictional system is arbitration under Annex VII of the Convention. Switzerland has consequently notified Nigeria of its submission of the dispute between the two States to arbitration by a Notification and Statement of Claims dated 6 May 2019.

The constitution of arbitral tribunals under article 3 of Annex VII of the Convention may take time. In some circumstances there is, however, a need to prescribe urgent measures to preserve the rights of the parties and/or to protect the marine environment. This is relatively simple when a case comes before a pre-constituted body such as this Tribunal or the International Court of Justice. It is more complex in the case of Annex VII arbitration where the establishment of the arbitral tribunal and, therefore, its ability to act may be relatively far away.

For this reason, the Convention assigns an important function to your Tribunal. Article 290, paragraph 5, reads – and I quote:

> 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.

Accordingly, the Tribunal may not only prescribe provisional measures if it considers that, *prima facie*, the arbitral tribunal to be set up in accordance with section 2 of Part XV of the Convention would have jurisdiction. It is Switzerland's contention that the arbitral tribunal to be established will have jurisdiction and that beyond a *prima facie* test.

Part XV of the Convention provides for a comprehensive system of dispute settlement, ensuring that many categories of disputes concerning the interpretation or application of the Convention can be settled in a binding way. However, to avoid surprise litigation and to give potential defendants an opportunity to change their attitude, the Convention also requires some procedural steps to be taken by the State planning to bring a case.

I will demonstrate in turn, first, that there is a dispute between Switzerland and Nigeria; second, that the dispute concerns the interpretation or application of the Convention; and, third, that Switzerland has taken the procedural steps required in Part XV of the Convention.

Mr President, Members of the Tribunal, to address the first point, there undoubtedly is a dispute between the participants to the present proceedings within the definition given by the Permanent Court of International Justice in the *Mavrommatis* case[1] and confirmed by the International Court of Justice in the *East Timor* case.[2] According to that definition: "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two

[1] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.
[2] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1955*, p. 99, para. 22.

persons". The definition says "two persons" but, in the present instance, it should say "two States".

As was confirmed by the present Tribunal in its most recent Order, the opposition of views may, in certain cases, be inferred from a party's conduct.[3] The Tribunal recalled the case law of the International Court of Justice on that point. The Court had made it clear that:

> 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.[4]

This is drawn from the *Land and Maritime Boundary, Preliminary Objections* case between Cameroon and Nigeria.

Switzerland repeatedly objected to Nigeria's conduct, explicitly stating that it considered it as violating various provisions of the Convention. Nigeria responded with a deafening silence. The respondent State was aware of Switzerland's position, yet refused to modify its conduct. This being the case, one can easily infer that the dispute existed, and continues to exist between the two States.

The second issue to be dealt with is whether the dispute concerns the interpretation or application of the Convention. The answer is that, yes, most clearly it pertains to the interpretation or application of provisions of the Convention. In particular, it concerns the provisions relative to the rights and obligations of flag States *vis-à-vis* their vessels and those relative to the rights and obligations of coastal States in their exclusive economic zone, such as the asserted right to arrest and to detain vessels flying the flag of a third State as well as their crew and cargo. The dispute concerns the interpretation and application of Parts V and VII of the Convention, including articles 56, 58, 87, 92 and 94.

Mr President, Members of the Tribunal, in its Statement in Response, Nigeria, however, challenges the assertion 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 (ICCPR) and on the Marine Labour Convention (MLC). Nigeria argues that this issue does not relate to the interpretation and application of provisions of the Law of the Sea Convention and "thus falls outside of the jurisdiction of the Annex VII arbitral tribunal".[5]

Article 56, paragraph 2, of the Convention provides that in exercising its rights and performing its duties under this Convention – please note these words – the coastal State shall have due regard "to the rights and duties of other States". Note the absence, here, of the words "under this Convention". This can only mean, at least in some situations, that the rights and duties of the states in question may not be those provided for by the Convention but are linked to them in some way, which is true here.

Indeed, in the present instance, 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 Marine Labour Convention. Some of these duties also result from customary law.

This being so, it can hardly be argued that the "alleged" dispute (the word "alleged" is borrowed from the Nigerian argument) does not concern the interpretation or application of a provision of the Convention. There is, at the minimum, a dispute over the application of

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[3] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, to be published, para. 43.

[4] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

[5] Nigeria's Statement in Response, para. 3.49.

article 56, paragraph 2, of the Convention; and Switzerland is of the firm view that there is, in the present case, a clear connection between the duties of the flag State, Switzerland, and the conduct of Nigeria, to whose exclusive economic zone the acts complained of relate. This is sufficient to conclude 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 Marine Labour Convention. To this, it must be added that article 293, paragraph1, of the Convention, which applies to all the dispute settlement mechanisms of Section 2 of Part XV of the Convention, provides that the court or tribunal having jurisdiction applies the provisions of the Convention and the other rules of international law not incompatible with it.

In addition, Nigeria contends that the alleged conventional rights "are not plausible". It is difficult to see, however, how that could be, considering the treatment suffered by crew members during almost 17 months, in the absence of there being any solid evidence of criminal activities on their part.

Finally, a word or two must be said about what is described as

> 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, with regard of their rights under the International Covenant on Civil and Political Rights and the Marine Labour Convention, as well as customary international law.[6]

These rights could be those included in article 9 of the International Covenant and those protected by articles IV and V of the Maritime Labour Convention. The passage of the claim just cited, says the Respondent, "appears to be a reference to Switzerland's right to exercise diplomatic protection, but such a right is not at stake in the present case and is thus also not plausible".[7] It is not quite clear to me what exactly the defendant means here. What is clear is that Switzerland is not, in this case, exercising diplomatic protection; it actually could not exercise such protection on behalf of Ukrainian nationals. What Switzerland can and does do is protect its own rights, as a flag State, that is those of a unit consisting of a vessel, a crew and a cargo.

Mr President, Members of the Tribunal, the third question is whether Switzerland has fulfilled all the requirements that the Convention places on potential applicants before they can submit a case to compulsory settlement under Section 2 of Part XV.

Articles 286 and 283 of the Convention are of particular interest. Article 286 provides that a dispute can be submitted to a court or tribunal "where no settlement has been reached by recourse to Section 1".

According to article 283: "The parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

For more than a year, since March 2018, on numerous occasions and through a variety of channels, Switzerland sought to settle its dispute with Nigeria and to exchange views on its settlement. I refer you not only to the attempts cited today by Ambassador Cicéron Bühler, but also to the full list of *démarches*, which are described in the Notification.[8]

Switzerland sent several diplomatic notes to the Nigerian authorities. It raised the matter in meetings with Nigerian representatives, some at the highest level, and it set out its legal position in no less than four *aide-mémoires*. In its aide-mémoire of 25 January 2019, it stated that – and I invite you to look at your screens

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[6] Statement of Claim, para. 45 (a) (iii), cited in the Statement in Response, para. 3.49.

[7] Statement in Response, para. 3.49.

[8] *Notification*, pp. 6-7, paras. 24-25, and annexes NOT/CH-40 to 50. The *Notification* is itself annexed to the *Request*.

> 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.[9]

There has been no response from Nigeria on the substance of the Swiss claim or about the modes of settling the dispute until very recently. It 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 discharged.

Switzerland has evidently respected its obligation under article 283 of the Convention. The same cannot be said of Nigeria. As your Tribunal recalled only last month in the case opposing Ukraine to Russia: "The obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute."[10] Nigeria's silence until very recently does not conform to the obligation to exchange views, let alone of doing so expeditiously.

Mr President, Members of the Tribunal, you may hear Nigeria argue that there can be no urgency since Switzerland attempted to negotiate for such a long period of time. My colleague, Sir Michael Wood, will show later this morning that the condition of urgency is to be understood within a specific framework and that urgency exists without any doubt in the present case. However, before he develops these points, I should like to highlight how indefensible such an argument by the Respondent – by any respondent in a similar situation – would be.

As you have heard from Ambassador Cicéron Bühler, Switzerland favours diplomatic solutions to its disputes, hence engaging in conciliation and negotiations for that purpose. This is an important element, to be understood against the background of the dispute's history. However, Switzerland's preference is not what matters. What matters is that Switzerland acted in conformity with the conventional requirements which I have just mentioned. Unfortunately, the Swiss efforts proved vain as Nigeria refused to discuss the substance of the dispute or the ways in which it could be settled.

Surely, 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. These two steps are formally required by the Convention. To punish Switzerland for having tried to settle the dispute by dialogue would fly in the face of articles 286 and 283 and create a dangerous precedent in discouraging attempts at the direct resolution of disputes.

Mr President, the time has come to end my statement. The Swiss Government's conclusion is that your Tribunal has jurisdiction over the request made by Switzerland under article 290, paragraph 5:

(i) The present case will ultimately be decided by Annex VII arbitration. It has been brought before you under article 290, paragraph 5, of the Convention to obtain an order of provisional measures.

(ii) Provisional measures under article 290 are binding. Once the arbitral tribunal is established, it may modify, revoke or confirm provisional measures initially prescribed by your Tribunal.

(iii) The claim laid by Switzerland and the lack of response on the part of Nigeria unambiguously show that there is a dispute between the Parties.

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[9] Judges' folder, tab 16, also as annex to the Notification (annex NOT/CH-50).

[10] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, para. 88; see also *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 91, para. 213.

(iv) The dispute is clearly on the application or interpretation of the Convention in the sense that it concerns the flag and coastal States' rights and obligations in the exclusive economic zone respectively towards their vessels and vessels flying the flag of a third State.

(v) Switzerland has repeatedly, but in vain, tried to engage discussions with Nigeria on the case of the "*San Padre Pio*", both on questions of substance and on the modes of settling the dispute. The conditions of articles 283 and 286 of the Convention are consequently met.

(vi) Switzerland is supportive of efforts to promote the peaceful settlement of international disputes, in particular by consultation and negotiation between the States concerned and without the involvement of third parties. It used this approach, prompted by the quality of its relations with Nigeria. As such *démarches* are also required by the Convention, it would be inappropriate to criticize Switzerland for having sought a negotiated solution.

Mr President, this ends my observations. Thank you for your kind attention. Mr President, Members of the Tribunal. I respectfully ask you to give the floor to Professor Laurence Boisson de Chazournes.

THE PRESIDENT: Thank you, Mr Caflisch.

I now give the floor to Madame Laurence Boisson de Chazournes.

NAVIRE « SAN PADRE PIO »

EXPOSÉ DE MME BOISSON DE CHAZOURNES
CONSEIL DE LA SUISSE
[TIDM/PV.19/A27/1/Rev.1, p. 21–29]

Monsieur le Président, Mesdames et Messieurs les juges, c'est pour moi un grand honneur et un grand plaisir de me présenter devant votre Tribunal pour défendre les intérêts de la Confédération suisse. La tâche qui m'incombe ce matin est double. Je démontrerai tout d'abord que les droits, dont la protection est recherchée par la Suisse dans la présente instance, sont plausibles. En fait, ils sont plus que plausibles. Je poursuivrai ensuite mon propos en soulignant le lien qui existe entre les droits dont se prévaut la Suisse et les mesures conservatoires qu'elle sollicite. Mon collègue, Sir Michael Wood, conclura cette matinée en établissant l'urgence associée à l'immobilisation du « San Padre Pio » et de sa cargaison ainsi qu'à la détention de son équipage.

Permettez-moi à présent d'aborder plus en détail le caractère plausible des droits dont la protection est recherchée par la Suisse.

Votre juridiction, tout comme la Cour internationale de Justice, applique ce critère dans les procédures en indication de mesures provisoires. Cette exigence de plausibilité a été formulée expressément pour la première fois en 2009 par la Cour, dans l'affaire des *Questions concernant l'obligation de poursuivre ou d'extrader* opposant la Belgique au Sénégal[1]. Elle est depuis devenue une condition nécessaire à l'octroi de mesures conservatoires par cette juridiction[2]. Le Tribunal de céans a également fait sienne cette exigence de plausibilité des droits allégués. Faisant suite à son usage explicite par la Chambre spéciale constituée pour connaître du différend entre le Ghana et la Côte d'Ivoire[3], votre juridiction y a également recouru dans l'*Affaire de l'Incident de l'« Enrica Lexie »*[4]. Depuis, la plausibilité des droits invoqués fait partie intégrante des critères à remplir pour la prescription de mesures conservatoires par votre Tribunal.

Ainsi que vous l'avez souligné dans votre ordonnance adoptée le 25 mai dernier en l'*Affaire relative à l'immobilisation de trois navires militaires ukrainiens*,

> [l]e pouvoir du Tribunal de prescrire des mesures conservatoires au titre de l'article 290, paragraphe 5, de la Convention a pour objet de préserver les droits invoqués par la partie demanderesse en attendant la constitution et le fonctionnement du tribunal arbitral prévu à l'annexe VII. [5]

Aussi, pour que votre Tribunal octroie des mesures conservatoires, il lui faut au préalable s'assurer de la vraisemblance des droits que la Suisse cherche à protéger[6].

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[1] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, C.I.J. Recueil 2009*, p. 151, par. 57.

[2] Voir, par exemple, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011*, p. 18, par. 53-54.

[3] *Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 158-159, par. 58-62.

[4] *L'incident de l'« Enrica Lexie » (Italie c. Inde), mesures conservatoires, ordonnance du 24 août 2015, TIDM Recueil 2015*, p. 197, par. 84-85.

[5] *Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie), ordonnance du 25 mai 2019*, par. 91 ; voir aussi *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 155, par. 39.

[6] *Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie), ordonnance du 25 mai 2019*, par. 91 ; voir également, *L'incident de l'« Enrica Lexie » (Italie c. Inde), mesures conservatoires, ordonnance du 24 août 2015, TIDM Recueil 2015*, p. 197, par. 84 ; *Délimitation de la frontière*

Pour ce faire, le Tribunal de céans n'est pas amené « à départager les prétentions des parties sur les droits et obligations qui font l'objet du différend », ni même « à établir de façon définitive l'existence des droits » invoqués par la Suisse[7]. A ce stade de la procédure,

> [c]e qui est requis, c'est davantage qu'une affirmation mais moins qu'une preuve ; autrement dit, la partie en question doit montrer qu'il existe au moins une possibilité raisonnable que le droit qu'elle revendique existe d'un point de vue juridique et que [le Tribunal] le lui reconnaîtra. [8]

Le seuil à franchir est donc « plutôt bas », pour reprendre les mots employés d'un juge dans l'*Affaire du Navire « Louisa »*[9]. Sans m'aventurer d'aucune manière, Mesdames et Messieurs les juges, je peux d'ores et déjà affirmer que les droits revendiqués par la Suisse dans la présente instance sont plausibles, comme je vais le démontrer dans les minutes à venir.

Monsieur le Président, puis-je me permettre de vous suggérer, si vous le souhaitez, de prendre votre pause maintenant ?

THE PRESIDENT: Ms Boisson de Chazournes, I think at this stage the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at noon.

(Break)

THE PRESIDENT: We will now continue the hearing. I give the floor to Ms Boisson de Chazournes to continue her statement.

MME BOISSON DE CHAZOURNES : Monsieur le Président, l'interception puis l'immobilisation forcée dont font actuellement l'objet le « San Padre Pio » et sa cargaison ainsi que la détention de son équipage s'opposent frontalement à un certain nombre de droits dont dispose la Suisse, en tant qu'Etat du pavillon, en vertu de la Convention des Nations Unies sur le droit de la mer. Ainsi que l'exposent notre notification et notre demande en prescription de mesures conservatoires, sont concernés le droit à la liberté de navigation, et notamment le droit à la liberté d'utiliser la mer à d'autres fins internationalement licites telles que le soutage, l'exercice par la Suisse de sa juridiction exclusive en tant qu'Etat du pavillon et les droits de l'équipage dont la protection incombe à la Suisse en tant qu'Etat du pavillon[10].

Mesdames et Messieurs les juges, les droits que je viens d'exposer sont en l'espèce plus que plausibles. L'idée essentielle contenue dans le principe de liberté de navigation est celle de non-interférence avec la liberté de déplacement du navire concerné. En accord avec

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maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015, p. 158, par. 58.

[7] *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 158, par. 57 ; voir aussi, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) ; Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013*, p. 354, par. 27.

[8] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, déclaration de M. le juge Greenwood, C.I.J. Recueil 2011*, p. 47, par. 4.

[9] *Affaire du navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), mesures conservatoires, opinion individuelle de M. le juge Paik, TIDM Recueil 2008-2010*, p. 73, par. 7.

[10] Voir *Demande en prescription de mesures conservatoires présentée par la Suisse*, 21 mai 2019 (ci-après *demande*), p. 7-8, par. 28-29 ; *Notification de la Confédération suisse faite au titre de l'article 287 et de l'article premier de l'annexe VII de la Convention des Nations Unies sur le droit de la mer*, 6 mai 2019 (ci-après *notification*), p. 11-12, par. 40-42. La *notification* est elle-même annexée à la *demande*.

l'ordonnancement et l'intention des rédacteurs de la Convention du droit de la mer, votre juridiction a ajouté, dans l'*Affaire du Navire « Norstar »*, la possibilité d'opérer l'activité de soutage dès lors qu'elle n'a pas trait à la pêche[11].

Or, en interceptant le « San Padre Pio » dans sa zone économique exclusive, à environ 32 milles marins de sa côte et hors de toute zone de sécurité qu'il aurait pu établir en application de l'article 60, paragraphe 4, de la Convention[12], le Nigéria a entravé le libre déplacement de ce navire. De ce fait, il a porté atteinte à la liberté de navigation de la Suisse.

De même, en décidant d'immobiliser le « San Padre Pio » et en détenant son équipage, le Nigéria rend impossible pour le navire d'accomplir le programme de navigation fixé par son affréteur. Non seulement le Nigéria entrave la liberté de déplacement du « San Padre Pio », mais il entrave également la possibilité pour celui-ci de procéder à l'activité de soutage qui, je le rappelle, a été reconnue par votre juridiction comme relevant de la liberté de navigation[13]. Ce faisant, le Nigéria empêche l'exercice par la Suisse de son droit à la liberté de navigation garantie à l'article 58, paragraphe 1, de la Convention.

En outre, l'article 92 de la Convention relatif à la condition juridique des navires, applicable dans la zone économique exclusive par le truchement de l'article 58, paragraphe 2, dispose que l'Etat du pavillon exerce de manière exclusive sa juridiction sur les navires battant son pavillon, sauf dans les cas exceptionnels expressément prévus par les traités internationaux ou par la Convention. Tel n'est pas le cas en la présente affaire. C'est donc la juridiction exclusive de la Suisse qui s'applique. Or, que cela soit pour l'interception du navire, son immobilisation et celle de sa cargaison, ou encore pour la détention de son équipage, à aucun moment le Nigéria n'a cherché à obtenir le consentement de la Suisse, en tant qu'Etat du pavillon. Ainsi, non seulement le Nigéria a contrevenu à l'exercice par la Suisse de sa juridiction exclusive en tant qu'Etat du pavillon, mais il continue d'y contrevenir. En effet, comme vous l'a précédemment rappelé l'Ambassadeur Cicéron Bühler, les poursuites engagées contre le navire, sa cargaison et son équipage devant les tribunaux nigérians se poursuivent. Encore récemment, de nouveaux chefs d'accusation ont été prononcés à l'encontre du capitaine, du navire et de l'affréteur[14]. Par ailleurs, les audiences ont été maintes fois reportées, et devraient, est-il allégué, se tenir d'ici à la fin de l'année. Mesdames et Messieurs les juges, ces poursuites constituent chaque jour un affront toujours plus grand à l'exercice par la Suisse de sa juridiction exclusive sur un navire battant son pavillon. Elles bafouent le droit que tient la Suisse de l'article 58, paragraphe 2, de la Convention, lu en conjonction avec l'article 92.

Monsieur le Président, nos amis de l'autre côté de la barre font grand cas de la Convention internationale de 2001 sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures de soute[15]. Mais ne leur en déplaisent, cette convention ne contredit aucunement la position avancée par la Suisse dans la présente instance. Cette convention n'octroie compétence aux tribunaux de l'Etat côtier que pour connaître d'actions en responsabilité civile en cas de dommages causés par des déversements d'hydrocarbures de soute. Et c'est en raison du consentement de la Suisse du fait de sa ratification à la Convention

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[11] *Affaire du navire « Norstar » (Panama c. Italie), arrêt, TIDM Recueil 2018-2019*, par. 219 ; *Affaire du navire « Virginia G » (Panama/Guinée-Bissau), arrêt, TIDM Recueil 2014*, p. 70, par. 223.

[12] Voir *Notification de la Confédération suisse faite au titre de l'article 287 et de l'article premier de l'annexe VII de la Convention des Nations Unies sur le droit de la mer*, 6 mai 2019 (ci-après *notification*), annexe NOT/CH-11.

[13] *Navire « Norstar » (Panama c. Italie), arrêt, TIDM Recueil 2018-2019*, par. 219.

[14] Voir *notification*, annexe PM/CH-2, p. 221-227.

[15] Exposé en réponse de la République fédérale du Nigéria à la demande en prescription de mesures conservatoires présentée par la Confédération suisse, par. 3.19.

que de telles actions sont possibles. Contrairement à ce qu'allèguent nos contradicteurs, cela vient donc confirmer la juridiction exclusive dont dispose l'Etat du pavillon.

J'en viens maintenant aux droits de l'équipage dont la protection incombe à la Suisse en tant qu'État du pavillon. Là encore, les droits invoqués par la Suisse sont, Monsieur le Président, plus que plausibles. En vertu de l'article 56, paragraphe 2, de la Convention, il échoit au Nigéria dans l'exercice de ses droits et obligations dans la zone économique exclusive de tenir dûment compte des obligations de l'État du pavillon qui découlent de l'article 94. Cela comprend notamment les obligations conventionnelles auxquelles la Suisse a souscrit, telles que celles incluses dans la Convention du travail maritime ou dans le Pacte international relatif aux droits civils et politiques et qui ont trait aux conditions de travail et de vie de l'équipage[16]. Le professeur Caflisch vous a rappelé l'application de ces instruments. Cela comprend également les obligations de la Suisse en vertu du droit international coutumier. Or, par ses actions, le Nigéria a rendu impossible pour la Suisse la mise en œuvre de ses obligations. Ce faisant, il apparaît clairement que l'exercice par le Nigéria de sa compétence à l'encontre du navire, de sa cargaison et de son équipage, exercice, je le rappelle, lui-même dénué de tout fondement en droit international, ne prend aucunement en compte les obligations de la Suisse en tant qu'Etat du pavillon.

Mesdames et Messieurs les juges, dans sa déclaration du 17 juin dernier, le Nigéria accorde soudainement une grande importance à la protection du milieu marin et allègue que les dispositions de la partie XII de la Convention s'en retrouvent applicables. Avant toute chose, soyez assurés que la Suisse est très soucieuse de la protection de l'environnement comme cela apparaît dans sa demande en prescription de mesures conservatoires. Cela étant, revenons aux propos de nos contradicteurs. Les dispositions invoquées ne sont pas applicables en l'espèce. Et même si elles l'étaient, *quod non*, le Nigeria aurait alors manqué à ses obligations énoncées aux articles 220, paragraphes 3, 6 et 7, 228, paragraphe 1, 230 et 231.

Mesdames et Messieurs les juges, comme je viens de le démontrer, les droits invoqués par la Suisse dans la présente instance sont au-delà du plausible.

Je vais à présent aborder une autre condition nécessaire à la prescription par votre juridiction de mesures conservatoires. Il s'agit de l'existence d'un lien entre les droits qui font l'objet de l'instance pendante sur le fond de l'affaire et les mesures conservatoires sollicitées. En effet, ainsi que je l'ai rappelé au début de ma plaidoirie, l'objet des mesures conservatoires devant le Tribunal de céans est de « préserver les droits invoqués par la partie demanderesse en attendant la constitution et le fonctionnement du tribunal arbitral prévu à l'annexe VII[17]. » Il faut donc que les mesures sollicitées par la Suisse répondent à cet objectif de protection des droits dont elle se prévaut[18]. Là encore, Monsieur le Président, Mesdames et Messieurs les juges, tel est le cas.

Pour rappel, les droits invoqués par la Suisse au fond sont énoncés aux paragraphes 40 à 42 de notre notification[19]. Il s'agit essentiellement du droit à la liberté de navigation, et notamment le droit à la liberté d'utiliser la mer à d'autres fins internationalement licites telles

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[16] La Confédération suisse a ratifié la Convention du travail maritime le 21 février 2011, voir https://www.ilo.org/dyn/normlex/fr/f?p=1000:80021:0::NO:80021:P80021_COUNTRY_ID:102861 ; et le Pacte international relatif aux droits civils et politiques le 18 juin 1992 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=fr&clang=_fr.

[17] *Immobilisation de trois navires militaires ukrainiens, ordonnance du 25 mai 2019*, par. 91.

[18] *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 159, par. 63 ; *Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie), mesures conservatoires, ordonnance du 3 mars 2014, C.I.J. Recueil 2014*, p. 152, par. 23.

[19] *Notification*, p. 11 et 12, par. 40 à 42.

que le soutage, l'exercice par la Suisse de sa juridiction exclusive en tant qu'Etat du pavillon et des droits de l'équipage dont la protection incombe à la Suisse en tant qu'Etat du pavillon.

Les mesures conservatoires sollicitées par la Suisse se trouvent au paragraphe 53 de notre demande en prescription de mesures conservatoires[20]. Elles sont constituées d'une mesure générale et de trois autres mesures plus spécifiques. Je vais à présent les aborder tour à tour.

Comme je viens de l'indiquer, la première mesure est la plus générale. Bien qu'il en ait déjà été donné lecture par Monsieur le Greffier au début de cette audience, permettez-moi, Mesdames et Messieurs les juges, de vous en rappeler le contenu.

> Le Nigéria prendra immédiatement toutes les mesures nécessaires pour que les restrictions imposées à la liberté, à la sécurité et à la circulation du « San Padre Pio », de son équipage et de sa cargaison soient immédiatement levées pour leur permettre de quitter le Nigéria.

Le lien avec les droits revendiqués par la Suisse est plus qu'évident. La mesure demandée vise à rétablir l'exercice des droits dont la Confédération est privée depuis près de 17 mois. Elle doit permettre à la Suisse d'obtenir pour le navire et son équipage le départ du Nigéria. Il s'agit donc de leur permettre de recouvrer leur liberté de déplacement conformément au principe de libre navigation. Il s'agit également de faire respecter le principe de juridiction exclusive qui est bafoué par l'immobilisation et les poursuites engagées à l'encontre du « San Padre Pio » et de son équipage. Il s'agit enfin de permettre à la Suisse de faire observer les droits de l'équipage qui lui incombent, notamment en vertu de la Convention du travail maritime. En conclusion, la mesure consistant à obtenir la levée de toutes les restrictions pesant sur le « San Padre Pio » et son équipage est directement liée aux droits objets de la procédure arbitrale à venir.

La seconde mesure conservatoire sollicitée par la Suisse est plus spécifique. Il est demandé que le Nigéria :

> a) permette au « San Padre Pio » d'être réapprovisionné et équipé de manière à pouvoir quitter, avec sa cargaison, son lieu d'immobilisation et les zones maritimes placées sous juridiction nigériane et à exercer la liberté de navigation dont jouit son État du pavillon, la Suisse, au regard de la Convention.

Comme l'indique directement son énoncé, cette mesure tend à permettre le départ du « San Padre Pio » de son lieu de mouillage au Nigéria, afin qu'il puisse accomplir son programme de navigation et d'entretien. Cette mesure est donc directement en lien avec les droits que la Suisse cherche à se voir reconnaître au fond, à savoir, le droit à la liberté de navigation et le droit au libre usage de la mer à d'autres fins internationalement licites, et plus particulièrement en l'espèce, l'activité de soutage.

La troisième mesure conservatoire a trait aux membres d'équipage détenus sur le « San Padre Pio » depuis près de 17 mois. Elle se lit comme suit : « b) [Le Nigéria doit] libérer le capitaine et les trois autres officiers du « San Padre Pio », et les autoriser à quitter le territoire et les zones maritimes sous juridiction nigériane. »

Tout comme les précédentes mesures sollicitées, cette mesure est en lien étroit avec les droits invoqués par la Suisse dans la procédure au fond. En l'espèce, il s'agit de préserver la juridiction exclusive de la Suisse en tant qu'Etat du pavillon, juridiction exclusive qui a été continuellement ignorée par le Nigéria depuis l'interception du « San Padre Pio » il y a près de 17 mois. En effet, l'exercice de toute forme de compétence par le Nigéria à l'encontre de l'équipage porte irrémédiablement atteinte à la juridiction exclusive dont dispose la Suisse en

[20] *Demande*, p. 14, par. 53.

tant qu'Etat du pavillon. Cette mesure ambitionne également de permettre à la Suisse, conformément aux articles 56, paragraphes 2 et 94, de la Convention, de s'assurer de la bonne mise en œuvre de ses obligations envers l'équipage, notamment celles découlant de la Convention du travail maritime et du Pacte international relatif aux droits civils et politiques. Là encore, le lien entre la mesure demandée et les droits en jeu est évident.

