

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**



2019

Friday, 21 June 2019, at 10 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,  
President Jin-Hyun Paik presiding

**THE M/T “SAN PADRE PIO” CASE**

(Switzerland v. Nigeria)

**Verbatim Record**

<i>Present:</i>	President	Jin-Hyun Paik
	Vice-President	David Attard
	Judges	José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Markiyani Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
	Judges <i>ad hoc</i>	Sean David Murphy
		Anna Petrig
	Registrar	Philippe Gautier

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*Switzerland is represented by:*

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

*as Agent;*

*and*

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

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

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

*as Counsel and Advocates;*

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

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

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

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

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

*as Counsel.*

*Nigeria is represented by:*

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

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

*as Co-Agents;*

*and*

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

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

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

*as Counsel and Advocates;*

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

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

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

*as Counsel;*

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

Rear Admiral Ibikunle Taiwo Olaiya, Nigerian Navy, Abuja,

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

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

Lieutenant Iveren Du-Sai, Nigerian Navy, Abuja,

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

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

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

*as Advisors;*

Ms Kathern Schmidt, Foley Hoag LLP, Washington D.C., United States of America,

Ms Anastasia Tsimberlidis, Foley Hoag LLP, Washington D.C., United States of America,

*as Assistants.*

1 **THE PRESIDENT:** Good morning. The Tribunal meets today pursuant to article 26 of  
2 its Statute to hear the Parties' arguments in the *M/T "San Padre Pio"* Case between  
3 the Swiss Confederation and the Federal Republic of Nigeria.  
4

5 At the outset I would like to note that Judges Ndiaye and Kelly are prevented from  
6 participating in this case for reasons duly explained to me.  
7

8 On 21 May 2019, Switzerland submitted to the Tribunal a Request for the prescription  
9 of provisional measures pending the constitution of an arbitral tribunal in a dispute  
10 with Nigeria concerning the arrest and detention of the *M/T "San Padre Pio"*, its crew  
11 and cargo. The Request was made pursuant to article 290, paragraph 5, of the  
12 United Nations Convention on the Law of the Sea. The case was named "*The M/T*  
13 "*San Padre Pio*" Case" and entered in the List of cases as Case No. 27.  
14

15 I now call on the Registrar to summarize the procedure and to read out the  
16 submissions of the Parties.  
17

18 **THE REGISTRAR** (*Interpretation from French*): On 21 May 2019, a Request for the  
19 prescription of provisional measures was transmitted to the Government of Nigeria.  
20 By order of 29 May 2019, the President fixed 21 and 22 June 2019 as the dates for  
21 the hearing. On 17 June 2019, Nigeria submitted its Statement in response to the  
22 Request made by Switzerland.  
23

24 I will now read the submissions of the Parties.  
25

26 (*Continued in English*) The Applicant requests that the Tribunal prescribe the  
27 following provisional measures:  
28

29 Nigeria shall immediately take all measures necessary to ensure that all  
30 restrictions on the liberty, security and movement of the "*San Padre Pio*", her  
31 crew and cargo are immediately lifted to allow and enable them to leave  
32 Nigeria. In particular, Nigeria shall:  
33

34 (a) enable the "*San Padre Pio*" to be resupplied and crewed so as to be able  
35 to leave, with her cargo, her place of detention and the maritime areas under  
36 the jurisdiction of Nigeria and exercise the freedom of navigation to which her  
37 flag State, Switzerland, is entitled under the Convention;  
38

39 (b) release the Master and the three other officers of the "*San Padre Pio*" and  
40 allow them to leave the territory and maritime areas under the jurisdiction of  
41 Nigeria;  
42

43 (c) suspend all court and administrative proceedings and refrain from initiating  
44 new ones which might aggravate or extend the dispute submitted to the Annex  
45 VII arbitral tribunal.  
46

47 The Respondent requests:  
48

49 that the International Tribunal for the Law of the Sea reject all of the Swiss  
50 Confederation's requests for provisional measures.  
51

1 Mr President.

2

3 **THE PRESIDENT:** Thank you, Mr Registrar.

4

5 At today's hearing, both Parties will present the first round of their respective oral  
6 arguments. Switzerland will make its arguments this morning until approximately  
7 1 p.m. with a break of 30 minutes at around 11.30 a.m. Nigeria will speak this  
8 afternoon from 3.00 p.m. until approximately 6.00 p.m. with a break of 30 minutes at  
9 around 4.30 p.m.

10

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

13

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

16

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

19

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

23

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

28

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

33

34 Thank you, Mr President.

35

36 **THE PRESIDENT:** Thank you, Ms Cicéron Bühler. We have been informed that the  
37 Agent of Nigeria, Ms Stella Anukam, will not be present at the hearing. I therefore call  
38 on the Co-Agent of Nigeria, Ms Chinwe Uwandu, to introduce the delegation of  
39 Nigeria.

40

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

43

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

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

6  
7 As Counsel we also have Ms Theresa Roosevelt, Dr Alejandra Torres Camprubi,  
8 Mr Peter Tzeng, and the team is assisted by Kathern Schmidt and Anastasia  
9 Tsimberlidis.

10  
11 Finally, I wish to acknowledge our counterparts representing the Government of  
12 Switzerland and convey our warm greetings to them.

13  
14 Thank you, Mr President.

15  
16 **THE PRESIDENT:** Thank you, Ms Uwandu.

17  
18 I now invite the Agent of Switzerland, Ms Cicéron Bühler, to begin her statement.

19  
20 **MS CICÉRON BÜHLER** (*Interpretation from French*): Mr President, thank you very  
21 much. With the permission of the Tribunal, I shall now present our case. This is the  
22 first time that a landlocked State finds itself before you. It is thus a pleasure for me to  
23 be today the representative of this group of States explicitly recognized under the UN  
24 Convention on the Law of the Sea.

25  
26 The dispute at the origin of the instant case relates to the interception on 23 January  
27 2018 of the “*San Padre Pio*”, a vessel flying the Swiss flag, whose photo is in your  
28 judges’ folders and also now you can see on screen.<sup>1</sup> At the moment of the facts, this  
29 vessel found itself in the exclusive economic zone of Nigeria, 32 nm from the  
30 Nigerian coast. Nigeria accused the “*San Padre Pio*” of not having complied with the  
31 domestic law regulations regarding petroleum trade, something that has always been  
32 robustly denied. Subsequent to this interception, the vessel was arrested by the  
33 Nigerian authorities, as was its crew. Since then, the vessel and its cargo are  
34 detained. The Master, Andrij Vaskov, and three officers – Mykhaylo Garchev,  
35 Vladyslav Shulga and Lvan Orlovskiy – have been maintained in detention in that  
36 country for 17 months now almost.

37  
38 The facts are disputed concerning the activities of the vessel and their lawfulness  
39 under Nigerian legislation, as you will certainly hear from the part of our opponents  
40 on the other side. I will, in a few minutes, briefly rebut the description made by  
41 Nigeria of these facts.

42  
43 Switzerland maintains that measures taken by Nigeria to “*San Padre Pio*”, its crew  
44 and its cargo, are contrary to the Convention on the Law of the Sea, a convention to  
45 which both Switzerland and Nigeria are parties; indeed, Nigeria’s exercise of its

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<sup>1</sup> Judges folder, tab 1, Photo of the vessel “*San Padre Pio*”, also as annex to *Notification under article 287 and Annex VII, article 1, of UNCLOS and Statement of Claim and Grounds on which it is based, 6 May 2019* (hereinafter *Notification*), (annex NOT/CH-1). The *Notification* is itself annexed to the *Request for the prescription of provisional measures submitted by Switzerland, 21 May 2019* (hereinafter *Request*).

1 enforcement jurisdiction against the vessel, its cargo and its crew is void of all merit  
2 under international law. As will be mentioned later on in greater detail during the  
3 presentation on the plausibility of rights invoked by Switzerland, the interception and  
4 detention of “*San Padre Pio*”, and the arresting of its crew, violates Switzerland’s  
5 rights as a flag State. Specifically, there are in play here certain fundamental  
6 principles of the law of the sea, such as freedom to navigation and the exclusive  
7 jurisdiction of the flag State over its vessels.

8  
9 The Convention in article 90 is explicit on the fact that, I quote “every State, whether  
10 coastal or land-locked, has the right to sail ships flying its flag on the high seas.”  
11 Thus, the rights of States which, such as Switzerland, have no direct access to the  
12 sea, are recognized and must be respected.

13  
14 According to Nigeria, the rights invoked by Switzerland are not applicable to the  
15 instant case. They do not even reach the threshold of plausibility required by your  
16 Tribunal. The presentations of this morning will prove the contrary, both regarding  
17 facts and regarding the law.

18  
19 Mr President, allow me to make an aside to point out that Nigeria does not really  
20 seem to be interested in truth in the question of the plausibility of rights. A major part  
21 of its lines of argument fall really to the proceedings on the merits. Thus, the precise  
22 contours of the legal framework applicable to bunkering activities and the exploitation  
23 of non-living resources in the exclusive economic zone of a coastal State do not  
24 belong to the current phase of proceedings. Nigeria accuses Switzerland of requiring  
25 from the Tribunal to prejudice the merits, which is in no way correct. On our side,  
26 Switzerland knows that the Tribunal will be mindful to take good account of the  
27 current procedural phase. As will be presented later, the rights invoked by  
28 Switzerland are clearly plausible.

29  
30 Confronted with the interception of the “*San Padre Pio*” and the detention of the  
31 vessel and its crew, Switzerland attempted on numerous occasions, and this point  
32 will be developed later on in my presentation, to find some sort of amiable solution  
33 with Nigeria. Generally speaking, we have good bilateral relations with this country.  
34 Our collaboration is fruitful, including in sensitive cases such as those concerning  
35 migration, or the restitution of ill-gotten gains purloined by the clan of the former  
36 Nigerian president, Sani Abacha. The same goes for the multilateral areas where we  
37 have close and constructive cooperation with Nigeria. For example, the co-chair of  
38 the working group Rule of Law, which we have occupied jointly with Nigeria for two  
39 years now within the framework of the global forum of the fight against terrorism, has  
40 got us used to open discussions, and in-depth discussions targeting concrete results.  
41 Thus, we thought it would be possible to do the same thing in the instant case and to  
42 bring to an end a dispute between us – in vain.

43  
44 The contact that Switzerland took up with the other side falls within the long tradition  
45 of our country to work with peace and international security by promoting peaceful  
46 settlement of disputes. The qualities of Switzerland and its domain are known and  
47 recognized at the international level. Let me underscore that Switzerland applies the  
48 self-same principles to the management of its own disputes.

1 In the case before us, Mr President, Switzerland regrets to have to recognize that,  
2 given the one-sidedness of our endeavours, which remained virtually unanswered, a  
3 negotiated solution became impossible. On 6 May 2019, Switzerland thus saw itself  
4 obliged to initiate proceedings before an Annex VII tribunal under the Convention.  
5 Switzerland requests today from ITLOS provisional measures in order to avoid  
6 irreparable prejudice be caused to Switzerland before the arbitral tribunal is  
7 constituted and fully operational. As we will demonstrate later, a real and imminent  
8 risk is there because of the actions carried out by Nigeria against “*San Padre Pio*”  
9 and its cargo and its crew.

10  
11 Switzerland has not only the right to defend its vessel, but also its crew and the  
12 cargo. Indeed, as your case law clearly indicates as, for example, in the “*Virginia G*”  
13 case, a vessel must

14  
15 be considered as a unit and therefore the motor vessel “*Virginia G*” [or here  
16 “*San Padre Pio*”], its crew and cargo on board as well as its owner and every  
17 person involved or interested in its operations, are to be treated as an entity  
18 linked to the flag State.<sup>2</sup>

19  
20 Now, in order to avoid that irreparable prejudice be caused to this unit represented by  
21 the vessel, Switzerland prays your Tribunal to prescribe by application of article 290,  
22 paragraph 5, of the Convention, the following provisional measures:

23  
24 Nigeria shall immediately take all measures necessary to ensure that all  
25 restrictions on the liberty, security and movement of the “*San Padre Pio*”, her  
26 crew and cargo, are immediately lifted to allow and enable them to leave  
27 Nigeria.

28  
29 Mr President, with your permission, our team is going to explain why these  
30 provisional measures are necessary in order to avoid irreparable prejudice to the  
31 rights of Switzerland. We will demonstrate that all conditions provided for the  
32 prescription of provisional measures under article 290, paragraph 5, of the  
33 Convention, are met.

34  
35 The oral pleadings of this morning are organized as follows:

36  
37 First, I will present, in somewhat deeper fashion, the facts, after which I will request  
38 that you call to the bar Professor Cafilisch, who will touch upon certain jurisdictional  
39 questions linked to our request.

40  
41 Madam Professor Boisson de Chazournes will explain subsequently the link between  
42 the provisional measures and the claims on the merits in this case and will also  
43 highlight the plausibility of rights invoked by Switzerland.

44  
45 Finally, Sir Michael Wood will demonstrate the urgency and the necessity of  
46 prescribing provisional measures requested in order to avoid an irreparable prejudice  
47 being caused to Switzerland’s rights.

48  

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<sup>2</sup> *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 48, para. 127.

