

Dissenting Opinion of Judge Bouguetaia

(Translation by the Registry)

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

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

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

That the 1st, 2nd, 3rd and 4th Defendants shall deposit their International Passport with the Registry of this Court

...

That the 1st, 2nd, 3rd and 4th Defendants shall not travel outside Nigeria without the prior approval or order of this Court.

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

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

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

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

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

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

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

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

The Tribunal is of the view that Nigeria needs to be assured unequivocally through an undertaking that the Master and the three officers will be available and present at the criminal proceedings in Nigeria, if the Annex VII arbitral tribunal finds that the arrest and detention of the *M/T "San Padre Pio"*, its cargo and its crew and the exercise of jurisdiction by Nigeria in relation to the event which occurred on 22–23 January 2018 do not constitute a violation of the Convention. In this regard, the Tribunal

considers that posting of a bond, whilst effective, may not afford sufficient satisfaction to Nigeria. The Tribunal, therefore, decides that Switzerland shall undertake to ensure the return of the Master and the three officers to Nigeria, if so required in accordance with the decision of the Annex VII arbitral tribunal ... The Tribunal considers that such undertaking will constitute an obligation binding upon Switzerland under international law.

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

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

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

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

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

15. Nevertheless, the Tribunal was concerned to uphold this obligation for Switzerland to "undertake to ensure the return of the Master and the three officers to Nigeria, if so required in accordance with the decision of the Annex VII arbitral tribunal". The Tribunal considers that such "undertaking ... will constitute an obligation binding upon Switzerland under international law" (Order, paragraph 141).

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

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

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

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

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

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

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

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

(signed) Boualem Bouguetaia