Permettez-moi, Mesdames et Messieurs les juges, de souligner avec force les considérations élémentaires d'humanité sous-jacentes à cette mesure[21]. Cela fait maintenant près de 17 mois que ces quatre hommes sont détenus sur le « San Padre Pio ». Vous imaginez sans doute bien qu'une telle période de détention ne va pas sans séquelles physiques, psychologiques et émotionnelles.

J'en viens maintenant à la dernière mesure sollicitée par la Suisse. Il est demandé au Nigéria : « c) de suspendre toutes les poursuites judiciaires et administratives, et de s'abstenir d'en engager de nouvelles qui risqueraient d'aggraver ou d'étendre le différend soumis au tribunal arbitral prévu à l'annexe VII. »

Monsieur le Président, cette mesure est une nouvelle fois directement liée aux droits dont se prévaut la Suisse au fond. Etant donné les conditions d'interception du navire, en zone économique exclusive, l'exercice de toute forme de juridiction par le Nigéria à l'encontre du navire « San Padre Pio », de son équipage et de son affréteur, affecte indubitablement le droit pour la Suisse de ne pas voir ses navires sujets à des poursuites par des Etats tiers. Le lien entre le droit pour la Suisse d'exercer sa juridiction exclusive en tant qu'Etat du pavillon et la mesure demandée est donc très clair. A cet égard, il convient de préciser que toute nouvelle procédure qui serait ouverte par le Nigéria viendrait nécessairement aggraver le différend qui existe quant au non-respect de la juridiction exclusive suisse.

Je voudrais ajouter, Mesdames et Messieurs les juges, que ce droit à l'exercice de sa juridiction exclusive sur un navire battant son pavillon n'est pas le seul droit de la Suisse affecté par ces poursuites. Ces dernières ont également pour conséquence grave de priver la Suisse de ses libertés de navigation et d'usage de la mer à d'autres fins internationalement licites. C'est en effet en raison de ces poursuites que le navire est aujourd'hui en mouillage forcé à Port Harcourt et l'équipage en détention. C'est également en raison de ces procédures que la Suisse ne peut s'assurer du respect de ses obligations envers l'équipage. Tout cela ne rend que plus évident le lien entre la mesure sollicitée et les droits que la Suisse cherche à faire reconnaître au fond.

Nous pouvons donc conclure à l'existence certaine d'un lien entre les différentes mesures demandées par la Suisse et les droits qu'elle revendique dans la présente affaire.

Avant d'en venir à mes conclusions, je souhaite rappeler deux points d'importance. L'objet de la présente procédure est de préserver les droits invoqués par la Suisse dans la procédure arbitrale. L'octroi des mesures indiquées ne constitue en aucun cas un pré-jugement sur le fond. Les demandes sollicitées par la Suisse au titre de l'urgence ne sont pas les mêmes que les demandes au fond. Pour vous en convaincre, j'invite les membres du Tribunal à comparer les conclusions suisses dans notre notification et celles dans notre demande en prescription de mesures conservatoires[22]. Tandis qu'au fond, la Suisse demande la constatation de la violation de plusieurs obligations internationales et l'engagement de la responsabilité internationale du Nigéria, devant vous, aujourd'hui, la Suisse ne cherche qu'à obtenir la protection *pendente lite* de la substance des droits invoqués. Je le répète, car c'est un point

[21] *Immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie), ordonnance du 25 mai 2019*, par. 112 ; *« Enrica Lexie » (Italie c. Inde), mesures conservatoires, ordonnance du 24 août 2015, TIDM Recueil 2015*, p. 197, par. 133 ; voir également, *Navire « Saiga » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée), arrêt du 1er juillet 1999, TIDM Recueil 1999*, p. 61 et 62, par. 155.

[22] Voir *demande*, p. 14, par. 53 ; *notification*, p. 15-16, par. 45.

important, il ne s'agit pas « d'obtenir un jugement provisionnel adjugeant une partie des conclusions »[23].

Le deuxième point que je souhaite évoquer est que contrairement à ce que nos contradicteurs avancent, l'octroi de ces mesures conservatoires ne risque pas de porter une atteinte irréparable aux droits que le Nigéria invoque[24]. Loin de là, je dirais même. Au fond, la Suisse dénonce l'exercice indu par le Nigéria de sa compétence, tandis que celui-ci prétend, à tort, qu'il est dans son bon droit. La demande de suspendre les procédures permet de préserver les thèses en présence[25]. Autrement, dans l'attente de la décision définitive, seuls les droits que le Nigéria invoque se verraient appliqués. Dans le même temps, les droits dont la Suisse se prévaut se verraient continuellement violés. Avec l'octroi de la mesure conservatoire sollicitée, ce sont les droits des deux parties qui se retrouvent protégés. Le Nigéria conserve sa capacité de poursuivre et de mettre en œuvre ses lois et la Suisse continue pour sa part, à jouir de ses droits en vertu de la Convention. Le tout jusqu'au moment où le tribunal arbitral rendra sa décision finale.

Le même raisonnement est applicable à la mesure conservatoire relative à la libération des quatre officiers. Leur détention constitue un affront quotidien aux droits invoqués par la Suisse. En revanche, leur libération permettrait de préserver les droits des deux parties à l'instance. Car si la thèse Suisse n'est pas retenue au fond, il sera toujours loisible au Nigéria de reprendre ses poursuites pénales à l'encontre des officiers ukrainiens. Au besoin, certaines procédures existent pour obtenir le retour des officiers ukrainiens.

Monsieur le Président, j'en arrive à la conclusion de mon propos. Les droits dont la Suisse se prévaut sont, nous le croyons, plausibles. En outre, il apparaît clairement que les mesures conservatoires sollicitées sont parfaitement en lien avec la protection de ces droits.

Monsieur le Président, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention. Je vous saurais gré, Monsieur le Président, de bien vouloir donner la parole à Sir Michael Wood afin qu'il vous démontre l'urgence de la situation qui a conduit aujourd'hui la Suisse à demander la prescription de mesures conservatoires. Je vous remercie.

THE PRESIDENT: Thank you, Ms Boisson de Chazournes.

I now give the floor to Sir Michael Wood.

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[23] *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979*, p. 16, par. 28 citant *Usine de Chorzów, ordonnance du 21 novembre 1927*, C.P.J.I. série A n° 12, p. 10.

[24] *Exposé en réponse de la République fédérale du Nigéria*, par. 3.43 et 3.44.

[25] *Navire « SAIGA » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée), mesures conservatoires, ordonnance du 11 mars 1998, TIDM Recueil 1998*, p. 38-39, par. 41 à 44.

STATEMENT OF MR WOOD
COUNSEL OF SWITZERLAND
[ITLOS/PV.19/C27/1/Rev.1, p. 27–36]

Mr President, Members of the Tribunal, it is a great honour to appear before you, and to do so on behalf of the Swiss Confederation.

My main task today is to address the requirement of urgency under article 290, paragraph 5, of the Convention; that is to say, the existence of a real and imminent risk of irreparable prejudice to Switzerland's rights.

I shall deal first with some legal aspects of the urgency requirement. I shall then explain that, on the facts of this case, the requirement is met in respect of the provisional measures requested by Switzerland.

I can be relatively brief on the law relating to urgency under article 290, paragraph 5, of the Convention. The Tribunal is very familiar with it. It was summarized as recently as 25 May of this year, at paragraph 100 of the Tribunal's Provisional Measures Order in the *Ukraine* v. *Russian Federation* case. That paragraph is cited in Nigeria's written statement.[1]

The requirement of urgency under paragraph 5 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. Urgency is to be measured from the present, from the time of the provisional measures proceedings, not by reference to the past. What matters for these provisional measures proceedings 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. That time is some months off: first the arbitral tribunal has to be constituted, then it needs to adopt its rules of procedure, appoint a registry, familiarize itself with the case, organize a hearing on provisional measures and prepare a Provisional Measures Order. Our friends opposite seek to downplay this period by referring to it in their written statement as "a short period of time".[2] But even they appear to assume that it would be around four months,[3] as we can see from some of their evidence, though it could of course be longer.

A further point of importance is that, in the words of the Tribunal in *Arctic Sunrise* (citing the *Land Reclamation* case), "there is nothing in article 290, paragraph 5, of the Convention to suggest that the measures prescribed by the Tribunal must be confined to the period prior to the constitution of the Annex VII arbitral tribunal".[4]

The timing of our Notification and Statement of Claim, and of our Request for provisional measures, is a reflection of the very considerable efforts Switzerland has made to resolve the matter amicably. As our Agent, Ambassador Cicéron Bühler, has just explained, and as we set out at paragraph 25 of the Notification and Statement of Claim, Switzerland has made numerous efforts at all levels to resolve the matter through diplomatic channels.[5] Switzerland has acted very much in the spirit of what the Permanent Court said in the *Free Zones* case – another case involving Switzerland – namely, that "the judicial settlement of

[1] *Statement in Response*, p. 22, para. 3.23.
[2] *Statement in Response*, p. 22, para. 3.24.
[3] Nigeria's Instructions to an expert: *Statement in Response*, annex 21, para. 2.1.
[4] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 248, para. 84.
[5] *Notification under Article 287 and Annex VII, Article 1, of UNCLOS and Statement of Claim and Grounds on which it is based* (hereinafter *Notification*), 6 May 2019, p. 6-9, paras. 24-26. The *Notification* is itself annexed to the *Request for the Prescription of Provisional Measures of the4 Swiss Confederation, under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea*, 21 May 2019 (hereinafter *Request*).

international disputes ... is simply an alternative to the direct and friendly settlement of such disputes between the Parties".[6]

As you have heard from my colleagues, there was no substantive response from Nigeria to Switzerland's many efforts. This was so even after the high-level Davos meeting, on 25 January 2019, between the Swiss Minister for Foreign Affairs and the Nigerian Minister of Industry. At that meeting, the Nigerian Minister undertook to take the Swiss aide-mémoire back to the Minister for Foreign Affairs in Abuja.[7] However, Nigeria never replied to Switzerland; all that we heard was the sound of silence. That, I might note, is in stark contrast to the detailed explanations that Nigeria and its lawyers have now sought to come up with, faced with the present proceedings – explanations which, for the most part, as we have said, go to the merits of the case.

Mr President, there is one last point I need to make on the legal framework for provisional measures. Throughout its written statement, Nigeria seeks to argue that provisional measures are "even more exceptional",[8] to use its words, under paragraph 5 of article 290 than under paragraph 1. Nigeria says that the requirement of urgency is "exceptionally strict" for this Tribunal, when it is acting under paragraph 5. In our submission, that argument is based neither on the text of paragraph 5 nor on your case law.

The text of paragraph 1 may be silent about the requirement of urgency, but that element is clearly inherent in the very concept of provisional measures. Whether under paragraph 1 or paragraph 5, provisional measures are conditioned by the existence of urgency. Requiring the presence of an exceptional level of urgency under paragraph 5 is not, in our submission, a good faith reading of article 290. It would, I suggest, deprive this innovative and important provision of the Convention of much of its effect.

In fact, the only relevant difference between paragraph 5 and paragraph 1 is the period of time to be taken into consideration when assessing risk. The fact that this Tribunal will probably not be the forum to determine the merits is not, in our submission, a relevant factor. At the stage of provisional measures, this Tribunal is in exactly the same position as a court or tribunal which is to hear the merits. In any event, the Annex VII arbitral tribunal to be constituted may always modify, revoke or affirm the measures prescribed.

Mr President, Members of the Tribunal, I now turn to the application of the law on provisional measures to the facts of the present case, and I would like to begin with three general points.

First and foremost, as at today, the "*San Padre Pio*", four of her crew members and what is left of her cargo have been detained in Nigeria for nearly 17 months. This causes serious risk to the vessel, crew and cargo. The risk is real and imminent.

Second, the "*San Padre Pio*" is anchored in Nigerian waters. Despite several attempts, which we mentioned this morning and which were detailed in the Notification,[9] it has proved impossible to get access to the vessel, her crew and cargo in order to examine the condition of the vessel, the health of the four crew members, and the quality of the remaining gasoil. Under these circumstances, the risk of irreparable and imminent prejudice to Switzerland's rights may be inferred from the prolonged detention of the vessel, her crew and cargo. We have referred in the Request[10] to what the International Court had to say in the *Corfu Channel* case; and I quote:

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[6] *Case of the Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, Series A, No. 22*, p. 13.
[7] *Notification*, p. 8, para. 25 (m).
[8] See, for example, *Statement in Response*, p. 16, para. 3.3.
[9] *Notification*, p. 9-10, paras. 28-29, 31.
[10] *Request*, p. 9, para. 37.

> By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.[11]

In other words – and these are now my words – there is a "general principle of law" within the meaning of article 38, paragraph 1(c), of the ICJ Statute. This is to the effect that where direct proof of facts is not possible because of the exclusive control of one party, the other party may be allowed "a more liberal recourse to inferences of fact and circumstantial evidence."

Third, in the circumstances of the present case it is particularly appropriate to have in mind the principle that, in the words of your *Saiga (No. 2)* Judgment,

> the Convention considers a ship as a unit, as regards ... the right of the flag State to seek reparation for loss or damage caused to the ship by acts of other States ... . Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State.[12]

This finding by the Tribunal has become part of the *jurisprudence constante* of the Tribunal, as can be seen from the *M/V "Virginia G" Case*.[13] The Annex VII arbitral tribunal in the *Arctic Sunrise* award on the merits likewise applied the principle of the unity of the ship, referring back both to *Saiga (No. 2)* and to *Virginia G*.[14]

In the present case, the importance of the unity of the vessel and of Switzerland's interest in the vessel, crew and cargo, is clear. As the flag State of the vessel, Switzerland has important responsibilities under international law, including under the Convention on the Law of the Sea and including in relation to the welfare of the crew. It is, of course, irrelevant that the four crew members are not Swiss nationals, but Ukrainian. Considerations of humanity are blind to nationality. The vessel and cargo are owned by Swiss firms. As a result of Nigeria's unlawful actions in connection with the *"San Padre Pio"*, natural and juridical persons connected with the vessel have suffered and continue to suffer damages of a personal and economic nature. They all form part of the unit of the vessel, a vessel which flies the flag of Switzerland.

Mr President, Members of the Tribunal, notwithstanding the principle of the unity of the vessel, I shall address the three elements in turn: the vessel; the Master and three other officers; and the cargo. I shall also mention the environmental concerns to which the ongoing situation gives rise.

So I turn first to the vessel. Each day that the *"San Padre Pio"* is detained is a day when Switzerland is denied the right to freedom of navigation in respect of a vessel flying its flag, and the right to exercise jurisdiction over its vessel. Such denial is not capable of purely monetary reparation. Switzerland's rights as a flag State are not just of monetary value; they reflect Swiss sovereignty, Switzerland's reputation as a responsible flag State, and Switzerland's economic interest in the proper functioning of its merchant fleet.

While, as I have just recalled, it has been impossible to assess the condition of the "*San Padre Pio*", the continuing detention clearly puts the vessel at a severe risk that she may soon

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[11] *Corfu Channel, Judgment of 9 April 1949, I.C.J Reports 1949*, p. 18.

[12] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 48, para. 106.

[13] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 48, para. 126.

[14] *"Arctic Sunrise" (Netherlands* v. *Russian Federation), Award on the Merits, 14 August 2015*, paras. 170-176: https://pcacases.com/web/sendAttach/1438.

become unseaworthy because it is not possible to conduct the high level of maintenance that is required. Nigeria's "evidence" to the contrary at Annex 21 of their written statement is, with respect, thoroughly unconvincing; it is based solely on a limited number of documents supplied by Nigeria's lawyers to their expert. The expert admits to "know[ing] little about the ship or the maintenance which has taken place", and so writes "by necessity, in general terms" – those are his words – and his opinion, as you will see, is subject to far-reaching "Limitations".[15]

The vessel has been immobilized without necessary precautions for a long time, and in very humid climatic conditions. Ships can of course be laid up for long periods if necessary, but only where maintenance guidelines are properly followed. That was impossible in the present case because of lack of access to the vessel. It has further not been possible to provide the vessel with the necessary spare parts to carry out proper maintenance. At paragraph 38 of the Provisional Measures Request, we set out an impressive but still non-exhaustive list of issues identified by the operator of the vessel as of the beginning of this year. You can see them on the screen. I will not repeat them here; they are at tab 17 of your folders.[16]

In short, Mr President, Members of the Tribunal, the "*San Padre Pio*" is at risk of remaining in detention until she has lost all value. Because of her prolonged immobility and the impossibility of carrying out full maintenance operations, her value has decreased enormously.

The ongoing detention of the *"San Padre Pio"* puts at risk not only the safety and security of the vessel but also the safety and security of the Master and the three other officers. The four officers – the Master, Andriy Vaskov, and the three officers, Mykhaylo Garchev, Vladyslav Shulga and Ivan Orlovskyi – have now been confined, first on board the vessel, then in prison, and then once again on board the vessel, under armed guard, for nearly 17 months (since January 2018). For nearly 17 months they have been separated from their families: from their wives, their children, their parents. In addition, it has been difficult to get permission for the crew to see a doctor, even when it was urgent. As the Agent has explained this morning, and as is described in our Notification,[17] the proceedings against the four crew members have made little progress. They are thus deprived of their right to be tried without delay. The psychological stress that all of this involves must be enormous. The harm that continues to be suffered by the Master and the three other officers is irreparable. As frequently has been said, every day spent in detention is irrecoverable.

I will now turn very briefly to two cases that involved similar issues, *Arctic Sunrise*[18] and the *Case involving three Ukrainian naval vessels*.[19] There are of course others, such as *ARA Libertad*[20] and *Virginia G*[21] As I have said, I can be very brief since the Tribunal is certainly very familiar with them.

In *Arctic Sunrise*, the arguments of the Netherlands were strikingly similar to those of Switzerland in this case. I would respectfully refer you to paragraph 87 of your Order of 22 November 2013. In light of those arguments, the Tribunal ordered the Respondent immediately to release the vessel and all persons who had been detained; and ensure that the

[15] Nigeria's Instructions to an expert: *Statement in Response*, annex 21, paras. 2.1 and 3.3, and 'Limitations'.
[16] Judges' folder, tab 17, List of issues of *"San Padre Pio"* identified by the operator; see also *Request*, p. 9-10, para. 38, and annex PM/CH-7.
[17] *Notification*, p. 5, para. 20, and annexes NOT/CH-31-34.
[18] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230.
[19] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, to be published.
[20] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332.
[21] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4.

vessel and all persons detained be allowed to leave the territory and maritime areas under the jurisdiction of the Respondent.[22]

Mr President, Members of the Tribunal, in the recent *Ukraine* v. *Russian Federation* case, Ukraine also made a similar request in respect of its vessels and crew members.[23]

There are of course differences between these cases and the present one, but there are striking similarities. For example, while the vessels in *Ukraine* v. *Russian Federation* had a different status to that of the "*San Padre Pio*", and were being used for public purposes, and while the crew were servicemen, we would submit that such differences are not material when considering the relevance, for provisional measures purposes, of the deterioration of the vessel and the individual rights of the crew members. Just as in the case of the Ukrainian vessels, the "*San Padre Pio*" may be permanently lost if it continues to deteriorate, and the rights of the crew members are infringed with every passing day.

Ambassador Cicéron Bühler has already drawn the Tribunal's attention to the risk of piracy and armed attack in the Gulf of Guinea and specifically in the Bonny River area, exemplified by the violent piratical attack that took place on the night of 15 April this year. This attack, which is described in our written pleadings,[24] endangered the lives of crew members and others on board the vessel. The robbers were armed with machine guns, there was shooting, and very sadly one of the Nigerian Navy guards was wounded. A few days later, another tanker, anchored off Bonny Island and identified as the "*Apecus*", was attacked and six members of the crew were kidnapped.[25]

Mr President, Members of the Tribunal, as you will appreciate, the safety of the four officers of the "*San Padre Pio*" is a matter of the most utmost concern. They remain at constant risk of being kidnapped, injured or even killed. For almost 17 months, they have been confined to prison on an immobile vessel in an area where the risk of piratical attack is high. It is clear from recent events that the Nigerian authorities are not able to prevent such attacks. An attack like that of 15 April may be repeated at any time before the Annex VII arbitral tribunal is in a position to act. There is thus a constant, daily risk of a similar or even more serious attack; and the vessel, crew and cargo may then suffer a far worse fate than on the earlier occasion.

Mr President, we are confident that the Members of the Tribunal will have in mind the serious humanitarian concerns to which the continued confinement of the Master of the "*San Padre Pio*" and the three officers gives rise. The Tribunal's case law on this matter is clear. You have repeatedly recognized, since your very first case on the merits, "*Saiga*" *(No. 2)*, that "considerations of humanity must apply in the law of the sea as they do in other areas of international law".[26] I would refer to your most recent pronouncement in the *Ukraine* v. *Russian Federation* Order, where you stated that "the continued deprivation of liberty and freedom of Ukraine's servicemen raises humanitarian concerns."[27]

Mr President, I now turn to the cargo. The ongoing detention puts at risk the cargo of the "*San Padre Pio*". In light of the recent extension of the charges to the charterer, the cargo appears at risk of being imminently seized. In any event, the prolonged detention has already forced the vessel to use substantial amounts of the oil for its own basic functioning.

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[22] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 252, para. 105.

[23] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019, to be published*, paras. 102, 106.

[24] *Notification*, p. 10, para. 30; *Request*, p. 11, para. 42; see also Judges' folders, tab 18, Pictures related to the piratical attack of 15 April 2019.

[25] *Notification*, p. 10, para. 30, and annex NOT/CH-58.

[26] *M/V "SAIGA" (Saint Vincent and the Grenadines* v. *Guinea), Prompt Release, Judgment, ITLOS Reports 1997*, p. 62, para. 155.

[27] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019, to be published*, para. 112.

Moreover, even the remaining cargo may be lost; the preservation of the quality of the oil cannot be guaranteed over such a long time and under the prevailing conditions. Some deleterious reactions undergone by gas oil during storage are inevitable; but their rate depends inter alia on the concentration of oxygen, the amount of light and the storage temperature. None of these factors can be controlled effectively in the current circumstances of storage. Nigeria, however, for its part, seeks to rely on the interim forfeiture order against the cargo, and apparently argues that this will preserve its value pending the arbitral tribunal's final award. We seriously doubt that. Among other things, it ignores the fact that the ship and the cargo are a unit.

More generally, Mr President, the prolonged detention of the "*San Padre Pio*" has resulted in harm of an economic nature to persons involved or interested in the operation of the vessel. Nigeria's actions deprive the owner and the charterer of their property, which, over such a long period of time, inevitably causes important losses of profits and business opportunities. And, as we have seen, in the light of the piratical attacks in the region, a permanent risk exists that the vessel, together with her cargo and crew, will be hijacked, with serious consequences for all those concerned with the vessel. The risk must be prevented that damage is further aggravated through seizure or hijacking of the vessel and/or the cargo.

There is also a risk of collision in the crowded area of the Bonny River. This too has materialized. As the Agent described this morning, just two weeks ago, on the night of 5 June, the "*M/V Invictus*" dragged its anchor and collided twice with the "*San Padre Pio*". The inspection report indicates that the "*M/V Invictus*" was without crew and had been detained by the Nigerian authorities for over three years. It is, apparently, one among many such vessels in Nigerian waters. In short, Mr President, Members of the Court, the vessel, crew and cargo are in constant danger.

Finally, Mr President, I turn briefly to environmental concerns, which are increasing. While Switzerland has not, at the present stage, sought provisional measures "to prevent serious harm to the marine environment", as provided for in article 290 of the Convention, we reserve the right to do so. We have focused on the vessel, crew and cargo. Nevertheless, if the provisional measures are not granted, the situation may evolve so as to pose a real risk to the environment, in particular from the vessel itself, as it deteriorates. It is far from clear that the vessel will remain in a sufficient condition so as to be able to avoid causing environmental harm, in particular through continued contact of the vessel's paint with the water and the lack of regular repainting. Also, in light of the piratical attacks in the region, and the ever present threat of collisions, a permanent risk exists that the vessel, together with its cargo, will be attacked, hijacked, or severely damaged. That may lead to serious harm to the marine environment. Environmental damage is, of course, often long-lasting, and cannot always be made good by monetary payments.

Mr President, if the present situation is allowed to continue, there is a significant risk that a then worthless "*San Padre Pio*" will be abandoned on a beach, left to pollute the area for generations to come. This has happened to at least one vessel in a similar predicament – shown here on your screens –[28], the "*Anuket Emerald*", about which you heard earlier today. The "*Anuket Emerald*" was arrested for alleged violation of Nigeria's petroleum laws, was forfeited at the end of the trial court's decision of March 2016 and the appeal court's judgment of December 2017; and it ended up wrecked on a beach. Switzerland does not want its own flagged vessel to end up beached and a hazard to the environment like the "*Anuket Emerald*".

Mr President, Members of the Tribunal, I shall now make some concluding observations. Both in our written Request, and in our oral pleadings today, we have shown that the requirements for the prescription of provisional measures under article 290, paragraph 5,

[28] Judges' folder, tab 19, Picture of *"Anuket Emerald"* abandoned on a beach, 18 July 2018.

are met. We have shown that a dispute exists between Switzerland and Nigeria concerning the interpretation or application of the Convention, and that the Annex VII tribunal will have *prima facie* jurisdiction. We have shown that the rights invoked by Switzerland are at least plausible. We have shown that there is a direct link between the provisional measures requested and the rights which Switzerland seeks to protect in the case on the merits. And we have shown that the urgency of the situation requires the prescription of the provisional measures set out in our Request.

We are, of course, aware that the Tribunal may prescribe measures different in whole or in part from those requested.[29] Nevertheless, we consider that the measures we have requested at paragraph 53 of the Request are those which are both necessary and appropriate in the circumstances of this case.

In sections V and VI of chapter 1 of its written statement, Nigeria seeks to question the appropriateness of the measures requested. We accept of course that the respective rights of both Parties may need to be taken into account. In our view, however, the prescription of the measures requested will not cause irreparable harm to Nigeria's rights under the Convention, nor will they prejudge the decision on the merits. In arguing the contrary, Nigeria relies on statements in the case law but does so without regard to the wholly different context of the cases, which are fact-specific. For example, in *"Enrica Lexie"*, a central issue was which of the two States' Parties to the case had jurisdiction.

The requirement not to prejudge the decision on the merits will surely be met, as Professor Boisson de Chazournes has just explained. In prescribing measures, the Tribunal will take care not to reach definitive conclusions on the facts and on the law that lie at the heart of the case. It may well expressly state that the Order is without prejudice to the merits. If necessary, the Tribunal could perhaps devise ways to ensure that the measures prescribed do not prejudice Nigeria's rights.

As Professor Boisson de Chazournes has just explained, the provisional measures we request consist of a general measure and three specific measures. In summary, we request the Tribunal to prescribe that "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".

It is necessary for the Tribunal to prescribe such measures now in order to save the vessel, the four crew members and the cargo. We have described this morning the conditions in which, after almost 17 months, the vessel, the members of the crew, and the cargo find themselves. The vessel may soon become a total write-off and have to be abandoned. The four crew members and their loved ones suffer daily deprivation, and worse. The cargo constantly loses value, and so does the vessel; and there may develop a serious risk of marine pollution, with all that that entails for the local inhabitants and the sea upon which so much depends.

In short, Mr President, Members of the Tribunal, the ongoing detention of the vessel, crew and cargo is already causing irreparable prejudice to Switzerland's rights as the flag State. It will cause further such prejudice if the provisional measures requested by Switzerland are not prescribed, and implemented.

As the Tribunal ruled in its first provisional measures case, *M/V "SAIGA" (No. 2)*:

> the rights of [the flag State] would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to any judicial or administrative measures in connection with the incidents leading to

[29] Rules of the Tribunal, art. 89, para. 5.

the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master.[30]

The same applies, we submit, some 20 years later, in the "*San Padre Pio*" case.

Mr President, Members of the Tribunal, with that we have concluded Switzerland's first round of oral presentations. We thank you for your kind attention.

THE PRESIDENT: Thank you, Sir Michael Wood.