1 Mr President, distinguished Members of the Tribunal, let me now come to the facts in  
2 this case.

3  
4 The “*San Padre Pio*” is a motor tanker vessel flying a Swiss flag. It is an average size  
5 and was built in 2012. As you can see on the flowchart on the screen,<sup>3</sup> it is managed  
6 by the Swiss company, ABC Maritime, which is the manager, and chartered by Argo  
7 Shipping and Trading, a company which is linked to Augusta Energy, which is also  
8 based in Switzerland. We will refer to this last company as the charterer.

9  
10 When it was intercepted and arrested by the Nigerian navy on 23 January 2018, the  
11 “*San Padre Pio*” was providing gasoil to Anosyke, the Nigerian company with which it  
12 had a supply contract. To this end, the vessel took on its cargo in Lomé in Togo, as is  
13 generally done in the region and, on 18 January 2018, headed in the direction of  
14 Nigeria’s EEZ. The map on your screen shows this journey.<sup>4</sup> Once arrived at its  
15 destination, the “*San Padre Pio*” transferred the gasoil to other transport vessels.

16  
17 Nigeria argues that the facts are completely different and implies that the operations  
18 of “*San Padre Pio*” are tainted by illegality through and through but, as I mentioned,  
19 this relates to the merits and not to this. However, I am going to respond to some  
20 particularly shocking elements in their description, which are both mistaken and  
21 unfounded.

22  
23 For instance, the gasoil on board is alleged to have been stolen from Nigeria and the  
24 same goes apparently for all trade in raw materials passing through Lomé. No  
25 evidence has been provided to support these serious insinuations, firstly against the  
26 vessel, and secondly against Togo, a third country. The clearance certificate showing  
27 the seal of the Togolese authorities officially contradicts Nigeria’s version<sup>5</sup> and, in  
28 more general terms, some of the petroleum storage facilities, or some of the largest  
29 in the region, are to be found in Togo,<sup>6</sup> which contradicts the insinuations from  
30 Nigeria as to the unlawfulness of activities originating in that country.

31  
32 Secondly, according to Nigeria, the “*San Padre Pio*” did not have the necessary  
33 permits, in particular the Navy certificates and the permit from the Department of  
34 Petroleum Resources. This allegation surprises us in two respects: first of all, it is not  
35 up to the vessel to procure these documents, but it is up to the importer, which he  
36 did.<sup>7</sup> One might also wonder why the Nigerian authorities accepted issuing permits  
37 for activities involving the “*San Padre Pio*” if, as Nigeria contends, their Navy  
38 suspected for quite some time that that vessel was engaging in unlawful activities.  
39 Here again, no evidence has been forthcoming to support that allegation.

40  
41 Thirdly, Nigeria contends that the “*San Padre Pio*” was in certain places on certain  
42 dates. Now these places and dates in no way correspond to the official data available  
43 to us. Even though the burden of proof is upon them, allow us to refer you, Members

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<sup>3</sup> Judges’ folder, tab 2, Schematic rendition 1 (Relations of ownership and cargo-related business) also as annex to the *Notification* (annex NOT/CH-2).

<sup>4</sup> Judge’s folder, tab 3, Map (route of the “*San Padre Pio*” from Lomé to the Odudu Terminal), also as annex to the *Notification* (annex NOT/CH-5).

<sup>5</sup> Judges’ folder, tab 4, Clearance Certificate of 18 January 2018.

<sup>6</sup> Judges’ folder, tab 5, Leaflet of Compel.

<sup>7</sup> Judges’ folder, tab 6, DPR Permit and Navy Certificate.

1 of the Tribunal, to the evidence provided by Switzerland. As you can see on the  
2 screen,<sup>8</sup> the “*San Padre Pio*” should have been, for instance, on 10 June 2017, in the  
3 Brass Oil Field, whereas in fact it was near Lomé in Togo. I just mentioned these two  
4 points are around 310 nm apart. Nigeria also contends without providing any  
5 evidence or concrete example that the AIS (automatic identification system) was  
6 switched off on several occasions. This has been formally denied by the Master.  
7 Maybe Nigeria does not have all the necessary information at its disposal. This  
8 seems more than likely, considering that one of the charges identified in the “*San*  
9 *Padre Pio*” as having previously had the name of a vessel whose registered tonnage  
10 is more than ten times greater than its own.<sup>9</sup> Perhaps Nigeria is associating  
11 information with the “*San Padre Pio*” which actually relates to another vessel.  
12

13 Members of the Tribunal, allow me to come back to what actually happened in  
14 January 2018. It was during the third ship-to-ship transfer that the “*San Padre Pio*”  
15 was intercepted and arrested by the Nigerian navy. As you can see on the map,<sup>10</sup> the  
16 “*San Padre Pio*”, when this happened was around 32 nm from the closest point on  
17 the Nigerian coast. Ship-to-ship transfers therefore took place within the EEZ of  
18 Nigeria. An important point to be noted – and this is very clear from the new map  
19 shown on the screen<sup>11</sup> – is that the vessel was actually more than 2 nm from the  
20 closest installation. The “*San Padre Pio*” was outside any safety zone which Nigeria  
21 may have established under the Convention.  
22

23 During a transfer operation, which is nothing different from what had happened  
24 previously, the Nigerian navy intervened. On 24 January 2018, they ordered the  
25 vessel to proceed to Port Harcourt and the Nigerian port of Bonny Inner Anchorage,  
26 which is top left of the map on your screens.<sup>12</sup> The “*San Padre Pio*” had no other  
27 choice than to obey and it was escorted to Bonny Inner Anchorage, where the vessel  
28 has since been detained. The 16 members of the crew were arrested and then  
29 detained on board the vessel.  
30

31 Six weeks later, on 9 March 2018, the vessel, with its crew, was handed over by the  
32 navy to the Nigerian Economic and Financial Crimes Commission, also known under  
33 the acronym EFCC, the stated aim being that the EFCC was going to carry out some  
34 initial preliminary investigations. On the same day the members of the crew were  
35 transferred to a prison on land where detention conditions were dire, among other  
36 things because of overcrowding.  
37

38 Nigeria has tried to play down what it is like in its prisons. However, the severity of  
39 the problem has been recognized by a number of independent bodies. Conditions in  
40 Nigerian prisons have, for instance, been evaluated by the United Nations, and that  
41 was in 2018 during its periodical universal examination carried out by the Council of  
42 Human Rights, and the result confirms all of our fears: prison conditions remained

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<sup>8</sup> Judges’ folder, tab 7, AIS Data.

<sup>9</sup> Annex NOT/CH-23.

<sup>10</sup> Judges’ folder, tab 8, Sketch map (general presentation of the coast of Nigeria), also as annex to the *Notification* (annex NOT/CH-11).

<sup>11</sup> Judges’ folder, tab 9, Sketch map (development area), also as annex to the *Notification* (annex NOT/CH-6).

<sup>12</sup> Judges’ folder, tab 8, Sketch map (general situation of Nigeria’s coast), also as annex to the *Notification* (annex NOT/CH-11).

1 harsh and life-threatening. They were characterized by overcrowding and inadequate  
2 medical care, food and water.”<sup>13</sup>

3  
4 Conditions in Port Harcourt prison, where the crew has been detained, seem to be no  
5 better than elsewhere in the country; far from it. Nigeria’s vice-president, Professor  
6 Yemi Osinbajo, informed the press, in an article which is now shown on your  
7 screens,<sup>14</sup> of the results of an investigation into conditions in prisons in the country  
8 and he in particular mentioned overcrowding in that specific prison, which was built to  
9 hold 800 people and actually contains nearly 5,000.

10  
11 For the crew of the “*San Padre Pio*”, conditions in prison left a lot to be desired by  
12 any yardstick, but it is also from a psychological point of view that their detention is  
13 an ordeal for the seamen. It is during this period that they met some Ukrainian  
14 compatriots who were also seamen and they had been languishing in prison for years  
15 without any prospect of release. These people had been caught up in the wheels of  
16 the system and abandoned by the shipowner and flag State of the vessel on which  
17 they were working. This meeting between the seamen of the “*San Padre Pio*” and  
18 their compatriots was extremely disturbing for them and meant that they feared the  
19 same fate would befall them. In our case, the shipowner acted differently. It is thanks  
20 to the Swiss company’s commitment that prison conditions for these seamen have  
21 been somewhat improved.

22  
23 As mentioned in the Notification,<sup>15</sup> it is thanks to the intervention of the local lawyers  
24 representing the shipowner that 12 members of the crew were able to leave prison  
25 and were returned to the vessel on 20 March 2018. However, they have stayed there  
26 under armed guard without being able to leave Nigeria. The other four members of  
27 the crew, namely the Master and three officers, have stayed in prison for five weeks  
28 and were only able to return to the vessel on 13 April 2018, and they have been there  
29 ever since under armed guard and they are not allowed to go onshore unless they  
30 have prior authorization.

31  
32 The first charge covered the 16 members of the crew and, on 19 March 2018, it was  
33 modified to cover just the four officers. Even so, it was only six months after their  
34 arrest, and four months after the accusations against them were abandoned, that the  
35 12 members of the crew were allowed to leave the country. This happy outcome  
36 mentioned in the Notification<sup>16</sup> did not just happen like that. The shipowner had to  
37 work for months to negotiate the departure of these 12 men.

38  
39 The 12 seamen have been replaced by a new crew, which is rotated at regular  
40 intervals. In fact, a vessel like the “*San Padre Pio*” needs on board a crew which can  
41 make sure that it is maintained on a daily basis and to make sure that safety  
42 requirements are met. Even though these sailors are nothing to do with the instant

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<sup>13</sup> Report of the United Nations High Commissioner for Human Rights, Compilation on Nigeria, A/HRC/WG.6/31/NGA/2 (August 2018), para. 31.

<sup>14</sup> Judges’ folder, tab 10, article of 2 February 2018, published in This Day and accessible on line, “Port Harcourt Prison Has 5,000 Inmates Instead of 800, Says Osinbajo”, <https://www.thisdaylive.com/index.php/2018/02/02/port-harcourt-prison-has-5000-inmates-instead-of-800-says-osinbajo/>

<sup>15</sup> *Notification*, p. 5, para. 19 and annexes NOT/CH-26 and 27.

<sup>16</sup> *Notification*, p. 5, para. 19 and annexes NOT/CH-28 and 29.

1 case, they are obliged by the Nigerian authorities to request prior authorization to  
2 disembark. Where the Master and the three other officers are concerned, they have  
3 been not been authorized to leave Nigeria and they remain on board the vessel  
4 under permanent armed guard.

5  
6 Nigeria contends in its written observations, and again in a diplomatic note which we  
7 received only two days ago, that the seamen, the Master and the officers are free to  
8 move and can leave the vessel whenever they wish, and that the only restriction  
9 imposed upon the four officers is not to leave the country. However, whatever the  
10 conditions for release on bail may say, the men who remain on board the vessel,  
11 and the four officers in particular, are not free to move. They are *de facto* in  
12 detention. They have to request authorization to disembark and this authorization is  
13 regularly refused without any reason being given, and sometimes we are talking  
14 about situations which would be worthy of a Kafka novel. One particularly shocking  
15 example happened on the 25 and 26 June 2018 when the navy refused the four  
16 officers on several occasions the right to disembark in order to attend their own  
17 hearings. The Federal High Court in Nigeria described the situation as follows: “The  
18 conduct of the Nigerian Navy in refusing the defendants permission to disembark  
19 from the fifth defendant is in flagrant violation of the order of this court admitting the  
20 defendants to bail.”<sup>17</sup>

21  
22 Having access to medical care has not been easy either. Requests to disembark in  
23 order to see a healthcare professional have often been refused. These men have not  
24 been able to disembark to attend legal proceedings against them. They have not  
25 been allowed to disembark to receive urgent medical care, so you cannot seriously  
26 say that they are free to move.

27  
28 Nigeria emphasizes the fact that the four officers chose to return to the vessel. This  
29 was not actually a real choice, certainly not for a professional master and his officers.  
30 You do not abandon your ship. The sorry fate of other vessels abandoned in the  
31 region only confirms this reality. Officers should not suffer because they assume their  
32 responsibility towards their vessel on which they serve, demonstrating great  
33 professionalism. Indeed, when they made this choice, the four officers were unaware  
34 of the aforementioned restrictions and indeed were unaware of the length of their  
35 stay on board.

36  
37 It is now nearly 17 months since the four officers were detained and they have not  
38 seen their families nor their countries since. The human consequences of the  
39 situation are dramatic and they extend to their wives, their children, as well as to the  
40 parents of these four men. They are all anxiously awaiting – for a year and a half  
41 now – the return of their loved ones. So it is absolutely crucial that the captain and  
42 the three officers be authorized to leave Nigeria. At this stage it is quite simply a  
43 matter of humanitarian considerations.

44  
45 It is a very serious situation that is made even more problematical by the dangers in  
46 the region. Piracy and armed attacks at sea are endemic in the Gulf of Guinea, as  
47 the International Maritime Bureau of the International Chamber of Commerce  
48 confirms. I quote: “As a region, the Gulf of Guinea accounts for 22 of the

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<sup>17</sup> Judges’ folder, tab 11, Motion on Notice of Federal Court of Nigeria of 26 June 2018.

