

## Separate Opinion of Judge *ad hoc* Murphy

### I. Introduction

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

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

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

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1 *M/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019* (hereinafter "Tribunal Order").

2 *Ibid.*, paras. 138, 146, para. 1(c). Since the crew (other than the four officers) is not being detained in Nigeria, the Court's provisional measure does not order its release.

3 *Ibid.*, para. 142.

4 *Ibid.*, paras. 139–140, 146, para. 1(a).

5 *Ibid.*, paras. 141, 146, para. 1(b).

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

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

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

6. Article 290 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) grants authority to the Tribunal to prescribe provisional measures of protection if it considers that (a) *prima facie* the Annex VII arbitral tribunal would have jurisdiction over this dispute, (b) the urgency of the situation so requires, and (c) the measures are appropriate to the circumstances to preserve the rights of the Parties pending the final decision of the Annex VII arbitral tribunal.<sup>6</sup> I concur with and do not see a need to address

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<sup>6</sup> Article 290 of the Convention, paras. 1 and 5.

further the reasoning of the Tribunal with respect to (a), other than to note the Tribunal’s “view that *at least some* of the provisions invoked by Switzerland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded.”<sup>7</sup>

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

8. Switzerland’s claims, as set forth in the “relief sought” at the end of Switzerland’s Notification and Statement of Claim (hereinafter “Statement of Claim”),<sup>10</sup> are that Nigeria has violated Switzerland’s rights under the Convention by infringing:

- (1) Switzerland’s right to freedom of navigation (articles 58 and 87 of the Convention) (hereinafter “claim 1”);
  - (2) Switzerland’s right to exercise exclusive jurisdiction over its flag vessels (articles 58 and 92 of the Convention) (hereinafter “claim 2”);
- and

<sup>7</sup> Tribunal Order, para. 60 (emphasis added).

<sup>8</sup> *Ibid.*, para. 77.

<sup>9</sup> See *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, Declaration of Judge Greenwood, I.C.J. Reports 2011, at p. 47, para. 4; *Questions Relating to Seizure and Detention of Certain Documents (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, Dissenting Opinion of Judge Greenwood, I.C.J. Reports 2014, at p. 195, para. 4; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, Separate Opinion of Judge Abraham, I.C.J. Reports 2006, p. 141, para. 11.

<sup>10</sup> M/T “San Padre Pio” (Switzerland v. Nigeria), Provisional Measures, ITLOS, Switzerland Notification and Statement of Claim, 6 May 2019, para. 45 (hereinafter “Statement of Claim”); see also Tribunal Order, para. 26.

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

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

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

A. *Plausibility of Switzerland's claims 1 and 2*

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

11. Those "other provisions" of the Convention include Nigeria's sovereign right to exploit and manage the non-living resources of the seabed and its subsoil (article 56, paragraph 1(a)), rights that are to be exercised in accordance with Part VI of the Convention (article 58, paragraph 3). Nigeria also has

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<sup>11</sup> Statement of Claim, para. 40(c) and (d).

<sup>12</sup> Tribunal Order, para. 108.

<sup>13</sup> *Ibid.*, para. 110.

jurisdiction to establish and use artificial islands, installations and structures in its exclusive economic zone, and to protect and preserve its environment (article 56, paragraph 1(b)). Other important rights are also accorded to Nigeria as a coastal State, notably in article 60 on artificial islands, installations and structures, and in articles 208 and 214 concerning pollution from seabed activities. It is noted that the Tribunal has found that the coastal State’s “sovereign rights” encompass “all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, *including the right to take the necessary enforcement measures*,”<sup>14</sup> while an Annex VII arbitral tribunal has held that the coastal State’s right to enforce its laws in relation to non-living resources within the exclusive economic zone “is clear.”<sup>15</sup>

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

13. With respect to the factual record, it appears that, in January 2018, the vessel engaged in two ship-to-ship transfers (hereinafter “STS transfer”) of fuel in the vicinity of Nigeria’s Odudu Oil Field, which is operated by Total E & P Nigeria Ltd. and is located in Nigeria’s exclusive economic zone.<sup>16</sup> It also

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14 *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 67, para. 211 (emphasis added).

15 *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, Annex VII Arbitral Tribunal, PCA Case No. 2014-02, Award on the Merits of 14 August 2014, para. 284 (hereinafter “*Arctic Sunrise Arbitration, Merits Decision*”).

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

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

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

15. Nigeria's legal argument may be that neither STS transfers nor offshore bunkering are themselves "navigation" and perhaps not even an "other international lawful use of the sea" related to navigation. Further, Nigeria's legal position may be that an STS transfer of fuel in its exclusive economic zone for the express and immediate purpose of supplying fuel to an oil installation is an

activity directly related to the exploitation of the resources of the zone, which can be regulated as part of the coastal State's sovereign rights under article 56, paragraph 1, to manage such resources (and perhaps also regulated under article 60).

