STATEMENT IN RESPONSE OF THE FEDERAL REPUBLIC OF NIGERIA, 17 JUNE 2019

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

CASE NO. 27

THE M/T "SAN PADRE PIO"

THE SWISS CONFEDERATION v. THE FEDERAL REPUBLIC OF NIGERIA

STATEMENT IN RESPONSE OF THE FEDERAL REPUBLIC OF NIGERIA TO THE REQUEST FOR THE PRESCRIPTION OF PROVISIONAL MEASURES OF THE SWISS CONFEDERATION

VOLUME I

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CHAPTER 1
INTRODUCTION

1.1 The Federal Republic of Nigeria ("**Nigeria**") submits this Statement in Response to the Request for the Prescription of Provisional Measures ("**Request for Provisional Measures**" or "**Request**") before the International Tribunal for the Law of the Sea ("**ITLOS**" or "**Tribunal**") filed by the Swiss Confederation ("**Switzerland**") on 21 May 2019. The Request is related to Switzerland's Notification and Statement of Claim of 6 May 2019 ("**Statement of Claim**") purporting to institute arbitral proceedings under Annex VII of the United Nations Convention on the Law of the Sea ("**UNCLOS**" **or "the Convention**") over an alleged dispute concerning the *M/T "San Padre Pio"* ("***San Padre Pio***").[1]

1.2 Switzerland is not entitled to the provisional measures it seeks because, *inter alia*, there is neither urgency nor real and imminent risk of irreparable prejudice to any right alleged by Switzerland under the Convention between now and the date of the constitution and functioning of the Annex VII arbitral tribunal.

1.3 Additionally, and of fundamental importance, Switzerland seeks an order requiring Nigeria to permit the four persons presently free on bail who are on trial for violations of Nigeria's criminal laws to depart the country. This would irreparably harm Nigeria's sovereign right to enforce its laws against persons legally prosecuted for violations of Nigerian criminal law because Switzerland cannot guarantee that the individuals would return to face the ongoing trial and appropriate punishment if convicted.

1.4 The absence of urgency is clear in Switzerland's actions in instituting these proceedings. Switzerland transmitted its Statement of Claim fifteen months after the Nigerian Navy arrested the *San Padre Pio* while bunkering the oil and gas production facilities at the Odudu oil field at night in violation of Nigerian law. The Statement of Claim was followed by Switzerland's Request for the prescription of provisional measures under Article 290, paragraph 5, of the Convention, which was submitted on 21 May 2019, sixteen months after the arrest of the vessel. By the time the Tribunal holds oral hearings on Switzerland's application on 21 and 22 June 2019, a total of one-and-a-half years will have elapsed since the arrest. While there had been correspondence between the Parties regarding the arrest over the course of the year that followed, that correspondence stopped in late January 2019, four months before Switzerland transmitted its Statement of Claim to Nigeria. Neither in its Statement of Claim, nor in its Request for the prescription of provisional measures does Switzerland allege any change in circumstances that suddenly requires an urgent order to protect the rights it alleges during the brief period before the Annex VII arbitral tribunal can decide for itself whether provisional measures are warranted.

1.5 The substance of Switzerland's Statement of Claim equally fails to justify the exceptional relief it seeks. Switzerland claims rights in the exclusive economic zone ("**EEZ**") through the reference in Article 58 of the Convention to the high seas freedoms enumerated under Article 87. It completely ignores the major qualification on those rights in the EEZ under Article 58 providing that they must be "compatible with the other provisions of this

[1] Notification and Statement of Claim of the Swiss Federation (6 May 2019) ("Statement of Claim"), para. 1.

Convention."[2] Specifically, a Swiss flagged ship's freedom of navigation, exclusive flag State jurisdiction in the EEZ and other rights are subject to Nigeria's *sovereign* rights for the purpose of exploring and exploiting, conserving and managing living and non-living natural resources in the waters, seabed and subsoil of the EEZ established in Article 56. Nor does Switzerland acknowledge Nigeria's rights as a coastal State under Articles 208 and 214 to enforce laws and regulations concerning the prevention, reduction and control of pollution arising from or in connection with seabed activities. When a foreign flagged ship involves itself in activities related to Nigeria's exploitation, conservation and management of its natural resources (in this case sub-seafloor hydrocarbons), it subjects itself to Nigeria's sovereign rights in the course of that involvement. That is precisely what the *San Padre Pio* did when it operated as a supply ship (a bunker) to one of Nigeria's most important oil and gas production facilities, which it was found doing in the middle of the night, in direct violation of the conditions that had been imposed by Nigeria, among other breaches of Nigerian law.

1.6 Switzerland criticizes Nigeria's arrest of the *San Padre Pio* and its crew, even though Nigeria's Navy approached the vessel because it had been under surveillance due to clear indications that it was likely involved in the illegal theft, refinement and bunkering of oil from Nigeria's EEZ and was, in fact, bunkering illegally in the dead of night. Subsequent analysis showed that the fuel the *San Padre Pio* was supplying to Nigeria's offshore oil and gas operations was substandard, a typical characteristic of stolen Nigerian crude oil that has been clandestinely refined and that puts Nigeria's costly installations at risk. Switzerland and Nigeria have both affirmed their commitment to fighting such crimes that have in the past caused environmental pollution, economic loss, personal injuries, and even tragic deaths in the Gulf of Guinea. Yet, to Nigeria's surprise and regret, Switzerland is now attempting to use the provisions of the Convention to prevent Nigeria from trying accused criminals before its national courts. In doing so, Switzerland is hindering Nigeria's right and duty as a State to exercise its criminal jurisdiction, an indispensable element of the maintenance of law and order.

1.7 Switzerland's Statement of Claim was surprising in other respects. It was the first time that Switzerland had—much to Nigeria's disappointment—suggested that Nigeria had violated its obligations under the International Convention on Civil and Political Rights ("**ICCPR**") and the Maritime Labour Convention ("**MLC**").[3]

1.8 Nigeria accepts that provisional measures are, in very exceptional circumstances, warranted to preserve the rights of the parties to a dispute when there is a real and imminent risk that irreparable prejudice could be caused to those rights. Nigeria also understands that provisional measures under Article 290(5) of UNCLOS are particularly exceptional, as they grant the Tribunal the power to prescribe provisional measures with respect to a dispute that does not fall within its own jurisdiction to adjudicate. Article 290(5) should accordingly only be resorted to in those extremely urgent circumstances when the alleged irreparable prejudice will likely materialize in the time between the request for provisional measures and the constitution and functioning of the Annex VII arbitral tribunal, which ordinarily only takes a

[2] United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), 1833 UNTS 397 (10 December 1982), entered into force 1 November 1994), art. 58.

[3] Statement of Claim, paras. 40(c), 40(d).

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few months.[4] As discussed below, this is most certainly not the case here because Switzerland fails to demonstrate any imminent and irreparable prejudice that will occur in this short window of time. It alleges prejudice that either is based on misrepresentations of the facts, has already occurred, would be minimal in the relevant timeframe, or could be fully remedied by economic compensation that could be ordered by the Annex VII arbitral tribunal.

1.9 For all of these reasons, and others, Nigeria files this Statement in Response to oppose Switzerland's Request. The Statement in Response consists of three chapters. **Chapter 2**, which follows this Introduction, provides a Statement of Facts for the Tribunal to properly assess the situation. **Chapter 3** then explains why Switzerland fails to satisfy the requirements for provisional measures. Nigeria's Statement in Response concludes with its Submission.

[4] In the most recently instituted Annex VII arbitration for which information is publicly available, it took three months to constitute the Annex VII arbitral tribunal from the filing of the Notification and Statement of Claim. The "Enrica Lexie" Incident (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015 ("*Enrica Lexie*, Provisional Measures, Order"), paras. 2, 14.

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CHAPTER 2
STATEMENT OF FACTS

2.1 In this Chapter, Nigeria corrects the factual record by rectifying the incomplete and misleading account that Switzerland has presented.[5] As shown below, there are extensive oil and gas installations located in Nigeria's EEZ that are used to extract hydrocarbon resources from the seabed. These facilities include the Odudu Oil Field operated by Total E & P Nigeria Ltd.[6] It is undisputed that the *San Padre Pio* was arrested while bunkering petroleum products to vessels in support of those extractive operations.

2.2 Nigeria is Africa's most populous country and largest economy. The economy is in significant measure dependent upon offshore oil and gas production. It has been reported that, over the past four decades, approximately 90% of Nigeria's export earnings and 70% of Nigeria's government revenues have come from oil.[7]

2.3 Significant quantities of Nigeria's petroleum resources are stolen. It has been estimated that Nigeria loses 300,000 to 400,000 barrels of oil every day to thieves, equating to losses of approximately US$ 1.7 billion per month.[8] Much of this stolen crude oil is illegally refined in Nigeria under dangerous and environmentally harmful conditions. The resultant illegally refined petroleum products are then shipped to other jurisdictions where false documentation of origin may be readily obtained. Among other locations where such documents are known to be secured is Lomé, Togo.[9] The falsely labelled and illegally refined petroleum products are then shipped back to Nigeria for distribution to, among other consumers, offshore oil and gas installations, where they are distributed via ship-to-ship bunkering.[10] A tell-tale hallmark of

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[5] Statement of Claim, Section II; Request for Provisional Measures of the Swiss Confederation (21 May 2019) ("Request for Provisional Measures"), Section II.