1 38 incidents in the first quarter 2019. All first quarter kidnappings occurred in this  
2 region – with 21 crew kidnapped in five separate incidents.”<sup>18</sup>

3  
4 Threats to the security of the “*San Padre Pio*” since it has been in Bonny Inner  
5 Anchorage have been demonstrated recently. There was an attack carried out by  
6 pirates against the vessel on 15 April 2019 at 21.20 local time. This attack  
7 endangered the lives of the crew and of the other people on board. Unfortunately  
8 such instances are not infrequent in the region.

9  
10 Detained in a vessel for close on 17 months in an area rife with pirates, the Master  
11 and three other officers of the “*San Padre Pio*”, as well as all the other persons  
12 aboard this vessel, run the risks of being abducted, injured or even killed. The  
13 publicity around this case is not unrelated to this situation.

14  
15 As mentioned previously, Nigeria claims in a very recent diplomatic note that the four  
16 men are free of their movements in Nigeria. This is not true. Firstly, the coincidence  
17 in time with the present audiences is in no way fortuitous. Our learned friends seek to  
18 demonstrate to you that provisional measures would not be necessary for the four  
19 officers, whereas the opposite is true. Secondly, Nigeria presents the facts  
20 selectively. Thirdly, it does not say that the four men enjoy freedom of movement, but  
21 only that the conditions of release on bail envisage such freedom. The reality is very  
22 different.

23  
24 That Nigeria claims in its written observations that the Master and three officers can  
25 move about freely in Nigeria is untrue. Over and above the responsibility over the  
26 vessel under their command, the four men on land would face a very worrying  
27 security situation. As regards Port Harcourt, armed confrontation takes place  
28 regularly, and travellers are explicitly advised not to travel to the coastal area close to  
29 the “*San Padre Pio*”.<sup>19</sup> The situation is in fact no better in the rest of the country.

30  
31 Over and above these very worrisome human aspects, one must recall that the  
32 vessel and its cargo have also been the subject of detention for over 17 months, as  
33 demonstrated by the documents in the written proceedings.<sup>20</sup> This causes very  
34 serious damage to the vessel, its cargo and all persons who seek to enjoy its smooth  
35 functioning. The vessel, for example, was not maintained to the necessary standards.  
36 It is unable to move and, according to the estimates by the shipowner, a spell in a dry  
37 dock would be required to make it fit for operations again. Even in the absence of  
38 attacks of piracy, this situation is highly dangerous. The forced detention does indeed  
39 create risks for the vessel in terms of collision and in the event of rough weather  
40 conditions. Only two weeks ago, another vessel, the *M/T “Invictus”* twice struck the  
41 “*San Padre Pio*”, which was unable to avoid this drifting vessel. According to the  
42 information supplied by the armed guard on board the “*San Padre Pio*”, the “*Invictus*”  
43 is a vessel arrested by the Nigerian authorities, moored at Bonny Inner Anchorage,

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<sup>18</sup> Judges’ folder, tab 12, International Chamber of Commerce – International Maritime Bureau (ICC-IMB), *Piracy and Armed Robbery Against Ships*, Report for the period 1 January – 31 March 2019, p. 19, also as annex to the *Notification* (annex NOT/CH-53).

<sup>19</sup> Judges’ folder, tab 13, Advice for Travelers to Nigeria by the Swiss Federal Department of Foreign Affairs, accessible on line at: <https://www.eda.admin.ch/eda/fr/dfae/representations-et-conseils-aux-voyageurs/nigeria/conseils-voyageurs-nigeria.html>

<sup>20</sup> See in particular *Notification*, p. 10, para. 32, and *Request*, pp. 9-12, paras. 36-46.

1 without a crew, and has been there for three years. This time the collision did not  
2 cause any damage. However, that possibility cannot be ruled out were a similar  
3 incident to happen again. This demonstrates, once again, that such a mooring,  
4 particularly over an extended period, is totally inadequate and dangerous.

5  
6 As to the cargo, it suffers simultaneously from two forms of deterioration. First of all, it  
7 is used to operate the vessel at a rate of approximately 35 metric tonnes per month,  
8 at a price of about US\$ 600 per metric tonne. This represents a substantial amount  
9 that continues to rise. In addition, the quality standpoint the remaining cargo is also  
10 losing value owing to the uncontrollable storage conditions. A precise check of the  
11 state of the gasoil was unfortunately not possible because the experts did not receive  
12 authorization to board the vessel. This loss in value of the remaining cargo is not  
13 included in the calculation brought about by the detention of the vessel. However, the  
14 figures are already quite staggering. Every day of detention of the vessel costs US\$  
15 12,000 to the charterer. The sum currently stands at over US\$ 6.2 million.

16  
17 These losses, which are constantly rising, are very regrettable and fully attributable  
18 to Nigeria. Added to that, there is a fear, based on a sad precedent that we hope will  
19 not reoccur in the present case, of seeing the “*San Padre Pio*” suffer the same sad  
20 fate as the “*Anuket Emerald*”. That vessel was confiscated by the Nigerian  
21 authorities and, barely six months after the final taking of control of the vessel by  
22 Nigeria, it literally broke its moorings and was washed ashore at Elegushi towards  
23 Lagos in Nigeria. The probable fate of the “*Anuket Emerald*” is to rust in peace and  
24 pollute the environment for decades to come, with all the health risks that that  
25 involves for the local population. We earnestly hope that this will not happen to the  
26 “*San Padre Pio*”.

27  
28 Mr President, honourable Members of the Tribunal, you will no doubt hear Nigeria  
29 argue that it is just applying its law and combatting criminal activities in the region.  
30 That is no doubt its prerogative, but let us recall that the application of domestic law  
31 must not be done to the detriment of international law. This principle is all the more  
32 important when it comes to the rights and obligations as part of the law of the sea,  
33 which are intrinsically linked one to the other. You know this better than all of us. The  
34 Convention is the result of a global compromise, the well-known “package deal”. The  
35 EEZ regime is the result of complex negotiations, where the recognition of the  
36 interests of the coastal States in specific areas was compensated by the assurance  
37 that the interests of flag States would be protected – in particular, freedom of  
38 navigation and the exclusive jurisdiction of that State, apart from cases where the  
39 Convention has planned otherwise.

40  
41 Switzerland recognizes and encourages the fight against crime but requests that this  
42 fight be conducted within the relevant legal framework. Nothing would have  
43 prevented Nigeria from contacting the flag State and asking it to investigate the  
44 alleged violations. Nigeria was in possession of no information that might lead it to  
45 believe that Switzerland would not respond.

46  
47 The unilateral actions of Nigeria, which we greatly regret, cause direct harm to  
48 persons who have an interest in the “*San Padre Pio*”. This situation is made even  
49 more painful by the way in which the administrative and judicial proceedings are

1 taking place domestically. They have been and remain difficult to follow and, in three  
2 respects, prove problematical.

3  
4 First, the slowness of proceedings. Proceedings initiated against the vessel and its  
5 crew before the Nigerian courts made very little headway since the first hearing for  
6 release on bail on 23 March 2018. Hearings were regularly postponed for various  
7 reasons that are set out in greater detail in the Notification.<sup>21</sup>

8  
9 Secondly, the public prosecutor frequently changed, and seems to change still, the  
10 direction of its proceedings. As set out in the Request,<sup>22</sup> the charges were amended  
11 on several occasions without proceedings underway on the previous charges making  
12 any headway.

13  
14 Thirdly, we can but note a marked lack in the communications to the potential  
15 accused. For example, following the request for the confiscation of the cargo, to  
16 which I have just referred, the charterer filed a suit in order to obtain a stay of  
17 execution of the decision. A judge found in his favour, claiming that the original  
18 request was directed against the property of the charterer without the latter being  
19 designated as defendant in the case, thereby preventing him from taking part in the  
20 proceedings and defending himself.

21  
22 Switzerland fully respects Nigeria's sovereignty and seeks in a way to undermine the  
23 reputation of its institutions. Certain aspects of proceedings underway, however,  
24 surprise us. We believe that it is necessary to mention them here. First of all, the  
25 proceedings that have progressed so slowly for over a year suddenly accelerated  
26 when it was announced in the press that Switzerland planned to initiate proceedings  
27 at international level. This information should, however, not have been new to  
28 Nigeria. It had indeed been officially informed of that. However, the coincidence in  
29 time of this acceleration with press articles in the months of April and May needs to  
30 be noted. Since early May, no fewer than ten hearing dates were planned, although  
31 some of those hearings did not take place. It nevertheless suggests a sudden,  
32 impressive and surprising, to say the least, acceleration in domestic proceedings.  
33 We must ask ourselves whether Nigeria seeks simply to make up for lost time or  
34 whether there is a willingness to take possession of the cargo of the vessel before a  
35 possible release of the vessel or even to place this Tribunal before a *fait accompli*.

36  
37 Even local experts have doubts about the practices of the Nigerian navy and the  
38 legality of proceedings underway. Thus, for example, a Nigerian lawyer, known for  
39 his commitment to the fight against corruption, Maître Femi Falana, recently  
40 commented in an article that appeared on 5 June 2019 in "*The Cable*", the case that  
41 concerns us, and raise certain ancillary issues.<sup>23</sup> The document to which we refer is  
42 new; it postdates the date of the Request. The comments of Mr Falana are words in  
43 the original language.

44  

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<sup>21</sup> *Notification*, p. 5, para. 20 and annexes NOT/CH-31-34.

<sup>22</sup> *Request*, pp. 3-4, para. 12, and annexes NOT/CH-31-36, 39; annex PM/CH-2.

<sup>23</sup> Judges' folder, tab 14, article of 5 June 2019, published in *TheCable* and accessible on line, "Switzerland sues Nigeria over vessel detained by navy since 2018", <https://www.thecable.ng/switzerland-sues-nigeria-over-detained-vessel>

1 (Continued in English)

2  
3 The navy arrested the Swiss vessel and the ... crew aboard the vessel on  
4 January 23, 2018 for illegal entry and illegal fuel trade. ... Since then the ship  
5 and the crew have been detained without trial.

6  
7 Why has the navy not completed investigation into the alleged crimes for  
8 almost one and a half years? Why should the navy expose the country to  
9 unwarranted international embarrassment? ...

10  
11 Many more cases are going to be filed against the federal government in  
12 municipal and foreign courts due to the provocative impunity of the nation's  
13 naval authorities who are behaving as if they are above the law ... From the  
14 information at my disposal, the Nigerian navy is detaining not less than 150  
15 people without trial. Some have been incarcerated incommunicado for over  
16 two years.

17  
18 (*Interpretation from French*) Honourable Members of the Tribunal, in addition to the  
19 very succinct communication as part of the domestic proceedings, similar  
20 shortcomings, and indeed more serious, took place at interstate level. Nigeria indeed  
21 omitted to keep Switzerland informed of the unfolding of events linked to the "*San*  
22 *Padre Pio*". At no point did it deem it necessary to inform Switzerland, which is the  
23 flag State. Occasions were many in number during or following the many actions and  
24 procedures initiated against the vessel, its crew and its cargo. It was not until  
25 Switzerland established contact with the Nigerian authorities on several occasions  
26 that a copy of the first charges levelled against the vessel and its crew was  
27 forwarded to it. It took Nigeria two months to forward to Switzerland information that  
28 was in fact, all things considered, sketchy.

29  
30 Furthermore, difficulties in communication and access to information just got worse.  
31 Switzerland undertook diplomatic actions at every level with Nigeria in order to find  
32 an amicable solution on this issue of tension between our two countries. As set out in  
33 detail in the Notification,<sup>24</sup> Switzerland attempted on multiple occasions and through  
34 various means to address the question of the "*San Padre Pio*". It submitted no fewer  
35 than four versions of an *aide-mémoire* to its Nigerian counterparts, including the  
36 director of the EFCC, the Minister for Industry, Trade and Investment, as well as the  
37 Foreign Affairs and Justice Ministers.

38  
39 These *aides-mémoires* set out Switzerland's position: the actions of Nigeria in  
40 respect of the "*San Padre Pio*" characterize violations of the law of the sea. It also  
41 demonstrates Switzerland's willingness to resolve the dispute. With time passing and  
42 Nigeria not engaging in dialogue, it seemed less and less probable that the  
43 diplomatic channel alone would lead to an outcome. Faced with this impasse,  
44 Switzerland repeated once again its position in the *aide-mémoire* forwarded to  
45 Nigeria on 25 January 2019 during the World Economic Forum held in Davos.  
46 Delivered by the Swiss Foreign Minister in person, this document indicated that  
47 Switzerland would consider, if there were no progress in the search for a solution,  
48 using the judicial proceedings provided for by the Convention. On this occasion  
49 Nigeria promised a reaction that Switzerland waited for, in vain, for several weeks

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<sup>24</sup> *Notification*, pp. 6-7, paras. 24-25 and annexes NOT/CH-40-50.

1 before realizing that the lack of response was not just due to the transition phase that  
2 followed the Nigerian elections. We would indeed have understood that this political  
3 situation might cause internal delays, and therefore we displayed patience.  
4 Unfortunately, this led to nothing. Worse still, we are blamed for it today.