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

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

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17 *M/V "Norstar" Case (Panama v. Italy)*, ITLOS, Judgment of 10 April 2019, para. 219.

18 *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, at p. 69, para. 217.

19 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at p. 54, para. 127.

20 *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Annex VII Arbitral Tribunal, PCA Case No. 2014-07, Award of 5 September 2016.

For example, Judge Anderson's separate opinion in the *M/V "SAIGA" (No. 2)* case indicated that offshore bunkering of a vessel in the exclusive economic zone that, immediately prior to and after receiving fuel, exercises its right of freedom of navigation "could well amount to" an internationally lawful use of the sea related to freedom of navigation.<sup>21</sup>

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

#### B. *Switzerland's claim 3*

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

1. Switzerland's "right to seek redress"

20. Switzerland's claim 3, as set forth in the "relief sought" in its Statement of Claim, asserts that Nigeria's actions in seizing the vessel, its crew and its cargo, and in conducting the Nigerian criminal proceedings, violated the Convention, by failing to give due regard, under article 56, paragraph 2, of the Convention

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

22 Tribunal Order, para. 110.

to Switzerland's "right and duties." The Swiss "right" at issue is framed as Switzerland's exercise of its "right to seek redress on behalf of crew members and all persons involved in the operation of the vessel, irrespective of their nationality, in regard to their rights under the ICCPR and the MLC, and under customary international law."<sup>23</sup>

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

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

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

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<sup>23</sup> Statement of Claim, para. 45(a)(iii).

<sup>24</sup> *Ibid.*, para. 40(c).

2. Switzerland’s “duties” relating to article 94, the ICCPR or the MLC

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

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

26. If this hurdle could be overcome, one issue of debate between the Parties was whether the “duties of other States” at issue in article 56, paragraph 2, are only duties arising under the Convention (and perhaps more specifically, such duties of other States as they exist in the coastal State’s exclusive economic zone).<sup>27</sup> Presumably article 56, paragraph 2, is not referring to *all* duties that

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25 ITLOS/PV.19/C27/1, p. 16, ll. 1–4.

26 *Ibid.*, p. 23, l. 28.

27 Compare *ibid.*, p. 15, ll. 39–45, and ITLOS/PV.19/C27/3, p. 5, ll. 17–24, with ITLOS/PV.19/C27/4, p. 5, ll. 28–39.

a flag State may have, such as those arising under the flag State's national law, about which the coastal State may have no knowledge. Yet even if, for the present purposes, it is assumed that the duties of other States referred to in article 56, paragraph 2, extend beyond duties arising under the Convention, there does not appear to be any connection between the facts as currently understood in this case and the duties identified by Switzerland, as discussed at paragraphs 28 to 30 below.

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

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

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

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

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

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

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

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

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<sup>28</sup> *Arctic Sunrise Arbitration*, Merits Decision, para. 198.

<sup>29</sup> *"Enrica Lexie" (Italy v. India)*, Provisional Measures, Order of 24 July 2015, ITLOS Reports 2015, p. 176, at p. 197, para. 87 (hereinafter "*Enrica Lexie*, Provisional Measures"); see Tribunal Order, para. 111.

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

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

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

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

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<sup>30</sup> Tribunal Order, para. 128.

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

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

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

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

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31 *Ibid.*, para. 129.

32 Nigeria Response, para. 2.19.

33 ITLOS/PV.19/C27/3, p. 4, ll. 1–18 (interpretation from French).

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

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

39. The Tribunal’s decision in this regard is not based on the risk of irreparable harm to the vessel or its cargo but, rather, the following factors: (a) the vessel, cargo and crew must be considered as constituting “a unit” when

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34 ITLOS/PV.19/C27/4, p. 4, ll. 14–21.

35 Statement of Claim, para. 21; Nigeria Response, paras. 2.23–2.26.

36 Statement of Claim, Annex 36, paras. 12 and 13.

37 Statement of Claim, Annex 38.

38 ITLOS/PV.19/C27/1, p. 31, ll. 43–45.

39 Statement of Claim, Annex 38, Affidavit in Support of Motion on Notice, p. 8, para (s).

considering irreparable prejudice;<sup>40</sup> (b) for the vessel to be kept in safe and good order, the shipowner has decided to maintain a crew on the vessel which changes composition over time as Nigeria has imposed no restrictions in this regard,<sup>41</sup> except for the four officers; (c) the crew both works and lives on the vessel full-time; (d) the location of the vessel at Port Harcourt, Bonny Inner Anchorage, exposes *the crew* to a real and imminent risk of irreparable harm; and (e) therefore, the best solution is to order Nigeria to allow the vessel and its cargo to depart Nigeria, so that there will not be a crew at that location. In other words, the risk of imminent harm is not so much with respect to the vessel or its cargo, but to the crew that remains on board the vessel.