[6] European Space Agency, Sentinel Image of Odudu Oil Field, Annex 1.

[7] I. M. Ralby, *Downstream Oil Theft: Global Modalities, Trends, and Remedies* (2017), p. 14; A. Ikelegbe, "The Resource and Environmental Conflicts in the Niger Delta Region: An Overview", *Oil, Environment and Resource Conflicts in Nigeria* (A. Ikelegbe, ed. 2013), p. 5; 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. 563; 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).

[8] 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).

[9] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya* ("*Affidavit* of Rear Admiral Ibikunle Taiwo Olaiya"), para. 17, Annex 2. *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).

[10] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, para. 4 et seq, Annex 2.

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illegally refined petroleum products is that they often fail to meet Nigeria's required specifications for such products.[11]

2.4 The consequences of illicit trafficking in petroleum products are not merely economic. Petroleum product traffickers employ environmentally hazardous practices not only to steal the oil, but also to refine, transport, and ultimately distribute those products.[12] In particular, ship-to-ship bunkering—the means by which petroleum products are distributed offshore—is susceptible to causing harmful oil spills. Indeed, bunker spills are reported to cause nearly half of global marine pollution claims.[13] Such spills are more environmentally harmful than crude oil spills, as the physical properties of fuel oil make it extremely difficult to clean up.[14] It is for this reason, among others, that 70 States concluded the International Convention on Civil Liability for Bunker Oil Pollution Damage ("**Bunkers Convention**") in 2001.[15] At present, 93 States—including Switzerland and Nigeria—covering 93.0% of the world's ship tonnage, are parties to the Bunkers Convention.[16]

2.5 The endemic criminality and related diminution of maritime security caused by illicit trafficking in Nigerian petroleum products has been recognized by the international community, which is assisting Nigeria and other States in the Gulf of Guinea to take effective action. For instance, on 28 December 2018, the United Nations Secretary-General reported to the Security Council:

> Maritime crime and piracy off the coast of West Africa continued to pose a threat to peace, security and development in the region. Oil-related crimes resulted in the loss of nearly $2.8 billion in revenues last year in Nigeria, according to government figures. Between 1 January and 23 November, there were 82 reported incidents of maritime crime and piracy in the Gulf of Guinea.[17]

2.6 The Secretary-General's December 2018 report further observed that during the reporting period, "international support to combat maritime crime and piracy focused on bolstering the operational capacity of maritime agencies to patrol their waters and

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[11] *Ibid.*, para. 8.

[12] A. Taylor, "Nigeria's Illegal Oil Refineries", *The Atlantic* (15 January 2013), *available at* https://www.theatlantic.com/photo/2013/01/nigerias-illegal-oil-refineries/100439/ (last access: 16 June 2019).

[13] C. Wu, "Liability and Compensation for Bunker Pollution", *Journal of Maritime Law & Commerce*, Vol. 33, No. 5 (2002), p. 553, at p. 555; N. A. Martínez Gutiérrez, "The Bunkers Convention and the Shipowner's Right to Limit Liability", *Journal of Maritime Law & Commerce*, Vol. 43, No. 2 (2012), p. 235, at p. 236.

[14] C. Wu, "Liability and Compensation for Bunker Pollution", *Journal of Maritime Law & Commerce*, Vol. 33, No. 5 (2002), p. 553, at p. 555; N. A. Martínez Gutiérrez, "The Bunkers Convention and the Shipowner's Right to Limit Liability", *Journal of Maritime Law & Commerce*, Vol. 43, No. 2 (2012), p. 235, at p. 236.

[15] International Maritime Organization, *International Convention on Convention on Civil Liability for Bunker Oil Pollution Damage, 2001*, LEG/CONF.12/19 (27 March 2001) ("Bunkers Convention"), Annex 3.

[16] Bunkers Convention, Annex 3.

[17] 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.

strengthening the capacity of the criminal justice chain to detect, investigate and prosecute cases of piracy and maritime crime."[18]

2.7 Nigeria, in cooperation with its international partners, has expended significant resources in combatting the interconnected web of maritime crimes associated with the theft of Nigeria's petroleum resources and the illicit transport and sale of illegally refined petroleum products. Regulation of bunkering—the principal means by which illegally refined petroleum products are distributed in Nigeria's waters—is a critical part of this strategy.[19]

2.8 Nigeria's Armed Forces Act gives the Nigerian Navy the authority to carry out maritime enforcement in its waters, including in the EEZ.[20] The Navy's areas of competence expressly include the regulation and enforcement of bunkering.[21] Pursuant to this statutory authority, vessels wishing to engage in offshore bunkering must obtain from the Nigerian Navy a Verification Certificate to Receive/Supply/Load/Discharge Approved Products ("**Navy Certificate**"). Approval to engage in bunkering is contingent upon enumerated conditions, including that bunkering operations must "be conducted between Sunrise and Sunset."[22] In addition, bunkering may not involve the transfer of "illegally refined crude oil products."[23] Further, a naval Officer-in-Charge ("**OIC**") must be present to supervise the taking of quality control samples.[24] The required Navy Certificate expressly states that vessels "found violating [the] above conditions" may be "arrested and prosecuted."[25]

2.9 Apart from the need to obtain the Navy Certificate, Nigeria requires that vessels engaged in the bunkering of petroleum products secure a permit from the Department of Petroleum Resources of the Nigerian Ministry of Petroleum ("**DPR Permit**"). They must also obtain a Ship Clearance Certificate from the Nigeria Maritime Administration and Safety Agency ("**NIMASA Certificate**").[26]

2.10 As the Nigerian Navy's Director of Operations explains, the Navy "monitors vessel activity in the Gulf of Guinea through maritime domain awareness systems, including such systems that are operated in collaboration with regional and international partners like the United States."[27] As part of the Nigerian Navy's maritime enforcement activities, vessels are placed on a Vessel of Interest ("**VOI**") list if there are grounds to suspect that they may be

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

[19] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, para. 10 et seq, Annex 2.

[20] Federal Republic of Nigeria, The Armed Forces Act, Cap. A20 (2004) (excerpt), sec. 1(2)(a), Annex 4.

[21] *Ibid.*

[22] Nigerian Navy, *Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/Load/Discharge Approved Products*, para. 12(d), Annex 5.

[23] *Ibid.*, para. 12(b).

[24] *Ibid.*, para. 12(d).

[25] Nigerian Navy, *Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/Load/Discharge Approved Products*, para. 13, Annex 5.

[26] *Affidavit of Facts in the Case of the Arrest and Detention of MT SAN PADRE PIO of Lieutenant Mohammed Ibrahim Hanifa (14 June 2019)* ("*Affidavit of Lieutenant Mohammed Ibrahim Hanifa*"), para. 8, Annex 6.

[27] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, para. 11, Annex 2.

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engaged in illegal activities.[28] Reasons may include travel between sites known to be associated with the illicit trade in petroleum products. They can also include suspicious acts like turning off a vessel's automatic identification system ("**AIS**") transponder, which is mandatory for large vessels to keep active unless there is an emergency requiring its disengagement.[29]

2.11 The *San Padre Pio* drew the attention of the Nigeria Navy because of suspicious activity, including instances in which the vessel's AIS transponder was turned off without apparent emergency justification, as well as a pattern of navigation that included visits to ports and locations associated with illegal bunkering and the illicit refining, transport, and sale of stolen Nigerian petroleum products.[30] Among the suspicious locations that the *San Padre Pio* frequented was the port of Lomé, Togo.[31] As noted above, Lomé is known to be a location where false documentation can be obtained to facilitate the shipment of illegally refined Nigerian petroleum products back to Nigeria for distribution to offshore extractive facilities.[32] As a result, the *San Padre Pio* was placed in the VOI list.[33]

2.12 On 22 January 2018, the Nigerian Navy's Falcon Eye Centre communicated information to the Nigerian naval vessel NNS Sagbama regarding the location of the *San Padre Pio*, which was in its vicinity.[34] The NNS Sagbama encountered the *San Padre Pio* at the Odudu Oil Field at approximately 20:00 on the night of 22 January 2018, where it was bunkering a vessel.[35] At approximately 03:00 on 23 January 2018, the *San Padre Pio* commenced bunkering another vessel. These ship-to-ship transfers occurred at night, in violation of the conditions set out in the Navy Certificate that the *San Padre Pio* had obtained.[36] As noted, that permit warns that violation of its conditions expose the bunkering vessel to arrest and prosecution.[37]

2.13 The NNS Sagbama requested that the *San Padre Pio* produce the required regulatory approvals. These were not provided, however.[38] Although the NNS Sagbama was presented with the *San Padre Pio*'s bill of lading and Navy Certificate, the other required permits—the

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[28] *Ibid.*, para. 18.

[29] *Ibid.*, paras. 12, 18.