5  
6 Switzerland would have considered as a sign of progress that Nigeria enters into  
7 discussions, or at least provides a response on the substance or on the settlement of  
8 the dispute. Much to the surprise and indeed considerable disappointment of  
9 Switzerland, Nigeria never seemed to grant the slightest importance to our country's  
10 attempts. Save as regards the copy of the charges forwarded by the EFCC in May  
11 2018, a deafening silence followed all the attempts at discussions and negotiations,  
12 be it on questions of substance or the mode of settling the dispute. Even the second  
13 communication and first diplomatic note of Nigeria on this case, received, it should  
14 be stressed, the day after the request for provisional measures, displayed on your  
15 screen, says nothing more than that (*continued in English*) "appropriate government  
16 agencies in Nigeria are seriously attending to the case."<sup>25</sup>

17  
18 (*Interpretation from French*) It is therefore on this factual basis, and after lengthy and  
19 unfruitful attempts to settle this dispute directly, that Switzerland had to envisage  
20 resorting to proceedings set out in section 2 of Part XV of the Convention. It then  
21 sought to initiate a dialogue with Nigeria on the matter and then, faced with no  
22 reaction on its part, resolved formally to initiate arbitral proceedings. Switzerland is  
23 now turning to you, Mr President and honourable Members of the Tribunal, in order  
24 to preserve its rights on the merits whilst waiting until the arbitral tribunal can take  
25 over.

26  
27 I thank you, Mr President, Members of the Tribunal, and would ask you to kindly call  
28 to the bar Professor Lucius Caflisch, who will discuss the *prima facie* jurisdiction of  
29 the arbitral tribunal.

30  
31 **THE PRESIDENT:** Thank you, Ms Cicéron Bühler. I now invite Mr Lucius Caflisch to  
32 make his statement.

33  
34 **MR CAFLISCH:** Mr President, Members of the Tribunal, it is an honour and a  
35 privilege to appear before you on behalf of the Swiss Confederation.

36  
37 My task is to outline briefly the position of the Swiss Government on jurisdictional  
38 matters. Switzerland has accepted the jurisdiction of your Tribunal pursuant to  
39 article 287 of the Law of the Sea Convention; Nigeria has made no declaration under  
40 that article. In such situations, the subsidiary means to ensure the compulsory  
41 character of the Convention's jurisdictional system is arbitration under Annex VII of  
42 the Convention. Switzerland has consequently notified Nigeria of its submission of  
43 the dispute between the two States to arbitration by a Notification and Statement of  
44 Claims dated 6 May 2019.

45  
46 The constitution of arbitral tribunals under article 3 of Annex VII of the Convention  
47 may take time. In some circumstances there is, however, a need to prescribe urgent

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<sup>25</sup> Judges' folder, tab 15, diplomatic note 34/2019 of the Federal Republic of Nigeria, dated 22 May 2019.

1 measures to preserve the rights of the parties and/or to protect the marine  
2 environment. This is relatively simple when a case comes before a pre-constituted  
3 body such as this Tribunal or the International Court of Justice. It is more complex in  
4 the case of Annex VII arbitration where the establishment of the arbitral tribunal and,  
5 therefore, its ability to act may be relatively far away.

6  
7 For this reason, the Convention assigns an important function to your Tribunal.  
8 Article 290, paragraph 5, reads – and I quote:

9  
10 Pending the constitution of an arbitral tribunal to which a dispute is being  
11 submitted under this section, any court or tribunal agreed upon by the parties  
12 or, failing such agreement within two weeks from the date of the request for  
13 provisional measures, the International Tribunal for the Law of the Sea ... may  
14 prescribe, modify or revoke provisional measures in accordance with this  
15 article if it considers that *prima facie* the tribunal which is to be constituted  
16 would have jurisdiction and that the urgency of the situation so requires.

17  
18 Accordingly, the Tribunal may not only prescribe provisional measures if it considers  
19 that, *prima facie*, the arbitral tribunal to be set up in accordance with section 2 of  
20 Part XV of the Convention would have jurisdiction. It is Switzerland's contention that  
21 the arbitral tribunal to be established will have jurisdiction and that beyond a *prima*  
22 *facie* test.

23  
24 Part XV of the Convention provides for a comprehensive system of dispute  
25 settlement, ensuring that many categories of disputes concerning the interpretation  
26 or application of the Convention can be settled in a binding way. However, to avoid  
27 surprise litigation and to give potential defendants an opportunity to change their  
28 attitude, the Convention also requires some procedural steps to be taken by the  
29 State planning to bring a case.

30  
31 I will demonstrate in turn, first, that there is a dispute between Switzerland and  
32 Nigeria; second, that the dispute concerns the interpretation or application of the  
33 Convention; and, third, that Switzerland has taken the procedural steps required in  
34 Part XV of the Convention.

35  
36 Mr President, Members of the Tribunal, to address the first point, there undoubtedly  
37 is a dispute between the participants to the present proceedings within the definition  
38 given by the Permanent Court of International Justice in the *Mavrommatis* case<sup>1</sup> and  
39 confirmed by the International Court of Justice in the *East Timor* case.<sup>2</sup> According to  
40 that definition: “a dispute is a disagreement on a point of law or fact, a conflict of  
41 legal views or of interests between two persons”. The definition says “two persons”  
42 but, in the present instance, it should say “two States”.

43  
44 As was confirmed by the present Tribunal in its most recent Order, the opposition of  
45 views may, in certain cases, be inferred from a party's conduct.<sup>3</sup> The Tribunal

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<sup>1</sup> *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.*

<sup>2</sup> *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1955, p. 99, para. 22.*

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

1 recalled the case law of the International Court of Justice on that point. The Court  
2 had made it clear that:

3  
4 a disagreement on a point of law or fact, a conflict of legal views or interests,  
5 or the positive opposition of the claim of one party by the other need not  
6 necessarily be stated *expressis verbis*. In the determination of the existence  
7 of a dispute, as in other matters, the position or the attitude of a party can be  
8 established by inference, whatever the professed view of that party.<sup>4</sup>  
9

10 This is drawn from the *Land and Maritime Boundary, Preliminary Objections* case  
11 between Cameroon and Nigeria.  
12

13 Switzerland repeatedly objected to Nigeria's conduct, explicitly stating that it  
14 considered it as violating various provisions of the Convention. Nigeria responded  
15 with a deafening silence. The respondent State was aware of Switzerland's position,  
16 yet refused to modify its conduct. This being the case, one can easily infer that the  
17 dispute existed, and continues to exist between the two States.  
18

19 The second issue to be dealt with is whether the dispute concerns the interpretation  
20 or application of the Convention. The answer is that, yes, most clearly it pertains to  
21 the interpretation or application of provisions of the Convention. In particular, it  
22 concerns the provisions relative to the rights and obligations of flag States *vis-à-vis*  
23 their vessels and those relative to the rights and obligations of coastal States in their  
24 exclusive economic zone, such as the asserted right to arrest and to detain vessels  
25 flying the flag of a third State as well as their crew and cargo. The dispute concerns  
26 the interpretation and application of Parts V and VII of the Convention, including  
27 articles 56, 58, 87, 92 and 94.  
28

29 Mr President, Members of the Tribunal, in its Statement in Response, Nigeria,  
30 however, challenges the assertion that the Annex VII arbitral tribunal will have *prima*  
31 *facie* jurisdiction over Switzerland's claim based on the International Covenant on  
32 Civil and Political Rights (ICCPR) and on the Marine Labour Convention (MLC).  
33 Nigeria argues that this issue does not relate to the interpretation and application of  
34 provisions of the Law of the Sea Convention and "thus falls outside of the jurisdiction  
35 of the Annex VII arbitral tribunal".<sup>5</sup>  
36

37 Article 56, paragraph 2, of the Convention provides that in exercising its rights and  
38 performing its duties under this Convention – please note these words – the coastal  
39 State shall have due regard "to the rights and duties of other States". Note the  
40 absence, here, of the words "under this Convention". This can only mean, at least in  
41 some situations, that the rights and duties of the states in question may not be those  
42 provided for by the Convention but are linked to them in some way, which is true  
43 here.  
44

45 Indeed, in the present instance, Nigeria has made it impossible for Switzerland, the  
46 flag State of the "*San Padre Pio*", to discharge toward the crew its duties resulting

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

<sup>5</sup> Nigeria's Statement in Response, para. 3.49.

1 from the International Covenant on Civil and Political Rights and the Marine Labour  
2 Convention. Some of these duties also result from customary law.

3  
4 This being so, it can hardly be argued that the “alleged” dispute (the word “alleged” is  
5 borrowed from the Nigerian argument) does not concern the interpretation or  
6 application of a provision of the Convention. There is, at the minimum, a dispute over  
7 the application of article 56, paragraph 2, of the Convention; and Switzerland is of  
8 the firm view that there is, in the present case, a clear connection between the duties  
9 of the flag State, Switzerland, and the conduct of Nigeria, to whose exclusive  
10 economic zone the acts complained of relate. This is sufficient to conclude that the  
11 Annex VII arbitral tribunal will have *prima facie* jurisdiction over Switzerland’s claim  
12 based on the International Covenant on Civil and Political Rights and also the Marine  
13 Labour Convention. To this, it must be added that article 293, paragraph 1, of the  
14 Convention, which applies to all the dispute settlement mechanisms of Section 2 of  
15 Part XV of the Convention, provides that the court or tribunal having jurisdiction  
16 applies the provisions of the Convention and the other rules of international law not  
17 incompatible with it.

18  
19 In addition, Nigeria contends that the alleged conventional rights “are not plausible”.  
20 It is difficult to see, however, how that could be, considering the treatment suffered  
21 by crew members during almost 17 months, in the absence of there being any solid  
22 evidence of criminal activities on their part.

23  
24 Finally, a word or two must be said about what is described as

25  
26 Switzerland’s right to seek redress on behalf of crew members and all persons  
27 involved in the operation of the vessel, irrespective of their nationality, with  
28 regard of their rights under the International Covenant on Civil and Political  
29 Rights and the Marine Labour Convention, as well as customary international  
30 law.<sup>6</sup>

31  
32 These rights could be those included in article 9 of the International Covenant and  
33 those protected by articles IV and V of the Maritime Labour Convention. The  
34 passage of the claim just cited, says the Respondent, “appears to be a reference to  
35 Switzerland’s right to exercise diplomatic protection, but such a right is not at stake in  
36 the present case and is thus also not plausible”.<sup>7</sup> It is not quite clear to me what  
37 exactly the defendant means here. What is clear is that Switzerland is not, in this  
38 case, exercising diplomatic protection; it actually could not exercise such protection  
39 on behalf of Ukrainian nationals. What Switzerland can and does do is protect its  
40 own rights, as a flag State, that is those of a unit consisting of a vessel, a crew and a  
41 cargo.

42  
43 Mr President, Members of the Tribunal, the third question is whether Switzerland has  
44 fulfilled all the requirements that the Convention places on potential applicants  
45 before they can submit a case to compulsory settlement under Section 2 of Part XV.

46  

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<sup>6</sup> Statement of Claim, para. 45 (a) (iii), cited in the Statement in Response, para. 3.49.

<sup>7</sup> Statement in Response, para. 3.49.

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

4  
5 According to article 283: “The parties to the dispute shall proceed expeditiously to an  
6 exchange of views regarding its settlement by negotiation or other peaceful means.”  
7

8 For more than a year, since March 2018, on numerous occasions and through a  
9 variety of channels, Switzerland sought to settle its dispute with Nigeria and to  
10 exchange views on its settlement. I refer you not only to the attempts cited today by  
11 Ambassador Cicéron Bühler, but also to the full list of *démarches*, which are  
12 described in the Notification.<sup>8</sup>  
13

14 Switzerland sent several diplomatic notes to the Nigerian authorities. It raised the  
15 matter in meetings with Nigerian representatives, some at the highest level, and it  
16 set out its legal position in no less than four *aide-mémoires*. In its aide-mémoire of  
17 25 January 2019, it stated that – and I invite you to look at your screens  
18

19       Efforts by Switzerland to solve this dispute through diplomatic means have  
20       been unsuccessful. In case no diplomatic resolution can be reached very  
21       shortly, Switzerland considers submitting the dispute to judicial procedure  
22       under the UN Convention on the Law of the Sea.<sup>9</sup>  
23

24 There has been no response from Nigeria on the substance of the Swiss claim or  
25 about the modes of settling the dispute until very recently. It is clear that no  
26 settlement has been reached by recourse to Section 1 of Part XV and that the  
27 obligation to exchange views has been discharged.  
28

29 Switzerland has evidently respected its obligation under article 283 of the  
30 Convention. The same cannot be said of Nigeria. As your Tribunal recalled only last  
31 month in the case opposing Ukraine to Russia: “The obligation to proceed  
32 expeditiously to an exchange of views applies equally to both parties to the  
33 dispute.”<sup>10</sup> Nigeria’s silence until very recently does not conform to the obligation to  
34 exchange views, let alone of doing so expeditiously.  
35

36 Mr President, Members of the Tribunal, you may hear Nigeria argue that there can  
37 be no urgency since Switzerland attempted to negotiate for such a long period of  
38 time. My colleague, Sir Michael Wood, will show later this morning that the condition  
39 of urgency is to be understood within a specific framework and that urgency exists  
40 without any doubt in the present case. However, before he develops these points,  
41 I should like to highlight how indefensible such an argument by the Respondent – by  
42 any respondent in a similar situation – would be.  
43

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

<sup>9</sup> Judges’ folder, tab 16, also as annex to the Notification (annex NOT/CH-50).