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

41. Against such evidence should be weighed that presented by Nigeria, consisting principally of a sworn declaration from the commander of the Nigerian navy’s Forward Operating Base Bonny (hereinafter “FOB Bonny”), which is

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40 Tribunal Order, para. 128.

41 Nigeria Response, para. 2.17. As previously noted, since the crew (other than the four officers) is not being detained by Nigeria, the Court’s provisional measure does not order its release.

42 Switzerland Request for Provisional Measures, 21 May 2019, paras. 42–43; ITLOS/PV.19/C27/1, p. 10, ll. 10–17.

approximately one nautical mile from the location of the vessel.<sup>43</sup> From the date of its arrest, the vessel has been under the protection of the Nigerian navy, with two armed guards from FOB Bonny placed on the vessel.<sup>44</sup> For some 18 months, there has been no act of violence against the vessel other than the attempted armed robbery on 15 April 2019. After that incident, the number of armed guards on the vessel from FOB Bonny was increased and a Nigerian naval gunboat was stationed in close proximity to the vessel at night.<sup>45</sup> Since that time, there have been no further attempts at armed robbery against the vessel.<sup>46</sup>

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

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

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

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43 Nigeria Response, Annex 8, para. 9.

44 *Ibid.*, Annex 8, paras. 7–8.

45 *Ibid.*, para. 8.

46 *Ibid.*

47 Tribunal Order, para. 129. The general information cited by the Tribunal derives from Statement of Claim, Annex 53.

44. The Tribunal has decided, correctly in my view, not to accept Switzerland's request that Nigeria be ordered to suspend all court and administrative proceedings and refrain from initiating new proceedings.<sup>48</sup> Consequently, Nigeria can continue such proceedings and initiate new ones as necessary for the exercise of its national jurisdiction relating to the facts of this case.

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

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

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

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48 *Ibid.*, para. 142.

49 *Ibid.*, paras. 139–140, 146, para. 1(a).

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

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

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

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50 *Enrica Lexie*, Provisional Measures, p. 176, at p. 204, para. 132.

51 "*ARA Libertad*" (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, at pp. 348–49, paras. 93–100; *Detention of three Ukrainian naval vessels* (*Ukraine v. Russian Federation*), Provisional Measures, Order of 25 May 2019, at paras. 110–13.

52 "*Arctic Sunrise*" (*Netherlands v. Russian Federation*), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, at pp. 242–43, paras. 49–50, 54–55, 57.

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

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

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

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53 ITLOS/PV.19/C27/1, p. 9, ll. 45–48 (interpretation from French) (emphasis added).

54 Nigeria Response, paras. 2.1–2.10; Annex 2.

55 *Ibid.*, Annexes 2, 6, and 22.

56 See, for example, *ibid.*, Annexes 7 and 9.

52. If Switzerland fails to persuade the Annex VII arbitral tribunal that its right to freedom of navigation or to exclusive jurisdiction over its flag vessels, or that Switzerland's duties to the crew of one of its flag vessels, were infringed by Nigeria, then Nigeria's right to regulate and enforce against the vessel and its crew will be irrefutable. Such enforcement includes Nigeria's right to pursue criminal proceedings in its courts against the four officers. By issuing a provisional measure that results in the four officers departing the country, Nigeria may be unable to proceed with a trial of the four officers, and will be unable to incarcerate the four officers if convicted at trial, unless the four officers return to Nigeria. Thus, if the four officers do not return, the Tribunal will have failed to preserve the rights of Nigeria.

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

54. In the absence of any specific proposals from or consultations with the Parties, the Tribunal on its own has decided to adopt two measures that must be in place before the four officers may depart Nigeria. First, the bond or financial security discussed above (paragraph 45) is set at a level that exceeds the value of the vessel and its cargo, thereby creating a financial incentive for the return of the four officers, as well as an ability of Nigeria – if they do not return – to levy a fine that can be satisfied as against the bond or financial security. Second, Switzerland must undertake to ensure to Nigeria that the

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57 ITLOS/PV.19/C27/1, p. 25, ll. 1–2 (interpretation from French).

58 ITLOS/PV.19/C27/3, p. 11, ll. 30–40.

four officers will return for the criminal proceedings.<sup>59</sup> The Order expressly provides that this unilateral act by Switzerland vis-à-vis Nigeria is to be a legally binding obligation;<sup>60</sup> as such, a breach of the undertaking will constitute an internationally wrongful act by Switzerland for which Nigeria may seek reparation.

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

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

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59 Tribunal Order, paras. 141, 146, para. 1(b).

60 *Ibid.*, para. 141 (“The Tribunal considers that the undertaking ... will constitute an obligation binding upon Switzerland under international law.”); see *Guiding Principles Applicable to Unilateral Declarations of State Capable of Creating Legal Obligations*, Report of the International Law Commission on the Work of Its Fifty-Eighth Session. UN Doc. A/61/10, at 367 (2006).

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

(*signed*) Sean David Murphy