

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2019

Friday, 21 June 2019, at 3 p.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
		Markiyan 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

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 afternoon. The Tribunal will continue the hearing in the
2 M/T “*San Pedro Pio*” case. This afternoon we will hear the first round of oral
3 arguments presented by Nigeria. May I invite the Co-Agent of Nigeria, Ms Chinwe
4 Uwandu, to begin her statement?
5

6 **MS UWANDU:** Mr President, honourable Members of the Tribunal, it is my privilege
7 and honour to appear before you today as Co-Agent for the Federal Republic of
8 Nigeria. May I begin by expressing Nigeria’s respect for, and deep gratitude to, all
9 the Members of this honourable Tribunal for their invaluable contribution to the just
10 and peaceful settlement of international disputes.
11

12 At the outset, before I introduce our case, I would like to make it clear that Nigeria
13 does not consider itself to have an adversarial relationship with Switzerland. On the
14 contrary, Switzerland has been and remains a friend and partner of Nigeria. Our
15 close relationship is multi-faceted and rooted in shared values and mutual interests
16 in sustainable economic development, human rights, the rule of law, and maritime
17 security.
18

19 Indeed, Nigeria is Switzerland’s second-largest trading partner in sub-Saharan
20 Africa.¹ Nigeria and Switzerland have committed to further enhancing their economic
21 relationship pursuant to a Joint Declaration on Cooperation signed by Nigeria and
22 the European Free Trade Association, of which Switzerland is a member.²
23

24 As a reflection of our shared values, Nigeria and Switzerland have engaged in an
25 annual human rights dialogue since 2011.³ That same year, we entered into a
26 Migration Partnership to address cooperatively and comprehensively the challenges
27 of human trafficking, the protection of refugees, and enhanced technical
28 cooperation.⁴
29

30 Our shared values also include a mutual commitment to the fight against corruption.
31 Nigeria greatly appreciates the fact that the first country to return looted assets was
32 Switzerland.⁵ In 2016, Nigeria and Switzerland signed a Memorandum of
33 Understanding on Mutual Legal Assistance in Criminal Matters.⁶
34

35 On issues of maritime security, Nigeria is pleased that Switzerland is an active
36 member of the G7++ Friends of the Gulf of Guinea, an initiative that brings together
37 partners to jointly combat illegal maritime activities in the Gulf of Guinea, including

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

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

³ Switzerland Federal Department of Foreign Affairs, Switzerland and Nigeria, “Human Security”, <https://www.eda.admin.ch/countries/nigeria/en/home/switzerland-and/menschliche-sicherheit.html> (last access 19 June 2019).

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

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

⁶ *Ibid.*

1 piracy and illicit trade activities, to ensure marine security and economic
2 development.⁷

3
4 Given our deep and collaborative relationship, particularly on issues related to
5 combating corruption and illegal maritime activities, Nigeria was genuinely surprised
6 by Switzerland's decision to institute arbitral proceedings under Annex VII of the
7 United Nations Convention on the Law of the Sea by its Notification and Statement
8 of Claim filed on 6 May 2019, which was followed on 21 May 2019 with the Request
9 for Provisional Measures that brought us to this honourable Tribunal today.

10
11 Mr President, honourable Members of the Tribunal, I say that Nigeria was surprised
12 by these filings by Switzerland because the vessel at issue in these proceedings –
13 the *M/T "San Padre Pio"* – while operating to supply a major international partner in
14 the production of oil from Nigeria's exclusive economic zone, has been implicated in
15 the illegal bunkering of petroleum products that have all the hallmarks of oil stolen
16 from Nigeria, or illegally refined in or around Nigeria, or both. It is absolutely clear
17 that the vessel was engaging in this bunkering activity in the Odudu field, in the
18 middle of the night, contrary to the explicit conditions provided for in the required
19 permit of the Nigerian Navy to ensure marine safety, and other permits required
20 under Nigerian law were also missing. Indeed, Mr President and honourable
21 Members, upon further investigation, it was discovered that information on various
22 permits and documents submitted by the "*San Padre Pio*"'s agent and officers to the
23 Nigerian authorities were falsified in material aspects, and when tested, the quantity
24 and quality of the fuel carried by the "*San Padre Pio*" was different from what the
25 ship master had declared to Nigerian officials. The ship was carrying more fuel than
26 declared, and its quality was sub-standard, a tell-tale sign of illegally refined oil from
27 Nigeria.⁸

28
29 I spoke earlier about Switzerland being the first State to return Nigeria's stolen
30 assets. Among Nigeria's most looted assets, Mr President and honourable Members,
31 are our offshore petroleum resources, from which 300,000 to 400,000 barrels of oil
32 are stolen by thieves every single month, at a value lost of approximately
33 US\$ 1.7 billion.⁹ The proceeds from this massive fuel piracy and corruption
34 undermine the Nigerian State's ability to protect marine security and promote
35 sustainable economic development, including of its seabed and subsoil resources.
36 Not only are these petroleum assets looted, but in the process the marine
37 environment suffers from spills and other environmental harms from illegal bunkering
38 and illicit refining activities.

39
40 Quite frankly, in circumstances such as those presented in this matter, we would
41 expect that Switzerland would support Nigeria in its efforts to combat maritime crime
42 in the Gulf of Guinea, rather than seek to have UNCLOS tribunals interfere with
43 Nigerian law enforcement and criminal prosecutions. It is indeed possible that the full
44 facts of this matter were not previously available to Switzerland before it decided to

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

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

⁹ Statement in Response, para. 2.3.

1 file these proceedings. Nevertheless, consistent with our commitment to combating
2 illegal maritime activities and enforcing the rule of law, Nigeria will vigorously defend
3 its sovereign right to exercise valid criminal jurisdiction over illegal activities
4 associated with the extraction of resources from the seabed and subsoil within
5 Nigeria's EEZ, as recognized in articles 56, 208 and 214 of the Convention.
6

7 Mr President, honourable Members of the Tribunal, Switzerland is not entitled to the
8 provisional measures it seeks, because the rights it asserts are not plausible. There
9 is no urgency or real and imminent risk of irreparable prejudice to any right it alleges
10 under the Convention between now and the date of the constitution of the Annex VII
11 arbitral tribunal. Granting the requested provisional measures, Mr President, would
12 prejudge the merits of the case and cause irreparable harm to Nigeria's rights.
13

14 Nigeria has the sovereign rights and obligation under articles 56, paragraph 1(a),
15 208, and 214 of the Convention to exercise its enforcement jurisdiction over the
16 bunkering activities in question here. The "*San Padre Pio*" was bunkering facilities
17 involved in the extraction of natural resources from the seabed and subsoil within
18 Nigeria's exclusive economic zone. Additionally, Nigeria has the sovereign right, Mr
19 President and honourable Members, and obligation to regulate bunkering to control
20 pollution of the marine environment associated with its seabed activities, including
21 the production of oil in the EEZ. Thus, the rights that Switzerland alleges are not
22 plausible because Nigeria was clearly acting within her sovereign rights as
23 recognized in the Convention.¹⁰
24

25 Regarding urgency, Mr President, honourable Members, one and a half years have
26 passed since the vessel's detention. Neither in its Statement of Claim nor in its
27 Request for Provisional Measures does Switzerland establish any change in
28 circumstances that would suddenly call for an extraordinary order from this Tribunal
29 to protect the rights asserted during the short period between now and the
30 functioning of the Annex VII arbitral tribunal, which can decide on the
31 appropriateness of provisional measures.¹¹
32

33 Moreover, there is no risk of irreparable injury or prejudice to any of Switzerland's
34 asserted rights. The "*San Padre Pio*"'s officers are free on bail—absolutely free – to
35 travel anywhere in Nigeria they desire. If they believe that there is a security risk in
36 staying on the "*San Padre Pio*" despite the presence of armed guards from the
37 Nigerian Navy and a gunboat stationed alongside the vessel, they are free to go
38 ashore, as they have done many times already. To be clear, Mr President,
39 honourable Members, it is not because of the Nigerian State that the "*San Padre*
40 *Pio*"'s officers remain on the vessel, and if they choose to remain onboard, they will
41 continue to benefit from the protection of the Nigerian Navy. The vessel itself is not
42 at risk of irreparable injury because any deterioration in its condition would be
43 compensable, and Nigeria has placed no restrictions on maintenance operations that
44 its owners might seek to undertake, Mr President, honourable Members.¹²
45

46 Furthermore, if the Tribunal were to order provisional measures, the merits of the
47 dispute to be determined by the Annex VII arbitral tribunal would be prejudged, as

¹⁰ Statement in Response, paras. 3.9-3.22.

¹¹ Statement in Response, para. 3.26.

¹² Statement in Response, paras. 3.27-3.36.

1 the vessel and its officers would no longer be in the jurisdiction of Nigeria, and the
2 vessel would be able to resume exercise of the freedom of navigation.¹³ Such a
3 result would also irreparably harm Nigeria's sovereign right to enforce her laws
4 against the "San Padre Pio" and its officers, who have been lawfully charged and are
5 being prosecuted for violation of Nigerian law.¹⁴

6
7 Finally, as to Switzerland's asserted rights under the International Covenant on Civil
8 and Political Rights and the Maritime Labour Convention, there is no basis in fact for
9 any claims of violations of these conventions, and the Annex VII arbitral tribunal
10 would not have *prima facie* jurisdiction over these claims because the rights do not
11 arise from the Convention itself. Accordingly, Mr President, honourable Members,
12 the Tribunal cannot prescribe provisional measures as to these claims.¹⁵

13
14 For all of these reasons, which my colleagues will discuss in more detail, Nigeria
15 respectfully requests the Tribunal to reject all the provisional measures requested by
16 Switzerland.