This concludes the first round of oral arguments by Switzerland. We will continue the hearing in the afternoon at 3 p.m. to hear the first round of oral arguments by Nigeria. The sitting is now closed.

(*The sitting closed at 1 p.m.*)

[30] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 38, para. 41.

PUBLIC SITTING HELD ON 21 JUNE 2019, 3 P.M.

Tribunal

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

For Switzerland: [See sitting of 21 June 2019, 10 a.m.]

For Nigeria: [See sitting of 21 June 2019, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 21 JUIN 2019, 15 H 00

Tribunal

Présents : M. PAIK, *Président* ; M. ATTARD, *Vice-Président* ; MM. JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, MME CHADHA, MM. KITTICHAISAREE, KOLODKIN, MME LIJNZAAD, *juges* ; M. MURPHY, MME PETRIG, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour la Suisse : [Voir l'audience du 21 juin 2019, 10 h 00]

Pour Nigéria : [Voir l'audience du 21 juin 2019, 10 h 00]

First round: Nigeria

STATEMENT OF MS UWANDU
CO-AGENT OF NIGERIA
[ITLOS/PV.19/C27/2/Rev.1, p. 1–4]

Mr President, honourable Members of the Tribunal, it is my privilege and honour to appear before you today as Co-Agent for the Federal Republic of Nigeria. May I begin by expressing Nigeria's respect for, and deep gratitude to, all the Members of this honourable Tribunal for their invaluable contribution to the just and peaceful settlement of international disputes.

At the outset, before I introduce our case, I would like to make it clear that Nigeria does not consider itself to have an adversarial relationship with Switzerland. On the contrary, Switzerland has been and remains a friend and partner of Nigeria. Our close relationship is multi-faceted and rooted in shared values and mutual interests in sustainable economic development, human rights, the rule of law, and maritime security.

Indeed, Nigeria is Switzerland's second-largest trading partner in sub-Saharan Africa.[1] Nigeria and Switzerland have committed to further enhancing their economic relationship pursuant to a Joint Declaration on Cooperation signed by Nigeria and the European Free Trade Association, of which Switzerland is a member.[2]

As a reflection of our shared values, Nigeria and Switzerland have engaged in an annual human rights dialogue since 2011.[3] That same year, we entered into a Migration Partnership to address cooperatively and comprehensively the challenges of human trafficking, the protection of refugees, and enhanced technical cooperation.[4]

Our shared values also include a mutual commitment to the fight against corruption. Nigeria greatly appreciates the fact that the first country to return looted assets was Switzerland.[5] In 2016, Nigeria and Switzerland signed a Memorandum of Understanding on Mutual Legal Assistance in Criminal Matters.[6]

On issues of maritime security, Nigeria is pleased that Switzerland is an active member of the G7++ Friends of the Gulf of Guinea, an initiative that brings together partners to jointly combat illegal maritime activities in the Gulf of Guinea, including piracy and illicit trade activities, to ensure marine security and economic development.[7]

Given our deep and collaborative relationship, particularly on issues related to combating corruption and illegal maritime activities, Nigeria was genuinely surprised by Switzerland's decision to institute arbitral proceedings under Annex VII of the United Nations Convention on the Law of the Sea by its Notification and Statement of Claim filed on 6 May 2019, which was followed on 21 May 2019 with the Request for Provisional Measures that brought us to this honourable Tribunal today.

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[1] Switzerland Federal Department of Foreign Affairs, "Bilateral relations Switzerland - Nigeria", https://www.eda.admin.ch/eda/en/home/representations-and-travel-advice/nigeria/switzerland-nigeria.html (last access 19 June 2019).

[2] European Free Trade Association, "EFTA and the Federal Republic of Nigeria sign Joint Declaration on Cooperation", 12 December 2017, https://www.efta.int/Free-Trade/news/EFTA-and-Federal-Republic-Nigeria-sign-Joint-Declaration-Cooperation-506551 (last access 19 June 2019).

[3] Switzerland Federal Department of Foreign Affairs, Switzerland and Nigeria, "Human Security", https://www.eda.admin.ch/countries/nigeria/en/home/switzerland-and/menschlische-sicherheit.html (last access 19 June 2019).

[4] Switzerland Federal Department of Foreign Affairs, *supra* note 1.

[5] Switzerland Federal Department of Foreign Affairs, Switzerland and Nigeria, "Legal Affairs", https://www.eda.admin.ch/countries/nigeria/en/home/switzerland-and/recht.html (last access 19 June 2019).

[6] *Ibid.*

[7] G7++ Friends of the Gulf of Guinea, "Rome Declaration", 26-27 June 2017, http://www.g7italy.it/sites /default/files/documents/G7%2b%2b%20FoGG%20-%20Rome%20Declaration_0/index.pdf (last access 19 June 2019).

STATEMENT OF MS UWANDU – 21 June 2019, p.m.

Mr President, honourable Members of the Tribunal, I say that Nigeria was surprised by these filings by Switzerland because the vessel at issue in these proceedings – the *M/T "San Padre Pio"* – while operating to supply a major international partner in the production of oil from Nigeria's exclusive economic zone, has been implicated in the illegal bunkering of petroleum products that have all the hallmarks of oil stolen from Nigeria, or illegally refined in or around Nigeria, or both. It is absolutely clear that the vessel was engaging in this bunkering activity in the Odudu field, in the middle of the night, contrary to the explicit conditions provided for in the required permit of the Nigerian Navy to ensure marine safety, and other permits required under Nigerian law were also missing. Indeed, Mr President and honourable Members, 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 when tested, 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.[8]

I spoke earlier about Switzerland being the first State to return Nigeria's stolen assets. Among Nigeria's most looted assets, Mr President and honourable Members, are our offshore petroleum resources, from which 300,000 to 400,000 barrels of oil are stolen by thieves every single month, at a value lost of approximately US$ 1.7 billion.[9] The proceeds from this massive fuel piracy and corruption undermine the Nigerian State's ability to protect marine security and promote sustainable economic development, including of its seabed and subsoil resources. Not only are these petroleum assets looted, but in the process the marine environment suffers from spills and other environmental harms from illegal bunkering and illicit refining activities.

Quite frankly, in circumstances such as those presented in this matter, we would expect that Switzerland would support Nigeria in its efforts to combat maritime crime in the Gulf of Guinea, rather than seek to have UNCLOS tribunals interfere with Nigerian law enforcement and criminal prosecutions. It is indeed possible that the full facts of this matter were not previously available to Switzerland before it decided to file these proceedings. Nevertheless, consistent with our commitment to combating illegal maritime activities and enforcing the rule of law, Nigeria will vigorously defend its sovereign right to exercise valid criminal jurisdiction over illegal activities associated with the extraction of resources from the seabed and subsoil within Nigeria's EEZ, as recognized in articles 56, 208 and 214 of the Convention.

Mr President, honourable Members of the Tribunal, Switzerland is not entitled to the provisional measures it seeks, because the rights it asserts are not plausible. There is no urgency or real and imminent risk of irreparable prejudice to any right it alleges under the Convention between now and the date of the constitution of the Annex VII arbitral tribunal. Granting the requested provisional measures, Mr President, would prejudge the merits of the case and cause irreparable harm to Nigeria's rights.

Nigeria has the sovereign rights and obligation under articles 56, paragraph 1(a), 208, and 214 of the Convention to exercise its enforcement jurisdiction over the bunkering activities in question here. The "*San Padre Pio*" was bunkering facilities involved in the extraction of natural resources from the seabed and subsoil within Nigeria's exclusive economic zone. Additionally, Nigeria has the sovereign right, Mr President and honourable Members, and obligation to regulate bunkering to control pollution of the marine environment associated with its seabed activities, including the production of oil in the EEZ. Thus, the rights that

[8] Statement in Response of the Federal Republic of Nigeria to the Request for the Prescription of Provisional Measures of the Swiss Confederation ("Statement in Response"), paras. 2.11-2.14.
[9] Statement in Response, para. 2.3.

Switzerland alleges are not plausible because Nigeria was clearly acting within her sovereign rights as recognized in the Convention.[10]

Regarding urgency, Mr President, honourable Members, one and a half years have passed since the vessel's detention. Neither in its Statement of Claim nor in its Request for Provisional Measures does Switzerland establish any change in circumstances that would suddenly call for an extraordinary order from this Tribunal to protect the rights asserted during the short period between now and the functioning of the Annex VII arbitral tribunal, which can decide on the appropriateness of provisional measures.[11]

Moreover, there is no risk of irreparable injury or prejudice to any of Switzerland's asserted rights. The "*San Padre Pio*"'s officers are free on bail—absolutely free – to travel anywhere in Nigeria they desire. If they believe that there is a security risk in staying on the "*San Padre Pio*" despite the presence of armed guards from the Nigerian Navy and a gunboat stationed alongside the vessel, they are free to go ashore, as they have done many times already. To be clear, Mr President, honourable Members, it is not because of the Nigerian State that the "*San Padre Pio*"'s officers remain on the vessel, and if they choose to remain onboard, they will continue to benefit from the protection of the Nigerian Navy. The vessel itself is not at risk of irreparable injury because any deterioration in its condition would be compensable, and Nigeria has placed no restrictions on maintenance operations that its owners might seek to undertake, Mr President, honourable Members.[12]

Furthermore, if the Tribunal were to order provisional measures, the merits of the dispute to be determined by the Annex VII arbitral tribunal would be prejudged, 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.[13] Such a result would also irreparably harm Nigeria's sovereign right to enforce her laws against the "*San Padre Pio*" and its officers, who have been lawfully charged and are being prosecuted for violation of Nigerian law.[14]

Finally, as to Switzerland's asserted rights under the International Covenant on Civil and Political Rights and the Maritime Labour Convention, there is no basis in fact for any claims of violations of these conventions, and the Annex VII arbitral tribunal would not have *prima facie* jurisdiction over these claims because the rights do not arise from the Convention itself. Accordingly, Mr President, honourable Members, the Tribunal cannot prescribe provisional measures as to these claims.[15]

For all of these reasons, which my colleagues will discuss in more detail, Nigeria respectfully requests the Tribunal to reject all the provisional measures requested by Switzerland.

Mr President, honourable Members of the Tribunal, the structure for the remainder of Nigeria's oral submissions this afternoon will be as follows: I will shortly ask you to invite Mr Andrew Loewenstein to present the full facts relevant to your decision. Then, Dr Derek Smith will explain why the Annex VII tribunal would not have *prima facie* jurisdiction over Switzerland's third claim and why none of Switzerland's claims are plausible. Finally, Mr President, honourable Members of the Tribunal, Professor Dapo Akande, will explain why there is no urgency or real and imminent risk of irreparable prejudice to any rights Switzerland alleges under the Convention between now and the date of the constitution of the Annex VII arbitral tribunal. Professor Akande will further discuss why granting the requested provisional measures would prejudge the merits of the case and cause irreparable harm to Nigeria's rights.

[10] Statement in Response, paras. 3.9-3.22.
[11] Statement in Response, para. 3.26.
[12] Statement in Response, paras. 3.27-3.36.
[13] Statement in Response, para. 3.39.
[14] Statement in Response, paras. 3.42-3.44.
[15] Statement in Response, paras. 3.50-3.53.

STATEMENT OF MS UWANDU – 21 June 2019, p.m.

I would also like to draw to the attention of the honourable Members of the Tribunal to the fact that, due to the great importance Nigeria places on this matter, Mr President, honourable Members, today in the courtroom I am joined by top-level officials from the Nigerian Navy, Nigeria's Federal Ministry of Justice, Nigeria's Diplomatic Mission to Germany, and Nigeria's Economic and Financial Crimes Commission, the agency prosecuting the crew.

Thank you, Mr President, honourable Members for your attention. May I now respectfully request you, Mr President, to invite Mr Loewenstein to the podium.

Thank you so much for your attention.

THE PRESIDENT: Thank you, Ms Uwandu.

I now give the floor to Mr Andrew Loewenstein to make his statement.

STATEMENT OF MR LOEWENSTEIN
COUNSEL OF NIGERIA
[ITLOS/PV.19/C27/2/Rev.1, p. 4–13]

Mr President, Members of the Tribunal, good afternoon. It is an honour to appear before you, and to do so on behalf of the Federal Republic of Nigeria. My role will be to introduce the case for Nigeria and to address the facts relevant to your determination of Switzerland's Request for Provisional Measures. We have listened carefully to Switzerland's presentation this morning, and will respond in full tomorrow.

Mr President, in Switzerland's telling, flag States – in the EEZ of another State – are entitled to the full range of high seas freedoms, subject only to a very small handful of narrowly construed exceptions, none of which are said to apply here.

One can understand why a land-locked State like Switzerland – which has no maritime space falling under its national jurisdiction – would prefer this arrangement. But that is not what UNCLOS codifies.[1] In fact, Switzerland's desire to convert the EEZ into high seas in all but name is fundamentally inconsistent with the outcome of the Third UN Conference on the Law of the Sea, where one of the seminal achievements was the agreement to extend the sovereign rights and jurisdiction of coastal States with respect to the exploitation and exploration of living and non-living resources out to the EEZ's 200 nautical mile limit.[2]

The approach advocated by Switzerland does not respect this key aspect of the package-deal that allowed for the Convention's conclusion, setting the stage for its resounding success. Instead of implementing a constitution for the oceans, bringing legal order to its waters, Switzerland's approach would create a regulatory vacuum. That is not what UNCLOS does.

In fact, as Dr Smith will explain, there are multiple provisions of the Convention that codify clear textual authority for Nigeria's exercise jurisdiction in regard to bunkering carried out in connection with the exploration and exploitation of hydrocarbon resources in the EEZ. Nothing argued by Switzerland this morning suggests otherwise. Nor has Switzerland come remotely close to satisfying the exacting standards required for the prescription of provisional measures, let alone for the extraordinary relief Switzerland seeks prior to the constitution of the Annex VII arbitral tribunal, a matter that Professor Akande will address.

Mr President, Nigeria declared an EEZ on 5 October 1978.[3] Perhaps more than many States, Nigeria has been able to benefit from the natural resources located in its EEZ, including the hydrocarbons that are found in abundance beneath the seabed. Nigeria has licensed concession blocs to international oil companies that undertake production operations under joint venture agreements with the Nigerian National Petroleum Company.

Extracting hydrocarbon from beneath the seabed is a challenging industrial exercise. As illustrated on your screen, in broad strokes, it requires erecting production platforms that house massive drills, which dig into and through the seabed to reach the deposits located far below. Crude oil travels up to the platform through pipes that transport it onto floating storage facilities, where it remains until being offloaded onto tankers for onward shipment. At any given production field in Nigeria's EEZ, there may be as many as five drilling platforms in operation.

These operations require significant quantities of fuel. Because raw crude oil cannot be used for this purpose, refined petroleum products must be transported to the production field

[1] United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), 1833 UNTS 397 (10 December 1982), entered into force 1 November 1994).
[2] *Ibid.*, arts. 56-58.
[3] Exclusive Economic Zone Decree No. 28 of 5 October 1978, United Nations, Legislation and Treaties, Nigeria, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES /PDFFILES/NGA_1978_Decree.pdf

via supply ships and delivered to the installations. This is done by transferring fuel from one vessel to another, a complicated process known as bunkering.

In fact, bunkering is an indispensable part of the industrial activities that occur in Nigeria's EEZ. These ship-to-ship transfers of large quantities of toxic, highly combustible fuel carries obvious risks to the marine environment. The need for oversight is plain, not least because bunker spills are even more environmentally harmful than crude oil spills as the attributes of fuel oil make its clean-up especially challenging, and regulating these transfers is critical for the safety of the personnel involved and the good functioning of the production field's equipment.

For Nigeria, the need to oversee bunkering in its oil-production fields is particularly great because of the central role it plays in the illicit trafficking of stolen Nigerian crude oil.[4] As Nigeria has detailed in its written statement, Nigerian crude oil is stolen on a massive scale.[5] The stolen crude is often illegally refined in Nigeria and shipped to other jurisdictions – like Togo – where it receives false documentation of origin and is then shipped back to Nigeria.[6]

A crucial part of this illicit distribution network are the bunker vessels that supply Nigeria's production installations in the EEZ. Too often they serve as the final links in this illicit supply chain, delivering to offshore installations the falsely labelled petroleum products that have been illegally refined from stolen Nigerian crude. Admiral Ibikunle Olaiya, the Nigerian Navy's Director of Operations, testifies in an affidavit reproduced at tab 1 of your Judges' folder, that "illegal bunkering activities usually involve illicit trade in stolen petroleum resources, including illegally refined petroleum products," because bunkering offers traffickers a "means of distribution" that can "readily evade government enforcement efforts."[7]

The Nigerian Navy is responsible for enforcing the laws that Nigeria has adopted to regulate offshore bunkering.[8] As you can see on your screen, the Armed Forces Act charges the Navy with "enforcing" Nigeria's "anti-bunkering" laws "at sea".

One of the principal means by which the Navy ensures that bunkering is done 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.[9] This allows the vessel lawfully to receive, load, supply and discharge approved products. You can find a copy at tab 2 of your Judges' folder. As you can see on the screen, 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.

In addition, the permit imposes mandatory conditions. Reflecting Nigeria's efforts to combat the use of bunkering in illicit petroleum trades, these include an express prohibition on the "lifting of illegally refined crude oil products". Vessels are also directed that bunkering

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[4] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya* ("*Affidavit* of Rear Admiral Ibikunle Taiwo Olaiya"), Statement in Response, Annex 2, para. 17. *See also* I. Orèd'Ola Falola, "Fuel Smuggling", *Development and Cooperation* (17 April 2017), available at https://www.dandc.eu/en/article/ smuggling-fuel-nigeria-frequent-crime-togo (last access: 16 June 201); K. McVeigh, "Fuel for Thought: Black Market in Petrol in Togo and Benin – in Pictures", *The Guardian* (9 May 2019), available at https://www.theguardian.com/global-development/gallery/2019/may/09/fuel-for-thought-the-black-market-in-petrol-in-togo-and-benin-in-pictures-london-business-school-photography-awards-2019 (last access: 16 June 2019).

[5] Statement in Response, para. 2.3; B. Odalonu, "The Upsurge of Oil Theft and Illegal Bunkering in the Niger Delta Region of Nigeria: Is There a Way Out?", *Mediterranean Journal of Social Sciences*, Vol. 6, No. 3, (May 2015), p. 563, at p. 564; E. Morgan, "A Primer on Nigeria's Oil Bunkering", *Council on Foreign Relations* (4 August 2015), available at https://www.cfr.org/blog/primer-nigerias-oil-bunkering (last access: 16 June 2019).

[6] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, Statement in Response, Vol. II, Annex 2, para. 4 et seq.

[7] *Ibid.*, para. 7.

[8] Federal Republic of Nigeria, The Armed Forces Act, Cap. A20 (2004) (excerpt), sec. 1(2)(a), Statement in Response, Vol. II, Annex 4.

[9] 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.

must be "conducted between Sunrise and Sunset". The permit warns: any vessel "found violating" these "conditions" will be "arrested and prosecuted". There is no ambiguity.

Beyond this navy certificate, Nigeria requires vessels wishing to bunker petroleum products to secure a permit from its Department of Petroleum Resources. A certificate from the Nigerian Maritime Administration and Safety Agency, referred to as NIMASA, is also required.[10]

Mr President, I turn now to the evidence that has been presented in connection with Switzerland's Request for Provisional Measures. I do so mindful of the Tribunal's observation that each request for provisional measures must be assessed based on its own unique facts and circumstances.

I begin with two preliminary observations. First, States seeking provisional measures generally support their requests with testimonial evidence, often in the form of sworn affidavits. For example, in the recent *Ukrainian naval vessels* case, Ukraine submitted a declaration by the counsel for the captain of one of the detained vessels.[11] In the "*ARA Libertad*" case, a declaration by the captain of the detained vessel was annexed to the provisional measures request.[12] In the "*Arctic Sunrise*" case, The Netherlands submitted a statement by the vessel's operator and presented live testimony.[13]

Switzerland, however, has elected to depart from this practice. No witness testimony – in written or live form – is offered for the Tribunal's consideration. One must therefore ask: why is no representative of the vessel's owner, or its charterer, or its operator, willing to come forward with a sworn statement made upon pains and penalties of perjury? And why has the Tribunal not been presented with affidavits from any of the vessel's officers or crew who could provide first-hand accounts?

In the absence of such testimony it is especially noteworthy, given that 12 of the "*San Padre Pio*"'s original crew face no criminal charges and are no longer in Nigeria. The vessel's current crew faces no charges either. The officers who remain in Nigeria have no restrictions on their ability to communicate with the Swiss Government, or with the vessel's owner, or charterer, or operator, or with anyone else. In these circumstances, where the factual assertions advanced by the other side are unaccompanied by supporting testimony, Nigeria respectfully submits that the narrative they advance should be approached with caution. And Nigeria would ask the Tribunal to keep this firmly in mind as it considers the allegations made this morning by the Agent of Switzerland, which were unsupported by any testimony by the parties concerned. Indeed, as we will discuss, the narrative we have heard this morning is disproven not only by the documentary record, but by the four sworn affidavits that Nigeria has presented from its prosecutors and its navy.[14]

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[10] *Affidavit of Facts in the Case of the Arrest and Detention of M/T SAN PADRE PIO of Lieutenant Mohammed Ibrahim Hanifa (14 June 2019)* ("*Affidavit of Lieutenant Mohammed Ibrahim Hanifa*"), Statement in Response, Vol. II, Annex 6, para. 8, Annex 38.

[11] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation),* ITLOS Case No. 26, *Provisional Measures* (16 April 2019), Annex C.

[12] *"ARA Libertad" (Argentina* v. *Ghana),* ITLOS Case No. 20, *Provisional Measures* (9 November 2012). Annex I.

[13] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013,* para. 28; *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures* (16 April 2019), Annex 2.

[14] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya,* Statement in Response, Vol. II, Annex 2, para. 4 et seq; *Affidavit of Lieutenant Mohammed Ibrahim Hanifa,* Statement in Response, Vol. II, Annex 6; *Affidavit of Facts in the Case of the Arrest and Detention of M/T SAN PADRE PIO of Captain Kolawole Olumide Oguntuga* (14 June 2019), Statement in Response, Vol. II, Annex 8; *Affidavit of Facts in the Case of the Arrest and Detention of M/T San Padre Pio of Ahmedu Arogha,* Legal Officer in the Legal and Prosecution Department of the Economic and Financial Crimes Commission (15 June 2019) ("*Affidavit of Ahmedu Arogha,* Legal Officer"), Statement in Response, Vol. II, Annex 22.

Second, approaching Switzerland's evidence with caution is especially warranted because, in the fragmentary emails and other documents that it presents and relies upon, pertinent information is often redacted. To be sure, there are sometimes occasions when redactions are appropriate. But many of Switzerland's redactions – even viewed charitably – do not fall into that category. For example, you can now see a slide of Switzerland's Annex 8 to its Request for Provisional Measures, which redacts not just the name of the addressee, but also the shipyard where the operator plans to have the vessel repaired.[15]

Mr President, by pointing this out, Nigeria does not intend to criticize Switzerland. We presume that the documents annexed to its pleadings were provided to the Swiss Government in the redacted form they appear as annexes. But Nigeria would be remiss if it did not draw the Tribunal's attention to this aspect of the evidence and to the consequences it could have for equality of arms and good administration of justice.

Mr President, as I have noted, the Gulf of Guinea is plagued by high levels of criminality, including the scourges of petroleum theft, illegal refining, piracy, and illicit trafficking in petroleum products. These crimes are interlinked and an urgent threat to maritime security. Admiral Olaiya explains the reality of the situation: the "theft and illicit trade in petroleum resources from offshore oil drilling activities" is a "major threat to the security, safety, environmental sustainability, and economic vitality of the Gulf of Guinea region"[16] and they "contribute to the funding and economic motives behind other illicit activities, including piracy and other criminal activities that threaten the region's safety, security, and marine environment."[17]

This is not just Nigeria's view. On 28 December 2018, the UN Secretary-General reported to the Security Council that "[m]aritime crime and piracy off the coast of West Africa" continues to "pose a threat" to the region's "peace, security and development."[18] The Secretary-General singled out "[o]il-related crimes" as a particular problem, which had cost Nigeria nearly $2.8 billion in revenues last year. In that connection, the Secretary-General reported that current efforts to address "maritime crime and piracy" focus 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."[19]

Mr President, these are precisely the efforts that Nigeria is undertaking – in cooperation with international partners – to combat the web of criminality that plagues the Gulf of Guinea. Principal among these efforts is the operation of maritime domain awareness systems that are designed to detect and alert the responsible authorities to possible criminal activities taking place at sea; and it was the operation of such a marine surveillance system that drew the "*San Padre Pio*" to the Nigerian navy's attention. As Admiral Olaiya explains, the "*San Padre Pio*" was navigating routes that track well-known itineraries for vessels engaged in the practice of "round-tripping", that is, taking on cargoes of stolen Nigerian crude that have been illegally refined in Nigeria, shipping them to jurisdictions known for providing false documentation of origin, and returning to Nigerian waters with falsely labelled petroleum products to distribute via bunkering to offshore installations.[20]

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[15] Request for Provisional Measures of the Swiss Confederation (21 May 2019) ("Request for Provisional Measures"), Email from ABC Maritime regarding expected repairs, dated 14 May 2019, Annex 8.

[16] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, para. 4.

[17] *Ibid.*, para. 6.

[18] 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.

[19] *Ibid.*, para. 65.

[20] *Affidavit* of Rear Admiral Ibikunle Taiwo Olaiya, paras. 16-17.

This was not the only reason for the Nigerian navy's suspicions. IMO regulations require vessels over 300 gross tonnes to operate an automatic identification system that allows them to be monitored and tracked by marine enforcement agencies. The identification system must remain operational unless there is a valid security or safety reason for it to be disengaged.[21] This was not disputed by Switzerland this morning. However, the "*San Padre Pio*" was observed by Nigeria's surveillance systems to have shut off its identification system. For these reasons, the Nigerian navy placed the "*San Padre Pio*" on its list of vessels of interest, and the naval vessel "*Sagbama*" was alerted to its presence off the Nigerian coast.[22]

This morning, Switzerland's Agent categorically denied that the vessel had ever turned off its system. How does she know? She did not mention having undertaken any independent investigation. Instead, she said that the Master had, in her terms, formally denied having done so. Evidently, that is enough for Switzerland.

Mr President, I can be brief about what happened next; the essential facts are not in dispute. The location where the Nigerian navy encountered the "*San Padre Pio*" is common ground. It was, as Switzerland states in its Statement of Claim, "intended to supply the Odudu Terminal".[23] That is correct.

A sketch map of this area is now on your screen. It is also available in the Judges' folder at tab 3. As you can see, it consists of five production platforms that drill through the seabed and pump hydrocarbons to its facility where the carbons are stored. The geographical coordinates for the location of the encounter are set out in figure 5 of the affidavit of Admiral Olaiya.[24] I note that Switzerland, no doubt relying on information provided by the ship's operator, overstated the distance between the "*San Padre Pio*" and the nearby production platforms.[25] However, there is no need to dwell on the discrepancy. Even on Switzerland's account, the "*San Padre Pio*" was situated amongst the Odudu oil-production facilities. That is the essential point.

Nor is there disagreement as to what the "*San Padre Pio*" was doing. 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.[26]

This brings us to when the bunkering occurred. Here, Switzerland's narrative is silent. Again, we infer no ill intent from the omission. We presume that Switzerland has presented the facts as provided to the Swiss Government by the vessel's owner and operator. Lieutenant Hanifa, the Nigerian naval officer on board the vessel that encountered the "*San Padre Pio*", completes the picture. He testifies, as you can see at tab 4 of your Judges' folder, that when the "*San Padre Pio*" was encountered at 8 p.m. it was in the midst of bunkering another vessel. It then proceeded to commence another ship-to-ship fuel transfer with a different vessel at 3 a.m. the next morning.[27]

Confronted with this situation, the "*Sagbama*" requested that the "*San Padre Pio*" produce the required bunkering permits.[28] But, only the navy certificate and bill of lading were presented.[29] A copy of the naval certificate is now on your screen.[30] It is reproduced at tab 5 of your Judges' folder. At line 4(a) you can see that the permit is for the "*San Padre Pio*". Line 5

[21] *Ibid.*, para. 14.
[22] *Ibid.*, paras. 18-19.
[23] Notification and Statement of Claim of the Swiss Federation (6 May 2019) ("Statement of Claim"), para. 7.
[24] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, Statement in Response, Vol. II, Annex 2, Figure 5.
[25] Statement of Claim, Annex 6.
[26] Statement of Claim, para. 7.
[27] *Affidavit of Lieutenant Mohammed Ibrahim Hanifa*, Statement in Response, Vol. II, Annex 6, paras. 6-7.
[28] *Ibid.*, paras. 8-9.
[29] *Ibid.*, para. 9.
[30] *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Motion on Notice, Exh. A3 (Federal High Court of Nigeria, 10 October 2018), Statement in Response, Annex 25.

specifies the product to be bunkered as "AGO" – which stands for automotive gasoil, a matter to which we will return. Line 8 states that the bunkered fuel will be discharged at the Odudu oilfield for use by Total. The sub-paragraphs of line 12 list the operation's conditions. These include, as specified in line 12(b), that illegally refined products may not be bunkered; and, at line 12(d), that the bunkering must be carried out during daylight hours. Line 14 sets out an additional requirement – not found on the form we reviewed earlier today. It specifies that a naval officer-in-charge (or OiC) must have the opportunity to take samples to confirm that the bunkered fuel is an approved product, that is, that it had not been illegally refined.