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

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

9  
10 Surely, the Swiss Government cannot be blamed for having, assiduously and in  
11 good faith, sought a negotiated settlement and attempted to engage Nigeria in a  
12 discussion on how to settle this dispute. These two steps are formally required by the  
13 Convention. To punish Switzerland for having tried to settle the dispute by dialogue  
14 would fly in the face of articles 286 and 283 and create a dangerous precedent in  
15 discouraging attempts at the direct resolution of disputes.

16  
17 Mr President, the time has come to end my statement. The Swiss Government's  
18 conclusion is that your Tribunal has jurisdiction over the request made by  
19 Switzerland under article 290, paragraph 5:

20  
21 (i) The present case will ultimately be decided by Annex VII arbitration. It has been  
22 brought before you under article 290, paragraph 5, of the Convention to obtain an  
23 order of provisional measures.

24  
25 (ii) Provisional measures under article 290 are binding. Once the arbitral tribunal is  
26 established, it may modify, revoke or confirm provisional measures initially  
27 prescribed by your Tribunal.

28  
29 (iii) The claim laid by Switzerland and the lack of response on the part of Nigeria  
30 unambiguously show that there is a dispute between the Parties.

31  
32 (iv) The dispute is clearly on the application or interpretation of the Convention in the  
33 sense that it concerns the flag and coastal States' rights and obligations in the  
34 exclusive economic zone respectively towards their vessels and vessels flying the  
35 flag of a third State.

36  
37 (v) Switzerland has repeatedly, but in vain, tried to engage discussions with Nigeria  
38 on the case of the "*San Padre Pio*", both on questions of substance and on the  
39 modes of settling the dispute. The conditions of articles 283 and 286 of the  
40 Convention are consequently met.

41  
42 (vi) Switzerland is supportive of efforts to promote the peaceful settlement of  
43 international disputes, in particular by consultation and negotiation between the  
44 States concerned and without the involvement of third parties. It used this approach,  
45 prompted by the quality of its relations with Nigeria. As such *démarches* are also  
46 required by the Convention, it would be inappropriate to criticize Switzerland for  
47 having sought a negotiated solution.

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

4  
5 **THE PRESIDENT:** Thank you, Mr Caflisch. I now give the floor to Madame Laurence  
6 Boisson de Chazournes.

7  
8 **MS BOISSON DE CHAZOURNES** (*Interpretation from French*): Mr President,  
9 distinguished Members of the Tribunal, it is both a great honour and a great pleasure  
10 for me to appear before your Tribunal to defend the interests of the Swiss  
11 Confederation. My task this morning is twofold. I will demonstrate, first of all, that the  
12 rights whose protection is being sought by Switzerland in the present case are  
13 plausible. Indeed, they are more than plausible. I will then continue my presentation  
14 by underscoring the link which exists between the rights that Switzerland relies on  
15 and the provisional measures requested by it. My colleague, Sir Michael Wood, will  
16 conclude this morning by establishing the urgency associated with the detention of  
17 the “*San Padre Pio*”, its cargo and its crew.

18  
19 Allow me, first of all, to look in greater detail at the plausible character of the rights  
20 whose protection is being sought by Switzerland.

21  
22 Your Tribunal, like the International Court of Justice, applies this criterion in  
23 proceedings for the prescription of provisional measures. This requirement of  
24 plausibility was expressly formulated for the first time by the Court in 2009 in  
25 *Questions relating to the Obligation to Prosecute or Extradite*, a case between  
26 Belgium and Senegal.<sup>1</sup> Since then it has become a necessary condition for the grant  
27 of provisional measures by that Court.<sup>2</sup> The Tribunal has also adopted this  
28 requirement that the alleged rights must be plausible. Following its explicit use by the  
29 Special Chamber formed to deal with the dispute between Ghana and Côte d’Ivoire,<sup>3</sup>  
30 your Tribunal also had recourse to it in the “*Enrica Lexie*” Incident.<sup>4</sup> Subsequently,  
31 the plausibility of the rights invoked has been an integral part of the criteria that must  
32 be met for your Tribunal to prescribe provisional measures.

33  
34 As you underlined in your Order adopted on 25 May 2019 in the *Case concerning*  
35 *the detention of three Ukrainian naval vessels*:

36  
37 The power of the Tribunal to prescribe provisional measures under article 290,  
38 paragraph 5, of the Convention has as its object the preservation of the rights  
39 asserted by a party requesting such measures pending the constitution and  
40 functioning of the Annex VII arbitral tribunal.<sup>5</sup>

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<sup>1</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 151, para. 57.

<sup>2</sup> See, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 18, paras. 53-54.

<sup>3</sup> *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional measures, Order of 25 April 2015, ITLOS Reports 2015, pp. 158-159, paras. 58-62.

<sup>4</sup> “*Enrica Lexie*” (*Italy v. India*), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 197, paras. 84-85.

<sup>5</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, para. 91; see also *Delimitation of the maritime boundary in the Atlantic Ocean*

1  
2 Thus, for your Tribunal to grant provisional measures, it first needs to satisfy itself  
3 that the rights which Switzerland seeks to protect are plausible.<sup>6</sup>  
4

5 In doing so, your Tribunal is not called upon “to settle the parties’ claims in respect of  
6 the rights and obligations in dispute”, nor “to determine definitively whether the rights  
7 [invoked by Switzerland] exist”.<sup>7</sup> At this stage of the proceedings  
8

9 [w]hat is required is something more than assertion but less than proof; in other  
10 words, the party must show that there is at least a reasonable possibility that  
11 the right which it claims exists as a matter of law and will be adjudged [by the  
12 Tribunal] to apply to that party’s case.<sup>8</sup>  
13

14 The threshold is thus “rather low”, to use the words of one Judge in the *M/V “Louisa”*  
15 *Case*.<sup>9</sup> Without going out on a limb in any way, distinguished Members of the  
16 Tribunal, I can affirm here and now that the rights claimed by Switzerland in the  
17 present case are plausible, as I will demonstrate shortly.  
18

19 Mr President, may I suggest that, if you wish, you take your break at this point?  
20

21 **THE PRESIDENT:** Ms Boisson de Chazournes, I think at this stage the Tribunal will  
22 withdraw for a break of 30 minutes. We will continue the hearing at noon.  
23

24 (Break)  
25

26 **THE PRESIDENT:** We will now continue the hearing. I give the floor to Ms Boisson  
27 de Chazournes to continue her statement.  
28

29 **MS BOISSON DE CHAZOURNES** (*Interpretation from French*): Mr President, the  
30 interception and then the forced detention to which “*San Padre Pio*” and its cargo are  
31 currently subject, as well as the detention of its crew, are diametrically opposed to a  
32 number of rights which Switzerland enjoys as a flag State under the United Nations  
33 Convention on the Law of the Sea. As was explained in our Notification and in our  
34 Request for the prescription of provisional measures, the rights in issue are the right

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(*Ghana/Côte d'Ivoire*), *Provisional measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 155, para. 39.

<sup>6</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, para. 91; see also “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 197, para. 84; *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 158, para. 58.

<sup>7</sup> *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 158, para. 57; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 354, para. 27.

<sup>8</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, declaration of Judge Greenwood, I.C.J. Reports 2011*, p. 47, para. 4.

<sup>9</sup> *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Separate Opinion of Judge Paik, ITLOS Reports 2008-2010*, p. 73, para. 7.

1 to freedom of navigation and other internationally lawful uses of the sea, including  
2 bunkering, the exercise by Switzerland of its exclusive jurisdiction as a flag State and  
3 the rights of the crew, whose protection is incumbent on Switzerland as the flag  
4 State.<sup>10</sup>

5  
6 Distinguished Members of the Tribunal, the rights which I have just set out are more  
7 than plausible in this case. The essential idea embodied in the principle of freedom of  
8 navigation is that of non-interference with the freedom of movement of the vessel in  
9 question. In line with the scheme of the Law of the Sea Convention and the intention  
10 of its drafters, your Tribunal added in the *M/V “Norstar” Case* the possibility of  
11 carrying out bunkering activities provided they are not connected with fishing.<sup>11</sup>

12  
13 Now, by intercepting the “*San Padre Pio*” in its exclusive economic zone, about  
14 32 nm off the coast and outside any safety zone which Nigeria could have  
15 established under article 60, paragraph 4, of the Convention,<sup>12</sup> Nigeria hampered the  
16 freedom of movement of the vessel. Accordingly, it infringed Switzerland’s freedom of  
17 navigation.

18  
19 In the same vein, by deciding to detain the “*San Padre Pio*” and its crew, Nigeria  
20 makes it impossible for the vessel to carry out the navigation schedule decided by its  
21 charterer. Not only does Nigeria hamper the “*San Padre Pio*”’s freedom of  
22 movement, but it also hinders the possibility for the vessel to carry out bunkering  
23 activities, which, let me recall, have been recognized by your Tribunal as being part  
24 of the freedom of navigation.<sup>13</sup> By so doing, Nigeria prevents Switzerland from  
25 exercising its right to the freedom of navigation guaranteed in article 58, paragraph 1,  
26 of the Convention.

27  
28 Furthermore, article 92 of the Convention on the status of ships, which is applicable  
29 in the exclusive economic zone by virtue of article 58, paragraph 2, stipulates that the  
30 flag State exercises exclusive jurisdiction over vessels flying its flag, save in  
31 exceptional cases expressly provided for in international treaties or in the  
32 Convention. That is not the case here. It is the exclusive jurisdiction of Switzerland  
33 that is applicable. Now, whether it be the interception of the vessel, its detention, the  
34 detention of its cargo, or the detention of its crew, at no time did Nigeria seek to  
35 obtain the consent of Switzerland as the flag State. Nigeria has therefore not only  
36 disregarded the exercise by Switzerland of its exclusive jurisdiction as the flag State,  
37 but continues to disregard it. Indeed, as Ambassador Cicéron Bühler has said, the  
38 proceedings instituted before the Nigerian courts against the vessel, its cargo and its  
39 crew are continuing. Just recently, new charges have been laid against the Master,  
40 the vessel and the charterer.<sup>14</sup> Besides, hearings have been postponed multiple  
41 times and apparently are set to be held by the end of the year. Members of the  
42 Tribunal, these proceedings represent a daily and ever greater affront to  
43 Switzerland’s exercise of its exclusive jurisdiction over a vessel flying its flag. They

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<sup>10</sup> *Request*, pp. 7-8, paras. 28-29; *Notification*, pp. 11-12, paras. 40-42.

<sup>11</sup> *M/V “Norstar” (Panama v. Italy)*, *Judgment*, *ITLOS Reports 2018-2019*, para. 219; *M/V “Virginia G” (Panama/Guinea-Bissau)*, *Judgment*, *ITLOS Reports 2014*, p. 70, para. 223.

<sup>12</sup> *Notification*, annex NOT/CH-11.

<sup>13</sup> *M/V “Norstar” (Panama v. Italy)*, *Judgment*, *ITLOS Reports 2018-2019*, para. 219.

<sup>14</sup> *Notification*, annex PM/CH-2, pp. 221-227.

1 violate Switzerland's right under article 58, paragraph 2, of the Convention, read in  
2 conjunction with article 92.

3  
4 Mr President, our friends opposite are making great play of the 2001 International  
5 Convention on Civil Liability for Bunker Oil Pollution Damage.<sup>15</sup> But, like it or not, that  
6 Convention in no way contradicts the position put forward by Switzerland in this case.  
7 This Convention gives jurisdiction to the courts of the coastal State only to hear civil  
8 liability claims in the case of damage caused by bunker oil spills. It is because of  
9 Switzerland's consent in ratifying the Convention that such claims are possible.  
10 Contrary to what our opponents allege, this therefore confirms the exclusive  
11 jurisdiction enjoyed by the flag State.

12  
13 Let me come now to the rights of the crew, whose protection is incumbent upon  
14 Switzerland as the flag State. Here again, Mr President, the rights invoked by  
15 Switzerland are more than plausible. Under article 56, paragraph 2, of the  
16 Convention, it is incumbent upon Nigeria, in exercising its rights and performing its  
17 duties in the exclusive economic zone, to have due regard to the duties of the flag  
18 State under article 94. This includes the treaty obligations into which Switzerland has  
19 entered, such as those included in the Maritime Labour Convention or in the  
20 International Covenant on Civil and Political Rights, which concern living and working  
21 conditions for the crew.<sup>16</sup> Professor Cafilisch reminded us of the application of those  
22 instruments. This also includes Switzerland's obligations under customary  
23 international law. By its actions, Nigeria has made it impossible for Switzerland to  
24 fulfil its obligations. In so doing, it is clear that Nigeria's exercise of its jurisdiction over  
25 the vessel, its cargo and its crew, for which there was no basis in international law,  
26 takes no account whatsoever of Switzerland's obligations as the flag State.