17
18 Mr President, honourable Members of the Tribunal, the structure for the remainder of
19 Nigeria's oral submissions this afternoon will be as follows: I will shortly ask you to
20 invite Mr Andrew Loewenstein to present the full facts relevant to your decision.
21 Then, Dr Derek Smith will explain why the Annex VII tribunal would not have *prima*
22 *facie* jurisdiction over Switzerland's third claim and why none of Switzerland's claims
23 are plausible. Finally, Mr President, honourable Members of the Tribunal, Professor
24 Dapo Akande, will explain why there is no urgency or real and imminent risk of
25 irreparable prejudice to any rights Switzerland alleges under the Convention
26 between now and the date of the constitution of the Annex VII arbitral tribunal.
27 Professor Akande will further discuss why granting the requested provisional
28 measures would prejudice the merits of the case and cause irreparable harm to
29 Nigeria's rights.

30
31 I would also like to draw to the attention of the honourable Members of the Tribunal
32 to the fact that, due to the great importance Nigeria places on this matter, Mr
33 President, honourable Members, today in the courtroom I am joined by top-level
34 officials from the Nigerian Navy, Nigeria's Federal Ministry of Justice, Nigeria's
35 Diplomatic Mission to Germany, and Nigeria's Economic and Financial Crimes
36 Commission, the agency prosecuting the crew.

37
38 Thank you, Mr President, honourable Members for your attention. May I now
39 respectfully request you, Mr President, to invite Mr Loewenstein to the podium.

40
41 Thank you so much for your attention.

42
43 **THE PRESIDENT:** Thank you, Ms Uwandu. I now give the floor to Mr Andrew
44 Loewenstein to make his statement.

45
46 **MR LOEWENSTEIN:** Mr President, Members of the Tribunal, good afternoon. It is
47 an honour to appear before you, and to do so on behalf of the Federal Republic of

¹³ Statement in Response, para. 3.39.

¹⁴ Statement in Response, paras. 3.42-3.44.

¹⁵ Statement in Response, paras. 3.50-3.53.

1 Nigeria. My role will be to introduce the case for Nigeria and to address the facts
2 relevant to your determination of Switzerland's Request for Provisional Measures.
3 We have listened carefully to Switzerland's presentation this morning, and will
4 respond in full tomorrow.

5

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

9

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

18

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

24

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

33

34 Mr President, Nigeria declared an EEZ on 5 October 1978.³ Perhaps more than
35 many States, Nigeria has been able to benefit from the natural resources located in
36 its EEZ, including the hydrocarbons that are found in abundance beneath the
37 seabed. Nigeria has licensed concession blocs to international oil companies that
38 undertake production operations under joint venture agreements with the Nigerian
39 National Petroleum Company.

40

41 Extracting hydrocarbon from beneath the seabed is a challenging industrial exercise.
42 As illustrated on your screen, in broad strokes, it requires erecting production
43 platforms that house massive drills, which dig into and through the seabed to reach
44 the deposits located far below. Crude oil travels up to the platform through pipes that

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

² *Ibid.*, arts. 56-58.

³ Exclusive Economic Zone Decree No. 28 of 5 October 1978, United Nations, Legislation and Treaties, Nigeria, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NGA_1978_Decree.pdf

1 transport it onto floating storage facilities, where it remains until being offloaded onto
2 tankers for onward shipment. At any given production field in Nigeria's EEZ, there
3 may be as many as five drilling platforms in operation.
4

5 These operations require significant quantities of fuel. Because raw crude oil cannot
6 be used for this purpose, refined petroleum products must be transported to the
7 production field via supply ships and delivered to the installations. This is done by
8 transferring fuel from one vessel to another, a complicated process known as
9 bunkering.
10

11 In fact, bunkering is an indispensable part of the industrial activities that occur in
12 Nigeria's EEZ. These ship-to-ship transfers of large quantities of toxic, highly
13 combustible fuel carries obvious risks to the marine environment. The need for
14 oversight is plain, not least because bunker spills are even more environmentally
15 harmful than crude oil spills as the attributes of fuel oil make its clean-up especially
16 challenging, and regulating these transfers is critical for the safety of the personnel
17 involved and the good functioning of the production field's equipment.
18

19 For Nigeria, the need to oversee bunkering in its oil-production fields is particularly
20 great because of the central role it plays in the illicit trafficking of stolen Nigerian
21 crude oil.⁴ As Nigeria has detailed in its written statement, Nigerian crude oil is stolen
22 on a massive scale.⁵ The stolen crude is often illegally refined in Nigeria and shipped
23 to other jurisdictions – like Togo – where it receives false documentation of origin
24 and is then shipped back to Nigeria.⁶
25

26 A crucial part of this illicit distribution network are the bunker vessels that supply
27 Nigeria's production installations in the EEZ. Too often they serve as the final links in
28 this illicit supply chain, delivering to offshore installations the falsely labelled
29 petroleum products that have been illegally refined from stolen Nigerian crude.
30 Admiral Ibikunle Olaiya, the Nigerian Navy's Director of Operations, testifies in an
31 affidavit reproduced at tab 1 of your Judges' folder, that "illegal bunkering activities
32 usually involve illicit trade in stolen petroleum resources, including illegally refined
33 petroleum products," because bunkering offers traffickers a "means of distribution"
34 that can "readily evade government enforcement efforts."⁷
35

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

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

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

⁷ *Ibid.*, para. 7.

1 The Nigerian Navy is responsible for enforcing the laws that Nigeria has adopted to
2 regulate offshore bunkering.⁸ As you can see on your screen, the Armed Forces Act
3 charges the Navy with “enforcing” Nigeria’s “anti-bunkering” laws “at sea”.

4
5 One of the principal means by which the Navy ensures that bunkering is done in a
6 safe and responsible manner is by requiring vessels – prior to engaging in bunkering
7 – to secure from the Navy a special permit known as a verification certificate.⁹ This
8 allows the vessel lawfully to receive, load, supply and discharge approved products.
9 You can find a copy at tab 2 of your Judges’ folder. As you can see on the screen,
10 the applicant is required to disclose the names of the vessels, the locations of the
11 loading and discharge points, the type of product and its quantity.

12
13 In addition, the permit imposes mandatory conditions. Reflecting Nigeria’s efforts to
14 combat the use of bunkering in illicit petroleum trades, these include an express
15 prohibition on the “lifting of illegally refined crude oil products”. Vessels are also
16 directed that bunkering must be “conducted between Sunrise and Sunset”. The
17 permit warns: any vessel “found violating” these “conditions” will be “arrested and
18 prosecuted”. There is no ambiguity.

19
20 Beyond this navy certificate, Nigeria requires vessels wishing to bunker petroleum
21 products to secure a permit from its Department of Petroleum Resources. A
22 certificate from the Nigerian Maritime Administration and Safety Agency, referred to
23 as NIMASA, is also required.¹⁰

24
25 Mr President, I turn now to the evidence that has been presented in connection with
26 Switzerland’s Request for Provisional Measures. I do so mindful of the Tribunal’s
27 observation that each request for provisional measures must be assessed based on
28 its own unique facts and circumstances.

29
30 I begin with two preliminary observations. First, States seeking provisional measures
31 generally support their requests with testimonial evidence, often in the form of sworn
32 affidavits. For example, in the recent *Ukrainian naval vessels* case, Ukraine
33 submitted a declaration by the counsel for the captain of one of the detained
34 vessels.¹¹ In the “*ARA Libertad*” case, a declaration by the captain of the detained
35 vessel was annexed to the provisional measures request.¹² In the “*Arctic Sunrise*”
36 case, The Netherlands submitted a statement by the vessel’s operator and
37 presented live testimony.¹³

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

⁹ Nigerian Navy, *Nigerian Navy Ship Pathfinder Verification Certificate to Receive/Supply/Load/Discharge Approved Products*, para. 12(d), Statement in Response, Vol. II, Annex 5.