The *"Sagbama"* was thus faced with the following facts. The "*San Padre Pio*" was carrying out bunkering operations in the dead of night, in direct contravention of the conditions imposed by the certificate. The vessel had not alerted the navy about when the bunkering would occur, so the navy had no opportunity to carry out the testing needed to verify that illegally refined petroleum products were not being transferred for use in Total's operations; and, as line 13 of the certificate had expressly warned, violating these conditions would subject the vessel to arrest and prosecution. Moreover, the "*San Padre Pio*" had failed to present the required petroleum distribution permit or NIMASA certificate. This morning, Switzerland's only response was to say that the permit was secured by another company that had contracted with the "*San Padre Pio*", but that would not relieve the vessel from its obligation to comply with the permit's terms.

In light of these plain violations of law, the *"Sagbama"* arrested and escorted the "*San Padre Pio*" to a Nigerian naval base, and the navy turned the matter over to Nigeria's Economic and Financial Crime Commission (EFCC).

The "*San Padre Pio*" ultimately did present the Nigerian authorities with a copy of one of the required permits – a certification from NIMASA, which is available at tab 6 of your folder.[31] You will recall that this is one the approvals that the "*San Padre Pio*" had failed to produce to the *"Sagbama"*. You can see it on your screen. It is dated 24 January 2018 and lists that same day for the "*San Padre Pio*'s" expected date of arrival at the Odudu oilfield. This of course is the day *after* the "*San Padre Pio*" had been arrested at the Odudu facility. Whatever else this may show, it proves beyond question that the "*San Padre Pio*" did not have the required NIMASA permit when it was caught at Odudu bunkering fuel in the middle of the night.

On 12 March 2018, the officers and crew were charged with conspiring to distribute and deal in petroleum products without the necessary approval and with having done so in connection with the cargo on board.[32] They were then relocated to the EFCC's facilities at Port Harcourt.

Thus begins, according to the other side, a period of prolonged detention in prison and on the vessel that amounts to nothing less than violations of the ICCPR and the Maritime Labour Convention. These are grave accusations, and Nigeria treats them with the gravity they require. Nigeria has thus carefully reviewed the evidence that has been presented in support of these serious allegations.

I begin with the alleged conditions at the EFCC facility where the defendants were initially held after being arrested; and I should emphasize that no defendant has been at this facility for a very long time. In its written pleading, Switzerland described the conditions there as having been "harsh". The rhetoric has now escalated. This morning, the Agent of Switzerland used words like "dire" and "life-threatening." We can all call to mind the mental images that descriptions like this tend to elicit.

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[31] Nigerian Maritime Administration and Safety Agency, *Ship Clearance Certificate M/T "San Padre Pio"* (24 January 2018), Statement in Response, Vol. II. Annex 38.

[32] Charges against the 16 crew members and the vessel, dated 12 March 2018, Statement of Claim, Annex NOT/CH-21.

Mr President, Members of the Tribunal, there are places in this world where people are held in dire conditions that are life-threatening but this was not one of them. As I mentioned, Switzerland has not presented any witness statements from anyone present, including those who are no longer in Nigeria. Only a single source is cited to support Switzerland's characterization.[33] You can see it on the screen. It is an email from one Iain Marsh to persons identified as Nikil Bhat and Holly Hughes. Certain others are copied; some of their names are redacted.

Mr Marsh is reporting on a visit he had made that day to the crewmembers, so it is a contemporaneous account. He acknowledges that bail has been offered. The crew's chief complaint appears to be about the quality of the mattresses and the presence of "hot peppers et cetera" in the "local food." Mr Marsh reports that the Nigerian authorities have allowed food to be delivered so that the crew can have "European cuisine." Why had these special food deliveries not yet happened? Mr Marsh says that his correspondents had not wired the necessary funds, and Mr Marsh was unwilling to front the money himself. Apparently, he was concerned that he might not be reimbursed.

I turn now to the accusation that the defendants have been "deprived of their right to be tried without delay."[34] In particular, Switzerland criticizes Nigeria because the charges have been amended.[35] However, the first of those amendments was to drop the charges against the 12 members of the crew when the EFCC elected to pursue charges only against the vessel's officers.[36]

And the subsequent amendment was made when further investigation revealed that the "*San Padre Pio*"'s bill of lading and cargo manifest had both falsely understated the volume of cargo that the vessel carried.[37] We note that this morning Switzerland made no attempt to deny that these documents had been falsified. Moreover, samples of the petroleum product carried by the "*San Padre Pio*" were sent to two different laboratories. Each independently concluded that the cargo consisted of automotive gasoil that fails to meet the product's required specifications, results that suggest that the "*San Padre Pio*" was, in fact, trafficking in illegally refined petroleum products.[38]

Finally, Mr President, I address the assertion that the defendants have been and continue to be detained on the "*San Padre Pio*" under armed guard, unable to leave.

I will be blunt. This claim is wholly without merit. On 21 March 2018 the defendants applied to the Federal High Court for bail.[39] Their application was unopposed.[40] Two days later, the Court granted bail.[41] You can find the order at tab 7 of the Judges' folder. Its conditions were entirely reasonable: the defendants merely had to deposit approximately $28,000, in either

[33] Email from Ian Marsh, Local Representative of the Protection and Indemnity Agency of the Vessel, dated 12 March 2018, Statement of Claim, Annex 20.
[34] Request for Provisional Measures, para. 40.
[35] *Ibid.*, para. 12.
[36] *Affidavit of Ahmedu Arogha*, Legal Officer, Statement in Response, Vol. II, Annex 22, para. 27; Charges against the Master and the three other officers and the vessel, dated 12 March 2018, Statement of Claim, Annex NOT/CH-22.
[37] *Affidavit of Ahmedu Arogha*, Legal Officer, Statement in Response, Vol. II, Annex 22, para. 25(v)-(w); Charges against the Master and the three other officers and the vessel, as well as against the Master, the vessel and the charterer, dated 24 April 2019, Statement of Claim, Annex 39.
[38] *Letter* from C. M. Bello, Zonal Operations Controller, DPR, PH, Ministry of Petroleum Resources, to The Zonal Head, South South Zone, Economic and Financial Crimes Commission (25 August 2018), Statement in Response, Annex, 16; *Letter* from S. Yusuf, Engineer, Zonal Operations Controller, Warri, Minister of Petroleum Resources, to The Director, Economic and Financial Crimes Commission (6 July 2018), Statement in Response, Annex 17.
[39] Order of the Federal High Court of Nigeria in the Port Harcourt Judicial Division, dated 23 March 2018, Statement of Claim, NOT/CH-24, paras. 1-2.
[40] *Ibid.*, para. 3.
[41] *Ibid.*, It Is Hereby Ordered As Follows.

US or Nigerian currency, and provide a surety for an equivalent amount. Upon release, the defendants could travel wherever they wished, subject only to the requirement that they not travel outside Nigeria without first obtaining leave from the Court. Consistent with state practice worldwide, the defendants' passports were collected and deposited with the Court's Registry for safekeeping. There is nothing improper about this. Foreign nationals charged with crimes in Switzerland are equally subject to having their passports taken.[42]

The defendants, it is true, reside on the "*San Padre Pio*", but that is because they have chosen to do so. There is nothing to prevent them from living in Port Harcourt, or Lagos, or Abuja, or anywhere else in Nigeria. This is confirmed by an affidavit from the EFCC prosecutor responsible for the case, which you can find at tab 8.[43] It is verified by an affidavit, found at tab 9, from the Nigerian naval officer responsible for the vessel's security. In his words: "since their return to the Vessel from the EFCC facilities on shore, the Master and the three officers may leave and return to the vessel whenever they please and under no obligation to remain on the vessel."[44] As Professor Akande will explain, to avoid any possible misunderstanding, Nigeria has formally extended its assurances to Switzerland that the defendants are not required to remain on the vessel.

Mr President, Members of the Tribunal, this concludes my presentation. Thank you for your kind attention. I ask that you invite Dr Smith to the podium.

THE PRESIDENT: Thank you, Mr Loewenstein.

I now give the floor to Mr Derek Smith to make his statement.

[42] Swiss Criminal Code of Procedure, arts. 237, 212, 196.

[43] *Affidavit of Ahmedu Arogha*, Legal Officer, Statement in Response, Vol. II, Annex 22, paras. 32-33.

[44] *Affidavit of Facts in the Case of the Arrest and Detention of M/T San Padre Pio* of Captain Kolawole Olumide Oguntuga (14 June 2019), Statement in Response, Annex 8, para. 11.

M/T "SAN PADRE PIO"

STATEMENT OF MR SMITH
COUNSEL OF NIGERIA
[ITLOS/PV.19/C27/2/Rev.1, p. 14–22]

Good afternoon, Mr President, distinguished Members of the Tribunal. It is a great honour for me to appear before you today on behalf of the Federal Republic of Nigeria.

Mr Loewenstein has presented to you detailed facts of this case that were absent from Switzerland's pleadings. In our remaining presentations this afternoon, Professor Akande and I will explain why it would be inappropriate for the Tribunal to prescribe any of the provisional measures requested by Switzerland in view of the requirements set forth in UNCLOS and the jurisprudence of the Tribunal.

Professor Akande will address this in more detail, but I would like to take a moment to emphasize the legal framework for provisional measures under article 290, paragraph 5, of the Convention.

It is apparent from Switzerland's pleadings this morning that they misunderstand the nature of provisional measures. Provisional measures are an exceptional form of relief. This is because they empower an international tribunal to compel a sovereign State to act against its will, even though the tribunal has not yet made a definitive determination of the merits, and in most cases it will not have made a definitive determination of its own jurisdiction. Tribunals, therefore, exercise caution in assessing not only whether to prescribe provisional measures but also what measures to prescribe.

Provisional measures under article 290, paragraph 5, are even more exceptional than ordinary provisional measures under article 290, paragraph 1.[1] This is because paragraph 5 grants the Tribunal the power to prescribe provisional measures with respect to a dispute that does not fall within its own jurisdiction. The Tribunal has, accordingly, exercised this extraordinary competence with restraint.

Applying the requirements of article 290, paragraph 5, to the present Request for provisional measures, it becomes evident that the Tribunal should not prescribe the provisional measures that Switzerland requests, for five reasons:

First, the Annex VII tribunal does not have *prima facie* jurisdiction over Switzerland's third claim; second, none of the rights alleged by Switzerland are plausible; third, there is no real and imminent risk of irreparable prejudice to the rights alleged by Switzerland before the constitution of the Annex VII tribunal; fourth, the provisional measures, if prescribed, would prejudge the merits of the dispute; and, finally, the provisional measures requested, if prescribed, would cause irreparable harm to the rights of Nigeria.

I will spend the remainder of my time elaborating on the first two points, then my colleague Professor Akande will explain the remaining three points. With the Tribunal's permission, I will now proceed to the first point on *prima facie* jurisdiction.

Mr President, Members of the Tribunal, the third claim concerning the International Convention on Civil and Political Rights (ICCPR) and the Maritime Labour Convention (MLC) manifestly falls outside of the jurisdiction of the Annex VII tribunal.

Before proceeding, I would like to reiterate Nigeria's affirmation that it is not violating the human rights of the officers and crew of the "*San Padre Pio*".

The facts contradict Switzerland's claims in this regard. No one is in jail. The officers and crew of the "*San Padre Pio*" are free to leave and return to the ship as they please,[2] and Nigeria has given an express assurance that they are free to leave the ship. They remain on the

[1] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures,* Separate Opinion of Judge Treves, para. 4.
[2] Nigeria's Statement in Response, Annexes 12, 15, 22, paras. 29-31.

ship by order of the owner.[3] The officers on trial for crimes in Nigeria are free on bail, under the sole condition that they do not leave Nigeria.[4] Merely requiring a criminal defendant to remain in the country during his trial is not a breach of a fundamental right.[5] The rest of the crew are free to leave Nigeria, like the crew before them.[6] As regards the rights of the individuals in criminal proceedings, the only specific claim made by Switzerland is that the trial in Nigeria has suffered some delay – Mr Loewenstein has addressed the specifics of this – and this delay hardly amounts to a human rights violation. In addition, the suspension of the criminal proceedings that they seek as relief would actually delay the trial further.

With this clarification of the facts, I return to the lack of *prima facie* jurisdiction of the Annex VII tribunal over Switzerland's claim. There is no such jurisdiction because the claim does not concern the interpretation or application of the Convention.

As you can see on the screen, Switzerland's third claim stated in its request for relief asks the Annex VII tribunal to adjudge and declare that

> 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 and the MLC, and under customary international law*.[7]

This was quite convoluted, but the ultimate intention is clear. While Professor Caflisch has attempted to deny this, Switzerland is asking the Annex VII tribunal to determine whether Nigeria has violated the rights of individuals under the ICCPR and the MLC. Unlike Switzerland's first two claims, this third claim does not mention UNCLOS, and the only specific rights Switzerland asserts are the rights of individuals under these other treaties.

This morning Professor Caflisch put forth a creative legal theory to argue that an Annex VII tribunal, with jurisdiction limited only to disputes concerning the interpretation or application of the Convention, could have jurisdiction over this claim. In particular, he invoked article 56, paragraph 2, of the Convention, which says that coastal States are to have due regard to the rights and duties of other States. He argues that these rights and duties include the rights of individuals under the ICCPR and the MLC. This argument, however, is entirely without merit.

Let us have a look at article 56, paragraph 2, in detail. As you can see on the screen, it provides:

> 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.[8]

Mr President, Members of the Tribunal, I would like to make two observations here.

First, article 56, paragraph 2, requires coastal States to have due regard only to the rights and duties of other States. The rights enshrined in the ICCPR and the MLC belong to individuals, not States. As such, article 56, paragraph 2, is inapplicable. In formulating its rights, as we heard today from Professor Caflisch, Switzerland attempts to circumvent this issue by claiming, in its own right, to "seek redress on behalf of crew members and all persons

[3] Nigeria's Statement in Response, Annex 11.
[4] Switzerland's Statement of Claim, Annex NOT/CH-24.
[5] ICCPR, arts. 9(1), 12(3); Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edition, 2013), paras. 11.01, 12.28.
[6] Nigeria's Statement in Response, Annexes 12, 15.
[7] Switzerland's Statement of Claim, para. 45(iii).
[8] UNCLOS, art. 56(2).

involved in the operation of the vessel."[9] However, Switzerland does not allege any facts that would suggest that Nigeria has interfered with Switzerland's efforts to espouse the rights of the vessel and crew. Switzerland is really just after a direct determination that Nigeria has violated the rights of the crew under the ICCPR and the MLC.

It expressly states this at paragraph 40(d) of the Statement of Claim now on your screen, and the pertinent part of this reads: "Nigeria has failed to have due regard ... to the right of persons to liberty and security" and "[t]he other rights of persons in connection with criminal proceedings."

Switzerland and its rights are nowhere to be found.

Even if Switzerland had alleged its own right, the requirement would be to have "due regard" to that right. This is not an obligation on the coastal States to have complete deference to the rights and duties of other States, and a State cannot invoke article 56, paragraph 2, to expand the jurisdiction of UNCLOS tribunals to claims of violations of instruments outside of UNLCLOS.

This is not to say that States have not tried to do so in the past. In the Chagos arbitration, with respect to one of its claims, Mauritius invoked article 56, paragraph 2, in an attempt to have the Annex VII tribunal determine that the United Kingdom had breached a set of undertakings outside UNCLOS.[10] The Tribunal, however, held that article 56, paragraph 2, "does not impose a uniform obligation to avoid any impairment of [the other State's] rights."[11] Similarly, in the *Arctic Sunrise* arbitration, the Netherlands, not unlike Switzerland, invoked article 56, paragraph 2, in order to have an Annex VII tribunal determine a violation of articles 9 and 12 of the ICCPR.[12] The tribunal, however, concluded that it "does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions".[13] The same conclusion should be reached in the present dispute: Switzerland cannot rely on article 56, paragraph 2, to have the Annex VII tribunal determine a violation of the ICCPR or the MLC.

We have also heard Switzerland invoke, both in its Statement of Claim and this morning, article 293 of the Convention, apparently in an attempt to extend the jurisdiction of the Annex VII tribunal to violations of the ICCPR and the MLC.[14] This attempt is equally unavailing. The Annex VII tribunals in *MOX Plant, Arctic Sunrise,* and *Duzgit Integrity* all affirmed that article 293 is an applicable law provision that does not affect the scope of their jurisdiction.[15] There is unanimity on this front.

Mr President, Members of the Tribunal, Switzerland's third claim is thus one that concerns the ICCPR and the MLC, not UNCLOS. If the Tribunal were to accept Switzerland's arguments on this point, any State could institute Annex VII proceedings against a coastal State over any alleged violation of international law that occurs in the coastal State's EEZ, even if that violation has nothing to do with the law of the sea. This cannot possibly be the result envisioned by the drafters of the Convention.

Even if Switzerland's third claim were one concerning the interpretation or application of UNCLOS, which it is not, the Annex VII tribunal still would not have jurisdiction over the

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[9] Switzerland's Statement of Claim, para. 45(iii).

[10] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No 2011-03, Memorial of Mauritius, paras. 5.23(v), 7.28-7.32; *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No 2011-03, Reply of Mauritius, paras. 6.76-6.82.

[11] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No 2011-03, Award, 18 March 2015, para. 519.

[12] *Arctic Sunrise (Netherlands* v. *Russian Federation), Award on the Merits*, paras. 193-194.

[13] *Arctic Sunrise (Netherlands* v. *Russian Federation), Award on the Merits*, para. 198.

[14] Switzerland's Statement of Claim, para. 42.

[15] *MOX Plant (Ireland* v. *United Kingdom), Procedural Order No. 3*, para. 19; *Arctic Sunrise, Award on the Merits*, paras. 188, 192; *Duzgit Integrity*, Award, para. 207.

claim. This is because, as the Tribunal recently affirmed in the *Detention of Naval Vessels* case, the dispute in question needs to have crystallized "as of the date of the institution of arbitral proceedings",[16] 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".[17]

Neither is the case here. In the exchanges between Switzerland and Nigeria concerning the "*San Padre Pio*" leading up to the institution of arbitral proceedings, including the aide-mémoire that Professor Caflisch showed this morning, there was not a single mention of the ICCPR or the MLC.

In conclusion, then, there is no question that the Annex VII tribunal would not have *prima facie* jurisdiction over the third claim. As a result, the Tribunal may not prescribe any provisional measure on the basis of this third claim.

Mr President, Members of the Tribunal, with your permission, I will now move on to the issue of plausibility. As the Members of the Tribunal are aware, plausibility is a critical requirement for the prescription of provisional measures. It is required by both the Tribunal and the International Court of Justice as a precondition for provisional measures.

This morning, Professor Boisson de Chazournes asserted a very narrow understanding of plausibility. According to this understanding, a right is plausible as long as there is a reasonable possibility that the right exists as a matter of law and will be recognized by the Tribunal. This is not, however, how the Tribunal or the Court understand plausibility. Rather, the jurisprudence of both institutions makes clear 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.

Thus, in *Detention of naval vessels*, the Tribunal, in determining whether Ukraine's right to the immunity of warships was plausible, examined whether, on the facts of that case, the vessels in question were actually warships.[18] Similarly, the International Court of Justice in *Ukraine* v. *Russia,* in determining whether Ukraine's right to Russia's cooperation in preventing the financing of terrorism was plausible, examined whether, on the facts of the case, the acts in question constituted terrorism financing.[19]

In the present case, the Tribunal thus needs to examine whether the rights that Switzerland alleges would actually apply to the situation at hand. Switzerland's Statement of Claim and Request for Provisional Measures make clear that it seeks the protection of three categories of rights: first, an alleged right regarding the freedom of navigation and other internationally lawful uses of the sea; second, an alleged right concerning exclusive flag State jurisdiction; and third, alleged rights concerning the ICCPR and the MLC. None of these rights are plausible in the present case. Please let me address each one of them in turn.

Switzerland first asserts its alleged right regarding the freedom of navigation and other internationally lawful uses of the sea, relying on articles 58 and 87 of the Convention. This morning, Professor Boisson de Chazournes stated that, outside of fishing, bunkering is a part of the freedom of navigation. She relied on the *M/V "Norstar" Case* for this proposition, but

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[16] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019,* para. 42.

[17] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019,* para. 81.

[18] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019,* para. 97,

[19] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*, Provisional Measures, Order (19 April 2017), paras. 72-76.

that case concerned bunkering in the high seas, not bunkering in the EEZ. This is a very important distinction. Allow me to explain.

There is no dispute that article 87 establishes the freedom of navigation in the high seas. There is also no dispute that article 58, paragraph 1, extends this freedom to the EEZ. Nevertheless, Professor Boisson de Chazournes this morning failed to mention that article 58, paragraph 1, is subject to an exception. As seen on the screen, article 58, paragraph 1, provides: "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy – and this is the important clause – subject to the relevant provisions of this Convention, the freedoms referred to in article 87 ... ."

Nigeria does not dispute that, in general, these freedoms apply to Nigeria's EEZ; but article 58 expressly provides that in the EEZ they are "subject to the relevant provisions of this Convention".[20] As such, to determine whether the alleged right is applicable, and thus plausible, the Tribunal must determine whether, on the current facts, there are other relevant provisions of the Convention that limit the freedom of navigation.

There are indeed such provisions. As emphasized in Nigeria's statement in response, article 56, paragraph 1(a), is the key provision here. Switzerland did not address this provision at all this morning. As seen on the screen, it 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 resources, 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....[21]

This article makes clear that Nigeria, as a coastal State, has sovereign rights to exploit, conserve and manage the natural resources of the EEZ. This includes enforcement jurisdiction, as expressly held by the Tribunal in *M/V "Virginia G"*. There, the Tribunal held:

> 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 ...

this is the important part

> 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.[22]

In *"Virginia G"*, the Tribunal held that the coastal State had the sovereign right to regulate the bunkering of fishing vessels in the EEZ. The present case concerns the bunkering of oil and gas exploitation installations rather than fishing vessels, but this distinction is without relevance. The Tribunal made clear that a coastal State's competence to take enforcement actions against such bunkering "derives from the sovereign rights of coastal States to explore, exploit, conserve and manage natural resources",[23] as stipulated in article 56, paragraph 1(a). As such, this enforcement competence applies to the coastal State's sovereign rights with respect to all natural resources, not just fishing. This was confirmed by the Annex VII tribunal

[20] UNCLOS, art. 87, para. 1.
[21] UNCLOS, art. 56, para. 1(a).
[22] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment*, para. 211 (emphasis added).
[23] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, para. 222.

in *Arctic Sunrise*, which expressly held that the exercise of "the coastal State's right to enforce its laws in relation to non-living resources in the EEZ" is "clear".[24]

In the present case, Nigeria was exercising its sovereign right to enforce its laws and regulations concerning the management of non-living resources in its EEZ when it acted against the "*San Padre Pio*" and its crew. As explained by my colleague Mr Loewenstein, the "*San Padre Pio*" and its crew were supplying fuel to a complex of installations built to extract petroleum from Nigeria's EEZ. The activities of the "*San Padre Pio*" and its crew thus fell within the competence of Nigeria as the coastal State. The fact that the Nigerian navy took an interest in the "*San Padre Pio*" because of evidence it was involved in the illegal theft, refinement, and bunkering of oil from Nigeria's EEZ highlights the importance and propriety of Nigeria's actions.

Articles 208 and 214 of the Convention also condition the rights asserted by Switzerland under article 58, paragraph 1. These articles impose on Nigeria the obligation to enforce its laws and regulations concerning pollution from seabed activities in its EEZ. As such, they serve as an additional, independently sufficient basis for Nigeria to take the enforcement actions it did against the "*San Padre Pio*" and its crew.

As explained earlier by Mr Loewenstein, there is no question that bunkering in connection with seabed activities is a major source of pollution of the marine environment. The threat posed by bunkering to the marine environment is particularly acute in the Gulf of Guinea. It is for this reason that Nigeria has enacted laws and regulations to regulate bunkering in connection with its seabed activities in the EEZ. It was pursuant to these laws and regulations that Nigeria arrested, detained, and initiated judicial proceedings against the "*San Padre Pio*" and its crew.

Moreover, in enforcing its laws against the "*San Padre Pio*", Nigeria was also acting in accordance with the G7 Friends of the Gulf of Guinea Rome Declaration on illegal maritime activity, issued in 2007 by 28 States, including Nigeria and Switzerland, the African Union, the European Union, the IMO and many other intergovernmental organizations.[25] These States and organizations came together to confront piracy, armed robbery and other illegal maritime activity in the Gulf of Guinea.[26] They expressed their support for "improved enforcement of the law in the maritime environment" and furthermore urged coastal States to "enhance capacities to achieve prosecutions and prevent all criminal acts at sea".[27] Most importantly, as you can see on the screen, they expressly recognized "that the primary responsibility to counter threats and challenges at sea rests with the States of the region" – States like Nigeria.

Switzerland's interpretation of UNCLOS and its request to have the Tribunal hinder Nigeria's efforts to prosecute crime related to the exploitation of the EEZ is thus inconsistent with its participation in the Rome Declaration.

In conclusion, Nigeria had not only the sovereign right, but also the obligation under UNCLOS to take the enforcement actions it did against the "*San Padre Pio*". As a result, Switzerland's right regarding the freedom of navigation and other internationally lawful uses of the sea is not applicable in the factual circumstances of the present case, and therefore is not plausible.

I would now like to turn to the second right asserted by Switzerland, which is its alleged right regarding exclusive flag State jurisdiction under articles 58 and 92 of the Convention. This right is not plausible for the same reason that the first right is not plausible, so I need not spend too much time here. Please allow me to explain.

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[24] *Arctic Sunrise*, Award on the Merits, para. 284.
[25] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017).
[26] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 1.
[27] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 9.

Professor Boisson de Chazournes this morning emphasized how article 92 establishes the exclusive jurisdiction of the flag State in the high seas, and article 58 extends this to the EEZ. Nigeria does not deny this. What Professor Boisson de Chazournes failed to mention, however, is that article 58, paragraph 2 – much like article 58, paragraph 1 – contains an exception. As seen on the screen, article 58, paragraph 2, provides: "articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part."[28]

The exception is this phrase "in so far as they are not incompatible with this Part". "[T]his Part" is, of course, is referring to Part V of the Convention on the exclusive economic zone. And Part V contains article 56, paragraph 1(a), which, as I explained previously, grants Nigeria the sovereign right to take the enforcement actions against the "*San Padre Pio*". The principle of exclusive flag State jurisdiction thus does not apply in these circumstances. 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. This would make law enforcement in an environment like the Gulf of Guinea impossible.

Switzerland's alleged right regarding exclusive flag State jurisdiction is therefore not applicable to the factual situation at hand, and thus not plausible.

I now come to the third and final category of rights that Switzerland asserts: those of individuals under the ICCPR and the MLC. On the screen, you can see again Switzerland's claim in this regard.

Here, there appear to be three layers of rights. First, it mentions "its own right", but that right is entirely undefined, so cannot be held by the Tribunal to be plausible.

The second is the alleged "right to seek redress on behalf of crew members and all persons involved in the operation of vessels". Professor Caflisch affirmed this morning that this is not a right to exercise diplomatic protection, but did not affirmatively state the right Switzerland invokes. UNCLOS contains no "right to seek redress" of breaches of other treaties. Article 2, paragraph 1, of the ICCPR and various provisions of the MLC impose obligations on States to ensure respect for the rights of individuals enshrined in those instruments; but neither instrument speaks of a "right to seek redress", as Switzerland alleges. Regardless, even if such right existed, Switzerland has not alleged any facts that Nigeria has interfered with such a right. As such, this right is not plausible either.