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

[31] *See Ibid.*, Figure 1 (showing port calls to Lomé, Togo in January and March 2017), Figure 2 (showing anchoring in Lomé, Togo in April 2017), Figure 3 (showing several periods of anchoring in Lomé, Togo in September 2017), and Figure 4 (showing several trips to and from various oil fields and Lomé, Togo in October, November, and December 2017).

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

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

[34] *Affidavit of Lieutenant Mohammed Ibrahim Hanifa*, para. 4, Annex 6.

[35] *Ibid.*, paras. 5-6, 13.

[36] *Ibid.*, para. 7, 10; Nigerian Navy Verification Certificate to Receive/Supply/Load/Discharge Approved Products, Annex 5, para. 12(d); see also *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, Figure 5, Annex 2 (depicting the movement of the MT San Padre Pio on 23 January 2018).

[37] Nigerian Navy Verification Certificate to Receive/Supply/Load/Discharge Approved Products, para. 13, Annex 5; *Affidavit of Lieutenant Mohammed Ibrahim Hanifa*, para. 10, Annex 6.

[38] *Affidavit of Lieutenant Mohammed Ibrahim Hanifa*, paras. 8-9, Annex 6.

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DPR Permit and the NIMASA Certificate – were not shown.[39] The vessel was accordingly detained and escorted by the NNS Sagbama to Forward Operating Base Bonny for further investigation.[40] Subsequent investigation revealed that the NIMASA Certificate was obtained on 24 January 2018, that is, *after* the *San Padre Pio* had been arrested.[41]

2.14 On 6 March 2018, the Nigerian Navy invited the Economic and Financial Crimes Commission ("**EFCC**") to assume investigative responsibility.[42] Three days later, the *San Padre Pio* and its officers and crew were handed over to the Commission for "further investigation and possible prosecution."[43] On 12 March 2018, the *San Padre Pio*, as well as her officers and crew, were charged with conspiring to distribute and deal with petroleum product without lawful authority or appropriate license, and with having done so with respect to the petroleum product onboard.[44]

2.15 The defendants were moved to EFCC facilities onshore.[45] Switzerland criticizes the conditions in that facility.[46] However, a contemporaneous report only describes what it characterizes as substandard mattresses and "local food" that the crew "cannot manage" due to "hot peppers etc."[47] The same report noted that although the EFCC permitted "European cuisine" to be delivered, such deliveries had not been made because the vessel's operator had not wired the necessary funds.[48]

2.16 Administrative bail was granted by the EFCC on 9 March 2018.[49] At their request, the officers and crew returned to the *San Padre Pio* and remained onboard voluntarily.[50] Indeed, the *San Padre Pio*'s master was instructed by his employer: "[d]o not leave the tanker without green light from owners…".[51]

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[39] *Ibid.*, paras. 8-9.

[40] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, para. 27, Annex 2; *Affidavit of Lieutenant Mohammed Ibrahim Hanifa*, para. 11, Annex 6.

[41] Statement of Claim, Annex NOT/CH-18; *Federal Republic of Nigeria v. Vaskov Andriy et al., 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), para. 16, Annex 22.

[42] *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Affidavit of A. Ismaila in Support of Motion on Notice (Federal High Court of Nigeria, 15 May 2018), Annex 7.

[43] *Ibid.*

[44] Statement of Claim, Annex NOT/CH-21.

[45] *Affidavit of Facts in the Case of the Arrest and Detention of MT SAN PADRE PIO of Captain Kolawole Olumide Oguntuga* (14 June 2019), para. 5, Annex 8.

[46] Statement of Claim, para. 4.

[47] Statement of Claim, Annex NOT/CH-20.

[48] *Ibid.*

[49] Economic and Financial Crimes Commission, *Bail Surety Forms signed 9 March 2018* (Certified Copy dated 11 June 2019), Annex 9.

[50] *Letter* from U. Ezeobi, Babajide Koku & Co., to The Head of Operations, Economic and Financial Crimes Commission (13 March 2018), Annex 10.

[51] *Email* from H. de Montauzon to Master San Padre Pio, et al. (9 March 2018), Annex 11.

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2.17 The charges were amended on 19 March 2018. All charges against the 12 members of the crew were dropped. Only charges against the officers and the vessel remained.[52] Upon the crew's release, they were "at liberty to go anywhere of their choice without restraint."[53] The passports of the 12 members of the crew were returned and they were allowed to leave Nigeria.[54] To that end, the EFCC informed the Nigerian Navy that they should be allowed to disembark, with a 13-member replacement crew boarding the *San Padre Pio* "for maintenance."[55]

2.18 On 21 March 2018, the master and officers applied to the Federal High Court for bail. The EFCC did not oppose their bail application; it simply asked that bail be "on terms that will make the defendants attend their trial."[56] Two days later, the Federal High Court granted bail on the conditions that the defendants deposit N10,000,000 or its dollar equivalent (approximately $28,000) and provide a reliable and reputable surety who could enter a bond of an equivalent amount and swear to an affidavit of means.[57] The Court imposed no restrictions on where the defendants could travel other than requiring that they "not travel outside Nigeria without the prior approval or order of this Court."[58]

2.19 Nigerian law permits arrested vessels to be released upon the posting of a bond. However, the vessel's owner did not seek to exercise that right.[59]

2.20 On 24 April 2018, the charges against the officers and vessel were amended to include additional counts for having provided a false bill of lading and false cargo manifest.[60] In particular, each of those documents had falsely stated that the vessel carried 4,625.865 cubic meter (CBM) of petroleum product; in fact, the bill of lading from Lomé, Togo discloses that the cargo actually contained 7,488.484 CBM.[61]

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[52] Statement of Claim, Annex NOT/CH-22.

[53] *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), para. 34, Annex 22.

[54] *Letter* from B. Koku, SAN, Babajide Koku & Co., to The Zonal Head of Operations, Economic and Financial Crimes Commission (16 July 2018), Annex 12.

[55] *Letter* from N. Obono Itam, Director, Zonal Office, Port Harcourt, Economic and Financial Crimes Commission, to The Commanding Officer, Forward Operating Base (10 July 2018), Annex 13.

[56] Statement of Claim, Annex NOT/CH-24.

[57] *Ibid.*

[58] *Ibid.* To that end, the Federal High Court required the defendants to deposit their passports with the Court' Registry. *Ibid.*

[59] *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), para. 18, Annex 22.

[60] Statement of Claim, Annex NOT/CH-39.

[61] *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), para. 26(q), Annex 22.

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2.21 After bail was granted, the master and officers were released, subject only to the requirement that they remit their passports, which were provided to the Deputy Chief Registrar of the Federal High Court for safekeeping.[62] Nigeria imposed no restrictions on the defendants' travel within Nigeria. For example, on 7 May 2018, the EFCC informed the Nigerian Navy that the crew should be allowed to disembark and board the *San Padre Pio* at will.[63] The EFCC further requested that a physician be permitted to "go onboard the Vessel" to "render medical services to the crew."[64] As the EFCC prosecutor responsible for their prosecution explains, the master and officers voluntarily returned to the vessel.[65] However, they are free to depart the *San Padre Pio* at any time. In fact, they stay at hotels "of their own choice whenever they come to Port Harcourt unguarded."[66]

2.22 Upon the EFCC's assumption of investigative responsibility, the petroleum product stored in the *San Padre Pio* was sampled and sent to the Department of Petroleum Resources in Port Harcourt for laboratory analysis.[67] This testing determined that the cargo consisted of Automotive Gas Oil that "does not meet" the required PPMC specifications for Automotive Gas Oil.[68] Further laboratory testing at a different laboratory confirmed that the samples were "refined petroleum products with low quality AGO characteristics."[69] As noted above, this indicates that the vessel was likely trafficking in illegally refined petroleum products.[70]

2.23 On 15 May 2018, the EFCC filed a motion with the Federal High Court of Nigeria requesting, *inter alia*, an order directing the Department of Petroleum Resources, in the presence of the representative of the defendants, to carry out additional sounding to verify the size of the *San Padre Pio*'s cargo as well as further quality control testing.[71] The Commission also asked the Federal High Court to enter a temporary forfeiture order for the cargo for the interim period "pending the final determination" of the charges.[72] In light of the fact that the vessel was laden with petroleum product, the EFCC explained that interim forfeiture was needed "to evacuate" the cargo to "avoid spill and possible pollution that may result from such

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[62] *Letter* from N. Obonoo Itam, Head of Operations, Port Harcourt, Economic and Financial Crimes Commission, to The Deputy Chief Registrar, Federal High Court (4 April 2018), Annex 14.

[63] *Letter* from A. Bawa, Zonal Head, Port Harcourt, Economic and Financial Crimes Commission, to The Commanding Officer, Forward Operating Base, Nigerian Navy (7 May 2018), Annex 15.

[64] *Ibid.*

[65] *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), para. 31, Annex 22.

[66] *Ibid.*, para. 16.

[67] *Ibid.*, para. 11.

[68] Statement of Claim, Annex NOT/CH-36, paras. 6-7. *See also 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 April 2018), Annex 16.

[69] *Letter* from S. Yusuf, Engineer, Zonal Operations Controller, Warri, Ministry of Petroleum Resources, to The Director, Economic and Financial Crimes Commission (6 July 2018), Annex 17.

[70] *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, para. 8, Annex 2.