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

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

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

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

1
2 Switzerland, however, has elected to depart from this practice. No witness
3 testimony – in written or live form – is offered for the Tribunal’s consideration. One
4 must therefore ask: why is no representative of the vessel’s owner, or its charterer,
5 or its operator, willing to come forward with a sworn statement made upon pains and
6 penalties of perjury? And why has the Tribunal not been presented with affidavits
7 from any of the vessel’s officers or crew who could provide first-hand accounts?
8

9 In the absence of such testimony it is especially noteworthy, given that 12 of the
10 “*San Padre Pio*”’s original crew face no criminal charges and are no longer in
11 Nigeria. The vessel’s current crew faces no charges either. The officers who remain
12 in Nigeria have no restrictions on their ability to communicate with the Swiss
13 Government, or with the vessel’s owner, or charterer, or operator, or with anyone
14 else. In these circumstances, where the factual assertions advanced by the other
15 side are unaccompanied by supporting testimony, Nigeria respectfully submits that
16 the narrative they advance should be approached with caution. And Nigeria would
17 ask the Tribunal to keep this firmly in mind as it considers the allegations made this
18 morning by the Agent of Switzerland, which were unsupported by any testimony by
19 the parties concerned. Indeed, as we will discuss, the narrative we have heard this
20 morning is disproven not only by the documentary record, but by the four sworn
21 affidavits that Nigeria has presented from its prosecutors and its navy.¹⁴
22

23 Second, approaching Switzerland’s evidence with caution is especially warranted
24 because, in the fragmentary emails and other documents that it presents and relies
25 upon, pertinent information is often redacted. To be sure, there are sometimes
26 occasions when redactions are appropriate. But many of Switzerland’s redactions –
27 even viewed charitably – do not fall into that category. For example, you can now
28 see a slide of Switzerland’s Annex 8 to its Request for Provisional Measures, which
29 redacts not just the name of the addressee, but also the shipyard where the operator
30 plans to have the vessel repaired.¹⁵
31

32 Mr President, by pointing this out, Nigeria does not intend to criticize Switzerland.
33 We presume that the documents annexed to its pleadings were provided to the
34 Swiss Government in the redacted form they appear as annexes. But Nigeria would
35 be remiss if it did not draw the Tribunal’s attention to this aspect of the evidence and
36 to the consequences it could have for equality of arms and good administration of
37 justice.
38

39 Mr President, as I have noted, the Gulf of Guinea is plagued by high levels of
40 criminality, including the scourges of petroleum theft, illegal refining, piracy, and illicit

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

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

1 trafficking in petroleum products. These crimes are interlinked and an urgent threat
2 to maritime security. Admiral Olaiya explains the reality of the situation: the “theft and
3 illicit trade in petroleum resources from offshore oil drilling activities” is a “major
4 threat to the security, safety, environmental sustainability, and economic vitality of
5 the Gulf of Guinea region”¹⁶ and they “contribute to the funding and economic
6 motives behind other illicit activities, including piracy and other criminal activities that
7 threaten the region’s safety, security, and marine environment.”¹⁷

8
9 This is not just Nigeria’s view. On 28 December 2018, the UN Secretary-General
10 reported to the Security Council that “[m]aritime crime and piracy off the coast of
11 West Africa” continues to “pose a threat” to the region’s “peace, security and
12 development.”¹⁸ The Secretary-General singled out “[o]il-related crimes” as a
13 particular problem, which had cost Nigeria nearly \$2.8 billion in revenues last year. In
14 that connection, the Secretary-General reported that current efforts to address
15 “maritime crime and piracy” focus on “bolstering the operational capacity of maritime
16 agencies to patrol their waters and strengthening the capacity of the criminal justice
17 chain to detect, investigate and prosecute cases of piracy and maritime crime.”¹⁹

18
19 Mr President, these are precisely the efforts that Nigeria is undertaking – in
20 cooperation with international partners – to combat the web of criminality that
21 plagues the Gulf of Guinea. Principal among these efforts is the operation of
22 maritime domain awareness systems that are designed to detect and alert the
23 responsible authorities to possible criminal activities taking place at sea; and it was
24 the operation of such a marine surveillance system that drew the “*San Padre Pio*” to
25 the Nigerian navy’s attention. As Admiral Olaiya explains, the “*San Padre Pio*” was
26 navigating routes that track well-known itineraries for vessels engaged in the practice
27 of “round-tripping”, that is, taking on cargoes of stolen Nigerian crude that have been
28 illegally refined in Nigeria, shipping them to jurisdictions known for providing false
29 documentation of origin, and returning to Nigerian waters with falsely labelled
30 petroleum products to distribute via bunkering to offshore installations.²⁰

31
32 This was not the only reason for the Nigerian navy’s suspicions. IMO regulations
33 require vessels over 300 gross tonnes to operate an automatic identification system
34 that allows them to be monitored and tracked by marine enforcement agencies. The
35 identification system must remain operational unless there is a valid security or
36 safety reason for it to be disengaged.²¹ This was not disputed by Switzerland this
37 morning. However, the “*San Padre Pio*” was observed by Nigeria’s surveillance
38 systems to have shut off its identification system. For these reasons, the Nigerian
39 navy placed the “*San Padre Pio*” on its list of vessels of interest, and the naval
40 vessel “*Sagbama*” was alerted to its presence off the Nigerian coast.²²

41

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

¹⁷ *Ibid.*, para. 6.

¹⁸ UN Secretary-General, *Activities of the United Nations Office for West Africa and the Sahel*, UN Doc. S/2018/1175, available at <https://undocs.org/S/2018/1175> (28 December 2018) (last access: 16 June 2019), para. 21.

¹⁹ *Ibid.*, para. 65.

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

²¹ *Ibid.*, para. 14.

²² *Ibid.*, paras. 18-19.

1 This morning, Switzerland’s Agent categorically denied that the vessel had ever
2 turned off its system. How does she know? She did not mention having undertaken
3 any independent investigation. Instead, she said that the Master had, in her terms,
4 formally denied having done so. Evidently, that is enough for Switzerland.
5

6 Mr President, I can be brief about what happened next; the essential facts are not in
7 dispute. The location where the Nigerian navy encountered the “*San Padre Pio*” is
8 common ground. It was, as Switzerland states in its Statement of Claim, “intended to
9 supply the Odudu Terminal”.²³ That is correct.
10

11 A sketch map of this area is now on your screen. It is also available in the Judges’
12 folder at tab 3. As you can see, it consists of five production platforms that drill
13 through the seabed and pump hydrocarbons to its facility where the carbons are
14 stored. The geographical coordinates for the location of the encounter are set out in
15 figure 5 of the affidavit of Admiral Olaiya.²⁴ I note that Switzerland, no doubt relying
16 on information provided by the ship’s operator, overstated the distance between the
17 “*San Padre Pio*” and the nearby production platforms.²⁵ However, there is no need to
18 dwell on the discrepancy. Even on Switzerland’s account, the “*San Padre Pio*” was
19 situated amongst the Odudu oil-production facilities. That is the essential point.
20

21 Nor is there disagreement as to what the “*San Padre Pio*” was doing. Switzerland
22 candidly admits that the vessel was engaged in a ship-to-ship bunkering operation,
23 transferring fuel for use in Total’s oil-production operations.²⁶
24

25 This brings us to when the bunkering occurred. Here, Switzerland’s narrative is
26 silent. Again, we infer no ill intent from the omission. We presume that Switzerland
27 has presented the facts as provided to the Swiss Government by the vessel’s owner
28 and operator. Lieutenant Hanifa, the Nigerian naval officer on board the vessel that
29 encountered the “*San Padre Pio*”, completes the picture. He testifies, as you can see
30 at tab 4 of your Judges’ folder, that when the “*San Padre Pio*” was encountered at
31 8 p.m. it was in the midst of bunkering another vessel. It then proceeded to
32 commence another ship-to-ship fuel transfer with a different vessel at 3 a.m. the next
33 morning.²⁷
34

35 Confronted with this situation, the “*Sagbama*” requested that the “*San Padre Pio*”
36 produce the required bunkering permits.²⁸ But, only the navy certificate and bill of
37 lading were presented.²⁹ A copy of the naval certificate is now on your screen.³⁰ It is
38 reproduced at tab 5 of your Judges’ folder. At line 4(a) you can see that the permit is
39 for the “*San Padre Pio*”. Line 5 specifies the product to be bunkered as “AGO” –
40 which stands for automotive gasoil, a matter to which we will return. Line 8 states

²³ Notification and Statement of Claim of the Swiss Federation (6 May 2019) (“Statement of Claim”), para. 7.

²⁴ *Affidavit of Rear Admiral Ibikunle Taiwo Olaiya*, Statement in Response, Vol. II, Annex 2, Figure 5.

²⁵ Statement of Claim, Annex 6.

²⁶ Statement of Claim, para. 7.

²⁷ *Affidavit of Lieutenant Mohammed Ibrahim Hanifa*, Statement in Response, Vol. II, Annex 6, paras. 6-7.

²⁸ *Ibid.*, paras. 8-9.

²⁹ *Ibid.*, para. 9.

³⁰ *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Motion on Notice, Exh. A3 (Federal High Court of Nigeria, 10 October 2018), Statement in Response, Annex 25.

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

9
10 The “*Sagbama*” was thus faced with the following facts. The “*San Padre Pio*” was
11 carrying out bunkering operations in the dead of night, in direct contravention of the
12 conditions imposed by the certificate. The vessel had not alerted the navy about
13 when the bunkering would occur, so the navy had no opportunity to carry out the
14 testing needed to verify that illegally refined petroleum products were not being
15 transferred for use in Total's operations; and, as line 13 of the certificate had
16 expressly warned, violating these conditions would subject the vessel to arrest and
17 prosecution. Moreover, the “*San Padre Pio*” had failed to present the required
18 petroleum distribution permit or NIMASA certificate. This morning, Switzerland's only
19 response was to say that the permit was secured by another company that had
20 contracted with the “*San Padre Pio*”, but that would not relieve the vessel from its
21 obligation to comply with the permit's terms.

22
23 In light of these plain violations of law, the “*Sagbama*” arrested and escorted the
24 “*San Padre Pio*” to a Nigerian naval base, and the navy turned the matter over to
25 Nigeria's Economic and Financial Crime Commission (EFCC).