The third group of rights are those of individuals under the ICCPR and the MLC. Switzerland spends most of its time on article 9 of the ICCPR, which concerns the right to liberty and security of individuals. This provision, however, obviously does not prohibit all arrest or detention. It only prohibits arbitrary arrest or detention and other procedural guarantees in relation thereto. Switzerland has not asserted, let alone demonstrated, that Nigeria's arrest and detention of the vessel and its crew were arbitrary. Rather, as my colleague Mr Loewenstein explained, Nigeria became interested in the vessel because of evidence of involvement in oil theft and illegal refinement and distribution of oil stolen from Nigeria, and arrested and detained the vessel and its crew because of their engagement in illegal bunkering – and they were later charged with presenting fraudulent documents, all of which constitutes violations of Nigerian law. Article 9 thus does not apply to the situation at hand and, therefore, is not a source of any plausible right.

In conclusion, then, if we examine all the rights that Switzerland asserts, we find that none of them are applicable to the factual situation at hand and, thus, none of them are plausible.

Mr President, Members of the Tribunal, this concludes my presentation for today. I thank you for your patience in listening to my presentation. I now ask that you kindly give

[28] UNCLOS, art. 58, para. 2.

the floor to my colleague Professor Akande, who will explain why the remaining requirements for the prescription of provisional measures are not met in this case.

Mr President, we are almost right at 4.30, so I suggest that this might be a good time for a break.

THE PRESIDENT: Thank you, Mr Smith.

We have reached 4.30. At this stage the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 5 p.m.

(*Break*)

THE PRESIDENT: The Tribunal will now continue the hearing in the *M/T "San Padre Pio" Case*.

I now give the floor to Mr Dapo Akande to make his statement.

M/T "SAN PADRE PIO"

STATEMENT OF MR AKANDE
COUNSEL OF NIGERIA
[ITLOS/PV.19/C27/2/Rev.1, p. 22–33]

Mr President, Distinguished Members of the Tribunal, it is an honour to appear before you and to represent the Federal Republic of Nigeria in these proceedings. In the time that remains for Nigeria's presentation in this first round of oral pleadings, my task is to set out and develop three further reasons why this Tribunal should not prescribe the provisional measures that Switzerland has requested.

In addition to the reasons that you have been given as to why the Tribunal should not accede to Switzerland's request, Nigeria argues:

(i) that there is no real and imminent risk of irreparable harm to any of the rights of Switzerland, pending the constitution and functioning of the Annex VII arbitral tribunal;

(ii) that to grant the provisional measures requested by Switzerland would require this Tribunal to prejudge the merits of the dispute that has been submitted to the Annex VII tribunal; and

(iii) that if this Tribunal were to prescribe the provisional measures requested by Switzerland, this would cause irreparable harm to Nigeria's rights, in particular the right and the duty to maintain law and order and the sovereign right of Nigeria to prosecute persons who have violated Nigerian laws which have been adopted in order to give effect to its international rights and obligations.

Mr President, before I proceed to developing each of these points, let me begin by highlighting an important consideration that provides context to Switzerland's Request for provisional measures. The essence of Switzerland's Request is that this Tribunal should prescribe measures in a dispute where at least two other tribunals are already called upon to exercise their functions with respect to the matters in dispute between the parties: the first an international tribunal, and the second, the domestic courts of Nigeria. This Tribunal will need to bear in mind the relationship between it and the Annex VII tribunal to which the dispute has been submitted. It will also wish to bear in mind that, despite what you heard this morning, it is being asked to interfere with the work of a functioning domestic judicial process which is engaged in the important task of maintaining law and order and combatting a form of criminality that is dangerous to Nigeria as well to its neighbouring States in the Gulf of Guinea.

Provisional measures are an exceptional form of relief,[1] since they are granted in cases where the jurisdiction of the tribunal to which the dispute has been submitted has not been definitively established and since they are granted at a stage where definitive determinations about the rights of the parties have not yet been established. For these reasons, this and other international tribunals exercise caution in assessing whether the conditions for the exercise of this power have been met. The interaction between the three courts and tribunals before which different aspects of this dispute are being considered suggests additional reasons why this Tribunal will wish to ensure that Switzerland is able to demonstrate that the conditions laid down for provisional measures are strictly met.

This is a request under article 290, paragraph 5, of the Convention and this Tribunal is asked to take a step with regard to a dispute, adjudication of the merits of which have been submitted to the tribunal to be constituted under Annex VII. The fact that the merits of the dispute have been submitted to another international tribunal has at least two consequences for the exercise of this Tribunal's power to grant provisional measures. First, and as will be further developed, this consideration has led to a more stringent condition of urgency than would be

[1] See *e.g.*, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, I.C.J. Reports 1991*, p. 29, Separate Opinion of Judge Shahabuddeen (quoting E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 184).

the case where provisional measures are requested under article 290, paragraph 1, with respect to disputes, the merits of which have been submitted to this Tribunal.[2] Second, this Tribunal will wish to take particular care to ensure that provisional measures do not prejudice any decision to be made on the merits of the dispute since the decision on the merits has been committed to adjudication by another international tribunal.

The caution that this Tribunal exercises before it accedes to requests for provisional measures is also heightened in a case such as this where the Tribunal is invited to interfere with the proper functioning of a domestic judicial process that is exercising important sovereign rights, to enforce domestic criminal law, to maintain the rule of law, and to ensure national and regional stability and security. Moreover, in seeking to enforce Nigerian law in this case, Nigerian domestic courts are not merely seeking to secure important national interests but are also giving effect to Nigeria's rights and obligations under international law, including under the Convention. Dr Smith has already shown you how the action taken by Nigeria relates to its sovereign rights with respect to exploring, exploiting, conserving and managing the non-living resources within the exclusive economic zone and how they relate to its obligation to take measures to reduce and control pollution of the marine environment in connection with seabed activities subject to its jurisdiction.

Mr President, Members of the Tribunal, I will now turn to the first of my reasons why this Tribunal should not grant Switzerland's request: there is no real and imminent risk of irreparable harm to any of Switzerland's rights.

Article 290, paragraph 5, provides that provisional measures will only be prescribed where "the urgency of the situation so requires".[3] This Tribunal has made it clear that provisional measures may not be prescribed unless it considers that there is a real and imminent risk that irreparable prejudice will be caused to the rights of the Party requesting it, pending the constitution and functioning of the Annex VII tribunal.[4] In order to meet this condition, Switzerland would need to demonstrate firstly that there is a risk of irreparable prejudice to its rights and secondly that such a risk is real and imminent. It has failed to meet either of these conditions. By contrast, as will be shown, Switzerland's request would cause irreparable harm to Nigeria's own rights.

Switzerland asserts that the detention of the vessel in Nigeria and the ongoing proceedings against the Master and officers of the vessel is causing serious risks to the vessel, her crew and cargo.

Mr President, Members of the Tribunal, let me start with the crew. Switzerland speaks of the detention of the Master and the officers, who, may I remind you, are subject to serious criminal charges in Nigeria. The second measure requested by Switzerland includes a request that the Tribunal order Nigeria to release the Master and the three other officers of the "*San Padre Pio*".[5] Nigeria acknowledges and endorses the Tribunal's view that considerations of

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[2] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, Separate Opinion of Judge Mensah*, pp. 119-120: "[I]n other words, although the conditions for provisional measures under paragraph 1 are necessary for prescription of measures under paragraph 5 they are not sufficient … The difference in the temporal requirement of the competence of the tribunal imposes a measure of constraint on a court or tribunal dealing with a requires for provisional measures dealing with a request for provisional measures under article 290, paragraph 5, of the Convention" (emphasis added). See also, *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013*, para. 85 (quoting *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003*, para. 68 ("The urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to 'modify, revoke or affirm those provisional measures'").

[3] UNCLOS, art. 290, para. 5.

[4] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*, para. 100.

[5] Request for the Prescription of Provisional Measures of the Swiss Confederation, Submissions, para. 53(b).

humanity must apply in the law of the sea as they do in other areas of international law.[6] Switzerland portrays this as a case in which the crew have been detained in harsh conditions since the arrest of the vessel. However, this is very far from the true situation.

This morning, the Agent of Switzerland focused your attention on conditions in the Nigerian prisons. However, permit me to remind you that the crew were released, by order of the Nigerian courts, from prison in early March 2018, over 15 months ago. It is hard to see how this focus on prison conditions relates to the argument that provisional measures are required because of the urgency of the situation. We agree with the point made by Sir Michael Wood in his speech of this morning. He said: "Urgency is to be measured from the present, ... not by reference to the past."

Despite the serious criminal charges that the Master and officers of the crew face, neither they nor any other member of the crew are currently detained on the vessel or elsewhere. The record demonstrates that the charges initially filed against 12 of the 16 crew members who were on board the vessel when it was arrested were later dropped, and they left Nigeria in July of last year.[7] They have been replaced by other crewmen who are in Nigeria voluntarily or, more likely, at the request of the owners or charterers of the vessel, and they are free to leave Nigeria at any time.

Mr President, Members of the Tribunal, while Nigeria acknowledges that the Master and the three other officers of the vessel, who are facing criminal charges, are presently located on the vessel, the true situation is that they are there voluntarily or on the orders of their employers. They are not being detained on the vessel by the Nigerian authorities. They were released on bail in March 2018 with the only restriction imposed on them being that they shall not travel outside Nigeria without the approval of the Federal High Court.[8] You see the order of the court in tab 10 of your Judges' folder, with the two relevant provisions highlighted, on the screen: the opening paragraph, where the defendants are admitted to bail on provision of a bank guarantee, and paragraph 5, which only requires that the defendants do not travel outside Nigeria without the prior approval of the Court.

Indeed, the Master and crew do in fact leave and return to the vessel as they please, occasionally going ashore to Port Harcourt. The affidavit of facts by Captain Kolawole Oguntuga, the commanding officer of the Forward Operating Base that has responsibility for the vessel, and which you have in the Judges' folder at tab 9, attests to this fact.[9] These points are collaborated by the affidavit of Mr Arogha, who is the legal officer in the Economic and Financial Crimes Commission (EFCC) with responsibility for prosecuting the charges against the vessel and the crew. That affidavit is also in the Judges' folder at tab 8. The relevant paragraphs are 30 and 31. In paragraph 30 he states that "upon the volition of the 1st to 4th Defendants, they returned to the vessel in Bonny to live there where they normally come to court at every adjourned date on their own accord [and] without any restraint of movement."

He then goes on to affirm at paragraph 31 that on some occasions the accused stay "in Hotels of their choice whenever they come to Port Harcourt unguarded".

If it was ever unclear whether the Master and the officers were detained on the vessel, this matter has now been clarified by the diplomatic note sent by Nigeria to Switzerland on 18 June 2019. In that note

> The Ministry of Foreign Affairs of the Federal Republic of Nigeria hereby provides its assurances to the Swiss Confederation that under the terms of their bail, the defendants ... are not required to remain aboard the *M/T "San Padre Pio"* but rather may disembark and board

[6] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment of 1 July 1999,* para. 155.
[7] Statement in Response of Nigeria, annex 12.
[8] Request for the Prescription of Provisional Measures of the Swiss Confederation, annex 24.
[9] Statement in Response of Nigeria, annex 8, para. 11.

the *M/T "San Padre Pio"* at their pleasure and are at liberty to travel and reside elsewhere in Nigeria.[10]

This note is in the Judges' folder at tab 11.

This not only clarifies the situation as to the past and present, but constitutes an assurance for the future.

Mr President, Members of the Tribunal, as the crew are not in fact detained, that aspect of Switzerland's second request where it asks this Tribunal to order that Nigeria release the Master and officers is without object. Mr President, I will return later to the other aspect of the second request that relates to permitting the Master and the crew to leave Nigeria. Our argument is that to make such an order would prejudice irreparably Nigeria's right to enforce its laws through criminal proceedings. This is because 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.

Mr President, distinguished Members of the Tribunal, Switzerland also asserts that irreparable harm is being, or may be, caused to the crew because of the conditions on the vessel, including the security situation in the area. Permit me to make a few points in response to this argument.

The first point is one that I have already made: the crew are present on the vessel voluntarily or, more likely, at the direction of their employers. They are not confined to the vessel by the Nigerian authorities. They are free to stay elsewhere in Nigeria, as they apparently do from time to time.

Second, the conditions on the vessel are the same as the normal working conditions of those who man the vessel in its ordinary seafaring activities.

Third, the vessel is supplied with food and other necessities. I refer Members of the Tribunal once again to the affidavit of the commanding officer of the naval base, Captain Oguntuga, which is in your Judges' folder at tab 11. I will not take you to it again but you can find the relevant statement highlighted at paragraph 12.

Fourth, the Nigerian authorities have not imposed any restrictions on the right of the crew to communicate with others outside the vessel, nor are there restrictions (other than logistical considerations) on medical or other persons visiting the crew. Indeed, the crew remain free to visit with others ashore as and when they wish. Switzerland submits, as evidence of the harsh conditions of the crew, a letter by a doctor asserting an inability to visit the vessel in April of this year.[11] However, this is one of those rather cryptic pieces of evidence referred to by Mr Loewenstein. The letter does not indicate which person, authority or office denied permission to visit the crew, nor is there any indication as to why the crew could not be examined while ashore, where they are occasionally.

The fifth point relates to the safety of the vessel and the security of the crew. This is an issue that Nigeria takes very seriously. Nigeria reminds the Tribunal that the action against the vessel and crew arises out of Nigeria's determined efforts to maintain law and order and to stamp out criminality in that maritime area. Nigeria has provided additional security since the armed attack that Switzerland refers to. Quite apart from the fact that the attack was foiled by the bravery of Nigerian navy personnel, additional guards have been stationed aboard the vessel after the attack, and a gunboat has been deployed nearby to the vessel. Again, I repeat that, even if the security conditions aboard the vessel were such as to give rise to an unacceptable level of risk, that risk is not caused by the actions of the Nigerian authorities. If there is any

[10] Diplomatic Note No. 749/2019 from Ministry of Foreign Affairs of the Federal Republic of Nigeria to the Embassy of Switzerland, dated 18 June 2019.

[11] Request for the Prescription of Provisional Measures of the Swiss Confederation, annex 52.

imposition of a risk, that risk is being imposed on the crew in order to further the economic interests of those involved in the operation of the vessel, as the crew is on the vessel to ensure that it is regularly maintained and that the condition of the vessel does not deteriorate.

Distinguished Members of the Tribunal, before I leave consideration of the condition of the crew, permit me to make brief reference to the point made this morning by the Agent of Switzerland with regard to security conditions in Port Harcourt and in the rest of Nigeria. Nigeria strongly rejects the inference that presence in any part of Nigeria would itself constitute an imminent risk of irreparable harm.

Mr President, Members of the Tribunal, permit me now to address you on Switzerland's argument that provisional measures are required because irreparable prejudice will be caused to the vessel and the cargo. Here, I have two points to make, one relating to what it means for harm to be irreparable and the second relating to the imminence of harm in a case such as this.

The first point is that the case law of this Tribunal, and of the International Court of Justice, establishes that for harm to be irreparable, it must be such that it would not be possible to provide an adequate remedy which would wipe out the consequences of the harm fully either through monetary compensation or by some other form of reparation.[12] As the Swiss Request itself demonstrates, any alleged harm to the vessel, to the cargo, and to their owners 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.[13]

With regard to the cargo, it is asserted that the quality will deteriorate over time. Not only is such harm purely economic, the Nigerian authorities have sought to take steps to prevent any economic damage to those who have an interest in the cargo. The Nigerian prosecutors applied for and the Nigerian court granted, on 26 September 2018,[14] an order for interim forfeiture of the cargo precisely 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. It is the charterers of the vessel that have delayed and that 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 ground that they are the beneficial owner of the cargo and that they were not given notice of the application for forfeiture. That application has been considered and 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, as Switzerland did this morning, that the cargo belonged to another entity.[15] The charterers have appealed this decision, again delaying the sale and preservation of the cargo.[16] If there has been any deterioration of the value of the cargo, not only can such be remedied by monetary compensation but such deterioration is entirely as a result of the actions of those entities involved in the operation of the vessel.

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[12] See, e.g. *Ghana/Côte d'Ivoire, Provisional Measures, Order of 25 April 2015*, p. 163, para. 89: "There is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and *where such modification cannot be fully compensated by financial reparations*" (emphasis added). See also, *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Separate Opinion of Judge Mensah*, p. 1 ("The second condition is that the prejudice of rights would be irreparable in the sense that it would not be possible to restore the injured party materially to the situation that would have prevailed without the infraction complained of, *or that the infraction 'could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form'*".) (citing the Denunciation of the Treaty *of 2 November 1865 between China and Belgium, Order of 8 January 1927, P.C.I.J. Series A, No. 8*, p. 7) (emphasis added).

[13] 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.

[14] Request for the Prescription of Provisional Measures of the Swiss Confederation, annex 19.

[15] Statement in Response of Nigeria, annex 18.

[16] *Id.*, annex 19.

STATEMENT OF MR AKANDE – 21 June 2019, p.m.

My second point in relation to the alleged harm to the vessel and cargo relates to the imminence of the harm. It picks up on a point that I made at the beginning of my speech about the relationship between this Tribunal and the Annex VII tribunal. In this case, even if there were harm to the vessel and the cargo, not only is such harm economic only, and thus not irreparable, the harm is also not imminent. This is an application for provisional measures under article 290, paragraph 5, which not only mentions that provisional measures may only be prescribed where the situation is urgent, but also makes clear that the measures are to be granted pending the constitution and functioning of the Annex VII tribunal to which the merits of the case are committed. As this Tribunal stated in the recent *Detention of three Ukrainian naval vessels* case:

> The Tribunal may not prescribe such measures unless it considers that 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. [17]

This Tribunal is clear that under article 290, paragraph 5, the time within which the irreparable harm that justifies the measure will occur is the period before the constitution and functioning of the Annex VII tribunal. It is only if harm will occur within that short period that there will be justification for Switzerland's Request.

Mr President, there is no imminent risk of irreparable harm in this case because there is no evidence that the condition of the vessel will materially or significantly worsen before the constitution and functioning of the Annex VII tribunal. Although Switzerland refers to general advice about laid-up vessels and refers to internal emails about the possible condition of this vessel, it does not adduce any detailed evidence to support its contention that the vessel may become unseaworthy soon. It also fails to take into account that the crew have had constant access to the vessel for the purpose of undertaking necessary maintenance. Switzerland provides no indication that the crew have requested additional support in providing maintenance. By contrast, the detailed expert report obtained by Nigeria comes to the overarching conclusions that (i) whether the vessel has been regularly maintained or not, the condition of the vessel will not significantly deteriorate over the next four months; and that (ii) the repair time or costs will not increase significantly over the next few months.[18]

Mr President, distinguished Members of the Tribunal, for these reasons, Nigeria asks you to find that there is no real and imminent risk of irreparable prejudice to any of the rights of Switzerland that may be relevant.

Mr President, as I mentioned at the beginning of this presentation, Switzerland's Request for provisional measures invites this Tribunal to enter into terrain that is already properly occupied by other tribunals that are acting in the exercise of functions conferred on them by international law and national law which is seeking to give effect to rights and obligations under international law. Beyond the impact that such a request would have on general considerations of comity that every Tribunal is called upon to follow, in this particular case the provisional measures requested by Switzerland would require this Tribunal to breach two important rules: the obligation not to prejudge the merits of the case when considering requests for provisional measures, on the one hand, and the obligation not to cause irreparable prejudice to the rights of the Respondent, in particular Nigeria's rights and obligations to maintain law and order through the enforcement of its criminal law, on the other.

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[17] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019,* para. 100 (citing "*Enrica Lexie*" (*Italy* v. *India*), *Provisional Measures, Order of 24 August 2015*, para. 87).

[18] Statement in Response of Nigeria, annex 21.

Now permit me to turn to Nigeria's next argument, which is that granting the first measure requested by Switzerland would impermissibly require this Tribunal to prejudge the merits of this dispute. In that first request, Switzerland requests that the Tribunal order that Nigeria shall

> 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.*[19]

As the wording makes clear, release of the vessel is said to be justified on the basis of the right to freedom of navigation. Through the provisional measures request, Switzerland is asking this Tribunal to make a finding of its rights to freedom of navigation with regard to the matters under dispute. However, this is precisely one of the central matters at issue at the merits phase of this dispute. This can be seen from Switzerland's own Statement of Claim initiating proceedings before the Annex VII tribunal. The first submission of Switzerland to that tribunal is that it adjudge and declare that

> [B]y 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.[20]

For the Tribunal to grant Switzerland's first request, it would have to make a determination that, as the Tribunal put it in the *Enrica Lexie* case, "touches upon issues related to the merits of the case".[21] Moreover, determining these issues will, as was also recognized in the *Enrica Lexie* case, would be inappropriate since it impermissibly trespasses on a matter committed to another tribunal, the Annex VII arbitral tribunal.

As the formulation in the *Enrica Lexie* suggests, the obligation not to prescribe provisional measures that may prejudge the merits of the case is a broad one. In the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, the Special Chamber of this Tribunal stated that provisional measures "must not prejudice any decision on the merits".[22] In this case, the first request of Switzerland not only touches on the merits or merely prejudices a decision on the merits but is conditional on affirmation by this Tribunal of the claims that it seeks to have adjudicated by the Annex VII tribunal.

As already noted, the power to grant provisional measures is an exceptional one with regard to which this Tribunal and others exercise particular caution. That caution extends to ensuring that the provisional measures do not constitute a form of interim judgment whereby a party is able to get a determination of the matters it seeks without a full argument on the merits.

Mr President, distinguished Members of the Tribunal, let me now turn to the last ground upon which Nigeria urges you to reject the request of Switzerland – the last but by no means

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[19] Request for the Prescription of Provisional Measures of the Swiss Confederation, para 53(a).

[20] Statement of Claim of the Swiss Confederation, para. 45.

[21] See also, *Ghana/Cote d'Ivoire, Provisional Measures, Order of 25 April 2015*, para. 98; and *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 ("The Court now turns to the issue whether the provisional measures requested are linked to the rights claimed and do not prejudge the merits of the case."). The Court observes that this request is exactly the same as one of Nicaragua's claims on the merits contained at the end of its Application and Memorial in the present case. A decision by the Court to order Costa Rica to provide Nicaragua with such an Environmental Impact Assessment Study as well as technical reports at this stage of the proceedings would therefore amount to prejudging the Court's decision on the merits of the case.").

[22] *Ghana/Cote d'Ivoire, Provisional Measures, Order of 25 April 2015*, para.98.

the least important. Switzerland's second and third requests would cause irreparable prejudice to the rights of Nigeria.

While provisional measures are granted in cases where there would be irreparable prejudice to the rights of the party seeking it, this Tribunal has stated that such measures should equally preserve the respective rights of both parties.[23] Thus, provisional measures will not be granted where they will cause irreparable harm to the rights of the party against which the measures are directed.

The second request of Switzerland seeks an order that Nigeria not only release the Master and the crew – and we have already shown that they are not in fact detained – but also that they be permitted to leave Nigeria with the vessel, despite the fact that they are the subject of very serious criminal charges. The third request then seeks suspension of the judicial and administrative proceedings against them and that Nigeria refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII tribunal.

Mr President, Members of the Tribunal, interference, in this case, with ongoing domestic judicial proceedings directed at the enforcement of criminal law intended to maintain law and order and to combat criminality would impermissibly and irreparably interfere with the rights of Nigeria. It would also be a setback for the rule of law and of the internationally recognized efforts to provide stability and security in the Gulf of Guinea.

More importantly, Nigeria's prosecution of the Master and three crew members of the "*San Padre Pio*" are for breaches of Nigerian law which not only give effect to the exercise of rights conferred by the Convention, but are also undertaken in compliance with its obligations under the same instrument.

First, my colleague Dr Smith has already shown you that the measures taken by Nigeria are on the basis of its *sovereign rights* to ensure the proper management of its non-living resources related to the seabed and the subsoil.

Second, Nigeria also has the obligation, pursuant to article 208, to adopt laws to prevent, reduce and control pollution of the marine environment "arising from or in connection with seabed activities subject to its jurisdiction". To give effect to such regulations and obtain the ultimate goal of the Convention with regard to the protection of the marine environment, article 214 also establishes State Parties' obligations to enforce such laws. Nigeria takes such obligations very seriously, as its conduct in the course of the events of 23 January 2018 revealed.

Should the Tribunal order that the Master and three officers of the vessel be permitted to depart from Nigeria, Nigeria would suffer irreparable harm because it may then prove impossible to secure their presence, which would be necessary for the successful conduct of the prosecution. This is particularly likely given that Switzerland, not being their State of nationality, nor their State of residence, or even their employer, cannot guarantee their return to Nigeria. Nigeria's rights to exercise her sovereign rights under article 56 would be impacted and, more importantly, it would also cause irreparable harm to her obligations to enforce its

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[23] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010,* para. 71: ("*Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment"); *Delimitation of the Maritime Boundary in the Atlantic Ocean Case (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, para. 40: ("*Considering* that the Chamber must be concerned to safeguard the respective rights which may be adjudged in its Judgment on the merits to belong *to either* Party") (emphasis added). *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, paras. 125 and 126: ("Considering that *the Order must protect the rights of both Parties* and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII; *Considering* that the first and the second submissions by Italy, if accepted, *will 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") (emphasis added).

regulations on the protection of the marine environment from activities in connection with or related to seabed activities.

Distinguished Members of the Tribunal, you will have observed in the record that the Nigerian courts have been responsive to claims that have been made not only by the crew but also by others involved in the operation of the vessel. As has been indicated, the applications for bail by the crew and that for suspension of the order for interim forfeiture by the charterer have been dealt with in a timely manner. Indeed, the commencement of the trial was delayed by the application made by the crew themselves.[24] In these circumstances, there is no reason to order suspension of the proceedings. Indeed, suspension of the proceedings would only serve to prolong the charges that will continue to be pending against the Master and the officers.

One cannot help but notice that Switzerland complains, quite unjustifiably, that the proceedings have been unduly long, but then requests a suspension which would only serve to lengthen the proceedings even further for the crew. Switzerland argues, again without justification, that Nigeria acts in breach of human rights of the crew members – a matter, as Dr Smith has just explained, that neither this Tribunal nor the Annex VII tribunal have jurisdiction over, even *prima facie* – but then requests a measure which would implicate the obligation of Nigeria to ensure that criminal proceedings are conducted without undue delay.[25]

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.

As previously noted, this Tribunal has been keenly aware of considerations of humanity in the law of the sea, and Nigeria does not contest the legitimacy and propriety of such considerations. However, Nigeria also notes that, while having been consistently aware of humanitarian considerations, the Tribunal has nonetheless exercised a great degree of caution when its action could potentially interfere with the proper exercise of judicial functions by the national courts of State Parties. This morning Sir Michael referred you to cases where this Tribunal has ordered release of vessels or of crew. He did not, however, refer you to those cases, such as the *M/V "Louisa"*[26] and *"Enrica Lexie"*,[27] where this Tribunal has refused to order, at the provisional measures stage, release of the vessel and the crew, taking into account the serious criminal charges brought against them, and the rights of the respondent State. He also downplayed the recognition by this Tribunal of the important sovereign interests that were being prejudiced by the detention of warships in the *Case concerning the detention of three Ukrainian naval vessels* and, I might add, in the *ARA "Libertad" Case* as well.[28]

Mr President, distinguished Members of the Tribunal, for all the reasons given by my colleagues and me, Nigeria urges you to reject all the provisional measures requested by Switzerland.

Unless I can assist you further, this brings to a close Nigeria's arguments in this first round, and I thank you for your kind attention.

THE PRESIDENT: Thank you, Mr Akande.

This concludes the first round or oral arguments by Nigeria. The hearing will continue tomorrow with the second round of arguments by both Parties. We will hear the arguments of

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[24] Statement of Claim, annex 3-1.

[25] International Convention of Civil and Political Rights (16 December 1966), art. 14.

[26] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010.*

[27] *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015.*

[28] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order of 25 May 2019*; *"ARA Libertad" (Argentina* v. *Ghana)*, Provisional Measures (2012)

Switzerland in the morning, from 10 a.m. until 11.30 a.m., and the arguments of Nigeria from 4.30 p.m. until 6 p.m. I wish you a good evening. The sitting is now closed.

(*The sitting closed at 5.45 p.m.*)

PUBLIC SITTING HELD ON 22 JUNE 2019, 10 A.M.

Tribunal

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

For Switzerland: [See sitting of 21 June 2019, 10 a.m.]