[71] Statement of Claim, Annex NOT/CH-35.

[72] *Ibid.*, para. (b).

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spill."[73] To protect the interests of the defendants, the Commission's motion requested that the cargo be sold and the proceeds "paid into an interest yielding account" for the period "pending the hearing and determination of the charge."[74] Although Nigerian law permits such interim forfeiture orders to be obtained *ex parte*, the EFCC filed its application by motion on notice to the defendants so as to afford them "an opportunity to be heard."[75]

2.24 On 26 September 2018, after hearing argument from the defendants, the Federal High Court granted the motion. In particular, the Court ordered, *inter alia*: (1) that the DPR, in the presence of the representative of the defendants, carry out sounding and quality control testing on the petroleum product stored on the *San Padre Pio* so as to "determine the quantity and quality of the said product"; (2) that the petroleum product be "temporarily forfeited" pending "the final determination of charge"; and (3) that it be sold under the supervision of the Deputy Chief Registrar of the Federal High Court and in the presence of the defendants' representative, with the proceeds being deposited into an interest bearing account "pending the hearing and determination of the charge."[76]

2.25 On 18 October 2018, Augusta Energy SA – the charterer of the *San Padre Pio* – moved for an order *inter alia* "extending [the] time within which" to seek discharge of the Court's order of 26 September 2018 and discharging the Court order for the cargo's interim forfeiture and sale.[77] Augusta claimed that it "beneficially owned" the cargo.[78] Among the asserted grounds for opposing the removal and sale of the *San Padre Pio*'s cargo, Augusta stated that because the vessel is a "chemical tanker" which is "certified and equipped with adaptable features to transport sizeable petroleum product such as the cargo on board," any "concerns of oil spillage or pollution is inconsequential."[79]

On 25 January 2019, the Federal High Court heard argument from the parties on Augusta's motion.[80] The Court denied the motion on 9 April 2019.[81] With respect to Augusta's assertion that it is the purported beneficial owner of the cargo, the Court found the claim to be contradicted by the evidence, including the fact that when Augusta's counsel had previously appeared before the Federal High Court he had "only appeared on behalf of the Charterers."[82] The Court held that in light of Augusta's "failure to establish its claim to the subject matter of this application," there is "no merit in the application and the reliefs sought."[83]

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[73] Statement of Claim, Annex NOT/CH-36, para. 12.

[74] Statement of Claim, Annex NOT/CH-35, para. (c).

[75] *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Applicant's Written Address in Support of its Motion on Notice (Federal High Court of Nigeria, 15 May 2018), para. 4.03, Annex 23.

[76] Statement of Claim, Annex NOT/CH-24, paras. 1-3.

[77] Statement of Claim, Annex NOT/CH-38, pp. 1-2.

[78] *Ibid.*, p. 2.

[79] *Ibid.*, p. 8.

[80] *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Ruling (Federal High Court of Nigeria, 9 April 2019), p. 5, Annex 18.

[81] *Ibid.*, p. 7.

[82] *Ibid.*, p. 6.

[83] *Ibid.*, p. 7.

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2.26 On 12 April 2019, Augusta filed a Notice of Appeal with the Federal Court of Appeal of Nigeria asking that the Federal High Court's order be set aside.[84] On 14 May 2019, Augusta filed a motion seeking to enjoin the cargo's sale and an order staying execution of the ruling of the Federal High Court.[85] That motion remains pending before the Court of Appeal.

* * *

2.27 Perhaps unaware of many of the facts recounted here—such as the evidence of the *San Padre Pio*'s involvement in the stolen oil trade that sparked the Nigerian Navy's interest in the vessel, the fact that when arrested it was engaged in prohibited nighttime bunkering or the fact that the officers and crew are currently on the vessel voluntarily—Switzerland instituted proceedings under Annex VII of the Convention and seeks provisional measures from the Tribunal under Article 290(5). As is demonstrated in the remainder of this Response, Switzerland does not meet the requirements for provisional measures.

[84] *Augusta Energy SA v. Federal Republic of Nigeria*, Notice of Appeal (Court of Appeal of Nigeria, 12 April 2019), para. 4, Annex 19.

[85] *Augusta Energy SA v. Federal Republic of Nigeria*, Motion of Notice (Court of Appeal of Nigeria, 14 May 2019), paras. 1-2, Annex 20.

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CHAPTER 3
SWITZERLAND FAILS TO SATISFY THE REQUIREMENTS FOR PROVISIONAL MEASURES

I. Introduction

3.1 It is in light of the foregoing more accurate and complete statement of the facts that the Tribunal must consider the three provisional measures that Switzerland has requested, which seek an order from the Tribunal so as to:

> (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.

3.2 Switzerland's application for provisional measures is brought under Article 290(5) of UNCLOS, which confers upon the Tribunal a special competence to prescribe provisional measures in respect of a dispute that has been submitted to arbitration under Annex VII of the Convention. Provisional measures are an "exceptional remedy" in international law[86] because they "derogate from the usual rule that a plaintiff cannot obtain relief until he has thoroughly proved his case, and all defences and objections of his adversary have been heard and considered".[87] The Special Chamber of the Tribunal in the *Ghana/Côte d'Ivoire* case recently recalled that provisional measures cannot be ordered as a matter of course, noting that "whether there exists imminent risk of irreparable prejudice can only be taken on a case by case basis in light of all relevant factors."[88]

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[86] *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Separate Opinion of Judge Shahabuddeen, ICJ Reports 1991, p. 29 (quoting E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 184). *See also, Enrica Lexie*, Provisional Measures, Order, Declaration of Judge Paik, para. 10 ("Provisional measures are an exceptional form of relief [...] Given this nature of provisional measures, the Tribunal should exercise caution in assessing not only whether to prescribe provisional measures but also what measures to prescribe"). See also *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998*, ITLOS Reports 1998 ("*M/V Saiga,* Provisional Measures, Order"), para. 47 ("Considering, in accordance with paragraph 89(5) of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested").

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

[88] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015*, ITLOS Reports 2015, para. 43.

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3.3 Provisional measures under Article 290(5) of UNCLOS are even more exceptional than those prescribed under paragraph 1 of that provision because paragraph 5 grants the Tribunal the power to prescribe provisional measures with respect to a dispute that does not even fall within its own jurisdiction to adjudicate.[89] The measures are prescribed in a dispute whose merits will be dealt with by another judicial body "which is not yet in a position to 'modify, revoke or affirm those provisional measures'".[90] This explains the stringent requirement for provisional measures under Article 290(5) and is reflected in the difference in wording between the two provisions and particularly highlighted by the fact that Article 290(5) makes an express reference to the condition of "urgency", which remains only implicit in Article 290(1).[91]

3.4 In particular, Article 290(5) provides that the Tribunal may prescribe provisional measures only "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".[92] Under this provision,

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[89] See *MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, Separate Opinion of Judge Mensah*, ITLOS Reports 2001, pp. 119-120: ("But whatever may be the considerations for determining that the prescription of provisional measures is appropriate under paragraph 1 of article 290 of the Convention, it is important to recognize that they are not the only factors that need to be taken into account when dealing with a request for provisional measures under paragraph 5 of article 290. In other words, although the conditions for provisional measures under paragraph 1 are necessary for prescription of measures under paragraph 5, they are no sufficient [...]These are not mere technical differences: they have significant implications not only with regard to the considerations and factors that need to be taken into account by the respective courts or tribunals but also with regard to the approach to be adopted in considering evidence adduced before them. [...] The difference in the temporal dimension of the competence of the tribunal imposes a measure of constraint on a court of tribunal dealing with a request for provisional measures under article 290, paragraph 5, of the Convention") (emphasis added).

[90] *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 85 (quoting *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003*, ITLOS Reports 2003, para. 68): "[T]he 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." The same finding was previously stated by the Tribunal is the *Land Reclamation* case, Order of 8 October 2003, para. 68.

[91] See *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, Separate Opinion of Judge Rao*, ITLOS Reports 2003, para. 15 ("In addition to the requirements of urgency imposed by article 290, paragraph 1, of the Convention, there is an additional requirement of urgency which needs to be satisfied if provisional measures are to be prescribed under article 290, paragraph 5, of the Convention, by virtue of which, pending the constitution of an arbitral tribunal to which a dispute is being submitted, the Tribunal may prescribe provisional measures if it considers that prima facie the arbitral tribunal which is to be constituted would have jurisdiction and that "the urgency of the situation so requires"). See also, *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, Separate Opinion of Judge Laing*, ITLOS Reports 1998, para. 14 ("Article 290, paragraph 5, of UNCLOS provides for urgency of "the situation" as a precondition to any measures which might be ordered where this Tribunal or another court is considering measures concerning parties the substance of whole dispute is before an arbitral tribunal. This provision was designed simply to restrict this Tribunal from unnecessarily asserting superior authority in matters relating to provisional measures over other tribunals with jurisdiction in the case") (*citing* M. H. Nodquist, *et al.*, *United Nations Convention on the Law of the Sea: a Commentary*, Vol. V, 1989, "which indicates that the legislative history of art. 290, para. 5., is clear, although the language of the article lacks complete clarity") (all emphasis added). See more recently, *Enrica Lexie*, Provisional Measures, Order, Dissenting Opinion of Judge Heidar, para. 7 (citing *Southern Bluefin Tuna Cases, Provisional Measures, Order of 27 August of 1999, Separate Opinion of Judge Treves*, ITLOS Reports 1999, p. 316, paras. 4 and 5).