26
27 The “*San Padre Pio*” ultimately did present the Nigerian authorities with a copy of
28 one of the required permits – a certification from NIMASA, which is available at tab 6
29 of your folder.³¹ You will recall that this is one the approvals that the “*San Padre Pio*”
30 had failed to produce to the “*Sagbama*”. You can see it on your screen. It is dated
31 24 January 2018 and lists that same day for the “*San Padre Pio*'s” expected date of
32 arrival at the Odudu oilfield. This of course is the day *after* the “*San Padre Pio*” had
33 been arrested at the Odudu facility. Whatever else this may show, it proves beyond
34 question that the “*San Padre Pio*” did not have the required NIMASA permit when it
35 was caught at Odudu bunkering fuel in the middle of the night.

36
37 On 12 March 2018, the officers and crew were charged with conspiring to distribute
38 and deal in petroleum products without the necessary approval and with having done
39 so in connection with the cargo on board.³² They were then relocated to the EFCC's
40 facilities at Port Harcourt.

41
42 Thus begins, according to the other side, a period of prolonged detention in prison
43 and on the vessel that amounts to nothing less than violations of the ICCPR and the
44 Maritime Labour Convention. These are grave accusations, and Nigeria treats them
45 with the gravity they require. Nigeria has thus carefully reviewed the evidence that
46 has been presented in support of these serious allegations.

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

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

1
2 I begin with the alleged conditions at the EFCC facility where the defendants were
3 initially held after being arrested; and I should emphasize that no defendant has
4 been at this facility for a very long time. In its written pleading, Switzerland described
5 the conditions there as having been “harsh”. The rhetoric has now escalated. This
6 morning, the Agent of Switzerland used words like “dire” and “life-threatening.” We
7 can all call to mind the mental images that descriptions like this tend to elicit.
8

9 Mr President, Members of the Tribunal, there are places in this world where people
10 are held in dire conditions that are life-threatening but this was not one of them. As I
11 mentioned, Switzerland has not presented any witness statements from anyone
12 present, including those who are no longer in Nigeria. Only a single source is cited to
13 support Switzerland’s characterization.³³ You can see it on the screen. It is an email
14 from one Iain Marsh to persons identified as Nikil Bhat and Holly Hughes. Certain
15 others are copied; some of their names are redacted.
16

17 Mr Marsh is reporting on a visit he had made that day to the crewmembers, so it is a
18 contemporaneous account. He acknowledges that bail has been offered. The crew’s
19 chief complaint appears to be about the quality of the mattresses and the presence
20 of “hot peppers et cetera” in the “local food.” Mr Marsh reports that the Nigerian
21 authorities have allowed food to be delivered so that the crew can have “European
22 cuisine.” Why had these special food deliveries not yet happened? Mr Marsh says
23 that his correspondents had not wired the necessary funds, and Mr Marsh was
24 unwilling to front the money himself. Apparently, he was concerned that he might not
25 be reimbursed.
26

27 I turn now to the accusation that the defendants have been “deprived of their right to
28 be tried without delay.”³⁴ In particular, Switzerland criticizes Nigeria because the
29 charges have been amended.³⁵ However, the first of those amendments was to drop
30 the charges against the 12 members of the crew when the EFCC elected to pursue
31 charges only against the vessel’s officers.³⁶
32

33 And the subsequent amendment was made when further investigation revealed that
34 the “*San Padre Pio*”’s bill of lading and cargo manifest had both falsely understated
35 the volume of cargo that the vessel carried.³⁷ We note that this morning Switzerland
36 made no attempt to deny that these documents had been falsified. Moreover,
37 samples of the petroleum product carried by the “*San Padre Pio*” were sent to two
38 different laboratories. Each independently concluded that the cargo consisted of
39 automotive gasoil that fails to meet the product’s required specifications, results that

³³ Email from Ian Marsh, Local Representative of the Protection and Indemnity Agency of the Vessel, dated 12 March 2018, Statement of Claim, Annex 20.

³⁴ Request for Provisional Measures, para. 40.

³⁵ *Ibid.*, para. 12.

³⁶ *Affidavit of Ahmedu Arogha*, Legal Officer, Statement in Response, Vol. II, Annex 22, para. 27; Charges against the Master and the three other officers and the vessel, dated 12 March 2018, Statement of Claim, Annex NOT/CH-22.

³⁷ *Affidavit of Ahmedu Arogha*, Legal Officer, Statement in Response, Vol. II, Annex 22, para. 25(v)-(w); Charges against the Master and the three other officers and the vessel, as well as against the Master, the vessel and the charterer, dated 24 April 2019, Statement of Claim, Annex 39.

1 suggest that the “*San Padre Pio*” was, in fact, trafficking in illegally refined petroleum
2 products.³⁸

3
4 Finally, Mr President, I address the assertion that the defendants have been and
5 continue to be detained on the “*San Padre Pio*” under armed guard, unable to leave.
6

7 I will be blunt. This claim is wholly without merit. On 21 March 2018 the defendants
8 applied to the Federal High Court for bail.³⁹ Their application was unopposed.⁴⁰ Two
9 days later, the Court granted bail.⁴¹ You can find the order at tab 7 of the Judges’
10 folder. Its conditions were entirely reasonable: the defendants merely had to deposit
11 approximately \$28,000, in either US or Nigerian currency, and provide a surety for
12 an equivalent amount. Upon release, the defendants could travel wherever they
13 wished, subject only to the requirement that they not travel outside Nigeria without
14 first obtaining leave from the Court. Consistent with state practice worldwide, the
15 defendants’ passports were collected and deposited with the Court’s Registry for
16 safekeeping. There is nothing improper about this. Foreign nationals charged with
17 crimes in Switzerland are equally subject to having their passports taken.⁴²
18

19 The defendants, it is true, reside on the “*San Padre Pio*”, but that is because they
20 have chosen to do so. There is nothing to prevent them from living in Port Harcourt,
21 or Lagos, or Abuja, or anywhere else in Nigeria. This is confirmed by an affidavit
22 from the EFCC prosecutor responsible for the case, which you can find at tab 8.⁴³ It
23 is verified by an affidavit, found at tab 9, from the Nigerian naval officer responsible
24 for the vessel’s security. In his words: “since their return to the Vessel from the
25 EFCC facilities on shore, the Master and the three officers may leave and return to
26 the vessel whenever they please and under no obligation to remain on the vessel.”⁴⁴
27 As Professor Akande will explain, to avoid any possible misunderstanding, Nigeria
28 has formally extended its assurances to Switzerland that the defendants are not
29 required to remain on the vessel.
30

31 Mr President, Members of the Tribunal, this concludes my presentation. Thank you
32 for your kind attention. I ask that you invite Dr Smith to the podium.
33

34 **THE PRESIDENT:** Thank you, Mr Loewenstein. I now give the floor to Mr Derek
35 Smith to make his statement.
36

³⁸ *Letter* from C. M. Bello, Zonal Operations Controller, DPR, PH, Ministry of Petroleum Resources, to The Zonal Head, South South Zone, Economic and Financial Crimes Commission (25 August 2018), Statement in Response, Annex, 16; *Letter* from S. Yusuf, Engineer, Zonal Operations Controller, Warri, Minister of Petroleum Resources, to The Director, Economic and Financial Crimes Commission (6 July 2018), Statement in Response, Annex 17.

³⁹ Order of the Federal High Court of Nigeria in the Port Harcourt Judicial Division, dated 23 March 2018, Statement of Claim, NOT/CH-24, paras. 1-2.

⁴⁰ *Ibid.*, para. 3.

⁴¹ *Ibid.*, It Is Hereby Ordered As Follows.

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

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

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

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

4
5 Mr Loewenstein has presented to you detailed facts of this case that were absent
6 from Switzerland's pleadings. In our remaining presentations this afternoon,
7 Professor Akande and I will explain why it would be inappropriate for the Tribunal to
8 prescribe any of the provisional measures requested by Switzerland in view of the
9 requirements set forth in UNCLOS and the jurisprudence of the Tribunal.

10
11 Professor Akande will address this in more detail, but I would like to take a moment
12 to emphasize the legal framework for provisional measures under article 290,
13 paragraph 5, of the Convention.

14
15 It is apparent from Switzerland's pleadings this morning that they misunderstand the
16 nature of provisional measures. Provisional measures are an exceptional form of
17 relief. This is because they empower an international tribunal to compel a sovereign
18 State to act against its will, even though the tribunal has not yet made a definitive
19 determination of the merits, and in most cases it will not have made a definitive
20 determination of its own jurisdiction. Tribunals, therefore, exercise caution in
21 assessing not only whether to prescribe provisional measures but also what
22 measures to prescribe.

23
24 Provisional measures under article 290, paragraph 5, are even more exceptional
25 than ordinary provisional measures under article 290, paragraph 1.¹ This is because
26 paragraph 5 grants the Tribunal the power to prescribe provisional measures with
27 respect to a dispute that does not fall within its own jurisdiction. The Tribunal has,
28 accordingly, exercised this extraordinary competence with restraint.

29
30 Applying the requirements of article 290, paragraph 5, to the present Request for
31 provisional measures, it becomes evident that the Tribunal should not prescribe the
32 provisional measures that Switzerland requests, for five reasons:

33
34 First, the Annex VII tribunal does not have *prima facie* jurisdiction over Switzerland's
35 third claim; second, none of the rights alleged by Switzerland are plausible; third,
36 there is no real and imminent risk of irreparable prejudice to the rights alleged by
37 Switzerland before the constitution of the Annex VII tribunal; fourth, the provisional
38 measures, if prescribed, would prejudge the merits of the dispute; and, finally, the
39 provisional measures requested, if prescribed, would cause irreparable harm to the
40 rights of Nigeria.