27  
28 Members of the Tribunal, in its Statement of 17 June 2019, Nigeria suddenly attaches  
29 great importance to the protection of the marine environment and claims that the  
30 provisions of Part XII of the Convention are applicable. First of all, rest assured that  
31 Switzerland is extremely mindful of environmental protection, as is clear from its  
32 Request for provisional measures. That being the case, let us come back to the  
33 comments made by the other side. The provisions invoked are not applicable in this  
34 case, and even if they were, *quod non*, Nigeria would not have fulfilled its obligations  
35 as laid down in article 220, paragraphs 3, 6 and 7, article 228, paragraph 1,  
36 article 230 and article 231.

37  
38 Members of the Tribunal, as I have just shown, the rights invoked by Switzerland in  
39 the present case are more than plausible.

40  
41 Let me now turn to another necessary condition for the prescription of provisional  
42 measures by your Tribunal: the existence of a link between the rights which are the  
43 subject of the pending proceedings on the merits and the requested provisional  
44 measures. As I said at the beginning of my presentation, the power of the Tribunal to

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<sup>15</sup> Statement in response of the Federal Republic of Nigeria to the request for the prescription of provisional measures of the Swiss Confederation, para. 3.19.

<sup>16</sup> The Swiss Confederation ratified the Maritime Labour Convention on 21 February 2011; see [https://www.ilo.org/dyn/normlex/fr/f?p=1000:80021:0::NO:80021:P80021\\_COUNTRY\\_ID:102861](https://www.ilo.org/dyn/normlex/fr/f?p=1000:80021:0::NO:80021:P80021_COUNTRY_ID:102861); and the International Covenant on Civil and Political Rights on 18 June 1992, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=fr&clang=fr](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=fr&clang=fr)

1 prescribe provisional measures “has as its object the preservation of the rights  
2 asserted by a party requesting such measures pending the constitution and  
3 functioning of the Annex VII arbitral tribunal”.<sup>17</sup> Therefore, the measures requested by  
4 Switzerland must meet this objective of protecting the rights it is claiming.<sup>18</sup> Here  
5 again, Mr President, Members of the Tribunal, this is indeed the case.  
6

7 The rights invoked by Switzerland on the merits are set out in paragraphs 40 to 42 of  
8 our Notification.<sup>19</sup> These are, in essence, the right to freedom of navigation and other  
9 internationally lawful uses of the sea, such as bunkering, the exercise by Switzerland  
10 of its exclusive jurisdiction as a flag State and the rights of the crew, whose protection  
11 is incumbent upon Switzerland as the flag State.  
12

13 The provisional measures requested by Switzerland can be found in paragraph 53 of  
14 our Request for the prescription of provisional measures.<sup>20</sup> They contain one general  
15 measure and three other more specific measures. I will now cover these one by one.  
16

17 As I have just said, the first measure is a more general measure. Although it has  
18 already been read out by the Registrar at the start of this hearing, allow me,  
19 Members of the Tribunal, to recall its wording:  
20

21 Nigeria shall immediately take all measures necessary to ensure that all  
22 restrictions on the liberty, security and movement of the “*San Padre Pio*”, her  
23 crew and cargo are immediately lifted to allow and enable them to leave  
24 Nigeria.  
25

26 The link with the rights claimed by Switzerland is more than obvious. The measure  
27 requested is intended to restore the exercise of the rights of which the Confederation  
28 has been deprived for nearly 17 months. It is intended to enable Switzerland to  
29 obtain the departure of the vessel and its crew from Nigeria. It is thus a question of  
30 allowing them to regain their freedom of movement in accordance with the principle  
31 of freedom of navigation. It is also a question of enforcing the principle of exclusive  
32 jurisdiction, which is being infringed by the detention and by the proceedings brought  
33 against the vessel and its crew. Finally, it is a question of allowing Switzerland to  
34 ensure respect for the rights of the crew, for which it is responsible under the  
35 Maritime Labour Convention. In conclusion, the measure seeking a lifting all  
36 restrictions on the “*San Padre Pio*” and its crew is directly linked to the rights which  
37 will be the subject matter of the future arbitral proceedings.  
38

39 The second provisional measure requested by Switzerland is more specific. It is  
40 requested that Nigeria:  
41

42 a) enable the “*San Padre Pio*” to be resupplied and crewed so as to be able  
43 to leave, with her cargo, her place of detention and the maritime areas under

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<sup>17</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, , para. 91.

<sup>18</sup> *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 159, para. 63; *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 152, para. 23.

<sup>19</sup> *Notification*, pp. 11 and 12, paras. 40 to 42.

<sup>20</sup> *Request*, p. 14, para. 53.

1 the jurisdiction of Nigeria and exercise the freedom of navigation to which her  
2 flag State, Switzerland, is entitled under the Convention.

3  
4 As the wording directly indicates, this measure seeks to allow the “*San Padre Pio*” to  
5 leave its anchorage in Nigeria so that it can complete its navigation and maintenance  
6 schedule. This measure is therefore directly linked to the rights which Switzerland is  
7 seeking to have recognized, namely the right to freedom of navigation and other  
8 internationally lawful uses of the sea, and in particular in this case bunkering  
9 activities.

10  
11 The third provisional measure concerns the crew members who have been detained  
12 on the “*San Padre Pio*” for nearly 17 months now, and it reads as follows:

13 “b) [Nigeria must] release the Master and the three other officers of the “*San Padre*  
14 *Pio*” and allow them to leave the territory and maritime areas under the jurisdiction of  
15 Nigeria.”

16  
17 Just like the previous requested measures, this measure is closely linked to the rights  
18 invoked by Switzerland in the proceedings on the merits. In this case it is a matter of  
19 preserving the exclusive jurisdiction of Switzerland as the flag State, which has been  
20 continually ignored by Nigeria since the interception of the “*San Padre Pio*” almost  
21 17 months ago. Indeed, the exercise of any form of jurisdiction by Nigeria over the  
22 crew irrevocably infringes the exclusive jurisdiction to which Switzerland is entitled as  
23 the flag State. This measure also seeks to allow Switzerland, pursuant to article 56,  
24 paragraph 2, and article 94 of the Convention, to ensure the proper fulfilment of its  
25 obligations towards the crew, including the obligations under the Maritime Labour  
26 Convention and the International Covenant on Civil and Political Rights. Here again,  
27 the link between the requested measure and the rights at stake is obvious.

28  
29 Allow me, honourable Members of the Tribunal, to underscore the basic humanitarian  
30 considerations underlying this measure.<sup>21</sup> It is now almost 17 months that these four  
31 men have been held on the “*San Padre Pio*”. You can no doubt imagine that such a  
32 period of detention must leave a physical, psychological and emotional mark.

33  
34 Turning now to the last measure requested by Switzerland, Nigeria is asked to  
35 “c) suspend all court and administrative proceedings and refrain from initiating new  
36 ones which might aggravate or extend the dispute submitted to the Annex VII arbitral  
37 tribunal.”

38  
39 Mr President, this measure is once again directly linked to the rights claimed by  
40 Switzerland on the merits. Given the conditions in which the vessel was intercepted,  
41 in the exclusive economic zone, the exercise of any form of jurisdiction by Nigeria  
42 over the “*San Padre Pio*”, its crew and its charterer undoubtedly affects Switzerland’s  
43 right for its vessels not to be subject to proceedings brought by third States. The link  
44 between Switzerland’s right to exercise its exclusive jurisdiction as the flag State and  
45 the requested measure is therefore very clear. In this respect it is worth noting that  
46 any new proceedings that might be initiated by Nigeria would necessarily aggravate

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<sup>21</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Order of 25 May 2019, para. 112; “*Enrica Lexie*” (*Italy v. India*), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, p. 197, para. 133; also *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, pp. 61-62, para. 155.

1 the dispute that exists in respect of the failure to respect Switzerland's exclusive  
2 jurisdiction.

3  
4 I would like to add, Members of the Tribunal, that this right to exercise its exclusive  
5 jurisdiction over a vessel flying its flag is not the only Swiss right affected by those  
6 proceedings. The proceedings also have the serious consequence of depriving  
7 Switzerland of its freedom of navigation and other internationally lawful uses of the  
8 sea. Indeed, it is because of those proceedings that the vessel is today forcibly  
9 anchored at Port Harcourt and the crew is in detention. It is also because of those  
10 proceedings that Switzerland cannot ensure that it complies with its obligations vis-à-  
11 vis the crew. All this makes even more manifest the link between the requested  
12 measure and the rights which Switzerland is seeking to have recognized on the  
13 merits.

14  
15 We can therefore conclude that there plainly exists a link between the various  
16 measures requested by Switzerland and the rights which it claims in the present  
17 case.

18  
19 Before I come to my conclusions, I wish to make two important points. The purpose  
20 of these proceedings is to preserve the rights invoked by Switzerland in the arbitral  
21 proceedings. The grant of the prescribed measures does not in any way constitute a  
22 pre-judgment on the merits. The urgent requests made by Switzerland are not the  
23 same as the requests on the merits. To convince you, I invite the Members of the  
24 Tribunal to compare Switzerland's submissions in our Notification with those in our  
25 Request for the prescription of provisional measures.<sup>22</sup> Whereas on the merits  
26 Switzerland requests a declaration of a breach of a number of international  
27 obligations and a finding of Nigeria's international responsibility, Switzerland is  
28 seeking before you today only to obtain the protection *pendente lite* of the substance  
29 of the right invoked. Let me repeat, because this is an important point, the aim is not  
30 "to obtain an interim judgment in favour of a part of the claim".<sup>23</sup>

31  
32 The second point that I would like to raise is that, contrary to what our opponents  
33 argue, the grant of these provisional measures is not likely to cause irreparable  
34 prejudice to the rights invoked by Nigeria;<sup>24</sup> far from that, I would say. On the merits,  
35 Switzerland criticizes the improper exercise by Nigeria of its jurisdiction, whereas  
36 Nigeria claims, wrongly, that it is within its rights. The request to suspend  
37 proceedings makes it possible to preserve the contentions at issue.<sup>25</sup> Otherwise,  
38 pending the final decision, only the rights invoked by Nigeria would be applied. At the  
39 same time, the rights relied on by Switzerland would be continually violated. With the  
40 grant of the requested provisional measure, the rights of both Parties would be  
41 protected. Nigeria retains its ability to prosecute and to enforce its laws and  
42 Switzerland, for its part, continues to enjoy its rights under the Convention – all until  
43 such time as the arbitral tribunal gives its final decision.

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<sup>22</sup> *Request*, p. 14, para. 53; *Notification*, pp. 15-16, para. 45.

<sup>23</sup> *United States Diplomatic and Consular Staff in Tehran, Order of 24 December 1979, I.C.J. Reports 1979*, p. 16, para. 28 citing *Factory of Chorzów, Order of 21 November 1927, P.C.I.J. Series A no. 12*, p. 10.

<sup>24</sup> Statement in Response of the Federal Republic of Nigeria, paras. 3.43-3.44.

<sup>25</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, pp. 38-39, paras. 41 to 44.

1  
2 The same reasoning applies to the provisional measure concerning the release of the  
3 four officers. Their detention constitutes a daily affront to the rights invoked by  
4 Switzerland. On the other hand, their release would allow the preservation of the  
5 rights of both Parties to the proceedings because if Switzerland's case is not upheld  
6 on the merits, it will always be possible for Nigeria to resume its criminal proceedings  
7 against the Ukrainian officers. If need be, certain procedures exist for securing the  
8 return of the Ukrainian officers.

9  
10 Mr President, I now come to my conclusion. The rights on which Switzerland relies  
11 are, we believe, plausible. It also seems clear that the requested provisional  
12 measures are firmly linked to the protection of those rights.

13  
14 Mr President, Members of the Tribunal, I thank you for your kind attention and would  
15 be grateful, Mr President, if you would give the floor to Sir Michael Wood so that he  
16 can demonstrate to you the urgency of the situation that has now led Switzerland to  
17 request the prescription of provisional measures. Thank you.

18  
19 **THE PRESIDENT:** Thank you, Ms Boisson de Chazournes. I now give the floor to  
20 Sir Michael Wood.

21  
22 **MR WOOD:** Mr President, Members of the Tribunal, it is a great honour to appear  
23 before you, and to do so on behalf of the Swiss Confederation.

24  
25 My main task today is to address the requirement of urgency under article 290,  
26 paragraph 5, of the Convention; that is to say, the existence of a real and imminent  
27 risk of irreparable prejudice to Switzerland's rights.

28  
29 I shall deal first with some legal aspects of the urgency requirement. I shall then  
30 explain that, on the facts of this case, the requirement is met in respect of the  
31 provisional measures requested by Switzerland.

32  
33 I can be relatively brief on the law relating to urgency under article 290, paragraph 5,  
34 of the Convention. The Tribunal is very familiar with it. It was summarized as recently  
35 as 25 May of this year, at paragraph 100 of the Tribunal's Provisional Measures  
36 Order in the *Ukraine v. Russian Federation* case. That paragraph is cited in Nigeria's  
37 written statement.<sup>26</sup>

38  
39 The requirement of urgency under paragraph 5 means that the party requesting  
40 provisional measures needs to show that there is a real and imminent risk that  
41 irreparable prejudice may be caused before the constitution and functioning of the  
42 Annex VII arbitral tribunal. Urgency is to be measured from the present, from the  
43 time of the provisional measures proceedings, not by reference to the past. What  
44 matters for these provisional measures proceedings is whether a risk will emerge  
45 between now and the time when the Annex VII arbitral tribunal is constituted and is  
46 itself operational and able to prescribe provisional measures. That time is some  
47 months off: first the arbitral tribunal has to be constituted, then it needs to adopt its  
48 rules of procedure, appoint a registry, familiarize itself with the case, organize a

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<sup>26</sup> *Statement in Response*, p. 22, para. 3.23.