[92] UNCLOS, art. 290(5).

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provisional measures cannot be prescribed unless: (1) the rights alleged by the applicant are plausible;[93] (2) there is urgency in the situation;[94] (3) there is a real and imminent risk of irreparable prejudice to the rights alleged by the applicant before the constitution and functioning of the Annex VII arbitral tribunal;[95] (4) the provisional measures do not prejudge the merits of the dispute to be determined by the Annex VII arbitral tribunal;[96] (5) the measures sought would not cause irreparable prejudice to the rights of the party against whom the measures are sought;[97] and (6) the Annex VII arbitral tribunal would have *prima facie* jurisdiction over each of the claims.[98]

3.5 As set out below, Switzerland has failed to establish: that (A) the rights alleged by Switzerland are plausible in this situation, that (B) there exists any circumstances of urgency which would require that provisional measures be prescribed prior to the constitution and functioning of the Annex VII arbitral tribunal, or that (C) there is a real and imminent risk of irreparable harm to its rights. In addition, (D) the provisional measures requested by Switzerland would prejudge the merits of the case to be heard by the Annex VII arbitral tribunal, and (E) would cause irreparable harm to Nigeria's rights to prosecute and try the defendants for violations of Nigerian law. Finally, (F) Switzerland has failed to demonstrate that the Annex VII arbitral tribunal would have *prima facie* jurisdiction over its claims under the ICCPR and the MLC.

II. None of the Rights Switzerland Seeks to Protect Are Plausible

3.6 The Tribunal has held that "[b]efore prescribing provisional measures, the Tribunal … needs to satisfy itself that the rights which [the party requesting provisional measures] seeks to protect are at least plausible".[99] The International Court of Justice similarly requires that, before indicating provisional measures, it must be "satisfied that the rights asserted by the party requesting such measures are at least plausible".[100]

3.7 The jurisprudence of the Tribunal and the Court indicates that, for a right to be plausible, it must be *applicable* to the situation at hand.[101] Thus, in *Detention of Naval Vessels*,

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[93] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, ITLOS Reports 2019, para. 91.

[94] UNCLOS, art. 290(5).

[95] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, ITLOS Reports 2019, para. 100.

[96] *Ibid.*, para. 127.

[97] *See Enrica Lexie*, Provisional Measures, Order, paras. 125-126; *see also Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018*, ICJ Reports 2018, para. 94.

[98] UNCLOS, art. 290(5).

[99] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, ITLOS Reports 2019, para. 91.

[100] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order of 3 October 2018, ICJ Reports 2018, para. 53.

[101] *See Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011*, ICJ Reports 2011, Declaration of Judge Greenwood, para. 5 (stating that the

the Tribunal, in determining whether Ukraine's right to the immunity of warships satisfied this standard, examined whether, on the facts of the case, the vessels in question were actually warships.[102] Similarly, in *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*, the Court, 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.[103]

3.8 In the present case, the Tribunal thus needs to examine whether the rights that Switzerland asserts actually apply to the situation at hand. Switzerland's Statement of Claim and Request for Provisional Measures seeks the protection of three categories of alleged rights:

- its alleged right "regarding the freedom of navigation provided for in article 58 read in conjunction with article 87 of UNCLOS"[104] and "other internationally lawful uses of the sea, including bunkering";[105]

- its alleged right to "the exercise of exclusive flag State jurisdiction as provided for in article 58 read in conjunction with article 92 of UNCLOS";[106] and

- the alleged rights of "crew members and all persons involved in the operation of the vessel, irrespective of their nationality, … under the [ICCPR] and the [MLC], and under customary international law",[107] including "the right to liberty and security of the crew members, their right to leave the territory and maritime areas under the jurisdiction of a coastal State, as well as the rights of the persons interested in the vessel",[108] as well as Switzerland's own "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".[109]

3.9 None of these rights are plausible in the present case because they are not applicable to the situation at hand. As regards to the first two rights alleged by Switzerland under Article 58

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plausibility test requires that there be "a reasonable prospect that a party will succeed in establishing that it has the right which it claims and that that right is applicable to the case").

[102] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, ITLOS Reports 2019, para. 97.

[103] *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 of 19 April 2017*, ICJ Reports 2017, paras. 72-76.

[104] UNCLOS, Art. 87(1).

[105] *Ibid.*

[106] *Ibid.*

[107] *Ibid.*

[108] *Ibid.*

[109] *Ibid.*

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

A. The Alleged Right Regarding the Freedom of Navigation and Other Internationally Lawful Uses of the Sea Is Not Plausible

3.10 Article 58(1) provides that the freedom of navigation and "other internationally lawful uses of the sea related [thereto]" apply in the EEZ "subject to the relevant provisions of this Convention".[110]

3.11 Here, the exercise of the freedom of navigation and other internationally lawful uses of the sea in Nigeria's EEZ is subject to the rules set out in Article 56(1)(a) of the Convention, which grants Nigeria, as the coastal State, the right to enforce its laws and regulations concerning the management of the natural resources in its EEZ. This encompasses the enforcement activities that Nigeria took against the *San Padre Pio* and its crew. Article 56(1)(a) provides in relevant part:

> In the exclusive economic zone, the coastal State has … 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 ….[111]

3.12 The Tribunal has had the opportunity to interpret and apply Article 56(1)(a) in the past. Specifically, in *M/V Virginia G*, it was stated:

> The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures.[112]

3.13 In that case, the Tribunal held that "the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned".[113] It furthermore noted that "[s]uch competence … derives from the sovereign

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[110] *Ibid.*

[111] *Ibid.*, art. 56(1)(a) (emphasis added).

[112] *M/V Virginia G (Panama v. Guinea-Bissau), Judgment of 14 April 2014*, ITLOS Reports 2014, para. 211 (emphasis added).

[113] *Ibid.*, para. 223.

rights of coastal States to explore, exploit, conserve and manage natural resources",[114] as stipulated in Article 56(1)(a).

3.14 The present case does not concern the bunkering of fishing vessels. Nevertheless, the source of the coastal State's competence to regulate the bunkering of fishing vessels in its EEZ – Article 56(1)(a) – does not apply only to the fishing. It applies to *both* living and non-living resources.[115] As a result, the coastal State's competence – including its "right to take the necessary enforcement measures"[116] – extends to the management of non-living resources in its EEZ. This was confirmed by the Annex VII arbitral tribunal in *Arctic Sunrise*, which held that the existence of "the coastal State's right to enforce its laws in relation to non-living resources in the EEZ" is "clear".[117] Indeed, without such powers, coastal States could not effectively manage and exploit their resources nor comply with their obligation to protect and preserve the marine environment.

3.15 In the present case, Nigeria was exercising its sovereign right to enforce its laws and regulations concerning the conservation and management of the non-living resources in its EEZ when it arrested and initiated judicial proceedings against the *San Padre Pio* and its crew. As explained in Chapter 2, the *San Padre Pio* and its crew were supplying fuel to an installation 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 *San Padre Pio* and its crew were suspected of being involved in the illegal theft, refinement, and bunkering of oil from Nigeria's EEZ highlights the importance and propriety of Nigeria's actions.

3.16 In addition to Article 56(1)(a), Articles 208 and 214 of the Convention are of particular relevance. These proivsions impose on Nigeria the obligation to enforce its laws and regulations concerning pollution from seabed activities in its EEZ, and as such, they serve as an independent basis for Nigeria to take the enforcement actions it did against the *San Padre Pio* and its crew. Article 208 provides in relevant part:

> 1. Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction ....
>
> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution....[118]

3.17 Article 214 expressly authorizes coastal States to enforce these laws and regulations. It provides in relevant part: "States shall enforce their laws and regulations adopted in accordance with article 208...."[119] The obligations of coastal States under Articles 208 and 214 must

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[114] *Ibid.*, para. 222.

[115] UNCLOS, art. 56(1)(a).

[116] *M/V Virginia G (Panama v. Guinea-Bissau), Judgment of 14 April 2014*, ITLOS Reports 2014, Judgment, para. 211.

[117] *Arctic Sunrise (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on the Merits, para. 284.

[118] UNCLOS, art. 208.

[119] *Ibid.*, art. 214.

furthermore be interpreted in the context of the provisions of Part XII of UNCLOS, including coastal States' "obligation to protect and preserve the marine environment" under Article 192,[120] coastal States' "sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment" under Article 193,[121] and the various specific environmental obligations set forth in Article 194.[122]

3.18 There is no question that bunkering carried out in connection with seabed activities is a major source of pollution of the marine environment. As described above, spills from bunkering are even more environmentally damaging than crude oil spills due to the physical characteristics of bunkered fuel. The threat posed by bunkering to the marine environment is particularly acute in the Gulf of Guinea, as a result of the widespread illicit trafficking in illegally refined and substandard petroleum products. It should thus not come as a surprise that Nigeria regulates bunkering in connection with seabed activities in the EEZ.