41
42 I will spend the remainder of my time elaborating on the first two points, then my
43 colleague Professor Akande will explain the remaining three points. With the
44 Tribunal's permission, I will now proceed to the first point on *prima facie* jurisdiction.

45

¹ *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Separate Opinion of Judge Treves, para. 4.

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

4
5 Before proceeding, I would like to reiterate Nigeria's affirmation that it is not violating
6 the human rights of the officers and crew of the "*San Padre Pio*".

7
8 The facts contradict Switzerland's claims in this regard. No one is in jail. The officers
9 and crew of the "*San Padre Pio*" are free to leave and return to the ship as they
10 please,² and Nigeria has given an express assurance that they are free to leave the
11 ship. They remain on the ship by order of the owner.³ The officers on trial for crimes
12 in Nigeria are free on bail, under the sole condition that they do not leave Nigeria.⁴
13 Merely requiring a criminal defendant to remain in the country during his trial is not a
14 breach of a fundamental right.⁵ The rest of the crew are free to leave Nigeria, like the
15 crew before them.⁶ As regards the rights of the individuals in criminal proceedings,
16 the only specific claim made by Switzerland is that the trial in Nigeria has suffered
17 some delay – Mr Loewenstein has addressed the specifics of this – and this delay
18 hardly amounts to a human rights violation. In addition, the suspension of the
19 criminal proceedings that they seek as relief would actually delay the trial further.

20
21 With this clarification of the facts, I return to the lack of *prima facie* jurisdiction of the
22 Annex VII tribunal over Switzerland's claim. There is no such jurisdiction because the
23 claim does not concern the interpretation or application of the Convention.

24
25 As you can see on the screen, Switzerland's third claim stated in its request for relief
26 asks the Annex VII tribunal to adjudge and declare that

27
28 Nigeria has breached its obligations to Switzerland in its own right, in the
29 exercise of its right to seek redress on behalf of *crew members and all persons*
30 *involved in the operation of the vessel, irrespective of their nationality, in*
31 *regard to their rights under the ICCPR and the MLC, and under customary*
32 *international law.*⁷

33
34 This was quite convoluted, but the ultimate intention is clear. While Professor
35 Cafilisch has attempted to deny this, Switzerland is asking the Annex VII tribunal to
36 determine whether Nigeria has violated the rights of individuals under the ICCPR
37 and the MLC. Unlike Switzerland's first two claims, this third claim does not mention
38 UNCLOS, and the only specific rights Switzerland asserts are the rights of
39 individuals under these other treaties.

40
41 This morning Professor Cafilisch put forth a creative legal theory to argue that an
42 Annex VII tribunal, with jurisdiction limited only to disputes concerning the
43 interpretation or application of the Convention, could have jurisdiction over this claim.
44 In particular, he invoked article 56, paragraph 2, of the Convention, which says that

² Nigeria's Statement in Response, Annexes 12, 15, 22, paras. 29-31.

³ Nigeria's Statement in Response, Annex 11.

⁴ Switzerland's Statement of Claim, Annex NOT/CH-24.

⁵ ICCPR, arts. 9(1), 12(3); Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edition, 2013), paras. 11.01, 12.28.

⁶ Nigeria's Statement in Response, Annexes 12, 15.

⁷ Switzerland's Statement of Claim, para. 45(iii).

1 coastal States are to have due regard to the rights and duties of other States. He
2 argues that these rights and duties include the rights of individuals under the ICCPR
3 and the MLC. This argument, however, is entirely without merit.

4
5 Let us have a look at article 56, paragraph 2, in detail. As you can see on the screen,
6 it provides:

7
8 In exercising its rights and performing its duties under this Convention in the
9 exclusive economic zone, the coastal State shall have due regard to the rights
10 and duties of other States and shall act in a manner compatible with the
11 provisions of this Convention.⁸

12
13 Mr President, Members of the Tribunal, I would like to make two observations here.

14
15 First, article 56, paragraph 2, requires coastal States to have due regard only to the
16 rights and duties of other States. The rights enshrined in the ICCPR and the MLC
17 belong to individuals, not States. As such, article 56, paragraph 2, is inapplicable. In
18 formulating its rights, as we heard today from Professor Caflisch, Switzerland
19 attempts to circumvent this issue by claiming, in its own right, to “seek redress on
20 behalf of crew members and all persons involved in the operation of the vessel.”⁹
21 However, Switzerland does not allege any facts that would suggest that Nigeria has
22 interfered with Switzerland’s efforts to espouse the rights of the vessel and crew.
23 Switzerland is really just after a direct determination that Nigeria has violated the
24 rights of the crew under the ICCPR and the MLC.

25
26 It expressly states this at paragraph 40(d) of the Statement of Claim now on your
27 screen, and the pertinent part of this reads: “Nigeria has failed to have due regard ...
28 to the right of persons to liberty and security” and “[t]he other rights of persons in
29 connection with criminal proceedings.”

30
31 Switzerland and its rights are nowhere to be found.

32
33 Even if Switzerland had alleged its own right, the requirement would be to have “due
34 regard” to that right. This is not an obligation on the coastal States to have complete
35 deference to the rights and duties of other States, and a State cannot invoke
36 article 56, paragraph 2, to expand the jurisdiction of UNCLOS tribunals to claims of
37 violations of instruments outside of UNLCLOS.

38
39 This is not to say that States have not tried to do so in the past. In the Chagos
40 arbitration, with respect to one of its claims, Mauritius invoked article 56,
41 paragraph 2, in an attempt to have the Annex VII tribunal determine that the United
42 Kingdom had breached a set of undertakings outside UNCLOS.¹⁰ The Tribunal,
43 however, held that article 56, paragraph 2, “does not impose a uniform obligation to
44 avoid any impairment of [the other State’s] rights.”¹¹ Similarly, in the *Arctic Sunrise*

⁸ UNCLOS, art. 56(2).

⁹ Switzerland’s Statement of Claim, para. 45(iii).

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

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

1 arbitration, the Netherlands, not unlike Switzerland, invoked article 56, paragraph 2,
2 in order to have an Annex VII tribunal determine a violation of articles 9 and 12 of the
3 ICCPR.¹² The tribunal, however, concluded that it “does not consider that it has
4 jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or
5 to determine breaches of such provisions”.¹³ The same conclusion should be
6 reached in the present dispute: Switzerland cannot rely on article 56, paragraph 2, to
7 have the Annex VII tribunal determine a violation of the ICCPR or the MLC.

8
9 We have also heard Switzerland invoke, both in its Statement of Claim and this
10 morning, article 293 of the Convention, apparently in an attempt to extend the
11 jurisdiction of the Annex VII tribunal to violations of the ICCPR and the MLC.¹⁴ This
12 attempt is equally unavailing. The Annex VII tribunals in *MOX Plant*, *Arctic Sunrise*,
13 and *Duzgit Integrity* all affirmed that article 293 is an applicable law provision that
14 does not affect the scope of their jurisdiction.¹⁵ There is unanimity on this front.

15
16 Mr President, Members of the Tribunal, Switzerland’s third claim is thus one that
17 concerns the ICCPR and the MLC, not UNCLOS. If the Tribunal were to accept
18 Switzerland’s arguments on this point, any State could institute Annex VII
19 proceedings against a coastal State over any alleged violation of international law
20 that occurs in the coastal State’s EEZ, even if that violation has nothing to do with
21 the law of the sea. This cannot possibly be the result envisioned by the drafters of
22 the Convention.

23
24 Even if Switzerland’s third claim were one concerning the interpretation or
25 application of UNCLOS, which it is not, the Annex VII tribunal still would not have
26 jurisdiction over the claim. This is because, as the Tribunal recently affirmed in the
27 *Detention of Naval Vessels* case, the dispute in question needs to have crystallized
28 “as of the date of the institution of arbitral proceedings”,¹⁶ and, when the dispute
29 arose, the Parties must have “proceed[ed] expeditiously to an exchange of views
30 regarding its settlement by negotiation or other peaceful means”.¹⁷

31
32 Neither is the case here. In the exchanges between Switzerland and Nigeria
33 concerning the “*San Padre Pio*” leading up to the institution of arbitral proceedings,
34 including the aide-mémoire that Professor Caffisch showed this morning, there was
35 not a single mention of the ICCPR or the MLC.

36
37 In conclusion, then, there is no question that the Annex VII tribunal would not have
38 *prima facie* jurisdiction over the third claim. As a result, the Tribunal may not
39 prescribe any provisional measure on the basis of this third claim.

40
41 Mr President, Members of the Tribunal, with your permission, I will now move on to
42 the issue of plausibility. As the Members of the Tribunal are aware, plausibility is a

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

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

¹⁴ Switzerland’s Statement of Claim, para. 42.

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

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

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

1 critical requirement for the prescription of provisional measures. It is required by both
2 the Tribunal and the International Court of Justice as a precondition for provisional
3 measures.

4
5 This morning, Professor Boisson de Chazournes asserted a very narrow
6 understanding of plausibility. According to this understanding, a right is plausible as
7 long as there is a reasonable possibility that the right exists as a matter of law and
8 will be recognized by the Tribunal. This is not, however, how the Tribunal or the
9 Court understand plausibility. Rather, the jurisprudence of both institutions makes
10 clear that a right is “plausible” only if it is applicable to the factual situation at hand.
11 This does not mean that the Tribunal needs to examine the facts underlying the
12 merits of the claim. But the Tribunal does need to undertake the limited examination
13 of the facts that purport to establish the applicability of the right to the situation at
14 hand.