1 hearing on provisional measures and prepare a Provisional Measures Order. Our  
2 friends opposite seek to downplay this period by referring to it in their written  
3 statement as “a short period of time”.<sup>27</sup> But even they appear to assume that it would  
4 be around four months,<sup>28</sup> as we can see from some of their evidence, though it could  
5 of course be longer.

6  
7 A further point of importance is that, in the words of the Tribunal in *Arctic Sunrise*  
8 (citing the *Land Reclamation* case), “there is nothing in article 290, paragraph 5, of  
9 the Convention to suggest that the measures prescribed by the Tribunal must be  
10 confined to the period prior to the constitution of the Annex VII arbitral tribunal”.<sup>29</sup>

11  
12 The timing of our Notification and Statement of Claim, and of our Request for  
13 provisional measures, is a reflection of the very considerable efforts Switzerland has  
14 made to resolve the matter amicably. As our Agent, Ambassador Cicéron Bühler,  
15 has just explained, and as we set out at paragraph 25 of the Notification and  
16 Statement of Claim, Switzerland has made numerous efforts at all levels to resolve  
17 the matter through diplomatic channels.<sup>30</sup> Switzerland has acted very much in the  
18 spirit of what the Permanent Court said in the *Free Zones* case – another case  
19 involving Switzerland – namely, that “the judicial settlement of international  
20 disputes ... is simply an alternative to the direct and friendly settlement of such  
21 disputes between the Parties”.<sup>31</sup>

22  
23 As you have heard from my colleagues, there was no substantive response from  
24 Nigeria to Switzerland’s many efforts. This was so even after the high-level Davos  
25 meeting, on 25 January 2019, between the Swiss Minister for Foreign Affairs and the  
26 Nigerian Minister of Industry. At that meeting, the Nigerian Minister undertook to take  
27 the Swiss aide-mémoire back to the Minister for Foreign Affairs in Abuja.<sup>32</sup> However,  
28 Nigeria never replied to Switzerland; all that we heard was the sound of silence.  
29 That, I might note, is in stark contrast to the detailed explanations that Nigeria and its  
30 lawyers have now sought to come up with, faced with the present proceedings –  
31 explanations which, for the most part, as we have said, go to the merits of the case.

32  
33 Mr President, there is one last point I need to make on the legal framework for  
34 provisional measures. Throughout its written statement, Nigeria seeks to argue that  
35 provisional measures are “even more exceptional”,<sup>33</sup> to use its words, under  
36 paragraph 5 of article 290 than under paragraph 1. Nigeria says that the requirement  
37 of urgency is “exceptionally strict” for this Tribunal, when it is acting under

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<sup>27</sup> *Statement in Response*, p. 22, para. 3.24.

<sup>28</sup> Nigeria’s Instructions to an expert: *Statement in Response*, annex 21, para. 2.1.

<sup>29</sup> “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, *ITLOS Reports 2013*, p. 248, para. 84.

<sup>30</sup> *Notification under Article 287 and Annex VII, Article 1, of UNCLOS and Statement of Claim and Grounds on which it is based* (hereinafter *Notification*), 6 May 2019, p. 6-9, paras. 24-26. The *Notification* is itself annexed to the *Request for the Prescription of Provisional Measures of the Swiss Confederation, under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea*, 21 May 2019 (hereinafter *Request*).

<sup>31</sup> *Case of the Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, Series A, No. 22*, p. 13.

<sup>32</sup> *Notification*, p. 8, para. 25 (m).

<sup>33</sup> See, for example, *Statement in Response*, p. 16, para. 3.3.

1 paragraph 5. In our submission, that argument is based neither on the text of  
2 paragraph 5 nor on your case law.

3  
4 The text of paragraph 1 may be silent about the requirement of urgency, but that  
5 element is clearly inherent in the very concept of provisional measures. Whether  
6 under paragraph 1 or paragraph 5, provisional measures are conditioned by the  
7 existence of urgency. Requiring the presence of an exceptional level of urgency  
8 under paragraph 5 is not, in our submission, a good faith reading of article 290. It  
9 would, I suggest, deprive this innovative and important provision of the Convention of  
10 much of its effect.

11  
12 In fact, the only relevant difference between paragraph 5 and paragraph 1 is the  
13 period of time to be taken into consideration when assessing risk. The fact that this  
14 Tribunal will probably not be the forum to determine the merits is not, in our  
15 submission, a relevant factor. At the stage of provisional measures, this Tribunal is in  
16 exactly the same position as a court or tribunal which is to hear the merits. In any  
17 event, the Annex VII arbitral tribunal to be constituted may always modify, revoke or  
18 affirm the measures prescribed.

19  
20 Mr President, Members of the Tribunal, I now turn to the application of the law on  
21 provisional measures to the facts of the present case, and I would like to begin with  
22 three general points.

23  
24 First and foremost, as at today, the “*San Padre Pio*”, four of her crew members and  
25 what is left of her cargo have been detained in Nigeria for nearly 17 months. This  
26 causes serious risk to the vessel, crew and cargo. The risk is real and imminent.

27  
28 Second, the “*San Padre Pio*” is anchored in Nigerian waters. Despite several  
29 attempts, which we mentioned this morning and which were detailed in the  
30 Notification,<sup>34</sup> it has proved impossible to get access to the vessel, her crew and  
31 cargo in order to examine the condition of the vessel, the health of the four crew  
32 members, and the quality of the remaining gasoil. Under these circumstances, the  
33 risk of irreparable and imminent prejudice to Switzerland’s rights may be inferred  
34 from the prolonged detention of the vessel, her crew and cargo. We have referred in  
35 the Request<sup>35</sup> to what the International Court had to say in the *Corfu Channel* case;  
36 and I quote:

37  
38 By reason of this exclusive control, the other State, the victim of a breach of  
39 international law, is often unable to furnish direct proof of facts giving rise to  
40 responsibility. Such a State should be allowed a more liberal recourse to  
41 inferences of fact and circumstantial evidence. This indirect evidence is  
42 admitted in all systems of law, and its use is recognized by international  
43 decisions.<sup>36</sup>

44  
45 In other words – and these are now my words – there is a “general principle of law”  
46 within the meaning of article 38, paragraph 1(c), of the ICJ Statute. This is to the  
47 effect that where direct proof of facts is not possible because of the exclusive control

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<sup>34</sup> *Notification*, p. 9-10, paras. 28-29, 31.

<sup>35</sup> *Request*, p. 9, para. 37.

<sup>36</sup> *Corfu Channel, Judgment of 9 April 1949, I.C.J Reports 1949*, p. 18.

1 of one party, the other party may be allowed “a more liberal recourse to inferences of  
2 fact and circumstantial evidence.”  
3

4 Third, in the circumstances of the present case it is particularly appropriate to have in  
5 mind the principle that, in the words of your *Saiga (No. 2)* Judgment,  
6

7 the Convention considers a ship as a unit, as regards ... the right of the flag  
8 State to seek reparation for loss or damage caused to the ship by acts of other  
9 States ... . Thus the ship, everything on it, and every person involved or  
10 interested in its operations are treated as an entity linked to the flag State.<sup>37</sup>  
11

12 This finding by the Tribunal has become part of the *jurisprudence constante* of the  
13 Tribunal, as can be seen from the *M/V “Virginia G” Case*.<sup>38</sup> The Annex VII arbitral  
14 tribunal in the *Arctic Sunrise* award on the merits likewise applied the principle of the  
15 unity of the ship, referring back both to *Saiga (No. 2)* and to *Virginia G*.<sup>39</sup>  
16

17 In the present case, the importance of the unity of the vessel and of Switzerland’s  
18 interest in the vessel, crew and cargo, is clear. As the flag State of the vessel,  
19 Switzerland has important responsibilities under international law, including under  
20 the Convention on the Law of the Sea and including in relation to the welfare of the  
21 crew. It is, of course, irrelevant that the four crew members are not Swiss nationals,  
22 but Ukrainian. Considerations of humanity are blind to nationality. The vessel and  
23 cargo are owned by Swiss firms. As a result of Nigeria’s unlawful actions in  
24 connection with the “*San Padre Pio*”, natural and juridical persons connected with  
25 the vessel have suffered and continue to suffer damages of a personal and  
26 economic nature. They all form part of the unit of the vessel, a vessel which flies the  
27 flag of Switzerland.  
28

29 Mr President, Members of the Tribunal, notwithstanding the principle of the unity of  
30 the vessel, I shall address the three elements in turn: the vessel; the Master and  
31 three other officers; and the cargo. I shall also mention the environmental concerns  
32 to which the ongoing situation gives rise.  
33

34 So I turn first to the vessel. Each day that the “*San Padre Pio*” is detained is a day  
35 when Switzerland is denied the right to freedom of navigation in respect of a vessel  
36 flying its flag, and the right to exercise jurisdiction over its vessel. Such denial is not  
37 capable of purely monetary reparation. Switzerland’s rights as a flag State are not  
38 just of monetary value; they reflect Swiss sovereignty, Switzerland’s reputation as a  
39 responsible flag State, and Switzerland’s economic interest in the proper functioning  
40 of its merchant fleet.  
41

42 While, as I have just recalled, it has been impossible to assess the condition of the  
43 “*San Padre Pio*”, the continuing detention clearly puts the vessel at a severe risk that  
44 she may soon become unseaworthy because it is not possible to conduct the high  
45 level of maintenance that is required. Nigeria’s “evidence” to the contrary at

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<sup>37</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 48, para. 106.

<sup>38</sup> *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 48, para. 126.

<sup>39</sup> “*Arctic Sunrise*” (*Netherlands v. Russian Federation*), Award on the Merits, 14 August 2015, paras. 170-176: <https://pcacases.com/web/sendAttach/1438>.

1 Annex 21 of their written statement is, with respect, thoroughly unconvincing; it is  
2 based solely on a limited number of documents supplied by Nigeria’s lawyers to their  
3 expert. The expert admits to “know[ing] little about the ship or the maintenance which  
4 has taken place”, and so writes “by necessity, in general terms” – those are his  
5 words – and his opinion, as you will see, is subject to far-reaching “Limitations”.<sup>40</sup>  
6

7 The vessel has been immobilized without necessary precautions for a long time, and  
8 in very humid climatic conditions. Ships can of course be laid up for long periods if  
9 necessary, but only where maintenance guidelines are properly followed. That was  
10 impossible in the present case because of lack of access to the vessel. It has further  
11 not been possible to provide the vessel with the necessary spare parts to carry out  
12 proper maintenance. At paragraph 38 of the Provisional Measures Request, we set  
13 out an impressive but still non-exhaustive list of issues identified by the operator of  
14 the vessel as of the beginning of this year. You can see them on the screen. I will not  
15 repeat them here; they are at tab 17 of your folders.<sup>41</sup>  
16

17 In short, Mr President, Members of the Tribunal, the “*San Padre Pio*” is at risk of  
18 remaining in detention until she has lost all value. Because of her prolonged  
19 immobility and the impossibility of carrying out full maintenance operations, her value  
20 has decreased enormously.  
21

22 The ongoing detention of the “*San Padre Pio*” puts at risk not only the safety and  
23 security of the vessel but also the safety and security of the Master and the three  
24 other officers. The four officers – the Master, Andriy Vaskov, and the three officers,  
25 Mykhaylo Garchev, Vladyslav Shulga and Ivan Orlovskiy – have now been confined,  
26 first on board the vessel, then in prison, and then once again on board the vessel,  
27 under armed guard, for nearly 17 months (since January 2018). For nearly  
28 17 months they have been separated from their families: from their wives, their  
29 children, their parents. In addition, it has been difficult to get permission for the crew  
30 to see a doctor, even when it was urgent. As the Agent has explained this morning,  
31 and as is described in our Notification,<sup>42</sup> the proceedings against the four crew  
32 members have made little progress. They are thus deprived of their right to be tried  
33 without delay. The psychological stress that all of this involves must be enormous.  
34 The harm that continues to be suffered by the Master and the three other officers is  
35 irreparable. As frequently has been said, every day spent in detention is  
36 irrecoverable.  
37

38 I will now turn very briefly to two cases that involved similar issues, *Arctic Sunrise*<sup>43</sup>  
39 and the *Case involving three Ukrainian naval vessels*.<sup>44</sup> There are of course others,

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<sup>40</sup> Nigeria’s Instructions to an expert: *Statement in Response*, annex 21, paras. 2.1 and 3.3, and ‘Limitations’.

<sup>41</sup> Judges’ folder, tab 17, List of issues of “*San Padre Pio*” identified by the operator; see also *Request*, p. 9-10, para. 38, and annex PM/CH-7.

<sup>42</sup> *Notification*, p. 5, para. 20, and annexes NOT/CH-31-34.