For Nigeria: [See sitting of 21 June 2019, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 22 JUIN 2019, 10 H 00

Tribunal

Présents : M. PAIK, *Président* ; M. ATTARD, *Vice-Président* ; MM. JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, MME CHADHA, MM. KITTICHAISAREE, KOLODKIN, MME LIJNZAAD, *juges* ; M. MURPHY, MME PETRIG, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour la Suisse : [Voir l'audience du 21 juin 2019, 10 h 00]

Pour Nigéria : [Voir l'audience du 21 juin 2019, 10 h 00]

THE PRESIDENT: Good morning. The Tribunal will continue the hearing in the *M/T "San Padre Pio"* case. This morning we will hear the second round of oral arguments presented by Switzerland.

I now invite the Agent of Switzerland, Madam Cicéron Bühler, to make her statement.

EXPOSÉ DE MME CICÉRON BÜHLER – 22 juin 2019, matin

Second tour : Suisse

EXPOSÉ DE MME CICÉRON BÜHLER
AGENT DE LA SUISSE
[TIDM/PV.19/A27/3/Rev.1, p. 1–5]

Monsieur le Président, Mesdames et Messieurs les juges, lors de ce deuxième tour des plaidoiries, je formulerai quelques remarques générales, nécessaires à la suite des présentations faites par les conseils du Nigéria. J'évoquerai ensuite deux éléments spécifiques. Il me reviendra enfin de répondre aux deux premières questions posées par votre Tribunal. Sir Michael Wood abordera la troisième.

Tout d'abord, mes remarques générales : Maître Loewenstein vous affirme que toutes les allégations que la Suisse n'a pas explicitement réfutées doivent être considérées comme acceptées par mon pays. Il n'en est rien. A ce stade de la procédure – nous le rappelons à nos contradicteurs – il s'agit d'une phase incidente d'urgence, les faits n'ont pas encore à être établis définitivement. Nous nous sommes donc limités à donner à titre d'exemples certains des points avancés par le Nigéria que nous réfutons. Notre silence ne peut aucunement être assimilé à une acceptation globale des assertions du Nigéria.

L'approche du Nigéria est d'autant moins convenable qu'il continue, quant à lui, de ne fournir aucune preuve étayant ses graves allégations. Il est surprenant qu'il s'évertue à attaquer la Suisse sur la nature et la qualité des documents fournis alors que, de son côté, il n'a fourni que de très rares documents. Et la majorité de ceux qu'il présente sont des affidavits d'officiels de l'Etat. En ce qui concerne la valeur probante de ces déclarations, que le Nigéria nous reproche de ne pas avoir produites, la Cour internationale de Justice a rappelé que, et vous le voyez sur votre écran :

> même les déclarations sous serment doivent être examinées avec « prudence » [...] Lorsqu'elle apprécie la valeur probante de toute déclaration la Cour prend nécessairement en compte sa forme, ainsi que les circonstances dans lesquelles elle a été reçue.
>
> [...] La Cour a ainsi souligné devoir « examiner notamment si les déclarations émanent d'agents de l'Etat ou de particuliers qui n'ont pas d'intérêts dans l'issue de la procédure, et si telle ou telle déclaration atteste l'existence de faits ou expose seulement une opinion sur certains événements » [...] Sur ce second point, la Cour a précisé qu'« un témoignage sur des points dont le témoin n'a pas eu personnellement une connaissance directe, mais seulement par "ouï-dire", n'a pas grand poids [...] ».[1]

Le Nigéria a tendance à détourner les propos de la Suisse et à tenter de nous faire dire que ce nous n'avons clairement pas dit. Au vu de la très grande qualité de la traduction, je ne peux pas penser que cela soit simplement dû à nos différences de langues. Ainsi, au sujet des prétendues violations de l'AIS, le Nigéria, au lieu de présenter des preuves, me prête des mots que je n'ai pas prononcés[2]. Cette approche tendancieuse est fort regrettable.

En outre, le Nigéria a annoncé sa décision de ne répondre à la totalité de nos arguments que lors du deuxième tour des plaidoiries, cet après-midi. Ce choix stratégique du Nigéria comporte un clair désavantage pour la Suisse : il nous empêchera, le cas échéant, de répondre à de nouvelles allégations ou à des éléments de preuve non fournis jusque-là. Nous demandons

[1] *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), arrêt, C.I.J. Recueil 2015*, p. 77-78, par. 196-197 ; voir l'onglet 1 du classeur des juges (deuxième tour).
[2] TIDM/PV.19/A27/2, p. 10.

donc que, faute d'information contraire de notre part, ces points soient considérés comme contestés par la Suisse.

J'en viens maintenant aux deux éléments spécifiques que j'aimerais aborder.

Premièrement, j'évoquerai la supposée liberté de mouvement des quatre officiers et les déclarations du Nigéria visant à fournir des assurances à cet égard. Monsieur le Président, Mesdames et Messieurs les juges, vous avez entendu à loisir le Nigéria affirmer que ces personnes bénéficiaient, conformément aux conditions de la libération sous caution, d'une liberté de mouvement totale au Nigéria. Mathématiquement, il suffirait de prouver une seule occasion qui contredise cette déclaration pour être en mesure de l'infirmer. C'est ce que nous avons fait, de manière indubitable, avec la décision de justice nigériane présentée au premier tour des plaidoiries[3]. Ainsi, les différentes entités étatiques nigérianes qui interagissent dans notre affaire ne semblent pas être en mesure d'accorder leurs violons. Puisque le Nigéria n'a pas respecté les conditions de libération sous caution par le passé, en affirmant toujours haut et fort le contraire, comment pourrions-nous faire confiance à leurs prétendues nouvelles assurances ? Cela est d'autant plus vrai que la note diplomatique dans laquelle ces prétendues assurances se trouvent nous est parvenue cette semaine seulement. Si le Nigéria l'avait réellement souhaité, il aurait eu de nombreux mois pour nous contacter et clarifier la situation. La présomption de bonne foi est importante, mais elle ne doit pas aller à l'encontre des faits.

En deuxième point, le Nigéria attaque la légalité des activités menées par le « San Padre Pio ». Il soutient que le pétrole serait d'origine illégale en raison de sa qualité et de son origine. En ce qui concerne son origine, comme toujours, le Nigéria ne fournit aucune preuve concrète liée aux activités du « San Padre Pio ». Il se réfère simplement à des descriptions des problèmes plus généraux dans la région. Les conclusions qu'il en tire ne peuvent en aucun cas étayer, faute de preuves réelles, ce que le Nigéria affirme. En ce qui concerne le Togo, il appartient à ce pays de réfuter l'image négative que le Nigéria tente de lui attribuer.

Monsieur le Président, Mesdames et Messieurs les juges, quant aux questions relatives à la qualité du pétrole, les conseils du Nigéria mélangent des concepts somme toute compliqués. Le gasoil marin est utilisé pour faire fonctionner les plateformes pétrolières. Ce gasoil marin répond à la spécification mondiale ISO sous la référence ISO 8217. Le produit acheté à Lomé, comme vous le voyez affiché à l'écran, correspondait à cette norme ISO, tel qu'indiqué dans le contrat[4]. Ce carburant n'est pas le même que le gasoil automobile. Je précise. On met en opposition le gasoil marin et le gasoil automobile qui, lui, est probablement importé au Nigéria pour le marché de l'automobile. Ce qui peut prêter à confusion est que le terme AGO utilisé sur les documents locaux est un terme générique qui regroupe différentes sortes de gasoil. Dans ce contexte, les tests effectués par les autorités nigérianes ont trouvé que le gasoil à bord du « San Padre Pio » ne remplissait pas les spécificités techniques plus contraignantes du gasoil automobile ; mais le gasoil à bord du « San Padre Pio » n'en était justement pas et il n'a jamais été prétendu qu'il en était. Ainsi, le gasoil en question n'était pas du AGO de mauvaise qualité mais bien du gasoil marin de qualité conforme aux normes internationales pour le marché maritime.

Le Nigéria a allégué tout récemment que les officiers auraient fait des faux dans les titres. Cette grave accusation semble se baser sur les valeurs quantitatives du gasoil à bord, chiffres dans lesquels les conseils du Nigéria semblent également se perdre. Il existe plusieurs *bills of lading* (ou connaissements en français) qui sont pertinents en ce qui concerne les opérations qui nous intéressent. Cela n'a rien de suspect en soi. Le connaissement du chargement à Lomé était de plus ou moins 6 267 tonnes métriques ; il s'agit là de l'achat de la cargaison, comme vous le voyez s'inscrire sur vos écrans. Ce volume s'est ajouté à bord du

[3] Voir onglet 11 du classeur des juges, intégrée le 21 juin 2019, *Motion on Notice Court of Nigeria* du 26 juin 2018.

[4] Voir onglet 2 du classeur des juges (deuxième tour).

navire aux 450 tonnes métriques environ qui restaient d'un transport précédent. Un autre connaissement est relatif aux déchargements spécifiques dans une région ou dans un pays. En effet, il ne convient pas d'obtenir un permis pour la totalité de la cargaison si seulement la partie correspondant au contrat est déchargée dans une région ou un pays. Le volume listé dans ce second document, soit 3 875 tonnes métriques, est donc logiquement inférieur à celui du premier document[5]. Cette pratique n'est pas propre uniquement au « San Padre Pio » ; elle est mondialement utilisée et standard dans l'industrie.

Le Nigéria affirme encore que le transfert de navire à navire entre le « San Padre Pio » et le PSV « Lahama » est en claire violation du droit nigérian. Un examen du droit applicable et des faits en l'espèce ne mène pas nécessairement à une telle conclusion. En effet, le *Petroleum Act*, bien qu'il interdise en général les transferts de nuit, prévoit aussi des exceptions. L'une d'entre elles est applicable ici. En effet, et je cite en anglais :

> (c) the loading or discharging of petroleum spirit or ballast water, and the rigging and disconnecting of hoses shall not be permitted between sunset and sunrise unless ;
>
> (i) adequate safe illumination is provided on board the ship, the equipment used for such illumination is designed, constructed and maintained in accordance with Lloyd's Register of Shipping or other approved classification society's requirements in relation to the position in the ship in which it is installed ;[6]

Comme vous pouvez le constater sur la photo à l'écran, le « San Padre Pio » est équipé de l'éclairage requis afin de pouvoir procéder après le coucher du soleil[7].

Monsieur le Président, je n'ai pas d'hésitation à reconnaître que les faits sont complexes et techniques. Cependant, le Ministère public n'a rien prouvé et les quatre officiers, tout comme les autres défendeurs, doivent bénéficier de la présomption d'innocence. Il convient en outre de rappeler les principes généraux de droit qui s'appliquent tant au niveau domestique que sur le plan international. Comme cela est reconnu dans la décision arbitrale en l'affaire « Duzgit Integrity », les peines encourues doivent être proportionnelles à la gravité des violations[8].

Monsieur le Président, Mesdames et Messieurs les juges, je vais maintenant répondre aux deux premières questions que vous avez posées hier soir. Je commencerai en anglais.

(Continued in English.) Your first question is related to Nigerian law and Switzerland is not in the most adequate position to address it. Nevertheless, we will answer to the best of our knowledge. According to our information, the possibility of posting a bond only exists in civil proceedings. The law permits the release of a ship under arrest through the provision of a bond under Order 10 of Admiralty Jurisdiction Procedure Rules of 2011.

The vessel was arrested and charged as a defendant under Section 1(17) of the Miscellaneous Offences Act CAP M17 Professor the commission of an alleged crime. According to our understanding, under criminal law, the law provides for forfeiture of the vessel to the Nigerian Government upon conviction.

The only exception where properties subject to criminal proceedings are released on bond are properties of victims recovered during investigations. In such cases, the court would be empowered to exercise its discretion to release the property under the Administration of Criminal Justice Act of 2015. The scenario here is not the same. From what we have heard, in

[5] Voir onglet 3 du classeur des juges (deuxième tour).
[6] Voir onglet 4 du classeur des juges (deuxième tour).
[7] Voir onglet 5 du classeur des juges (deuxième tour).
[8] *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe), Award*, 5 septembre 2016, par. 256, https://pcacases.com/web/sendAttach/1915.

none of the cases where the vessels have been charged was any released on bond before the determination of the case.

(Reprend en français) Je passe maintenant à votre deuxième question sur le déroulement des événements des 22 et 23 janvier 2018. Lors de ces deux jours, le « San Padre Pio » était engagé dans des opérations de transfert de navire à navire. Selon le log-book du navire[9], les préparatifs de la première opération qui nous intéresse ont commencé le 22 janvier à 15 h 42 avec une inspection du réservoir. A 17 h 18, la première ligne entre le « San Padre Pio » et le PSV « Lahama » a été attachée, commençant ainsi officiellement l'opération. A 17 h 36, le processus de raccord de tuyaux avec le PSV « Lahama » a débuté. A 18 h 12, le soutage lui-même a commencé. Il a duré jusqu'à 1 h 42 du matin. Les activités de finalisation de l'opération ont pris fin à 3 h 06 avec le départ du PSV « Lahama ».

Le 23 janvier au matin, le PSV « Energy Scout » s'est approché à son tour. A 7 h 18, la première ligne entre le « San Padre Pio » et le petit navire de transport a été attachée. Le soutage a commencé à 8 h 24, puis a été suspendu sur l'ordre de la marine à 8 h 42. Le NNS « Sagbama » de la marine nigériane a en effet approché le « San Padre Pio » et ordonné cet arrêt. La marine a demandé à voir des documents officiels, dont certains inapplicables à des navires battant pavillon étranger. Après la présentation de la *Naval Clearance* et du *Vessel Certificate of Registry*, le soutage a pu reprendre. Cette activité a pris fin à 13 h 12 et le PSV « Energy Scout » est parti à 14 h 30. C'est à 15 h 30 que la marine nigériane a ordonné au navire de se rendre à *Inner Bonny Anchorage*. Le NNS « Sagbama » a escorté le « San Padre Pio » à *Inner Bonny Anchorage* où il est arrivé le 24 janvier.

Cela m'amène au terme de ma présentation. Monsieur le Président, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention et vous demande d'appeler à la barre Monsieur Caflisch.

THE PRESIDENT: Thank you, Madam Cicéron Bühler.

I give the floor to Mr Caflisch to make the next statement on behalf of Switzerland.

[9] Voir annexe NOT/CH-14 pour les 23-24 janvier 2018. La Suisse fournira avec plaisir une copie de ce document pour le 22 janvier si cela sied au Tribunal.

STATEMENT OF MR CAFLISCH
COUNSEL OF SWITZERLAND
[ITLOS/PV.19/C27/3/Rev.1, p. 5–7]

Mr President, Members of the Tribunal. Speaking on jurisdictional issues, Dr Derek Smith claimed yesterday that there was no *prima facie* jurisdiction regarding Switzerland's claim with respect to the International Covenant on Civil and Political Rights and the Maritime Labour Convention. I shall be happy to attempt to clarify the issue.

Article 293, paragraph 1, of the Convention on the Law of the Sea, has this to say about the applicable law, and I quote: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."

The ICCPR and the MLC contain such other rules of international law. They are certainly compatible with the Convention and, as such, form part of the applicable law. They are treaties in force between the parties and give rise to rights and obligations.

This provision – that is article 293, paragraph 1 – should be viewed together with article 56, paragraph 2, of the Convention. Article 56, paragraph 2, provides that, when exercising its rights and performing its duties under the Convention – please note those words – the coastal State shall have due regard to the rights and duties of other States under international law. Note the absence here of the words "under this Convention", used for the coastal State. This can only mean that the flag State is not limited to the reference to the Convention. This is not a negligent omission by the drafters of the Convention, who knew perfectly what they were doing.

It follows logically that the flag State can make reference to law other than that contained in the Law of the Sea Convention, and that there is room in particular for provisions found in the ICCPR and in the MLC, as well as rules of customary international law.

This is true in particular for article 9 of the ICCPR, which provides, *inter alia*, and allow me to cite once again:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him.

It is submitted that these rules are likely to have been breached in the case of the crew of the *"San Padre Pio"* on account of the actions of the Nigerian authorities against the crew.

This does not in any way imply – contrary to what Dr Smith claims – that Switzerland seeks to apply this Convention to individuals. It seeks to do so because, through Nigeria's conduct, it has been deprived of its right as the flag State to ensure respect of its rights.

The situation is similar regarding the Maritime Labour Convention which provides, *inter alia*, that – and I cite again:

> 3. Every seafarer has a right to decent working and living conditions on board ship.
>
> 4. Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection.

In the present instance, the seafarers lost their right to such working and living conditions onboard ship, the respect of which the flag State can no longer ensure on account of

Nigeria's conduct. In addition, it is tempting to ask how health protection and medical care have been assured in the present case.

Mr President, Members of the Tribunal, let me conclude. The references to the ICCPR and the MLC – to which I would add some rules of customary international law – are of high relevance to the flag State. It is therefore unsatisfying, according to the Swiss Government, to assert that the right of protection of the flag State resulting from these sources falls outside the framework of the dispute-settlement provisions of Part XV of the Law of the Sea Convention.

According to the Swiss Government, its claim relates to a right of a State Party to the Convention and therefore the Annex VII arbitral tribunal should have jurisdiction over that claim as well. Dr Smith also suggests that as a result of this construction, Switzerland's third claim has not had the opportunity to crystallize, but the alleged absence of crystallization would be the result of Nigeria's refusal to react to the Swiss attempts at settling the dispute or discussing the means of settlement. It would be unfair, therefore, to assign the responsibility of this state of affairs to Switzerland, which did a maximum to bring about a bilateral discussion about the case.

Finally, Dr Smith has claimed that Switzerland, in the exchanges with Nigeria regarding the dispute, had never raised issues concerning rules of international law other than those of the Convention. However, in its aide-mémoires Switzerland actually had referred to such other rules of international law.

For the same reason, the question has been asked whether the present issue can be considered plausible. I refer you to the first round of pleadings of Switzerland.

Mr President, Members of the Tribunal, that concludes what I have to say this morning. I would request that you now invite Professor Laurence Boisson de Chazournes to take the floor.

THE PRESIDENT: Thank you.

I now give the floor to Ms Boisson de Chazournes to make the next statement.

EXPOSÉ DE MME BOISSON DE CHAZOURNES
CONSEIL DE LA SUISSE
[TIDM/PV.19/A27/3/Rev.1, p. 7–10]

Monsieur le Président, Mesdames et Messieurs les juges, dans le temps qui m'est imparti aujourd'hui, je reviendrai tout d'abord sur le critère de la plausibilité des droits invoqués par la Suisse.

Monsieur le Président, la partie adverse affirme sans vergogne que les droits dont la Suisse se prévaut ne sont pas plausibles parce que – je cite en anglais ce qui a été dit par Monsieur Smith – *« un droit n'est "plausible" que s'il est applicable aux faits de l'espèce. »*[1] Proposant leur propre lecture des faits, nos contradicteurs veulent que ce Tribunal entre dans la phase du fond et départage les prétentions des Parties. Cela ne peut pas être le cas.

Ainsi que l'a bien dit votre juridiction, au stade des mesures conservatoires, il convient seulement pour le Tribunal de s'assurer que les droits allégués par la Partie demanderesse sont plausibles[2]. Ce n'est donc pas le moment, et je cite à nouveau votre jurisprudence, de « départager les prétentions des Parties sur les droits et obligations qui font l'objet du différend »[3]. La Chambre spéciale constituée pour connaître du différend entre le Ghana et la Côte d'Ivoire est plus explicite encore :

> [A]vant de prononcer des mesures conservatoires, [la Chambre n'a pas] à se préoccuper des prétentions concurrentes des deux Parties », « elle doit seulement s'assurer que les droits que la Côte d'Ivoire revendique au fond et dont elle sollicite la protection sont au moins plausibles »[4].

En dépit de cela, le Nigéria n'a cessé, dans ses plaidoiries, de vous demander de prendre position. Ainsi, selon ses dires, les droits dont se prévaut la Suisse ne sont pas plausibles car le Nigéria a agi en vertu de son droit souverain à appliquer ses lois et règlements concernant la gestion des ressources non biologiques dans sa zone économique exclusive[5]. Toujours selon ses dires, les droits dont se prévaut la Suisse ne sont pas plausibles car le Nigéria a agi en vertu de l'obligation qui lui incombe en vertu des articles 208 et 214 d'appliquer sa règlementation concernant la pollution résultant d'activités relatives aux fonds marins[6]. Je pourrais continuer encore longtemps cette litanie. Je reviendrai d'ailleurs sur ces différents arguments que je viens de mentionner.

Mesdames et Messieurs les juges, ces exemples font clairement ressortir le caractère inapproprié de l'argumentation nigériane. Le Nigéria vous demande, et cela en totale contradiction avec votre jurisprudence, de départager les prétentions des Parties.

Conformément à vos lignes directrices, je ne répèterai pas ce que la Suisse a dit hier sur la plausibilité des droits[7]. Mais permettez-moi seulement d'en rappeler la conclusion. Qu'il

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[1] TIDM/PV.19/A27/2, p. 20 (Derek C. Smith).

[2] TIDM, *Immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie), ordonnance du 25 mai 2019*, par. 95 ; voir également, *« Enrica Lexie » (Italie c. Inde), mesures conservatoires, ordonnance du 24 août 2015, TIDM Recueil 2015*, p. 197, par. 84 ; *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 158, par. 58.

[3] *« Enrica Lexie » (Italie c. Inde), mesures conservatoires, ordonnance du 24 août 2015, TIDM Recueil 2015*, p. 197, par. 83 ; *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 158, par. 57.

[4] *Délimitation de la frontière maritime dans l'océan Atlantique (Ghana/Côte d'Ivoire), mesures conservatoires, ordonnance du 25 avril 2015, TIDM Recueil 2015*, p. 158, par. 58.

[5] TIDM/PV.19/A27/2, p. 20-21 (Derek C. Smith).

[6] TIDM/PV.19/A27/2., p. 22 (Derek C. Smith).

[7] TIDM, PV19/A27/1, p. 24-25 (Prof. Boisson de Chazournes).

s'agisse du droit à la liberté de navigation, et notamment le droit à la liberté d'utiliser la mer à d'autres fins internationalement licites telles que le soutage, de l'exercice par la Suisse de sa juridiction exclusive en tant qu'Etat du pavillon et des droits de l'équipage dont la protection incombe à la Suisse en tant qu'Etat du pavillon, tous en l'espèce sont plausibles.

J'en viens maintenant au droit à la liberté de navigation, et notamment le droit à la liberté d'utiliser la mer à d'autres fins internationalement licites telles que le soutage. Nos contradicteurs font grand cas de la référence faite par la Suisse à l'*Affaire du navire « Norstar »* pour tenter de contredire la Suisse. Ne leur en déplaise, l'activité de soutage constitue une composante de la liberté de navigation qui ne peut être règlementée que dans certains cas, très limités. C'est ce qu'explique votre juridiction dans l'*Affaire du navire « Virginia G »* :

> Le Tribunal souligne que le soutage de navires étrangers qui pêchent dans la zone économique exclusive est une activité qui peut être réglementée par l'Etat côtier. L'Etat côtier n'a toutefois pas compétence pour règlementer d'autres activités de soutage, sauf en accord avec la Convention.[8]

Alors, dans ce contexte, le Nigéria avance, à tort, que l'article 56, paragraphe 1 a), constituerait une limitation de ce type, telle que visée par la citation que je viens de lire[9]. C'est faire, Monsieur le président, une lecture sélective de l'article 56. Celui-ci, cet article 56, comprend en effet un paragraphe 3 qui se lit comme suit : « les droits relatifs aux fonds marins et à leur sous-sol énoncés dans le présent article s'exercent conformément à la partie VI. » Si tant est que l'activité du « San Padre Pio » puisse être associée à l'extraction de ressources naturelles dans le fond marin et dans le sous-sol à l'intérieur de la zone économique exclusive du Nigéria – je dis puisse puisqu'il faudrait pour cela établir le lien direct nécessaire –, et bien, si l'on disait que cela puisse se faire[10], cela n'autoriserait pas le Nigéria à exercer sa compétence d'exécution. En effet, tandis qu'il existe dans la partie V relative à la zone économique exclusive une disposition spéciale, à savoir l'article 73, permettant à l'Etat côtier de mettre en œuvre ses lois et règlements pour tout ce qui a trait à l'exploration, l'exploitation, la conservation et la gestion des ressources biologiques, une telle disposition pour les ressources non biologiques est absente à la fois de la partie V sur la zone économique exclusive et de la partie VI relative au plateau continental. Aussi, Mesdames et Messieurs les juges, l'interprétation nigériane de l'article 56 ne trouve-t-elle aucun support dans la Convention et ne peut contredire l'argument de la Suisse quant à la liberté de navigation et au soutage qui lui est associé.

Monsieur le Président, Mesdames et Messieurs les juges, j'en viens maintenant à la protection de l'environnement à laquelle le Nigéria porte soudainement un grand intérêt. La Suisse s'en étonne, en voyant là un jeu d'argutie qui fait peu cas du différend qui l'oppose au Nigéria depuis plus d'une année. Le Nigéria n'avait auparavant pas fait mention de la protection de l'environnement dans les chefs d'accusation retenus par ses autorités et tribunaux à l'encontre du « San Padre Pio », de l'équipage ou encore de l'affréteur. Pourtant, Monsieur Smith a proclamé haut et fort hier que c'était « en application de ces lois et règlements que le Nigéria a saisi et immobilisé le "San Padre Pio", arrêté et mis en détention son équipage et entamé des poursuites contre l'un et l'autre. »[11] Soudainement, il est question de protection de l'environnement marin. Les inculpés n'en avaient encore jamais été informés. Comment faire confiance au système judiciaire nigérian ? Tout cela s'inscrit dans les méandres judiciaires déjà présentés par l'Agent de la Suisse auxquels ont à faire face les officiers depuis

[8] *Navire « Virginia G » (Panama/Guinée-Bissau), arrêt, TIDM Recueil 2014*, p. 70, par. 223.
[9] TIDM/PV.19/A27/2, p. 21-23 (Derek C. Smith).
[10] TIDM/PV.19/A27/2, p. 3 (Chinwe Uwandu).
[11] TIDM/PV.19/A27/2, p. 22-23 (Derek C. Smith).

près de 17 mois ou encore l'affréteur plus récemment. La Suisse, en tant qu'Etat du pavillon, n'a jamais été informée de ces chefs d'accusation liés à l'environnement.

Mesdames et Messieurs les juges, le Nigéria appelle à son aide la protection de l'environnement marin pour asseoir l'exercice de droits dont il ne peut pourtant pas bénéficier. Il invoque les articles 208 et 214 de la Convention. Comme la Suisse l'a dit lors du premier tour des plaidoiries, si ces articles trouvaient application dans le présent différend, *quod non*, il faudrait alors prendre en compte l'ensemble des dispositions applicables de la partie XII. Qu'en est-il de l'application de l'article 220 et de ses paragraphes 3, 6 et 7 ? Qu'en est-il de l'article 230 ? Permettez-moi de m'arrêter un instant sur ce dernier article, l'article 230. Je souhaite lire les paragraphes 1 et 3 de cette disposition :

> 1. Seules des peines pécuniaires peuvent être infligées en cas d'infraction aux lois et règlements nationaux ou aux règles et normes internationales applicables visant à prévenir, réduire et maîtriser la pollution du milieu marin, qui ont été commises par des navires étrangers au-delà de la mer territoriale.
>
> 3. Dans le déroulement des poursuites engagées en vue de réprimer des infractions de ce type commises par un navire étranger pour lesquelles des peines peuvent être infligées, les droits reconnus de l'accusé sont respectés.

Ces paragraphes parlent d'eux-mêmes. Il n'est question que de peines pécuniaires et dans le respect des droits de l'accusé pour les infractions concernant la pollution du milieu marin.

Je voudrais aussi évoquer l'article 231 de la Convention. Il précise notamment que l'Etat du pavillon doit être notifié sans retard des mesures prises à l'encontre d'un navire battant son pavillon et qu'il doit recevoir tous les rapports officiels concernant lesdites mesures relatives à la pollution marine. La Suisse n'a pas été notifiée et n'a reçu aucun rapport.

Vous le voyez, Mesdames et Messieurs les juges, le Nigéria a fait une lecture très sélective et temporellement très tardive de la Partie XII de la Convention du droit de la mer qu'il invoque à sa rescousse. Il s'est bien gardé de mentionner toutes les obligations auxquelles il est pourtant tenu, notamment à l'égard de l'Etat du pavillon et quant aux peines qui peuvent être infligées.

Mesdames et Messieurs, ceci conclut ma plaidoirie. Je vous remercie de votre attention. Puis-je vous demander, Monsieur le Président, de bien vouloir appeler à la barre Sir Michael Wood.

THE PRESIDENT: Thank you, Ms Boisson de Chazournes.

I now invite Sir Michael Wood to make the next statement.