15
16 Thus, in *Detention of naval vessels*, the Tribunal, in determining whether Ukraine’s
17 right to the immunity of warships was plausible, examined whether, on the facts of
18 that case, the vessels in question were actually warships.¹⁸ Similarly, the
19 International Court of Justice in *Ukraine v. Russia*, in determining whether Ukraine’s
20 right to Russia’s cooperation in preventing the financing of terrorism was plausible,
21 examined whether, on the facts of the case, the acts in question constituted terrorism
22 financing.¹⁹

23
24 In the present case, the Tribunal thus needs to examine whether the rights that
25 Switzerland alleges would actually apply to the situation at hand. Switzerland’s
26 Statement of Claim and Request for Provisional Measures make clear that it seeks
27 the protection of three categories of rights: first, an alleged right regarding the
28 freedom of navigation and other internationally lawful uses of the sea; second, an
29 alleged right concerning exclusive flag State jurisdiction; and third, alleged rights
30 concerning the ICCPR and the MLC. None of these rights are plausible in the
31 present case. Please let me address each one of them in turn.

32
33 Switzerland first asserts its alleged right regarding the freedom of navigation and
34 other internationally lawful uses of the sea, relying on articles 58 and 87 of the
35 Convention. This morning, Professor Boisson de Chazournes stated that, outside of
36 fishing, bunkering is a part of the freedom of navigation. She relied on the *M/V*
37 *“Norstar” Case* for this proposition, but that case concerned bunkering in the high
38 seas, not bunkering in the EEZ. This is a very important distinction. Allow me to
39 explain.

40
41 There is no dispute that article 87 establishes the freedom of navigation in the high
42 seas. There is also no dispute that article 58, paragraph 1, extends this freedom to
43 the EEZ. Nevertheless, Professor Boisson de Chazournes this morning failed to
44 mention that article 58, paragraph 1, is subject to an exception. As seen on the
45 screen, article 58, paragraph 1, provides: “In the exclusive economic zone, all

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

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

1 States, whether coastal or land-locked, enjoy – and this is the important clause –
2 subject to the relevant provisions of this Convention, the freedoms referred to in
3 article 87”

4
5 Nigeria does not dispute that, in general, these freedoms apply to Nigeria’s EEZ; but
6 article 58 expressly provides that in the EEZ they are “subject to the relevant
7 provisions of this Convention”.²⁰ As such, to determine whether the alleged right is
8 applicable, and thus plausible, the Tribunal must determine whether, on the current
9 facts, there are other relevant provisions of the Convention that limit the freedom of
10 navigation.

11
12 There are indeed such provisions. As emphasized in Nigeria’s statement in
13 response, article 56, paragraph 1(a), is the key provision here. Switzerland did not
14 address this provision at all this morning. As seen on the screen, it provides that:

15
16 In the exclusive economic zone, the coastal State has: (a) sovereign rights for
17 the purpose of exploring and exploiting, conserving and managing the natural
18 resources, whether living or non-living, of the waters superjacent to the seabed
19 and of the seabed and its subsoil, and with regard to other activities for the
20 economic exploitation and exploration of the zone....²¹

21
22 This article makes clear that Nigeria, as a coastal State, has sovereign rights to
23 exploit, conserve and manage the natural resources of the EEZ. This includes
24 enforcement jurisdiction, as expressly held by the Tribunal in *M/V “Virginia G”*.
25 There, the Tribunal held:

26
27 The Tribunal observes that article 56 of the Convention refers to sovereign
28 rights for the purpose of exploring and exploiting, conserving and managing
29 natural resources. The term “sovereign rights” in the view of the Tribunal
30 encompasses ...

31
32 this is the important part

33
34 all rights necessary for and connected with the exploration, exploitation,
35 conservation and management of the [natural] resources, including the right
36 to take the necessary enforcement measures.²²

37
38 In *“Virginia G”*, the Tribunal held that the coastal State had the sovereign right to
39 regulate the bunkering of fishing vessels in the EEZ. The present case concerns the
40 bunkering of oil and gas exploitation installations rather than fishing vessels, but this
41 distinction is without relevance. The Tribunal made clear that a coastal State’s
42 competence to take enforcement actions against such bunkering “derives from the
43 sovereign rights of coastal States to explore, exploit, conserve and manage natural
44 resources”,²³ as stipulated in article 56, paragraph 1(a). As such, this enforcement
45 competence applies to the coastal State’s sovereign rights with respect to all natural
46 resources, not just fishing. This was confirmed by the Annex VII tribunal in *Arctic*

²⁰ UNCLOS, art. 87, para. 1.

²¹ UNCLOS, art. 56, para. 1(a).

²² *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, para. 211 (emphasis added).

²³ *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, para. 222.

1 *Sunrise*, which expressly held that the exercise of “the coastal State’s right to
2 enforce its laws in relation to non-living resources in the EEZ” is “clear”.²⁴

3
4 In the present case, Nigeria was exercising its sovereign right to enforce its laws and
5 regulations concerning the management of non-living resources in its EEZ when it
6 acted against the “*San Padre Pio*” and its crew. As explained by my colleague
7 Mr Loewenstein, the “*San Padre Pio*” and its crew were supplying fuel to a complex
8 of installations built to extract petroleum from Nigeria’s EEZ. The activities of the
9 “*San Padre Pio*” and its crew thus fell within the competence of Nigeria as the
10 coastal State. The fact that the Nigerian navy took an interest in the “*San Padre Pio*”
11 because of evidence it was involved in the illegal theft, refinement, and bunkering of
12 oil from Nigeria’s EEZ highlights the importance and propriety of Nigeria’s actions.

13
14 Articles 208 and 214 of the Convention also condition the rights asserted by
15 Switzerland under article 58, paragraph 1. These articles impose on Nigeria the
16 obligation to enforce its laws and regulations concerning pollution from seabed
17 activities in its EEZ. As such, they serve as an additional, independently sufficient
18 basis for Nigeria to take the enforcement actions it did against the “*San Padre Pio*”
19 and its crew.

20
21 As explained earlier by Mr Loewenstein, there is no question that bunkering in
22 connection with seabed activities is a major source of pollution of the marine
23 environment. The threat posed by bunkering to the marine environment is
24 particularly acute in the Gulf of Guinea. It is for this reason that Nigeria has enacted
25 laws and regulations to regulate bunkering in connection with its seabed activities in
26 the EEZ. It was pursuant to these laws and regulations that Nigeria arrested,
27 detained, and initiated judicial proceedings against the “*San Padre Pio*” and its crew.

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

41
42 Switzerland’s interpretation of UNCLOS and its request to have the Tribunal hinder
43 Nigeria’s efforts to prosecute crime related to the exploitation of the EEZ is thus
44 inconsistent with its participation in the Rome Declaration.

45

²⁴ *Arctic Sunrise*, Award on the Merits, para. 284.

²⁵ G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017).

²⁶ G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 1.

²⁷ G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 9.

1 In conclusion, Nigeria had not only the sovereign right, but also the obligation under
2 UNCLOS to take the enforcement actions it did against the “*San Padre Pio*”. As a
3 result, Switzerland’s right regarding the freedom of navigation and other
4 internationally lawful uses of the sea is not applicable in the factual circumstances of
5 the present case, and therefore is not plausible.
6

7 I would now like to turn to the second right asserted by Switzerland, which is its
8 alleged right regarding exclusive flag State jurisdiction under articles 58 and 92 of
9 the Convention. This right is not plausible for the same reason that the first right is
10 not plausible, so I need not spend too much time here. Please allow me to explain.
11

12 Professor Boisson de Chazournes this morning emphasized how article 92
13 establishes the exclusive jurisdiction of the flag State in the high seas, and article 58
14 extends this to the EEZ. Nigeria does not deny this. What Professor Boisson de
15 Chazournes failed to mention, however, is that article 58, paragraph 2 – much like
16 article 58, paragraph 1 – contains an exception. As seen on the screen, article 58,
17 paragraph 2, provides: “articles 88 to 115 and other pertinent rules of international
18 law apply to the exclusive economic zone in so far as they are not incompatible with
19 this Part.”²⁸
20

21 The exception is this phrase “in so far as they are not incompatible with this Part”.
22 “[T]his Part” is, of course, referring to Part V of the Convention on the exclusive
23 economic zone. And Part V contains article 56, paragraph 1(a), which, as I explained
24 previously, grants Nigeria the sovereign right to take the enforcement actions against
25 the “*San Padre Pio*”. The principle of exclusive flag State jurisdiction thus does not
26 apply in these circumstances. If it did, then the sovereign and exclusive rights of the
27 coastal State enshrined in Part V of the Convention could never be enforced against
28 foreign flagged vessels without the consent of the flag State. This would make law
29 enforcement in an environment like the Gulf of Guinea impossible.
30

31 Switzerland’s alleged right regarding exclusive flag State jurisdiction is therefore not
32 applicable to the factual situation at hand, and thus not plausible.
33

34 I now come to the third and final category of rights that Switzerland asserts: those of
35 individuals under the ICCPR and the MLC. On the screen, you can see again
36 Switzerland’s claim in this regard.
37

38 Here, there appear to be three layers of rights. First, it mentions “its own right”, but
39 that right is entirely undefined, so cannot be held by the Tribunal to be plausible.
40

41 The second is the alleged “right to seek redress on behalf of crew members and all
42 persons involved in the operation of vessels”. Professor Caflisch affirmed this
43 morning that this is not a right to exercise diplomatic protection, but did not
44 affirmatively state the right Switzerland invokes. UNCLOS contains no “right to seek
45 redress” of breaches of other treaties. Article 2, paragraph 1, of the ICCPR and
46 various provisions of the MLC impose obligations on States to ensure respect for the
47 rights of individuals enshrined in those instruments; but neither instrument speaks of
48 a “right to seek redress”, as Switzerland alleges. Regardless, even if such right

²⁸ UNCLOS, art. 58, para. 2.