3.19 Indeed, the Bunkers Convention grants the courts of coastal States exclusive jurisdiction over actions for compensation for pollution damage caused by bunkering in the EEZ.[123] Both Switzerland and Nigeria are parties to the Bunkers Convention; they thus agree that the coastal State has authority to exercise jurisdiction over bunkering in the EEZ and have expressly recognized that authority in actions for compensation. Switzerland's position before the Tribunal that bunkering in another State's EEZ is an exercise of the freedom of navigation and subject to exclusive flag State jurisdiction cannot be reconciled with its ratification of the Bunkers Convention.

3.20 In conclusion, multiple provisions of the Convention establish Nigeria's sovereign right and obligation to take the enforcement actions it did against the *San Padre Pio*. Switzerland's asserted right regarding the freedom of navigation and other internationally lawful uses of the sea is not "compatible with [these] other provisions of the Convention." It is thus not applicable in the present case and is therefore not a plausible basis upon which Switzerland can assert claims against Nigeria.

B. The Alleged Right Regarding the Exercise of Exclusive Flag State Jurisdiction Is Not Plausible

3.21 Switzerland next asserts its alleged right regarding the exercise of exclusive flag State jurisdiction by invoking Articles 58 and 92 of UNCLOS. Article 92 provides that ships on the high seas are generally subject to the exclusive jurisdiction of the flag State, but not in "cases expressly provided for ... in this Convention".[124] Article 58 provides that Article 92 applies to the EEZ, but only "in so far as [it is] not incompatible with this Part".[125] The upshot is that

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[120] *Ibid.*, art. 192.

[121] *Ibid.*, art. 193.

[122] *Ibid.*, art. 194.

[123] International Convention on Convention on Civil Liability for Bunker Oil Pollution Damage, art. 9, Annex 3

[124] UNCLOS, art. 92(1).

[125] *Ibid.*, art. 58(2).

Articles 58 and 92 grant the flag State exclusive jurisdiction over the ship, but not if there is a provision in the Convention providing otherwise.

3.22 As explained above, Articles 56(1)(a), 208 and 214 grant Nigeria the sovereign right and obligation to take the enforcement actions it did against the *San Padre Pio* and its crew. As a result, the principle of exclusive flag State jurisdiction does not apply in the present case.

III. There Is No Urgency in the Present Situation.

3.23 In its recent Order on Provisional Measures in the *Detention of Three Ukrainian Naval Vessels* case, the Tribunal summarized the requirements for establishing urgency under Article 290(5):

> Pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if the urgency of the situation so requires. Accordingly, the Tribunal may not prescribe such measures unless 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.[126]

3.24 Thus, when considering whether to order provisional measures under Article 290(5), the condition of urgency is to be assessed by reference to the interim period before the constitution and functioning of the Annex VII arbitral tribunal, and not by reference to the time that will elapse before a final decision on the merits is rendered.[127] Provisional measures may only be prescribed where the situation is so urgent that it cannot wait for the short period of time until the Annex VII arbitral tribunal is in a position to make a decision for itself as to whether to prescribe such measures. Additionally, there must be a real and imminent risk of irreparable prejudice to the rights alleged by the applicant party during this brief interval.

IV. There Is No Risk of Imminent Irreparable Harm to Any Rights of Switzerland Pending the Constitution and Functioning of the Annex VII Arbitral Tribunal

3.25 To satisfy the condition of urgency required by Article 290(5), the party seeking provisional measures must demonstrate that its rights will suffer real, imminent and "irreparable" harm in the short period of time pending the constitution and functioning of the Annex VII arbitral tribunal. In the present case, Switzerland has failed to establish that the

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[126] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019*, ITLOS Reports 2019, para. 100 (citing *Enrica Lexie*, Provisional Measures, Order, para. 87).

[127] See, e.g., *ARA Libertad (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, Declaration of Judge Paik, para. 3 ("The time frame envisaged under article 290, paragraph 5, is much tighter than that under article 290, paragraph 1, which provides for the prescription of provisional measures pendent lite. While the requirement of urgency under article 290, paragraph 5, is accordingly more stringent than that under article 290, paragraph 1, whether such a requirement is met depends on the circumstances of the particular case") (emphasis added).

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rights of the officers and crew, or the vessel and cargo, are currently exposed to a risk of imminent irreparable prejudice.

3.26 Switzerland's actions since the events of 23 January 2018 belie their claim that urgent measures are needed in the short time before the Annex VII arbitral tribunal is constituted and in function. It took almost sixteen months, from the moment of arrest of the *San Padre Pio*, for Switzerland to bring the matter before an international arbitral tribunal and to request the prescription of provisional measures by this Tribunal on 21 May 2019. By the time the Tribunal holds oral hearings on this application, one year and a half will have elapsed since the events. Presumably, had the matter been truly urgent so as to require such an exceptional form of relief, Switzerland would have come to the Tribunal as soon as it could. Members of the Tribunal have been careful in the past not to overlook such delay suggests that the matter is not urgent.[128]

3.27 As regards the specific allegations of prejudice, Switzerland's claim that the master and crew are suffering because they are being held on the vessel against their will by the Nigerian authorities is based on a misrepresentation of the facts. The current presence of the officers and crew on the vessel is voluntary. In fact, as Switzerland rightly indicates in its Request, the large majority of the present crew is not the same as the personnel who were on board at the time of the events of 23 January 2018, but a new team that, upon instructions of the ship owner, accepted to replace the original crew in order to perform routine maintenance of the vessel. Members of the current replacement crew remain free to leave the vessel, and Nigeria, at any time.

3.28 In addition, the officers who are currently subject to criminal proceedings in Nigeria received bail, under the sole requirement that they do not leave the country. They have not been ordered by Nigerian authorities to return to the vessel or prevented from leaving the vessel. In fact, they do sometimes leave to go ashore without restrictions. Like the rest of the crew, they are on the vessel voluntarily or at the order of the owner.

3.29 Moreover, the vessel is fully supplied with food, water and other necessities.[129] Contrary to the claim of Switzerland, there are no restrictions on the ability of the crew to communicate with persons not on board the vessel nor have the Nigerian authorities impeded medical professionals from visiting or scheduling appointments with the crew.[130] Thus, the part of Switzerland's request that stipulates that "Nigeria shall. . . release the master and the three other officers of the '*San Padre Pio*'" is without object, as they are not detained.

3.30 The vessel is under the protection of the Nigerian Navy, which has deployed armed guards on board the vessel since it was arrested. It was those armed guards that successfully prevented an attack by armed robbers that attempted to board the vessel on 15 April 2019. Since that incident, the Nigerian Navy has increased the number of guards on the vessel and

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[128] *See,* for instance, *Enrica Lexie*, Provisional Measures, Order, Dissenting Opinion of Judge Lucky, para. 61 ("I have to be quite emphatic in the circumstances. The matter is by no means urgent. Italy should note have come to this Tribunal at this time, not after three and a half years.").

[129] *Affidavit of Facts in the Case of the Arrest and Detention of MT SAN PADRE PIO of Captain Kolawole Olumide Oguntuga* (14 June 2019), para. 12, Annex 2.

[130] *Ibid.*, paras. 13-14, 17.

has stationed a gun boat in close proximity to the vessel.[131] If the master and crew considered this to be insufficient protection of their personal safety, they could simply leave the ship, as they are at liberty to do.

3.31 Relatedly, in support of its third request to have all court and administrative proceedings suspended, Switzerland claims that criminal proceedings have been unduly protracted.[132] In fact, charges were brought promptly by the Nigerian authorities who have been prepared to proceed with the case expeditiously. That the criminal proceedings have not yet been concluded 16 months after the arrest can hardly be characterized as unduly long. For example, in the *M/V Norstar* case, where the vessel was seized at the request of the Italian authorities in September 1998, the Criminal Division of the Court of Savona did not deliver its judgment until March 2013.[133] Indeed, suspending the proceedings would only serve to delay without remedying the alleged harm caused by the length of the criminal proceedings.

3.32 Switzerland has also failed to establish that urgent measures are needed to prevent harm to the vessel and its cargo. Switzerland and the owners have assessed that the vessel requires 20 days of repairs so as to ensure full capability.[134] As is indicated in the Expert Report of Mr. Duncan Tanner, a Marine Engineer and Senior Manager at Exponent Engineering and Scientific Consulting, the condition of the vessel will not materially change in the few months it will take to form the Annex VII arbitral tribunal.[135] In addition, the time required for repair

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[131] *Ibid.*, para. 8.

[132] Request for the Prescription of Provisional Measures, para. 12.

[133] *M/V Norstar (Panama v. Italy)*, Preliminary Objections, Judgment, paras. 43-45.

[134] Request for the Prescription of Provisional Measures, para. 39.