STATEMENT OF MR WOOD
COUNSEL OF SWITZERLAND
[ITLOS/PV.19/C27/3/Rev.1, p. 10–13]

Mr President, Members of the Tribunal, this morning I shall respond to what Professor Akande said yesterday. I can be reasonably brief; for the most part Professor Akande did not add much to Nigeria's written statement, and – perhaps understandably – did not respond to what we had said earlier in the day. I should make it clear that we stand by all that we said yesterday – and I shall try to avoid repeating myself.

Mr President, I start with a general point. If the Tribunal were to follow the approach to article 290, paragraph 5, advocated by our friends opposite, that would gravely weaken the important provisional measures jurisdiction conferred upon the Tribunal by paragraph 5. They suggest that paragraph 5 is to be applied more stringently than paragraph 1. They suggest that somehow paragraph 5 provisional measures are subject to different and tougher requirements. That is, I would suggest, an unattractive proposition. It would significantly weaken the system of dispute settlement provided for in Part XV of UNCLOS. It would do so in a way that was surely not envisaged by those for whom effective dispute settlement provisions were an essential part of the overall package deal at the Law of the Sea Conference. In passing, I might mention that several persons in this room were personally involved in that. It would significantly weaken what has become an important development in international dispute settlement.

Mr President, yesterday Mr Akande develops a curious "three courts" theory to urge special caution upon you. In doing so he added nothing to his arguments – except perhaps a little confusion. He suggested that your Tribunal "will need to bear in mind the relationship between it and the Annex VII tribunal to be constituted". That is no doubt true, but – as I explained yesterday – it does not affect the way you reach your decisions on provisional measures under paragraph 5. Mr Akande suggests two reasons why it should. First, that there is a more stringent condition of urgency of timing; but this is no more than the basic premise of paragraph 5, that urgency is to be measured by reference to the time when the arbitral tribunal itself will be in a position to prescribe measures.

Second, he said that this Tribunal would wish to take particular care to ensure that the measures do not prejudge the merits, which are for a different tribunal. That, with respect, Mr President, is an assertion without basis in authority or logic. The test of non-prejudice of the merits is the same under paragraph 1 and paragraph 5, and under the law and practice of provisional measures in general.

In the same breath, Mr Akande asked you to bear in mind that the Nigerian domestic courts are involved. It was not clear what point he is trying to make here. Of course, Nigerian domestic courts are involved. They are part of the facts of this case. A key question, but a question for the merits, will be whether the domestic courts of the coastal State lawfully have jurisdiction over alleged offences by a foreign ship in the exclusive economic zone. Here, Mr Akande appeals to the need to respect Nigeria's rights and obligations in connection with the maintenance of law and order; but that simply begs the question: Nigeria can only enjoy its rights and fulfil its obligations in accordance with international law.

Mr Akande then turned to what he termed "three further reasons" why the Tribunal should not prescribe the provisional measures requested by Switzerland. I really have nothing to add to what I said yesterday on his second and third "reasons" (prejudging the final decision and prejudicing Nigeria's rights). I dealt with them fully yesterday, and Mr Akande, as I have said, has not really added to Nigeria's written statement on these points.

Mr Akande focused on the first of his "three further reasons" – urgency. He repeated Nigeria's arguments, already in their written statement, that there was none. He began with the

crew. Here the Parties disagree, and disagree fundamentally, on the facts. Mr Akande painted a rather rosy picture of life on board the *"San Padre Pio"*. According to him, for the Master and three other officers it is life as normal at sea. He failed to note the extraordinary length of time the four crew members have been confined to an immobile ship, some 15 months, I think, after being moved there from prison. He failed to say anything serious about the dangers to life and limb faced on daily basis because of the risk of armed robbery or collisions (other than to blame the officers themselves and their employers for their predicament). He suggested that the four were free to come and go as they pleased, to visit the hotels within Nigeria etc., and rather implied that they did so pretty often. As the Agent for Switzerland has explained this morning, that is simply not the case.

Mr Akande based himself on affidavits given for the specific purpose of this hearing, by two interested Nigerian officials: the commanding officer of the base that has responsibility for the *"San Padre Pio"*; and the legal officer in the Economic and Financial Crimes Commission (EFCC). The Agent of Switzerland has already referred this morning to such affidavits. We are confident that the Tribunal will approach these and other similar affidavits presented by Nigeria with the utmost caution. International courts and tribunals, including the International Court of Justice, rightly place little, if any, reliance on such evidence. In fact, Mr President, the true picture on board the *"San Padre Pio"* is not rosy at all; it is bleak. Life for the Master and three officers, as for their families, is harsh, and has been for a very prolonged period of time.

Mr President, Members of the Tribunal, this might be a good moment to turn to the Tribunal's third question from yesterday evening, which was addressed to Switzerland. The question read:

> During the first round of its oral pleadings, Switzerland (Professor Boisson de Chazournes) referred to the possibility of Nigeria's continuing the criminal proceedings against the four accused persons, stated: (*Continued in French*) "Au besoin, certaines procédures existent pour obtenir le retour des officiers ukrainiens."
>
> *(Continued in English)* Could Switzerland elaborate on this?

Mr President, I also adverted to this matter yesterday when, in the context of not prejudging Nigeria's rights, I said

> The requirement not to prejudge the decision on the merits will surely be met, as Professor Boisson de Chazournes has just explained. In prescribing measures, the Tribunal will take care not to reach definitive conclusions on the facts and on the law that lie at the heart of the case. It may well expressly state that the Order is without prejudice to the merits. If necessary, the Tribunal could perhaps devise ways to ensure that the measures prescribed do not prejudice Nigeria's rights.

Mr President, as you can see, I was quite cautious. If the Tribunal were minded consider something along these lines, it would seem to us to be necessary to explore the matter with the Nigerian authorities, and perhaps also with the authorities of the State of nationality of the Master and three officers. Mutual legal assistance in criminal matters is a complex area, with many bilateral and multilateral treaties and arrangements. A change of bail conditions would presumably be needed. I would recall that the Nigerian courts have already imposed bail when they permitted the four to leave prison. The bail would presumably need to be adjusted to allow for their departure from Nigeria. One other possibility that occurred to me is that the Master and officers might be asked to give some sort of formal undertaking to the court to return under certain circumstances in light of the outcome of the arbitration.

Mr President, I now turn to the vessel and cargo. In suggesting that no harm will come to the vessel in the months before the arbitral tribunal is able itself to issue a provisional measures order, Mr Akande relied on an expert report that was at Annex 21 to their written statement; but he did so without referring to what I had said in the morning about that report. That report is of no assistance to Nigeria's case. I recommend that you read it; it is quite short. As I pointed out yesterday, the expert, Mr Tanner, has never visited the vessel; his report is based entirely on some documents passed to him by Nigeria. It is so heavily qualified as to be meaningless. As we explained yesterday, we have not been able to commission our own survey of the vessel because the Nigerian authorities did not permit this. In the circumstances, and given the rapidly declining condition of the vessel, it must, we say, be presumed that there is indeed great urgency for provisional measures if the vessel is to be saved.

Mr President, Members of the Tribunal, according to Nigeria, money can remedy everything. Financial reparation, they say, is sufficient for the loss of a ship or cargo. Yet in the modern world, with sustainable development and the environment at the centre of our concerns, money is not everything. There are higher values. A responsible and respected business does not simply allow its major assets to go to ruin and be content, at some distant time, with reparation when it can purchase a new ship or aircraft or whatever. Such is wasteful.

Mr President, Members of the Tribunal, we explained at paragraph 39 of our Request for provisional measures that most commercial vessels flying the Swiss flag, including the *"San Padre Pio"*, benefit from a guarantee from Switzerland. The system of guarantees, which was already established in 1958, ensures that Switzerland has available a critical mass of maritime shipping for economic supply of the country in case of crisis. If a ship benefiting from such guarantee suffers irreparable damage, Switzerland may be required to pay the guarantee. Such a scenario would have serious consequences for Switzerland, not only financial, but for the reputation of its maritime flag.

In addition, the manager, ABC Maritime, only manages two ships under Swiss flag. If it were to lose the *"San Padre Pio"*, there would be a great risk for the continued operation of the enterprise. Beyond the work places on board ship, we would also have to take into consideration those relating directly to the owner of the ship, to the management of the latter, and the charterer. The enterprises concerned would also suffer great loss of reputation. Thus, if the present situation were to continue, it would risk causing a cascade of bankruptcies.

Mr President, Members of the Tribunal, the last point I want to deal with concerns the diplomatic note sent by Nigeria to Switzerland, dated 18 June 2019, which Nigeria submitted to the Tribunal on Thursday and which is at tab 11 of Nigeria's Judges' folders. That note purports to give an assurance to Switzerland. Yesterday, Mr Akande said the following:

> If it was ever unclear whether the Master and the officers were detained on the vessel, this matter has now been clarified by the diplomatic note sent by Nigeria to Switzerland on 18 June 2019. In that note, "The Ministry of Foreign Affairs of the Federal Republic of Nigeria hereby provides its assurances to the Swiss Confederation that under the terms of their bail, the defendants… are not required to remain aboard 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."[1]

Mr President, Members of the Tribunal, I must be very clear. That so-called "assurance" adds nothing; and it commits Nigeria to nothing. In it, the Nigerian Foreign Ministry "provides its assurances" that, under the terms of their bail, the Master and three other officers are not required to remain aboard the *M/T "San Padre Pio"* etc. An assurance from the Ministry for

[1] Diplomatic Note No. 749/2019 from Ministry of Foreign Affairs of the Federal Republic of Nigeria to the Embassy of Switzerland, dated 18 June 2019.

Foreign Affairs as to the terms of bail is meaningless. We already know the terms of bail. But the terms of bail are not respected in the real world, where the Master and officers are confined to the vessels; and even if the terms were respected by the navy and others, the Master and officers would still be restricted to Nigeria. This so-called "assurance", which is no assurance, in no way meets the concerns that have brought us to your Tribunal seeking provisional measures.

Mr President, Members of the Tribunal, that concludes what I have to say this morning. I would request that you now invite the Agent of the Swiss Confederation, Ambassador Cicéron Bühler, to the podium to make the final submissions on behalf of Switzerland.

THE PRESIDENT: Thank you, Sir Michael. We have now reached the final stage of the oral arguments by Switzerland.

Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a party at the hearing its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Tribunal and transmitted to the other party.

I now invite the Agent of Switzerland, Ms Cicéron Bühler, to make her concluding remarks and to present the final submissions of Switzerland.

EXPOSÉ DE MME CICÉRON BÜHLER
AGENT DE LA SUISSE
[TIDM/PV.19/A27/3/Rev.1, p. 15–16]

Monsieur le Président, Mesdames et Messieurs les juges, avant de terminer la présentation des exposés de la Suisse par nos conclusions finales, je saisis cette occasion pour remercier, au nom de la Suisse, le Greffier, Monsieur Philippe Gautier, et le personnel du Greffe pour l'organisation de ces audiences, leur coopération et leur professionnalisme. Je remercie également le Président et chacun des membres de votre Tribunal de nous avoir écoutés durant ces deux jours et pour l'examen bienveillant que vous ferez de notre requête. Je remercie tout particulièrement les interprètes pour leur travail indispensable et fait de manière très fiable. Je remercie également tous ceux qui ont travaillé pendant de longues heures pour produire rapidement les procès-verbaux des audiences publiques. Et je remercie nos amis nigérians de leur coopération au cours de cette procédure.

Au cours de ces deux jours, notre équipe a expliqué pourquoi les mesures conservatoires demandées sont nécessaires afin d'éviter un dommage irréparable aux droits de la Suisse. Elle a démontré que toutes les conditions prévues pour la prescription de mesures conservatoires au titre de l'article 290, paragraphe 5, de la Convention sont remplies.

Monsieur le Président, Mesdames et Messieurs les juges, conformément à l'article 75, paragraphe 2, du règlement du Tribunal, je vais maintenant présenter, avec votre permission, les conclusions finales de la Suisse. Une copie du texte écrit des conclusions a été communiquée au Greffe du Tribunal et transmise au Nigéria.

La Suisse prie le Tribunal de prescrire les mesures conservatoires ci-après :

Le Nigéria prendra immédiatement toutes les mesures nécessaires pour que les restrictions imposées à la liberté, à la sécurité et à la circulation du « San Padre Pio », de son équipage et de sa cargaison soient immédiatement levées pour leur permettre de quitter le Nigéria. En particulier, le Nigéria devra :

a) permettre au « San Padre Pio » d'être réapprovisionné et équipé de manière à pouvoir quitter, avec sa cargaison, son lieu d'immobilisation et les zones maritimes placées sous juridiction nigériane et à exercer la liberté de navigation dont jouit son Etat du pavillon, la Suisse, au regard de la Convention ;

b) libérer le capitaine et les trois autres officiers du « San Padre Pio » et les autoriser à quitter le territoire et les zones maritimes sous juridiction nigériane ;

c) suspendre toutes les poursuites judiciaires et administratives et s'abstenir d'en engager de nouvelles qui risqueraient d'aggraver ou d'étendre le différend soumis au tribunal arbitral prévu à l'annexe VII.

THE PRESIDENT: Thank you, Ms Cicéron Bühler.

This concludes the oral arguments presented by Switzerland. We will continue the hearing in the afternoon, at 4.30 p.m., to hear the second round of oral arguments of Nigeria.

The sitting is now closed.

(*The sitting closed at 11.08 a.m.*)

22 June 2019, p.m.

PUBLIC SITTING HELD ON 22 JUNE 2019, 3 P.M.

Tribunal

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

For Switzerland: [See sitting of 21 June 2019, 10 a.m.]

For Nigeria: [See sitting of 21 June 2019, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 22 JUIN 2019, 15 H 00

Tribunal

Présents : M. PAIK, *Président* ; M. ATTARD, *Vice-Président* ; MM. JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, MME CHADHA, MM. KITTICHAISAREE, KOLODKIN, MME LIJNZAAD, *juges* ; M. MURPHY, MME PETRIG, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour la Suisse : [Voir l'audience du 21 juin 2019, 10 h 00]

Pour Nigéria : [Voir l'audience du 21 juin 2019, 10 h 00]

THE PRESIDENT: Good afternoon. The Tribunal will continue the hearing in the *M/T "San Padre Pio"* case. We will now hear the second round of oral arguments presented by Nigeria.

May I invite Mr Loewenstein to make the first statement on behalf of Nigeria?

Second round: Nigeria

STATEMENT OF MR LOEWENSTEIN
COUNSEL OF NIGERIA
[ITLOS/PV.19/C27/4/Rev.1, p. 1–4]

Mr President, Members of the Tribunal, good afternoon. I have the honour to begin Nigeria's second round presentation. It will be my task to respond to the arguments advanced by Switzerland in relation to the principal issues of fact that divide the Parties.

I begin with the question of the defendants' freedom of movement. Switzerland does not dispute that the defendants received bail, or that, under the terms of bail, the defendants may reside anywhere in Nigeria. The defendants' bail, as I mentioned yesterday, was unopposed by the prosecution. Nonetheless, Switzerland's Agent insisted that their bail is meaningless. Why? Because the Nigerian navy is said to wantonly disregard it.

This is an incendiary accusation. The Agent of Switzerland explained the basis for her confidence in levelling it. It is a document that Switzerland sought permission to introduce into the record on Thursday. Nigeria did not oppose the request. The Agent of Switzerland first invoked the document yesterday. She described it as "shocking." Why? Because she said it shows that no less an authority than the Federal High Court of Nigeria had condemned the navy for having engaged in a "flagrant violation of the order of this court admitting the defendants to bail."[1]

The Agent for Switzerland returned to the same document this morning. She insisted that she need only cite this single document to support her accusation about the navy because, she said, "it would suffice to provide one single occasion where this was not the case to rebut it; and that is what we did, indisputably with the judicial ruling presented during the first round of pleading." In fact, this was the only document that Switzerland has cited. Switzerland's Agent then used the document to dismiss Nigeria's attempt to clarify the situation. She demanded, "How can we have any confidence in their purported new assurances?" She went as far as to question Nigeria's good faith. She said, "The presumption of good faith is important, but it should not run counter to the facts." Sir Michael joined in when he also rubbished Nigeria's assurances.

Mr President, the image that is now on your screen reproduces the same one that Switzerland showed you this morning and included in the Swiss Judges' folder. Switzerland has circled in red the language it seizes upon.

I would now ask that you cast your eyes to the highlighted words in the document's caption. They are "Motion on Notice." Mr President, this is not an order from the High Court of Nigeria. It is a motion filed by the defendants. If it proves anything, it is that the defendants know what to do when they consider their rights under the terms of the court's bail to be violated. In that connection, I observe that the date of the motion is 26 June 2018, nearly a full year ago. The defendants have evidently had no occasion to complain to the court since then.

Mr President, Nigeria's delegation has listened patiently. However, I must tell you that Nigeria's surprise at Switzerland's questioning of its attempts to clarify the situation through its offering of assurances is verging into frustration. This is a matter that the Agent of Nigeria will address.

I now turn to the Agent of Switzerland's comments regarding alleged improprieties in the Nigerian court proceedings, which she said yesterday are characterized failures to properly communicate with the accused. The only support for that accusation that she cited was to claim that in the cargo forfeiture proceeding the owner had not been properly designated as a

[1] *Motion on Notice* (Federal High Court of Nigeria, 26 May 2018), Switzerland's Judges' folder, round 1, tab 11.

defendant. The Agent said that "a judge found in his favour." This is wrong. Again, she has confused a motion with a court order. The charterer advanced this argument before the Federal High Court in a motion.[2] However, the Court denied the motion.[3] You will see the relevant citation to the record in the footnote.

I turn now to address Switzerland's assertion that Nigeria refuses to allow healthcare providers to visit the defendants on the vessel. Our first response is that, for the reasons just discussed, there is nothing to prevent the defendants from going ashore to visit doctors, or anyone else. Regardless, Switzerland's assertion is wrong. It appears to rely upon a note from one Felix Oresarya, who had evidently been asked to travel from Lagos to Port Harcourt to examine the defendants.[4] Why a local doctor had not been asked is not explained. As you consider this document, I would respectfully suggest that you keep in mind the Agent of Switzerland's condemnation of hearsay.

You can see a copy on the screen. The note reports that upon arrival in Port Harcourt on a Saturday morning, Dr Oresarya contacted one Mr Chia by phone. Beyond referring to him as "the agent," Mr Chika's identity, role, and employer are not explained. Dr Oresarya reports that they had not obtained the permission from the authority to visit the defendants on the vessel. The "they" and "the authority" are undefined. Dr Oresarya's narrative continues by saying, in the passive voice, that later that day "I was informed that the permission to visit and examine the detainees in their vessel was refused by the authority." Who allegedly informed him of this is not any clearer than his second reference to "the authority." I believe we have also now reached three degrees of hearsay. Dr Oresarya did not wait long. He returned to Lagos the very next morning, on Sunday.

I now address the Agent of Switzerland's argument that under Nigerian law the *"San Padre Pio"* was permitted to bunker at night. In that regard, she relied upon a provision in Nigeria's Petroleum Act. However, as Nigeria explained yesterday, the Nigerian navy is given competence in regard to bunkering at sea by the Armed Forces Act. Its authority is independent of and supersedes the Petroleum Act and is derived from Section 217 of the 1999 Constitution (as amended). As a result, the navy's authority to impose restrictions on when bunkering may take place is independent of any rules that may be codified in other statutes.

Mr President, this brings me to the context in which Nigeria's regulation of bunkering in connection with hydrocarbon exploitation in the Nigerian EEZ takes places. The facts are indisputable. The Nigerian regulations to which Switzerland objects have been promulgated and applied in regard to seabed activities undertaken and sponsored by Nigeria. The supplying of fuel via bunkering is an integral part of those operations.

It is equally beyond purview that bunkering for this purpose carries significant risks to the marine environment and to the persons and equipment involved in the process. Regulation and oversight is therefore required. The crux of the dispute, then, concerns not whether such bunkering should be regulated, but by which State. In Switzerland's view, it must be the exclusive jurisdiction of the various flag States whose vessels might from time to time participate in bunkering Nigeria's offshore installations. Nigeria disagrees. For the reasons explained by Dr Smith, the Convention plainly gives this jurisdiction to the coastal State.

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[2] *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Ruling (Federal High Court of Nigeria, 9 April 2019), p. 5, Annex 18.

[3] *Ibid.*, p. 7.

[4] Notification and Statement of Claim of the Swiss Federation (6 May 2019) ("Statement of Claim"), Report of Dr Felix Oresanya about the impossibility to examine the Master and the three other officers, dated 28 April 2019, Annex NOT/CH-52.

That the waters of the Gulf of Guinea suffer from unacceptable levels of criminality is undisputed. Much of the related threats to maritime security can be traced to what the UN Secretary-General referred to in December as petroleum-related crimes.[5]

Mr President, the only matter connected to this general context that Switzerland seems to dispute concerns the Agent for Switzerland's objection to Nigeria observing that stolen and illegally refined Nigerian petroleum is trafficked through Togo, among other places. She said, "No evidence has been provided to support these serious insinuations." The Agent's position is a matter of surprise. These well-established trafficking routes are a matter of common knowledge, and it seems unlikely that the companies with which the Swiss Government is engaging for this case, which are in the business of shipping petroleum products in the Gulf of Guinea, would be unaware of them. With the greatest of respect for our friends on the other side, the Nigerian navy's chief of operations, who is responsible for directing Nigeria's enforcement efforts and who has explained these trafficking patterns for the Tribunal's consideration, did not simply make it up.

The Agent of Switzerland referred to a clearance certificate that appears to have been stamped by customs officials in Togo. She said that this officially contradicts Nigeria's account. She did not explain the putative contradiction. In fact, the document confirms what Nigeria has said: that the *"San Padre Pio"* obtained its cargo in Lomé and that its destination was the Nigeria Offshore Odudu Field.

The Agent of Switzerland also referred to promotional literature from Togo that she said shows that Togo houses "petroleum storage facilities." But, even if true, it says nothing about where the petroleum products stored in those facilities may have been extracted or refined.

Mr President, I turn now to provide Nigeria's response to the Tribunal's request that the Parties provide a factual description of the bunkering operations conducted by the *M/T "San Padre Pio"* on 22-23 January 2018. As detailed in the affidavit of Lieutenant Mohammed Hanifa, the Nigerian naval officer on board the Nigerian naval ship *"Sagbama"*, testifies, when the *"San Padre Pio"* was encountered at 8 p.m. it was in the midst of bunkering another vessel. It then proceeded to commence another ship-to-ship fuel transfer with a different vessel at 3 a.m. the next morning.[6] As Nigeria explained yesterday, the vessel was then arrested and escorted from the scene.

The Tribunal has also asked for an elaboration on the right of arrested vessels to be released upon the posting of a bond, a right that the *"San Padre Pio"*'s owner did not seek to exercise. A vessel can be released under the administrative procedure upon the posting of a bond. Owners of a vessel can apply to a court under the inherent jurisdiction of a court provided for in the relevant sections of the 1999 Constitution (as amended). In that regard, litigants may file motions in ongoing judicial proceedings seeking any relief they deem fit. A court can examine the motion and determine either to refuse the relief, grant it, or partially grant or modify the relief.

As we have noted, the owner of the *"San Padre Pio"* decided not to pursue this avenue for obtaining the vessel's release upon the posting of a bond.

Mr President, this concludes my presentation. Thank you very much for your kind attention. I ask that you invite Dr Smith to the podium.

THE PRESIDENT: Thank you, Mr Loewenstein.

I now give the floor to Mr Smith to make the next statement.

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[5] 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.

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

STATEMENT OF MR SMITH
COUNSEL OF NIGERIA
[ITLOS/PV.19/C27/4/Rev.1, p. 4–11]

Good afternoon, Mr President, distinguished Members of the Tribunal. I would like to take this opportunity to respond to the arguments advanced by Switzerland yesterday and this morning regarding *prima facie* jurisdiction and plausibility.

Let me first turn to *prima facie* jurisdiction. Yesterday, I explained why the Annex VII tribunal manifestly would not have jurisdiction, not even on a *prima facie* basis, over Switzerland's third claim concerning the ICCPR and the Maritime Labour Convention.

Before delving into this question in detail, I would like to emphasize once again that Nigeria is not in any way violating the rights of the crew of the ship. As explained by my colleagues, Mr Loewenstein and Professor Akande, yesterday, the crew regularly leave the ship and then return voluntarily. As noted in the affidavit of Captain Oguntuga, they do not need to be escorted and are not escorted by Nigerian officials when they leave the ship, and they are under no compulsion to return to the ship. Each time they return to the ship it is always on a voluntary basis. If there were any real concern about their safety and the conditions on the ship, they could have simply not returned to the ship on one of the many occasions on which they left. Importantly, they could leave today and not return if so desired. These conditions cannot possibly be called detention.

Now on the question of *prima facie* jurisdiction, this morning Professor Caflisch started with article 293, paragraph 1, suggesting that it expands the Annex VII tribunal's jurisdiction. He essentially just repeated what he stated yesterday[1] and what was already stated in Switzerland's Statement of Claim.[2] In doing so, he entirely failed to respond to any of the arguments and jurisprudence that Nigeria cited in its Statement in Response[3] and in its oral submissions yesterday on this point.[4]

Let me repeat and be clear that article 293, paragraph 1, is an applicable law provision that does not affect the Annex VII tribunal's jurisdiction.[5] As we noted yesterday, there is unanimity on this front. As the *MOX Plant* Annex VII tribunal held, "There is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand."[6] The *Arctic Sunrise* Annex VII tribunal was more succinct. It stated: "Article 293, paragraph 1, does not extend the jurisdiction of a tribunal."[7]

Professor Caflisch is thus entirely mistaken to invoke article 293, paragraph 1, of UNCLOS in this discussion of jurisdiction. If anything, the fact that he resorted to article 293, paragraph 1, is, as his first argument, revealing.

If we can now move from article 293, paragraph 1, I would like to respond to Professor Caflisch's arguments on article 56, paragraph 2. This morning, just like yesterday, he noted that the phrase "under this Convention" modifies the rights and duties in the first half of article 56, paragraph 2, but emphatically stressed how that phrase is omitted with respect to the rights and duties in the second half of article 56, paragraph 2. This is a classic knife that cuts both ways argument. On the one hand, one could argue that the drafters, having clarified the

[1] ITLOS/PV.19/C27/1, p. 16, lines 28-32 (Caflisch).
[2] Switzerland's Statement of Claim, para. 42.
[3] Nigeria's Statement in Response, para. 3.52.
[4] ITLOS/PV.19/C27/2, p. 17, lines 9-14 (Smith).
[5] *MOX Plant (Ireland* v. *United Kingdom)*, Procedural Order No. 3, para. 19; *Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits, paras. 188, 192; *Duzgit Integrity (Malta* v. *São Tomé and Príncipe)*, Award, para. 207.
[6] *MOX Plant (Ireland v. United Kingdom)*, Procedural Order No. 3, para. 19 (emphasis added).
[7] *Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits, para. 188.

scope of the rights and duties in the first half of article 56, paragraph 2, found it unnecessary to do so again in the second half. On the other hand, one could argue that the drafters deliberately omitted the phrase in the second half to distinguish it from the first half. Professor Caflisch adopted this latter approach without explaining why the first approach does not apply.

However, even if Professor Caflisch were correct, all it would show is that the rights and duties in the second half of article 56, paragraph 2, include rights and duties outside the Convention. This does not actually address Nigeria's arguments with respect to article 56, paragraph 2, which are that the "due regard" language does not impose an obligation to have complete deference, and that it does not expand the jurisdiction of the Annex VII tribunal.

We noted yesterday 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. Yesterday morning Professor Caflisch, in attempting to show that a dispute had crystallized between the Parties, referred to the four *aide-mémoires* sent by Switzerland to Nigeria,[8] and stated "Switzerland repeatedly objected to Nigeria's conduct, explicitly stating that it considered it as violating various provisions of the Convention."[9] The key phrase here is "various provisions". The question is: what are these provisions? We invite the Members of the Tribunal to examine the four *aide-mémoires* referred to by Professor Caflisch. The third and fourth do not specify any provisions of UNCLOS. The first two each specify the same two provisions. You can see the relevant paragraphs on the screen. The first *aide-mémoire* alleges that "the arrest and the detention of the *M/T San Padre Pio* appear inconsistent with articles 58, paragraph 1, and 87 of [UNCLOS] ..."[10] The second *aide-mémoire* alleges that "Switzerland considers the detention of the *M/T San Padre Pio* to be inconsistent with articles 58, paragraph 1, and 87 ..."[11] You can see that there had only been exchanges between the Parties concerning articles 58, paragraph 1, and 87 of UNCLOS, which concern the freedom of navigation. None 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. More revealingly, none of the exchanges even mention article 56, paragraph 2, of UNCLOS. So even under Switzerland's creative due regard theory, which I address in more detail later, a dispute regarding Switzerland's third claim would not have crystallized between the Parties at the time of the institution of the Annex VII arbitral proceedings. Clearly, this was a new idea that Switzerland's lawyers came up with for the purposes of these proceedings.