1 existed, Switzerland has not alleged any facts that Nigeria has interfered with such a
2 right. As such, this right is not plausible either.

3
4 The third group of rights are those of individuals under the ICCPR and the MLC.
5 Switzerland spends most of its time on article 9 of the ICCPR, which concerns the
6 right to liberty and security of individuals. This provision, however, obviously does
7 not prohibit all arrest or detention. It only prohibits arbitrary arrest or detention and
8 other procedural guarantees in relation thereto. Switzerland has not asserted, let
9 alone demonstrated, that Nigeria's arrest and detention of the vessel and its crew
10 were arbitrary. Rather, as my colleague Mr Loewenstein explained, Nigeria became
11 interested in the vessel because of evidence of involvement in oil theft and illegal
12 refinement and distribution of oil stolen from Nigeria, and arrested and detained the
13 vessel and its crew because of their engagement in illegal bunkering – and they
14 were later charged with presenting fraudulent documents, all of which constitutes
15 violations of Nigerian law. Article 9 thus does not apply to the situation at hand and,
16 therefore, is not a source of any plausible right.

17
18 In conclusion, then, if we examine all the rights that Switzerland asserts, we find that
19 none of them are applicable to the factual situation at hand and, thus, none of them
20 are plausible.

21
22 Mr President, Members of the Tribunal, this concludes my presentation for today.
23 I thank you for your patience in listening to my presentation. I now ask that you kindly
24 give the floor to my colleague Professor Akande, who will explain why the remaining
25 requirements for the prescription of provisional measures are not met in this case.

26
27 Mr President, we are almost right at 4.30, so I suggest that this might be a good time
28 for a break.

29
30 **THE PRESIDENT:** Thank you, Mr Smith. We have reached 4.30. At this stage the
31 Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at
32 5 p.m.

33
34 (Break)

35
36 **THE PRESIDENT:** The Tribunal will now continue the hearing in the *M/T "San Padre*
37 *Pio"* Case. I now give the floor to Mr Dapo Akande to make his statement.

38
39 **MR AKANDE:** Mr President, Distinguished Members of the Tribunal, it is an honour
40 to appear before you and to represent the Federal Republic of Nigeria in these
41 proceedings. In the time that remains for Nigeria's presentation in this first round of
42 oral pleadings, my task is to set out and develop three further reasons why this
43 Tribunal should not prescribe the provisional measures that Switzerland has
44 requested.

45
46 In addition to the reasons that you have been given as to why the Tribunal should
47 not accede to Switzerland's request, Nigeria argues:
48

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

4
5 (ii) that to grant the provisional measures requested by Switzerland would require
6 this Tribunal to prejudge the merits of the dispute that has been submitted to the
7 Annex VII tribunal; and

8
9 (iii) that if this Tribunal were to prescribe the provisional measures requested by
10 Switzerland, this would cause irreparable harm to Nigeria's rights, in particular the
11 right and the duty to maintain law and order and the sovereign right of Nigeria to
12 prosecute persons who have violated Nigerian laws which have been adopted in
13 order to give effect to its international rights and obligations.

14
15 Mr President, before I proceed to developing each of these points, let me begin by
16 highlighting an important consideration that provides context to Switzerland's
17 Request for provisional measures. The essence of Switzerland's Request is that this
18 Tribunal should prescribe measures in a dispute where at least two other tribunals
19 are already called upon to exercise their functions with respect to the matters in
20 dispute between the parties: the first an international tribunal, and the second, the
21 domestic courts of Nigeria. This Tribunal will need to bear in mind the relationship
22 between it and the Annex VII tribunal to which the dispute has been submitted. It will
23 also wish to bear in mind that, despite what you heard this morning, it is being asked
24 to interfere with the work of a functioning domestic judicial process which is engaged
25 in the important task of maintaining law and order and combatting a form of
26 criminality that is dangerous to Nigeria as well to its neighbouring States in the Gulf
27 of Guinea.

28
29 Provisional measures are an exceptional form of relief,¹ since they are granted in
30 cases where the jurisdiction of the tribunal to which the dispute has been submitted
31 has not been definitively established and since they are granted at a stage where
32 definitive determinations about the rights of the parties have not yet been
33 established. For these reasons, this and other international tribunals exercise caution
34 in assessing whether the conditions for the exercise of this power have been met.
35 The interaction between the three courts and tribunals before which different aspects
36 of this dispute are being considered suggests additional reasons why this Tribunal
37 will wish to ensure that Switzerland is able to demonstrate that the conditions laid
38 down for provisional measures are strictly met.

39
40 This is a request under article 290, paragraph 5, of the Convention and this Tribunal
41 is asked to take a step with regard to a dispute, adjudication of the merits of which
42 have been submitted to the tribunal to be constituted under Annex VII. The fact that
43 the merits of the dispute have been submitted to another international tribunal has at
44 least two consequences for the exercise of this Tribunal's power to grant provisional
45 measures. First, and as will be further developed, this consideration has led to a
46 more stringent condition of urgency than would be the case where provisional
47 measures are requested under article 290, paragraph 1, with respect to disputes, the

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

1 merits of which have been submitted to this Tribunal.² Second, this Tribunal will wish
2 to take particular care to ensure that provisional measures do not prejudice any
3 decision to be made on the merits of the dispute since the decision on the merits has
4 been committed to adjudication by another international tribunal.

5
6 The caution that this Tribunal exercises before it accedes to requests for provisional
7 measures is also heightened in a case such as this where the Tribunal is invited to
8 interfere with the proper functioning of a domestic judicial process that is exercising
9 important sovereign rights, to enforce domestic criminal law, to maintain the rule of
10 law, and to ensure national and regional stability and security. Moreover, in seeking
11 to enforce Nigerian law in this case, Nigerian domestic courts are not merely seeking
12 to secure important national interests but are also giving effect to Nigeria's rights and
13 obligations under international law, including under the Convention. Dr Smith has
14 already shown you how the action taken by Nigeria relates to its sovereign rights
15 with respect to exploring, exploiting, conserving and managing the non-living
16 resources within the exclusive economic zone and how they relate to its obligation to
17 take measures to reduce and control pollution of the marine environment in
18 connection with seabed activities subject to its jurisdiction.

19
20 Mr President, Members of the Tribunal, I will now turn to the first of my reasons why
21 this Tribunal should not grant Switzerland's request: there is no real and imminent
22 risk of irreparable harm to any of Switzerland's rights.

23
24 Article 290, paragraph 5, provides that provisional measures will only be prescribed
25 where "the urgency of the situation so requires".³ This Tribunal has made it clear that
26 provisional measures may not be prescribed unless it considers that there is a real
27 and imminent risk that irreparable prejudice will be caused to the rights of the Party
28 requesting it, pending the constitution and functioning of the Annex VII tribunal.⁴ In
29 order to meet this condition, Switzerland would need to demonstrate firstly that there
30 is a risk of irreparable prejudice to its rights and secondly that such a risk is real and
31 imminent. It has failed to meet either of these conditions. By contrast, as will be
32 shown, Switzerland's request would cause irreparable harm to Nigeria's own rights.

33
34 Switzerland asserts that the detention of the vessel in Nigeria and the ongoing
35 proceedings against the Master and officers of the vessel is causing serious risks to
36 the vessel, her crew and cargo.

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

³ UNCLOS, art. 290, para. 5.

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

1 Mr President, Members of the Tribunal, let me start with the crew. Switzerland
2 speaks of the detention of the Master and the officers, who, may I remind you, are
3 subject to serious criminal charges in Nigeria. The second measure requested by
4 Switzerland includes a request that the Tribunal order Nigeria to release the Master
5 and the three other officers of the “*San Padre Pio*”.⁵ Nigeria acknowledges and
6 endorses the Tribunal’s view that considerations of humanity must apply in the law of
7 the sea as they do in other areas of international law.⁶ Switzerland portrays this as a
8 case in which the crew have been detained in harsh conditions since the arrest of
9 the vessel. However, this is very far from the true situation.