[135] Expert Report of Mr. Duncan Tanner, para. 6.2, Annex 21 ("If the vessel has been kept maintained, other than not being able to utilise specialist service engineers and carry out the servicing that it would be expected for shore based personnel to carry out, then *the ship should still remain in reasonable condition*. If this is the case, then providing the maintenance work continues, *it would not be expected that the repair time or cost will increase significantly if the repairs are deferred for another four months*".); para. 6.3 ("Alternatively, if little or no maintenance has taken place during the detention, then it is possible that the vessel is already in a poor condition. If this is the case, then extensive blasting, painting and machinery overhaul may be required in order to return the vessel to an operational condition. In these circumstances, then *it is unlikely that the scope of work will increase significantly if the vessel remains neglected for a further four months*".); para. 6.6. ("[G]iven the age of the ship and the fact that it is unlikely that ballast or cargo operations have taken place since the arrest, *it is not considered likely that severe internal steel work wastage will have taken place or will do so over the next four months*".); para.6.7. ("[T]he top sides should have remained in satisfactory condition and *are likely to remain so for the next four months, unless localised coating breakdown has taken place*".); para. 6.8 ("[I]t would be expected that after a year and a half with the vessel not moving, the marine growth over the hull and propeller would be significant. While this growth will continue over the next four months, *it is not likely to increase to the point where it takes significantly longer to remove when the vessel is in dry dock*".); para.6.9 ("Likewise, marine growth will continue to accumulate on the underwater hull surfaces of the rudder and propeller. *Again, it is unlikely that there will be a sudden worsening of this or that the growth rate will suddenly increase*."); para.6.10 ("It would be expected that a class surveyor would be appointed to carry out annual surveys … *It is not expected that the cost of carrying this out in four months' time will greatly exceed the cost of carrying out the work now*."); para. 6.11 ("*The navigational equipment would not be expected to deteriorate over the next four months* providing that there is no unexpected change in conditions."); para. 6.12 ("If this level of maintenance is continued over the next four months, *then the machinery should not deteriorate significantly in this time frame*".); and paras. 7.1-7.3 ("If the vessel has been kept maintained during the detention, *then the ship should remain in reasonable condition*. If this is the case, then providing the maintenance work continues, *it would not be expected that the repair time or cost will increase significantly if the repairs are deferred for another four months.* [A]lternatively, if little or no maintenance has taken place during the detention, then it is possible that the vessel is already in a poor condition. If this is the case,

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of the vessel will remain materially unchanged between the present time and the composition of the Annex VII arbitral tribunal, thus indicating that the present situation is not one where urgent measures need to be adopted to preserve the rights of the parties.

3.33 Switzerland's claim that there is irreparable prejudice to the vessel and cargo is similarly misconceived. For prejudice to be considered as "irreparable", it must not be possible to provide adequate reparation to the prejudiced party by financial compensation or other means that the court or tribunal may order in its final decision on the merits.[136] In the *Ghana/Côte d'Ivoire* case, the Special Chamber of the Tribunal reaffirmed this interpretation of the notion of irreparable harm when noting that "the alleged loss of the revenues derived from oil production could be the subject of adequate compensation in the future".[137] Since any loss that might be caused by damage to the vessel or the cargo is capable of being erased fully by payment of compensation or other reparation that may be ordered by the Annex VII arbitral tribunal,[138] such loss cannot justify the indication of provisional measures by the Tribunal.

3.34 The situation of the vessel and its cargo in this case is entirely different from that of the seabed and subsoil of the continental shelf at stake in *Ghana/Côte d'Ivoire*. In that case, there was a risk of "significant and permanent modification of the physical character of the area in dispute" that could not "be fully compensated by financial reparations".[139] In contrast, should the vessel or cargo undergo significant harm to their value, which is contested, it would in all cases be possible to quantify such harm and repair it through economic compensation in an amount decided by the Annex VII arbitral tribunal in its final decision.

3.35 Further, there can be no situation of urgency with regard to the cargo since the Nigerian court has already issued an interim forfeiture order and authorized that it be sold and its economic value preserved, pending the hearing and determination of the charges.[140]

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then extensive blasting, painting and machinery overhaul may be required in order to return the vessel to an operational condition. *It is unlikely that the scope of work will increase significantly if the vessel remains neglected for a further four months. [I]n either scenario, there is no reason to conclude that the repair time will be significantly increased should the vessel remain in detention for a further four months*.") (all emphasis added).

[136] *Ghana/Cote d'Ivoire*, Provisional Measures, Order of 25 April 2015, p. 163, para. 89 ("[T]here 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"). This interpretation of the notion of irreparability dates back to the early jurisprudence of the Permanent Court of International Justice, as expressed by the Court in the case *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. For a commentary on the case law on this provision by the International Court of Justice, see S. Oda, "Provisional Measures: The Practice of the International Court of Justice" in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE (V. Lowe & M. Fitzmaurice eds., 1996), p. 551 ("The anticipated or actual breach of the rights to be preserved [should] be one that could not be erased by the payment of reparation or compensation to be ordered in a later judgment on the merits").

[137] *Ghana/Cote d'Ivoire*, Provisional Measures, Order of 25 April 2015, para. 88.

[138] *The M/V Norstar Case (Panama v Italy)*, Judgment, para. 469(4).

[139] *Ghana/Cote d'Ivoire*, Provisional Measures, Order of 25 April 2015, para. 89.

[140] *See* Annex NOT/CH-37.

3.36 Switzerland's request for provisional measures should therefore be rejected because it does not comply with the conditions of urgency and risk of irreparable harm required by article 290(5) of UNCLOS.

V. The Provisional Measures Requested by Switzerland Would Impermissibly Prejudge the Merits of the Case

3.37 As explicitly stated by the Special Chamber in the provisional measures phase of the *Ghana/Côte d'Ivoire* case, "the Order must not prejudice any decision on the merits".[141] As previously noted, the need not to prejudge the merits of the case is particularly important when provisional measures are requested under Article 290(5), given the Tribunal's exercise of a special competence in such cases. In the *Enrica Lexie* case, the Tribunal has explained that:

> [T]he Order must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII. [S]ince it will be for the Annex VII arbitral tribunal to adjudicate the merits of the case, the Tribunal does not consider it appropriate to prescribe provisional measures in respect of the situation of the two Marines because that touches upon issues related to the merits of the case.[142]

3.38 The difference between the wording of paragraphs 1 and 5 of Article 290 previously mentioned not only bears an impact on the standard of urgency and its assessment by the Tribunal, it also reflects that the functions of the Tribunal are different under each of these two provisions. Under paragraph 1, the focus of the Tribunal is on whether to prescribe provisional measures on a dispute that has been duly submitted to it, pending its own final decision. In contrast, under paragraph 5, the Tribunal's main consideration is whether it is "appropriate" to prescribe provisional measures in a dispute which will be heard on the merits by another judicial body, and to address such measures to parties that have not accepted its jurisdiction.[143]

3.39 Switzerland has submitted to the determination of the Annex VII arbitral tribunal claims that, with regard to the vessel and cargo, Nigeria has breached Switzerland's alleged rights to freedom of navigation and exclusive flag state jurisdiction under the Convention.[144] To order that Nigeria shall enable the vessel to leave, with her cargo, in order to exercise freedom of

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[141] *Ghana/Cote d'Ivoire*, Provisional Measures, Order of 25 April 2015, para. 98 (emphasis added).

[142] *Enrica Lexie*, Provisional Measures, Order, para. 125. *See also* para. 132.

[143] *Enrica Lexie*, Provisional Measures, Order, Dissenting Opinion of Judge Heidar, para. 6 (citing Thomas A. Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2002), p. 46.): ("The functions of the Tribunal under paragraphs 1 and 5 of article 290 are quite different. When the Tribunal examines a request for provisional measures under paragraph 1, it has to consider whether or not to prescribe such measures pending its own final decision on a dispute that has been "duly submitted" to it. However, under paragraph 5, the Tribunal has to consider whether it is appropriate to prescribe such measures in a dispute the merits of which will be dealt with by another body, and the measures it prescribes will be addressed to parties which have not accepted its jurisdiction in respect of the dispute").

[144] Statement of Claim, para. 45.

navigation under the exclusive jurisdiction asserted by Switzerland would be to predetermine these questions, which are the crux of the merits of the case.

VI. The Provisional Measures Requested by Switzerland Would Cause Irreparable Harm to Nigeria's Right to Prosecute the Defendants for Violation of Nigerian Laws

3.40 An additional reason why the Tribunal may not prescribe the second and third provisional measures requested is that it would cause irreparable prejudice to Nigeria's rights, in particular its right to prosecute individuals for violations of its laws.

3.41 The Tribunal has accepted that, in considering requests for provisional measures, the rights of *both* Parties must be taken into account,[145] and any measures should "equally preserve the respective rights of both Parties."[146] In addition, in one of its most recent orders on provisional measures, the International Court of Justice has also indicated that provisional measures must not cause irreparable prejudice to the State against whom the measures are sought.[147]

3.42 As explained above, Nigeria has the right to enforce its laws concerning the management of non-living resources in its EEZ.[148] If the second provisional measure requested is prescribed, and the master and the other three officers are allowed to leave Nigeria, their prosecution would be frustrated. This is particularly the case since Switzerland, not being the State of nationality of the crew, cannot guarantee that they would return to Nigeria to face trial. As has been pointed out by some members of the Tribunal, custody of the accused is often crucial to domestic criminal proceedings.[149] Not only is such custody often legally required, early release from custody may prejudice investigations.