This morning, Professor Caflisch attributed the non-crystallization of the dispute to Nigeria's alleged "refus[al] to engage in an exchange of views." According to him, Switzerland "did a maximum to bring about a bilateral discussion about the case." Professor Caflisch was very careful with his words. It is true that Switzerland tried to bring about a discussion of the case, but the case, as Switzerland understood it in its exchanges, only concerned the freedom of navigation under articles 58, paragraph 1, and 87 of UNCLOS. It did not concern the ICCPR or the MLC, and it did not concern article 56, paragraph 2.

Professor Caflisch, perhaps anticipating this weakness, further stated this morning that "in its aide-mémoires, Switzerland constantly referred precisely to *such* rules of international law". Again, I invite the Tribunal to examine the four *aide-mémoires*. The first, second, and fourth refer vaguely to "customary international law" and the third refers to "general principles of international public law". There is no precise referral to the ICCPR or the MLC. A State

[8] ITLOS/PV.19/C27/1, p. 17, line 27 (Caflisch).
[9] ITLOS/PV.19/C27/1, p. 15, lines 28-29 (Caflisch) (emphasis added).
[10] Switzerland's Statement of Claim, Annex NOT/CH-44.
[11] Switzerland's Statement of Claim, Annex NOT/CH-46.

cannot crystallize a dispute simply by stating that another State has violated unspecified principles of international law.

Moreover, even if this dispute had crystallized *quod non*, as I explained yesterday, this dispute clearly concerns the ICCPR and the MLC, not UNCLOS, such that it does not fall within the subject-matter jurisdiction of the Annex VII tribunal. In fact, yesterday morning, Professor Caflisch expressly admitted that its third claim is "based on the ICCPR and the MLC".[12]

In conclusion, then, the third claim manifestly had not crystallized into a dispute at the time of the initiation of the Annex VII arbitral proceedings, and in any case does not concern the interpretation and application of UNCLOS. Therefore, it falls outside the *prima facie* jurisdiction of the Annex VII arbitral tribunal, and the present Tribunal should not prescribe any provisional measures on the basis of this third claim.

This last point is significant and so warrants repetition: the Tribunal should not prescribe any provisional measures on the basis of Switzerland's third claim. A close examination of Switzerland's three claims in its Statement of Claim reveals that the third claim is the only claim that complains of the institution of Nigerian domestic court proceedings against the *"San Padre Pio"* and its officers.[13] As such, since the Annex VII tribunal would not have *prima facie* jurisdiction over the third claim, the Tribunal cannot grant the third provisional measure requested by Switzerland, as it is only linked to the third claim on the merits, not the first or second claim.

Mr President, distinguished Members of the Tribunal, with your permission I will now move on to the issue of plausibility.

This morning our distinguished colleagues representing Switzerland argued that Nigeria is requesting that the Tribunal take a position on the merits of the dispute through our challenge to the plausibility of the rights asserted by Switzerland. I respectfully submit that Switzerland has misunderstood our position. As I stated yesterday, we are not asking the Tribunal to inquire into the merits. Our point, based on the jurisprudence of the Tribunal and the International Court of Justice, is different. We referred the Tribunal to its decision in the *Detention of Naval Vessels* case, in which the Tribunal, in determining whether Ukraine's right to the immunity of warships was plausible, examined whether, on the facts of the case, the vessels in question were actually warships.[14] We also referred to the Judgment of the Court in *Ukraine* v. *Russia,* in which the Court, in determining whether Ukraine's rights to Russia's cooperation in preventing the financing of terrorism was plausible, examined whether, on the facts of the case, the acts in question constituted terrorism financing.[15] Counsel for Switzerland did not mention this or any jurisprudence related to this question.

What we indicated yesterday is that to determine plausibility, the Tribunal must determine whether the rights alleged by Switzerland are applicable to the specific facts of this case. If they are not, then Switzerland's rights are not plausible. Switzerland appears to take issue with our understanding of "plausibility", but an examination of their own pleadings reveals that the authority they rely on – Judge Greenwood's separate opinion in the *Certain Activities* case before the ICJ – succinctly states Nigeria's position,[16] and in no way supports Switzerland's position. Judge Greenwood stated that plausibility requires: "a reasonable

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[12] ITLOS/PV.19/C27/1, p. 16, lines 3-4 (Caflisch).

[13] Switzerland's Statement of Claim, para. 45.

[14] *Detention of three Ukrainian naval vessels (Ukraine* v. *Russian Federation), Provisional Measures, Order (25 May 2019)*, para. 97.

[15] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order (19 April 2017),* paras. 72-76.

[16] TIDM/PV.19/C27/1, p. 22, fn. 32 (Boisson de Chazournes).

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".[17] Yesterday, Switzerland in fact quoted a French translation of this statement by Judge Greenwood, but misquoted it by omitting the language of "applicability" and replacing it with words that cannot be found in the official French translation of Judge Greenwood's opinion.

In determining the plausibility of the rights alleged, the Tribunal does not need to judge the merits of the case. It need only undertake the limited examination of the facts that purport to establish the applicability of the right to the situation at hand.

As we explained yesterday, Switzerland's alleged rights concerning the freedom of navigation and exclusive flag State jurisdiction are not plausible because they are subject to relevant provisions of the Convention in the exclusive economic zone. In particular, article 56, paragraph 1(a), grants Nigeria the sovereign right to regulate and take enforcement action with respect to the management of the natural resources in its exclusive economic zone.. This is the unequivocal holding of the Tribunal in the *M/V "Virginia G"* decision, which, for its clarity, merits quoting again:

> 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 necessary enforcement measures.[18]

Our distinguished friends representing Switzerland did not address this language in any of their pleadings. Rather, Professor Boisson de Chazournes referred you to paragraph 3 of article 56, which indicates: "The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI." As the esteemed Members of the Tribunal are aware, Part VI of the Convention deals with the coastal State's sovereign rights in the continental shelf. Professor Boisson de Chazournes cited no provision in Part VI that limits the rights of the coastal States under Part V.

Switzerland's counsel further attempts to find limits to the enforcement powers related to exclusive economic zone activities for the exploitation, management, and conservation of non-living resources in the provisions regarding living resources and, in particular, the provisions related to fishing. This is a misunderstanding of the relationship between the many provisions on enforcement related to the EEZ in the Convention. The Convention has a general provision granting rights in article 56, paragraph 1(a). As recognized by the Tribunal in the *"Virginia G"* case, this provision allows for the enforcement of laws and regulations in connection with living and non-living resources. It contains no specific limitations. Article 73, referred to by our esteemed colleagues representing Switzerland, which does contain limitations, is a rule of *lex specialis* to establish specific limitations on enforcement "in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone". It makes no mention of, and does not affect, enforcement related to non-living resources.

In fact, the *Arctic Sunrise* Annex VII Tribunal addressed and rejected the very argument of Professor Boisson de Chazournes on this point. The tribunal, after quoting article 73 and noting that "there is no equivalent provision relating to *non*-living resources in the EEZ",[19] the

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[17] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order (8 March 2011)*, Declaration of Judge Greenwood (emphasis added).
[18] *M/V "Virginia G", Judgment*, para. 211 (emphasis added).
[19] *Arctic Sunrise*, Award on the Merits, para. 281.

tribunal concluded that "the coastal State's right to enforce its laws in relation to non-living resources in the EEZ" is "clear".[20] Article 73 does not limit those rights

Finally, I would like to respond to Switzerland's creative, though meritless, arguments on the plausibility of its claims concerning the ICCPR and the MLC.

Switzerland appears to have changed track over the course of these proceedings. In its Statement of Claim, Switzerland formulated its third claim using the convoluted language I put on the screen yesterday. I will not read this again but it is on the screen.

As seen on the screen, the only right Switzerland alleged was its so-called "right to seek redress". After its written pleadings and two rounds of oral proceedings, the source and scope of this alleged right is still unknown. Yesterday, Professor Caflisch stated that it is not a reference to diplomatic protection,[21] perhaps because he does not want the exhaustion of local remedies rule to apply. And he also noted that the relevant individual rights "could be those included in article 9 of the ICCPR and those protected by articles IV and V of the Maritime Labour Convention".[22] But he did not clarify the source or the scope of Switzerland's alleged "right to seek redress".

Instead of explaining this right, Switzerland appears to have amended its argument. Both Professor Caflisch and Professor Boisson de Chazournes appear to have moved away from this notion of rights held by Switzerland. Switzerland has instead begun to base its arguments on alleged obligations held by Switzerland, which Nigeria has allegedly failed to give due regard to under article 56, paragraph 2.

For example, as you can see on the screen, today Professor Boisson de Chazournes stated as follows, and I will read the original French first, and to save everybody putting headphones on and then off I will read the English:

> (*Poursuit en français*)
> En vertu de l'article 56, paragraphe 2, de la Convention, il échoit au Nigéria dans l'exercice de ses droits et obligations dans la zone économique exclusive de tenir dûment compte des obligations de l'État du pavillon qui découlent de l'article 94. Cela comprend notamment les obligations conventionnelles auxquelles la Suisse a souscrit, telles que celles inclues dans la Convention du travail maritime ou dans le Pacte international relatif aux droits civils et politiques et qui ont trait aux conditions de travail et de vie de l'équipage.
>
> (*Continued in English*)
> Under article 56, paragraph 2 of the Convention, it is incumbent upon Nigeria when exercising its rights and obligations in the exclusive economic zone to take due account of the *obligations* of the flag State under article 94. This includes in particular treaty obligations to which Switzerland has subscribed such as those included in the Maritime Labour Convention or in the International Covenant on Civil and Political Rights which concern the living and working conditions of the crew.[23]

So Switzerland's third claim is now based, not on an alleged "right of redress", but rather on alleged obligations. Professor Boisson de Chazournes suggests that article 56, paragraph 2, refers to obligations under article 94, which in turn allegedly refers to obligations under the ICCPR and the MLC.

Article 94 is very long and I invite you to read it in full at your leisure. You will see that it imposes many obligations on flag States, such as the obligation to: maintain a register of

[20] *Arctic Sunrise*, Award on the Merits, para. 284.
[21] ITLOS/PV.19/C27/1, p. 16, line 39 – p. 17, line 6 (Caflisch).
[22] ITLOS/PV.19/C27/1, p. 16, lines 46-47 (Caflisch).
[23] ITLOS/PV.19/C27/1, p. 22, lines 2-10 (Boisson de Chazournes).

ships; ensure that the ship has on board nautical charts and navigation equipment; ensure the use of signals; and assume jurisdiction over administrative, technical and social matters.

What you will not see in article 94 is any reference to the MLC or the ICCPR. In fact, there is no reference whatsoever to the civil and political rights enshrined in the ICCPR. The only potentially relevant reference to labour rights is article 94, paragraph 3(b), which provides: "Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard ... to ... the manning of ships, labour conditions and the training of crews ...."[24] Switzerland's only allegation in this regard is that the *"San Padre Pio"* is subject to pirate attacks. That is the only risk to safety that has been mentioned here, but we note that this vessel regularly operates in the Gulf of Guinea loaded with crude oil worth millions of dollars. That means it is constantly subject to pirate attacks, not just when moored, but when sailing. Now, it is under the protection of a Nigerian gunboat and armed soldiers. This is far superior to any protection that Switzerland has ever provided to the *San Padre Pio* when navigating in the dangerous waters of the Gulf of Guinea.

(*Poursuit en français*) Ceci conclut ma présentation du deuxième tour de plaidoiries du Nigéria. C'était un honneur de plaider devant votre Tribunal en représentation de la République fédérale du Nigéria. Je vous remercie pour votre bienveillante attention.

(*Continued in English*) I now ask that you give the floor to my colleague, Professor Akande.

THE PRESIDENT: Thank you, Mr Smith.

I now give the floor to Mr Akande to make the next statement.

[24] UNCLOS, art. 94, paragraph 3(b).

STATEMENT OF MR AKANDE
COUNSEL OF NIGERIA
[ITLOS/PV.19/C27/4/Rev.1, p. 11–15]

Mr President, distinguished Members of the Tribunal, my task this afternoon is to respond to the points made by Switzerland regarding the urgency of the situation and in relation to the risk of irreparable harm to the rights of Switzerland.

I will have five points.

The first point that I wish to respond to is Sir Michael Wood's insistence this morning that "it is a most unattractive proposition" to "suggest that somehow paragraph 5 provisional measures are subject to different and tougher requirements". He suggests that this proposition would weaken the provisions of Part XV of UNCLOS. However, both the text of article 290, and the case law of your Tribunal make it abundantly clear that the conditions for the prescription of provisional measures under paragraph 5 of article 290 are not the same as under paragraph 1. Under paragraph 1 such measures may be prescribed to preserve rights "pending the final decision". This means that the Tribunal may consider whether irreparable harm to the rights of the party seeking provisional measures, or to the marine environment would occur at any time until the final decision is rendered. So urgency in that context thus relates to anything that may happen between the present and the rendering of that final decision.

However, as I indicated yesterday, the Tribunal has made it clear, including in your recent decision in the *Detention of Three Ukrainian Naval Vessels* case, that, under paragraph 5, the time within which the irreparable harm that would justify provisional measures must occur is the period between the present and the constitution and functioning of the Annex VII tribunal. In short, something that would be urgent in an application made under paragraph 1, because it would occur before the rendering of the final decision, might not be urgent for this Tribunal under paragraph 5 because it would only occur after the constitution and functioning of the Annex VII tribunal.

It is baffling to see how this approach, which follows from the decisions of your Tribunal, would, as suggested by Sir Michael, weaken the dispute-settlement system under Part XV of UNCLOS. The approach leaves no gaps in protection. Between the initiation of a request for provisional measures and the constitution and functioning of the Annex VII tribunal, this Tribunal performs the important function of ensuring that no rights are irreparably prejudiced. However, from the constitution and functioning of the Annex VII tribunal, that tribunal will take over that task. All that this scheme does is precisely what I said yesterday: it takes into account the proper relationship between this Tribunal and the Annex VII tribunal.

While I am on this point about the time frame for the assessment of urgency, let me address the point that Sir Michael Wood made yesterday that the period between the present and the constitution and functioning of the Annex VII tribunal is some months off. He then listed a series of steps that will have to happen between now and the moment when that tribunal will be able to prescribe provisional measures. By enumerating several stages, he sought to give the impression that the relevant time frame could quite possibly be lengthy. Distinguished Members of the Tribunal will of course be aware that Annex VII has strict timelines for the constitution of the tribunal. If my maths is accurate – and I would kindly ask that you do not seek an expert opinion from my schoolteachers on this question – under 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. So the time period began on 6 May. Again, if my maths is accurate, we are already on day 46 or day 47 of that process.

My point is that the time frame for assessing urgency in this case is short. I will return later to how this point is relevant to the facts of this case.

I now wish to move on to my second point. This morning, Sir Michael responded to the argument that there is a need to respect the fact that the Nigerian courts are acting to give effect to Nigeria's rights and obligations. He said that this simply begs the question and that Nigeria can only carry out its rights and obligations in accordance with international law. The suggestion was that until it is determined that Nigeria does indeed have these rights and obligations in accordance with international law, this tribunal should somehow not take them into account with respect to the indication of provisional measures.

Mr President, distinguished Members of the Tribunal, please permit me to remind you, though I am entirely confident that what I am about to say is very much present in your minds, the rights that Switzerland asserts, and that it says need protection, have also not yet been established. The implication behind Sir Michael's point goes completely against what you have held, which is that provisional measures must preserve the rights of both Parties. It just will not do for Switzerland to suggest that they have unestablished rights which you must protect at this stage and then to suggest that protection of the rights being exercised by Nigerian courts begs the question as to whether those rights exist. Nigeria is confident that you will ensure that the rights of both Parties are not harmed equally.

The third point that I wish to address is the risk of irreparable harm to the crew. Mr President and distinguished Members of the Tribunal, here we simply have a dispute about the facts, and apparently also about how to establish those facts. The main dispute is about whether the crew are in fact detained on the vessel and whether they are present of their own volition. Nigeria maintains that they are not detained on the vessel and they are present there of their own volition. Nigeria has pointed to the terms of bail conditions granted by the Nigerian courts. Mr Loewenstein has already dealt with the document that Switzerland displayed to suggest that Nigerian courts have found a violation of those bail conditions. As he stated, this was an application to the court, not a court order and, as he pointed out, that application was made a year ago, on the very day when the alleged breach of the bail conditions apparently occurred. No evidence is supplied to this Tribunal of any further applications alleging breaches by the Nigerian authorities of the terms on which bail was granted. We can assume that if there had been allegations of breaches of those bail conditions, the lawyers representing the Master and the crew are aware of how to obtain a remedy.

Switzerland then questions the evidence that has been produced by Nigeria to support the contention that Master and Crew are on the vessel of their own volition and that they do go ashore unguarded. You were taken to a decision of the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia).*[1] Let us look again at that provision:

> The Court has thus held that it must assess "whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events" (ibid.). On this second point, the Court has stated that "testimony of matters not within the direct knowledge of the witness, but known only to him from hearsay, [is not] of much weight" ... Lastly, the Court has recognized that "in some cases evidence which is contemporaneous with the period concerned may be of special value."

First, there is nothing in that paragraph that suggests that statements by State officials will not be given weight. More importantly, that decision does not stand for the proposition that sworn affidavits will not be given weight in circumstances where the other party produces practically no evidence to contradict them. Second, these are affidavits as to facts and as to facts within the direct knowledge of the witnesses. They are to be contrasted with the single

[1] *I.C.J. Reports 2015,* para 197.

letter submitted by Switzerland – the one that Mr Loewenstein showed you earlier and I encourage you to bear the terms of that letter in mind – where a doctor recounts that he was told by a second person that some unidentified third person had not approved that the doctor may visit the Master and crew.

THE PRESIDENT: Mr Akande, I am sorry to interrupt you, but the interpreters have difficulty in following your statement, so can you slow down a little bit. Thank you.

MR AKANDE: Thank you, Mr President.

Third, these affidavits provide evidence which is contemporaneous with the period concerned.

Yesterday Sir Michael argued that "where direct proof of facts is not possible because of the exclusive control of one party, the other party may be allowed 'a more liberal recourse to inferences of fact and circumstantial evidence'."[2] However, the Agent of Switzerland reminded us yesterday that the 12 seamen who were released by Nigeria have been replaced by a new crew, which is rotated at regular intervals. Surely, these other men, who are not under the control of Nigeria, should have been able to provide testimony or affidavits as the facts in dispute. Not a single statement is provided by Switzerland from any of them.

In these circumstances there is no basis to accord a more liberal recourse to inferences.

If, as Nigeria says, the crew leave the vessel unguarded, every act of them returning to the vessel, however many times, or indeed on however few occasions, demonstrates their voluntary presence on the vessel.

Before I leave the issue of whether irreparable harm is being done to the crew, let me make a point in passing about the conditions of the crew on the vessel. Sir Michael Wood stated that the true picture on board is not rosy at all; that it is bleak and harsh. However, despite this, the Agent for Switzerland tells us that seaman are regularly rotated into these same conditions, and this to simply preserve the economic interests of the owners.

My fourth point, Mr President and distinguished Judges, is a brief one relating to the argument there will be irreparable harm to the vessel and the cargo. This morning, we had an interesting lesson in ethics and moral philosophy from Sir Michael Wood: money is not everything and there are higher values, he told us. I am sure that many of us will agree. However, this does not change the very clear and uniform jurisprudence of international tribunals on this issue. In the Provisional Measures Order of the Special Chamber of this Tribunal in the *Ghana* v. *Côte d'Ivoire* case, it was stated that:

> There is a risk of irreparable prejudice where, in particular, activities result in significant and permanent modification of the physical character of the area in dispute and where such modification cannot be fully compensated by financial reparations.[3]

Sir Michael referred to all manner of losses that could conceivably occur to the shipowner, the cargo owner, to Switzerland. All of them are economic losses and each of them can be fully compensated by financial reparation.

Mr President, distinguished Judges, my fifth and final point addresses the argument that there will be irreparable harm to the marine environment resulting from the abandonment of a vessel. In particular, the Agent of Switzerland illustrated this argument by drawing a doubtful comparison between a hypothetical, future situation of the *"San Padre Pio"*, and the also hypothetical situation of a vessel known as the *"Anuket Emerald"*. In the words of the Agent of Switzerland: "The probable fate of the *"Anuket Emerald"* is to rust in peace and pollute the

[2] Transcripts (unrevised version), 21 June 2019, a.m., p. 18. (Sir Michael Wood).

[3] *Ghana/Côte d'Ivoire, Provisional Measures, Order of 25 April 2015*, p. 163, para. 89. Emphasis added.

environment for decades to come, with all the health risks that that involves for the local population. We earnestly hope that will not happen to the *"San Padre Pio"*."[4]

In response, I will address an issue of law and then some issues of fact – first, the legal issue. I recall this is a request for provisional measures under article 290, paragraph 5, and that as I explained earlier it would need to be shown that any irreparable harm to the marine environment will occur in the few months between now and the constitution and functioning of the Annex VII tribunal; or, at the very minimum, it will need to be shown that irreversible steps that will lead to such harm will occur before then.

There is no evidence at all that anything will happen to the *"San Padre Pio"* which will cause irreparable harm to the marine environment in the few weeks or months before the constitution and functioning of the Annex VII tribunal.

Let me turn to some factual issues which put the claim by Switzerland that the hypothetical future situation of the *"San Padre Pio"* is that it will pose a significant risk of damage to the marine environment very much in doubt.

Mr President and distinguished Members of the Tribunal, you will recall that a picture of the *"Anuket Emerald"* is the only evidence produced by Switzerland to prove that the situation of such vessel has created risks or risks creating prejudice to the marine environment. This picture now before you is said to be taken on 18 July 2018, and it was annexed to the Swiss Request for Provisional Measures,[5] shown on the screen yesterday and included in the Judges' folder.

As Switzerland explained, and Nigeria accepts, that vessel and her crew were charged by Nigeria with illegally trading in petroleum products, and the vessel and her cargo were forfeited at the end of the trial in the Federal High Court, and the subsequent appeal to the Federal Court of Appeal failed. After the period in which appeals to the Supreme Court of Nigeria elapsed and no further appeals were filed, the petroleum products on board the cargo were sold to a buyer. This vessel was blocking a channel used for navigation and was intentionally and safely moved to a beach by the Nigerian navy. The cargo has now been discharged and negotiations are ongoing with regard to the sale of the vessel. As the vessel is now the property of the Federal Government of Nigeria, she has an economic interest in preserving its value and certainly has no intention to abandon it.

Let us look at this picture more closely. Nothing in this picture indicates that it was a tanker wreck on a beach. The vessel is upright and if you look to the right side of the vessel, it appears to anchored. You see the anchor dropped straight down into the water, indicating that this is not an abandoned vessel.

Mr President, distinguished Members of the Tribunal, that concludes my presentation this afternoon. Thank you for your kind attention. May I now request that you invite the Co-Agent of the Federal Republic of Nigeria to make the final submissions on behalf of Nigeria.

THE PRESIDENT: Thank you, Mr Akande.

This brings us to the last stage of the oral arguments of Nigeria.

Article 75, paragraph 2, of the Rules of the Tribunal, provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

I now invite the Co-Agent of Nigeria, Ms Uwandu, to present her concluding remarks and the final submissions of Nigeria.

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[4] Transcripts (unrevised version), 21 June 2019, a.m., p. 11. (Agent).
[5] Annex PM/CH-12.

STATEMENT OF MS UWANDU
CO-AGENT OF NIGERIA
[ITLOS/PV.19/C27/4/Rev.1, p. 16–17]

Mr President, highly respected Members of the Tribunal, may I begin by reiterating that Nigeria does not consider itself to have an adversarial relationship with Switzerland. Nigeria remains confident that Switzerland will support Nigeria in its efforts to combat maritime crime in the Gulf of Guinea, including through 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 Nigeria's exclusive economic zone.

Indeed, activities such as illegal bunkering not only undermine Nigeria's ability to protect the marine environment, which is its obligation under the Convention; they are also at odds with Nigeria's efforts to promote sustainable economic development in the country, and cooperate with other States to wipe out the kind of activities such as illegal oil bunkering which are endemic in the Gulf of Guinea and lay at the heart of the insecurity and instability of the region. Mr President, esteemed Members of the Tribunal, Nigeria was conscious of this when it, along with Switzerland, 26 other States, as well as the African Union, the European Union, the IMO and many other intergovernmental organizations, agreed to the G7 Friends of the Gulf of Guinea Rome Declaration on illegal maritime activity in 2007, which committed coastal States to "enhance capacities to achieve prosecutions and prevent all criminal acts at sea".[1] That is precisely what Nigeria is trying to do. Most importantly, Mr President and highly esteemed Members of the Tribunal, it expressly recognized that

> the primary responsibility to counter threats and challenges at sea rests with the States of the region [like Nigeria] and that only a combined effort will allow for a comprehensive response to threats to maritime security. We stand ready to enhance regional and international cooperation.[2]

Mr President, honourable Members of this Tribunal, to conclude Nigeria's oral submissions, I will not repeat the points Nigeria made in the first round or go into the facts in any greater detail. You have our oral and written submissions and evidence on this, and you will have an opportunity to study these at your leisure in your deliberations.

Mr President, highly respected Members of the Tribunal, as mentioned previously on 18 June 2019, the Ministry of Foreign Affairs of Nigeria sent a note verbale to the Embassy of Switzerland in Abuja. In that note verbale, which has been duly acknowledged by our friend from Switzerland, the Ministry of Foreign Affairs formally provided its assurances that the four individual defendants who are being prosecuted before the Federal High Court of Nigeria 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. In order to dispel any confusion, I would like to reiterate and give you my word 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, Mr President, who are being prosecuted before the Federal High Court of Nigeria in Port Harcourt Judicial Division. Specifically, Mr President, respected Members of the Tribunal, we provide assurances that Messrs Andriy Vaskov, Mykhaylo Garchev, Vladysla Shulga and Ivan Orlovkyi, under the terms of their bail, are not required to remain on board the *M/T "San Padre*

[1] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 9.
[2] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 10.

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.

Mr President, Members of the Tribunal, on behalf of the Federal Republic of Nigeria, I therefore most respectfully request that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation's requests for provisional measures.

May I conclude by thanking you, Mr President and highly esteemed Members of the Tribunal, and the Registrar and his excellent staff, for arranging this hearing so quickly at such short notice, and for exceptionally agreeing to sit even on a Saturday to deal with the hearing in such an efficient manner. The work of the translators and the Registry staff has been exemplary and we are equally grateful for that. We also thank the Agent, Counsel and advocates of the Swiss Confederation for their co-operation.

Mr President, highly esteemed Members of the Tribunal, this concludes the oral argument on behalf of Nigeria. We thank you all very much for your attention.

THE PRESIDENT: Thank you, Ms Uwandu.

Closure of the Oral Proceedings
[ITLOS/PV.19/C27/4/Rev.1, p. 17–18; TIDM/PV.19/A27/4/Rev.1, p. 19]

THE PRESIDENT: We have now reached the end of the hearing. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Switzerland and Nigeria. I would also like to take this opportunity to thank both the Agent of Switzerland and the Co-Agent of Nigeria for their exemplary spirit of co-operation.

The Registrar will now address questions in relation to documentation.

LE GREFFIER : Monsieur le Président, conformément à l'article 86, paragraphe 4, du Règlement du Tribunal, les parties peuvent, sous le contrôle du Tribunal, corriger le compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Ces corrections concernent la version vérifiée (*checked version*) du compte rendu dans la langue officielle utilisée par la partie concernée. Les corrections devront être transmises au Greffe le plus tôt possible et au plus tard le mardi 25 juin 2019 à 18 heures, heure de Hambourg.

THE PRESIDENT: Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The date for the reading of the order in this case is tentatively set at 6 July 2019. The Agents of the Parties will be informed reasonably in advance of any change to this date.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the order.

The hearing is now closed.

(*The sitting closed at 5.50 p.m.*)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The M/T "San Padre Pio" Case (Switzerland* v. *Nigeria), Provisional Measures.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du navire « San Padre Pio » (Suisse c. Nigéria), mesures conservatoires.*

Le 10 août 2020
10 August 2020

Le Président
Jin-Hyun Paik
President

La Greffière
Ximena Hinrichs Oyarce
Registrar