<sup>43</sup> “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230.

<sup>44</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, *ITLOS Reports 2018-2019*, to be published.

1 such as *ARA Libertad*<sup>45</sup> and *Virginia G*<sup>46</sup> As I have said, I can be very brief since the  
2 Tribunal is certainly very familiar with them.

3  
4 In *Arctic Sunrise*, the arguments of the Netherlands were strikingly similar to those of  
5 Switzerland in this case. I would respectfully refer you to paragraph 87 of your Order  
6 of 22 November 2013. In light of those arguments, the Tribunal ordered the  
7 Respondent immediately to release the vessel and all persons who had been  
8 detained; and ensure that the vessel and all persons detained be allowed to leave  
9 the territory and maritime areas under the jurisdiction of the Respondent.<sup>47</sup>

10  
11 Mr President, Members of the Tribunal, in the recent *Ukraine v. Russian Federation*  
12 case, Ukraine also made a similar request in respect of its vessels and crew  
13 members.<sup>48</sup>

14  
15 There are of course differences between these cases and the present one, but there  
16 are striking similarities. For example, while the vessels in *Ukraine v. Russian*  
17 *Federation* had a different status to that of the “*San Padre Pio*”, and were being used  
18 for public purposes, and while the crew were servicemen, we would submit that such  
19 differences are not material when considering the relevance, for provisional  
20 measures purposes, of the deterioration of the vessel and the individual rights of the  
21 crew members. Just as in the case of the Ukrainian vessels, the “*San Padre Pio*”  
22 may be permanently lost if it continues to deteriorate, and the rights of the crew  
23 members are infringed with every passing day.

24  
25 Ambassador Cicéron Bühler has already drawn the Tribunal’s attention to the risk of  
26 piracy and armed attack in the Gulf of Guinea and specifically in the Bonny River  
27 area, exemplified by the violent piratical attack that took place on the night of 15 April  
28 this year. This attack, which is described in our written pleadings,<sup>49</sup> endangered the  
29 lives of crew members and others on board the vessel. The robbers were armed with  
30 machine guns, there was shooting, and very sadly one of the Nigerian Navy guards  
31 was wounded. A few days later, another tanker, anchored off Bonny Island and  
32 identified as the “*Apecus*”, was attacked and six members of the crew were  
33 kidnapped.<sup>50</sup>

34  
35 Mr President, Members of the Tribunal, as you will appreciate, the safety of the four  
36 officers of the “*San Padre Pio*” is a matter of the most utmost concern. They remain  
37 at constant risk of being kidnapped, injured or even killed. For almost 17 months,  
38 they have been confined to prison on an immobile vessel in an area where the risk of  
39 piratical attack is high. It is clear from recent events that the Nigerian authorities are  
40 not able to prevent such attacks. An attack like that of 15 April may be repeated at  
41 any time before the Annex VII arbitral tribunal is in a position to act. There is thus a

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<sup>45</sup> “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, *ITLOS Reports 2012*, p. 332.

<sup>46</sup> *M/V “Virginia G” (Panama/Guinea-Bissau)*, *Judgment*, *ITLOS Reports 2014*, p. 4.

<sup>47</sup> “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, *ITLOS Reports 2013*, p. 252, para. 105.

<sup>48</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, *ITLOS Reports 2018-2019, to be published*, paras. 102, 106.

<sup>49</sup> *Notification*, p. 10, para. 30; *Request*, p. 11, para. 42; see also Judges’ folders, tab 18, Pictures related to the piratical attack of 15 April 2019.

<sup>50</sup> *Notification*, p. 10, para. 30, and annex NOT/CH-58.

1 constant, daily risk of a similar or even more serious attack; and the vessel, crew and  
2 cargo may then suffer a far worse fate than on the earlier occasion.

3  
4 Mr President, we are confident that the Members of the Tribunal will have in mind the  
5 serious humanitarian concerns to which the continued confinement of the Master of  
6 the “*San Padre Pio*” and the three officers gives rise. The Tribunal’s case law on this  
7 matter is clear. You have repeatedly recognized, since your very first case on the  
8 merits, “*Saiga*” (No. 2), that “considerations of humanity must apply in the law of the  
9 sea as they do in other areas of international law”.<sup>51</sup> I would refer to your most recent  
10 pronouncement in the *Ukraine v. Russian Federation* Order, where you stated that  
11 “the continued deprivation of liberty and freedom of Ukraine’s servicemen raises  
12 humanitarian concerns.”<sup>52</sup>

13  
14 Mr President, I now turn to the cargo. The ongoing detention puts at risk the cargo of  
15 the “*San Padre Pio*”. In light of the recent extension of the charges to the charterer,  
16 the cargo appears at risk of being imminently seized. In any event, the prolonged  
17 detention has already forced the vessel to use substantial amounts of the oil for its  
18 own basic functioning.

19  
20 Moreover, even the remaining cargo may be lost; the preservation of the quality of  
21 the oil cannot be guaranteed over such a long time and under the prevailing  
22 conditions. Some deleterious reactions undergone by gas oil during storage are  
23 inevitable; but their rate depends inter alia on the concentration of oxygen, the  
24 amount of light and the storage temperature. None of these factors can be controlled  
25 effectively in the current circumstances of storage. Nigeria, however, for its part,  
26 seeks to rely on the interim forfeiture order against the cargo, and apparently argues  
27 that this will preserve its value pending the arbitral tribunal’s final award. We  
28 seriously doubt that. Among other things, it ignores the fact that the ship and the  
29 cargo are a unit.

30  
31 More generally, Mr President, the prolonged detention of the “*San Padre Pio*” has  
32 resulted in harm of an economic nature to persons involved or interested in the  
33 operation of the vessel. Nigeria’s actions deprive the owner and the charterer of their  
34 property, which, over such a long period of time, inevitably causes important losses  
35 of profits and business opportunities. And, as we have seen, in the light of the  
36 piratical attacks in the region, a permanent risk exists that the vessel, together with  
37 her cargo and crew, will be hijacked, with serious consequences for all those  
38 concerned with the vessel. The risk must be prevented that damage is further  
39 aggravated through seizure or hijacking of the vessel and/or the cargo.

40  
41 There is also a risk of collision in the crowded area of the Bonny River. This too has  
42 materialized. As the Agent described this morning, just two weeks ago, on the night  
43 of 5 June, the “*M/V Invictus*” dragged its anchor and collided twice with the “*San*  
44 *Padre Pio*”. The inspection report indicates that the “*M/V Invictus*” was without crew  
45 and had been detained by the Nigerian authorities for over three years. It is,  
46 apparently, one among many such vessels in Nigerian waters. In short,

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<sup>51</sup> *M/V “SAIGA” (Saint Vincent and the Grenadines v. Guinea), Prompt Release, Judgment, ITLOS Reports 1997*, p. 62, para. 155.

<sup>52</sup> *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019, to be published*, para. 112.

1 Mr President, Members of the Court, the vessel, crew and cargo are in constant  
2 danger.

3  
4 Finally, Mr President, I turn briefly to environmental concerns, which are increasing.  
5 While Switzerland has not, at the present stage, sought provisional measures “to  
6 prevent serious harm to the marine environment”, as provided for in article 290 of the  
7 Convention, we reserve the right to do so. We have focused on the vessel, crew and  
8 cargo. Nevertheless, if the provisional measures are not granted, the situation may  
9 evolve so as to pose a real risk to the environment, in particular from the vessel  
10 itself, as it deteriorates. It is far from clear that the vessel will remain in a sufficient  
11 condition so as to be able to avoid causing environmental harm, in particular through  
12 continued contact of the vessel’s paint with the water and the lack of regular  
13 repainting. Also, in light of the piratical attacks in the region, and the ever present  
14 threat of collisions, a permanent risk exists that the vessel, together with its cargo,  
15 will be attacked, hijacked, or severely damaged. That may lead to serious harm to  
16 the marine environment. Environmental damage is, of course, often long-lasting, and  
17 cannot always be made good by monetary payments.

18  
19 Mr President, if the present situation is allowed to continue, there is a significant risk  
20 that a then worthless “*San Padre Pio*” will be abandoned on a beach, left to pollute  
21 the area for generations to come. This has happened to at least one vessel in a  
22 similar predicament – shown here on your screens –<sup>53</sup>, the “*Anuket Emerald*”, about  
23 which you heard earlier today. The “*Anuket Emerald*” was arrested for alleged  
24 violation of Nigeria’s petroleum laws, was forfeited at the end of the trial court’s  
25 decision of March 2016 and the appeal court’s judgment of December 2017; and it  
26 ended up wrecked on a beach. Switzerland does not want its own flagged vessel to  
27 end up beached and a hazard to the environment like the “*Anuket Emerald*”.

28  
29 Mr President, Members of the Tribunal, I shall now make some concluding  
30 observations. Both in our written Request, and in our oral pleadings today, we have  
31 shown that the requirements for the prescription of provisional measures under  
32 article 290, paragraph 5, are met. We have shown that a dispute exists between  
33 Switzerland and Nigeria concerning the interpretation or application of the  
34 Convention, and that the Annex VII tribunal will have *prima facie* jurisdiction. We  
35 have shown that the rights invoked by Switzerland are at least plausible. We have  
36 shown that there is a direct link between the provisional measures requested and the  
37 rights which Switzerland seeks to protect in the case on the merits. And we have  
38 shown that the urgency of the situation requires the prescription of the provisional  
39 measures set out in our Request.

40  
41 We are, of course, aware that the Tribunal may prescribe measures different in  
42 whole or in part from those requested.<sup>54</sup> Nevertheless, we consider that the  
43 measures we have requested at paragraph 53 of the Request are those which are  
44 both necessary and appropriate in the circumstances of this case.

45  
46 In sections V and VI of chapter 1 of its written statement, Nigeria seeks to question  
47 the appropriateness of the measures requested. We accept of course that the

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<sup>53</sup> Judges’ folder, tab 19, Picture of “*Anuket Emerald*” abandoned on a beach, 18 July 2018.

<sup>54</sup> Rules of the Tribunal, art. 89, para. 5.

1 respective rights of both Parties may need to be taken into account. In our view,  
2 however, the prescription of the measures requested will not cause irreparable harm  
3 to Nigeria's rights under the Convention, nor will they prejudice the decision on the  
4 merits. In arguing the contrary, Nigeria relies on statements in the case law but does  
5 so without regard to the wholly different context of the cases, which are fact-specific.  
6 For example, in "*Enrica Lexie*", a central issue was which of the two States' Parties  
7 to the case had jurisdiction.

8  
9 The requirement not to prejudice the decision on the merits will surely be met, as  
10 Professor Boisson de Chazournes has just explained. In prescribing measures, the  
11 Tribunal will take care not to reach definitive conclusions on the facts and on the law  
12 that lie at the heart of the case. It may well expressly state that the Order is without  
13 prejudice to the merits. If necessary, the Tribunal could perhaps devise ways to  
14 ensure that the measures prescribed do not prejudice Nigeria's rights.

15  
16 As Professor Boisson de Chazournes has just explained, the provisional measures  
17 we request consist of a general measure and three specific measures. In summary,  
18 we request the Tribunal to prescribe that "Nigeria shall immediately take all  
19 measures necessary to ensure that all restrictions on the liberty, security and  
20 movement of the "*San Padre Pio*", her crew and cargo are immediately lifted to allow  
21 and enable them to leave Nigeria".

22  
23 It is necessary for the Tribunal to prescribe such measures now in order to save the  
24 vessel, the four crew members and the cargo. We have described this morning the  
25 conditions in which, after almost 17 months, the vessel, the members of the crew,  
26 and the cargo find themselves. The vessel may soon become a total write-off and  
27 have to be abandoned. The four crew members and their loved ones suffer daily  
28 deprivation, and worse. The cargo constantly loses value, and so does the vessel;  
29 and there may develop a serious risk of marine pollution, with all that that entails for  
30 the local inhabitants and the sea upon which so much depends.

31  
32 In short, Mr President, Members of the Tribunal, the ongoing detention of the vessel,  
33 crew and cargo is already causing irreparable prejudice to Switzerland's rights as the  
34 flag State. It will cause further such prejudice if the provisional measures requested  
35 by Switzerland are not prescribed, and implemented.

36  
37 As the Tribunal ruled in its first provisional measures case, *M/V "SAIGA" (No. 2)*:

38  
39 the rights of [the flag State] would not be fully preserved if, pending the final  
40 decision, the vessel, its Master and the other members of the crew, its owners  
41 or operators were to be subjected to any judicial or administrative measures  
42 in connection with the incidents leading to the arrest and detention of the  
43 vessel and to the subsequent prosecution and conviction of the Master.<sup>55</sup>

44  
45 The same applies, we submit, some 20 years later, in the "*San Padre Pio*" case.

46  
47 Mr President, Members of the Tribunal, with that we have concluded Switzerland's  
48 first round of oral presentations. We thank you for your kind attention.

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<sup>55</sup> *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p. 38, para. 41.*

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**THE PRESIDENT:** Thank you, Sir Michael Wood. This concludes the first round of oral arguments by Switzerland. We will continue the hearing in the afternoon at 3 p.m. to hear the first round of oral arguments by Nigeria. The sitting is now closed.

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