3.43 The Tribunal has in previous cases been reluctant to order, as provisional measures, suspension of domestic court and administrative proceedings. Despite being requested in a number of cases,[150] the Tribunal has only prescribed such a measure in wholly exceptional

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[145] *Enrica Lexie*, Provisional Measures, Order, paras. 84-85; *see also Ghana/Côte d'Ivoire*, Provisional Measures, Order, para. 40 ("In considering whether to prescribe provisional measures, the Tribunal must consider the rights of both parties: "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).

[146] *Ibid.*, paras. 126.

[147] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order, para. 94.

[148] *See supra* Section II.A.

[149] See e.g., *Enrica Lexie*, Provisional Measures, Order, Declaration of Judge Paik, paras. 6-7 ("Exercise of criminal jurisdiction is a duty of the State. It is indispensable to the maintenance of law and order, a fundamental basis of any society, which no State can take lightly if it is not to neglect its duty as a State [...] Due to the crucial role of the custody of the accused in the exercise of criminal jurisdiction, it is quite common in most legal systems for restrictions in one form or another to be imposed on their liberty and movement before the final determination of guilt").

[150] *Detention of Three Ukrainian Vessels* case, Order of 25 May 2019, para. 24 (measure requested by Ukraine); *Enrica Lexie*, Provisional Measures, Order, para. 108 (measure requested by Italy); *Arctic Sunrise (Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLSO Reports 2013, para. 34

circumstances. In *M/V Saiga (No. 2)*, the criminal proceedings in question were brought almost immediately after the Tribunal had made a prompt release order and were effectively an attempt to circumvent the order.[151] The situation in *Enrica Lexie* was also significantly different as there were competing criminal investigations and proceedings ongoing in relation to the incident at issue before the Tribunal and it required *both* parties to suspend court proceedings. Furthermore, the respondent State had placed on record that its Supreme Court had actually stayed its proceedings.[152]

3.44 There are good reasons for the Tribunal's cautious approach to requests for suspension of ongoing domestic judicial proceedings. States do not merely have the right to engage in prosecutions of crimes committed within their jurisdiction, they have a duty to do so. This is not only a normal function of a State but an emanation of their sovereignty and sovereign rights. To accede to the request for suspension of domestic judicial proceedings not only undermines the duty of the State to maintain law and order in the particular case, it is contrary to the rule of law. Suspension of the ongoing criminal proceedings could also implicate the obligation of the State to ensure that criminal proceedings are conducted without undue delay.

VII. The Annex VII Arbitral Tribunal Would Not Have *Prima Facie* Jurisdiction over Switzerland's Third Claim

3.45 In its Statement of Claim, Switzerland asserted three claims against Nigeria.[153] At the present stage of the proceedings, Nigeria does not challenge the *prima facie* jurisdiction of the Annex VII arbitral tribunal over Switzerland's first and second claims.[154] Nigeria does, however, challenge the Annex VII arbitral tribunal's *prima facie* jurisdiction over Switzerland's third claim that:

> By arresting the *San Padre Pio* and her crew, by detaining the vessel, her crew and cargo without the consent of Switzerland and by initiating judicial proceedings against them, Nigeria has breached its obligations to Switzerland in its own right, in the exercise of its right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR and the MLC, and under customary international law.[155]

3.46 The Tribunal has formulated the applicable test for *prima facie* jurisdiction as follows:

(measure requested by the Netherlands); and *M/V Saiga (No. 2), Provisional Measures, Order of 11 March 1998*, para. 21.

[151] See *M/V "Saiga" (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, ITLOS Reports 1997, p.16

[152] *Enrica Lexie*, Provisional Measures, Order, para. 126.

[153] Statement of Claim, para. 45(a).

[154] Nigeria reserves its rights to challenge the jurisdiction of the Annex VII arbitral tribunal over Switzerland's first and second claims in the arbitration proceedings themselves.

[155] Statement of Claim, para. 45(a)(iii).

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> The Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which jurisdiction of the Annex VII arbitral tribunal could be founded, but need not definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it.[156]

3.47 The Annex VII arbitral tribunal may have jurisdiction over Switzerland's third claim only if, *inter alia*, the alleged dispute "concern[s] the interpretation or application of [the] Convention".[157]

3.48 The alleged dispute does not concern the interpretation or application of UNCLOS but rather the interpretation and application of the ICCPR and the MLC. It thus falls outside of the jurisdiction of the Annex VII arbitral tribunal.

3.49 In its Statement of Claim (though not in its Request for Provisional Measures), Switzerland attempts to circumvent this fact by framing its ICCPR and MLC claims as breaches of the obligation of the coastal State in Article 56(2) of UNCLOS to have "due regard to the rights and duties of other States".[158] This fails to give effect to the plain meaning of Article 56(2) and the relevant jurisprudence.

3.50 Article 56(2) does not grant Annex VII arbitral tribunals the jurisdiction to determine violations of instruments outside of UNCLOS. In *Arctic Sunrise*, the Netherlands, not unlike Switzerland, invoked Article 56(2) in order to have an Annex VII arbitral tribunal determine a violation of Articles 9 and 12(2) of the ICCPR.[159] 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".[160] Similarly, in *Chagos Marine Protected Area*, Mauritius sought to have an Annex VII arbitral tribunal adjudicate that the United Kingdom had breached a set of undertakings outside of UNCLOS by invoking Article 56(2).[161] The tribunal, however, held that the provision "does not impose a uniform obligation to avoid any impairment of [the other State's] rights".[162]

3.51 The present case is no different. Switzerland, at least in its Statement of Claim, invokes Article 56(2) in order to claim that Nigeria has violated the ICCPR and the MLC. Like the Annex VII arbitral tribunals, the Tribunal should not permit Switzerland to circumvent the jurisdictional constraints of UNCLOS in this fashion.

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[156] *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order (25 May 2019), para. 36.

[157] UNCLOS, art. 288(1).

[158] Statement of Claim, paras. 40(c), 40(d).

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

[160] *Ibid.*, para. 198.

[161] *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Memorial of Mauritius, paras. 5.23(v), 7.28-7.32; *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Reply of Mauritius, paras. 6.76-6.82.

[162] *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award, para. 519.

3.52 Finally, insofar as Switzerland may be attempting to use Article 293 of the Convention as a means to extend the jurisdiction of the Annex VII arbitral tribunal so as to enable it to determine violations of the ICCPR and the MLC,[163] that attempt is equally unavailing. Annex VII arbitral tribunals have repeatedly affirmed that Article 293, an applicable law provision, does not affect the scope of their jurisdiction.[164]

3.53 In conclusion, Switzerland's claims regarding the ICCPR and the MLC do not concern the interpretation or application of UNCLOS. Its attempts to circumvent this reality are wholly devoid of merit.

A. The Alleged Rights Regarding the ICCPR and the MLC Are Not Plausible

3.54 Even if there were *prima facie* jurisdiction with respect to Switzerland's ICCPR and MLC claims, the rights asserted by Switzerland are not plausible because they are not applicable to the present case.

3.55 With respect to the ICCPR, in its Statement of Claim, Switzerland cites to only one specific provision: Article 9.[165] Switzerland refers in particular to "the right of persons to liberty and security and the right not to be arbitrarily detained", as well as, vaguely, "the other rights of persons in connection with criminal proceedings".[166]

3.56 Article 9, however, "does not grant complete freedom from arrest or detention".[167] Article 9(1) simply "acts as a substantive guarantee that arrest or detention will not be arbitrary or unlawful", and the remainder of the article "provides procedural guarantees that help ensure enjoyment of the substantive guarantee in article 9(1)".[168]

3.57 In the present case, there is no question that the arrest, detention, and initiation of judicial proceedings against the crew of the *San Padre Pio* were not arbitrary or unlawful. As explained in Chapter II, Nigeria acted on concrete evidence that the crew was engaging in criminal activity, and as such, their arrest and detention, as well as the initiation of judicial proceedings against them, were justified. Moreover, as explained above, they were done in accordance with UNCLOS.

3.58 With respect to the MLC, Switzerland does not cite to any specific right enshrined therein that is called into question in the present proceedings. Indeed, no such right is applicable to the present case. As a result, the alleged rights under the MLC are not plausible either.

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[163] Statement of Claim, para. 42.

[164] *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.

[165] Statement of Claim, para. 40(d).

[166] *Ibid.*, para. 40(d).

[167] Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edition, 2013), para. 11.01.

[168] *Ibid.*

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3.59 It should finally be noted that, in its Statement of Claim, Switzerland refers to its own "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".[169] This 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.

VIII. Conclusion

3.60 In conclusion, Switzerland fails to meet the requirements for provisional measures. As a result, the Tribunal may not prescribe the provisional measures that it requests.

[169] Statement of Claim, para. 45(a)(iii).

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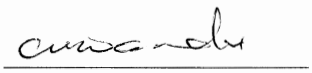
CHAPTER 4
SUBMISSION

4.1 For the reasons stated above, the Federal Republic of Nigeria respectfully requests that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation's requests for provisional measures.

Respectfully submitted,



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Federal Republic of Nigeria

CO-AGENT OF THE FEDERAL REPUBLIC OF NIGERIA

17 June 2019