10
11 This morning, the Agent of Switzerland focused your attention on conditions in the
12 Nigerian prisons. However, permit me to remind you that the crew were released, by
13 order of the Nigerian courts, from prison in early March 2018, over 15 months ago. It
14 is hard to see how this focus on prison conditions relates to the argument that
15 provisional measures are required because of the urgency of the situation. We agree
16 with the point made by Sir Michael Wood in his speech of this morning. He said:
17 “Urgency is to be measured from the present, ... not by reference to the past.”
18

19 Despite the serious criminal charges that the Master and officers of the crew face,
20 neither they nor any other member of the crew are currently detained on the vessel
21 or elsewhere. The record demonstrates that the charges initially filed against 12 of
22 the 16 crew members who were on board the vessel when it was arrested were later
23 dropped, and they left Nigeria in July of last year.⁷ They have been replaced by other
24 crewmen who are in Nigeria voluntarily or, more likely, at the request of the owners
25 or charterers of the vessel, and they are free to leave Nigeria at any time.
26

27 Mr President, Members of the Tribunal, while Nigeria acknowledges that the Master
28 and the three other officers of the vessel, who are facing criminal charges, are
29 presently located on the vessel, the true situation is that they are there voluntarily or
30 on the orders of their employers. They are not being detained on the vessel by the
31 Nigerian authorities. They were released on bail in March 2018 with the only
32 restriction imposed on them being that they shall not travel outside Nigeria without
33 the approval of the Federal High Court.⁸ You see the order of the court in tab 10 of
34 your Judges’ folder, with the two relevant provisions highlighted, on the screen: the
35 opening paragraph, where the defendants are admitted to bail on provision of a bank
36 guarantee, and paragraph 5, which only requires that the defendants do not travel
37 outside Nigeria without the prior approval of the Court.
38

39 Indeed, the Master and crew do in fact leave and return to the vessel as they please,
40 occasionally going ashore to Port Harcourt. The affidavit of facts by Captain
41 Kolawole Oguntuga, the commanding officer of the Forward Operating Base that has
42 responsibility for the vessel, and which you have in the Judges’ folder at tab 9,
43 attests to this fact.⁹ These points are collaborated by the affidavit of Mr Arogha, who

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

⁶ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, para. 155.

⁷ Statement in Response of Nigeria, annex 12.

⁸ Request for the Prescription of Provisional Measures of the Swiss Confederation, annex 24.

⁹ Statement in Response of Nigeria, annex 8, para. 11.

1 is the legal officer in the Economic and Financial Crimes Commission (EFCC) with
2 responsibility for prosecuting the charges against the vessel and the crew. That
3 affidavit is also in the Judges' folder at tab 8. The relevant paragraphs are 30 and 31.
4 In paragraph 30 he states that "upon the volition of the 1st to 4th Defendants, they
5 returned to the vessel in Bonny to live there where they normally come to court at
6 every adjourned date on their own accord [and] without any restraint of movement."
7 He then goes on to affirm at paragraph 31 that on some occasions the accused stay
8 "in Hotels of their choice whenever they come to Port Harcourt unguarded".
9

10 If it was ever unclear whether the Master and the officers were detained on the
11 vessel, this matter has now been clarified by the diplomatic note sent by Nigeria to
12 Switzerland on 18 June 2019. In that note
13

14 The Ministry of Foreign Affairs of the Federal Republic of Nigeria hereby
15 provides its assurances to the Swiss Confederation that under the terms of
16 their bail, the defendants ... are not required to remain aboard the *M/T "San*
17 *Padre Pio"* but rather may disembark and board the *M/T "San Padre Pio"* at
18 their pleasure and are at liberty to travel and reside elsewhere in Nigeria.¹⁰
19

20 This note is in the Judges' folder at tab 11.
21

22 This not only clarifies the situation as to the past and present, but constitutes an
23 assurance for the future.
24

25 Mr President, Members of the Tribunal, as the crew are not in fact detained, that
26 aspect of Switzerland's second request where it asks this Tribunal to order that
27 Nigeria release the Master and officers is without object. Mr President, I will return
28 later to the other aspect of the second request that relates to permitting the Master
29 and the crew to leave Nigeria. Our argument is that to make such an order would
30 prejudice irreparably Nigeria's right to enforce its laws through criminal proceedings.
31 This is because custody of the defendants is essential for the successful
32 continuation of those proceedings and Switzerland, not being the State of nationality
33 or of residence of the Master and officers, nor their employer, is not in a position to
34 assure their return to face the criminal charges in Nigeria.
35

36 Mr President, distinguished Members of the Tribunal, Switzerland also asserts that
37 irreparable harm is being, or may be, caused to the crew because of the conditions
38 on the vessel, including the security situation in the area. Permit me to make a few
39 points in response to this argument.
40

41 The first point is one that I have already made: the crew are present on the vessel
42 voluntarily or, more likely, at the direction of their employers. They are not confined
43 to the vessel by the Nigerian authorities. They are free to stay elsewhere in Nigeria,
44 as they apparently do from time to time.
45

46 Second, the conditions on the vessel are the same as the normal working conditions
47 of those who man the vessel in its ordinary seafaring activities.
48

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

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

5
6 Fourth, the Nigerian authorities have not imposed any restrictions on the right of the
7 crew to communicate with others outside the vessel, nor are there restrictions (other
8 than logistical considerations) on medical or other persons visiting the crew. Indeed,
9 the crew remain free to visit with others ashore as and when they wish. Switzerland
10 submits, as evidence of the harsh conditions of the crew, a letter by a doctor
11 asserting an inability to visit the vessel in April of this year.¹¹ However, this is one of
12 those rather cryptic pieces of evidence referred to by Mr Loewenstein. The letter
13 does not indicate which person, authority or office denied permission to visit the
14 crew, nor is there any indication as to why the crew could not be examined while
15 ashore, where they are occasionally.

16
17 The fifth point relates to the safety of the vessel and the security of the crew. This is
18 an issue that Nigeria takes very seriously. Nigeria reminds the Tribunal that the
19 action against the vessel and crew arises out of Nigeria's determined efforts to
20 maintain law and order and to stamp out criminality in that maritime area. Nigeria has
21 provided additional security since the armed attack that Switzerland refers to. Quite
22 apart from the fact that the attack was foiled by the bravery of Nigerian navy
23 personnel, additional guards have been stationed aboard the vessel after the attack,
24 and a gunboat has been deployed nearby to the vessel. Again, I repeat that, even if
25 the security conditions aboard the vessel were such as to give rise to an
26 unacceptable level of risk, that risk is not caused by the actions of the Nigerian
27 authorities. If there is any imposition of a risk, that risk is being imposed on the crew
28 in order to further the economic interests of those involved in the operation of the
29 vessel, as the crew is on the vessel to ensure that it is regularly maintained and that
30 the condition of the vessel does not deteriorate.

31
32 Distinguished Members of the Tribunal, before I leave consideration of the condition
33 of the crew, permit me to make brief reference to the point made this morning by the
34 Agent of Switzerland with regard to security conditions in Port Harcourt and in the
35 rest of Nigeria. Nigeria strongly rejects the inference that presence in any part of
36 Nigeria would itself constitute an imminent risk of irreparable harm.

37
38 Mr President, Members of the Tribunal, permit me now to address you on
39 Switzerland's argument that provisional measures are required because irreparable
40 prejudice will be caused to the vessel and the cargo. Here, I have two points to
41 make, one relating to what it means for harm to be irreparable and the second
42 relating to the imminence of harm in a case such as this.

43
44 The first point is that the case law of this Tribunal, and of the International Court of
45 Justice, establishes that for harm to be irreparable, it must be such that it would not
46 be possible to provide an adequate remedy which would wipe out the consequences
47 of the harm fully either through monetary compensation or by some other form of

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

1 reparation.¹² As the Swiss Request itself demonstrates, any alleged harm to the
2 vessel, to the cargo, and to their owners is, or rather would be, economic only.
3 Reparation for any such harm, were it to occur, can easily be provided through the
4 award of monetary compensation by the Annex VII tribunal.¹³

5
6 With regard to the cargo, it is asserted that the quality will deteriorate over time. Not
7 only is such harm purely economic, the Nigerian authorities have sought to take
8 steps to prevent any economic damage to those who have an interest in the cargo.
9 The Nigerian prosecutors applied for and the Nigerian court granted, on
10 26 September 2018,¹⁴ an order for interim forfeiture of the cargo precisely in order to
11 preserve the economic value of the oil for the benefit of its owner. The money was to
12 be placed in an interest-bearing account. It is the charterers of the vessel that have
13 delayed and that continue to delay this sale. First, they applied to the Nigerian courts
14 for a stay of the execution of the order of 26 September 2018 on the ground that they
15 are the beneficial owner of the cargo and that they were not given notice of the
16 application for forfeiture. That application has been considered and rejected, on
17 9 April of this year, by the Nigerian court which found that the charterer had not, prior
18 to the forfeiture order, disclosed that it has a beneficial interest in the cargo but, to
19 the contrary, has asserted, as Switzerland did this morning, that the cargo belonged
20 to another entity.¹⁵ The charterers have appealed this decision, again delaying the
21 sale and preservation of the cargo.¹⁶ If there has been any deterioration of the value
22 of the cargo, not only can such be remedied by monetary compensation but such
23 deterioration is entirely as a result of the actions of those entities involved in the
24 operation of the vessel.

25
26 My second point in relation to the alleged harm to the vessel and cargo relates to the
27 imminence of the harm. It picks up on a point that I made at the beginning of my
28 speech about the relationship between this Tribunal and the Annex VII tribunal. In
29 this case, even if there were harm to the vessel and the cargo, not only is such harm
30 economic only, and thus not irreparable, the harm is also not imminent. This is an
31 application for provisional measures under article 290, paragraph 5, which not only
32 mentions that provisional measures may only be prescribed where the situation is
33 urgent, but also makes clear that the measures are to be granted pending the
34 constitution and functioning of the Annex VII tribunal to which the merits of the case

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

¹³ See, e.g., *Duzgit Integrity (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award (5 September 2016), para. 342(d); *Arctic Sunrise (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on Compensation (10 July 2017), para. 128.

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

¹⁵ Statement in Response of Nigeria, annex 18.

¹⁶ *Id.*, annex 19.

1 are committed. As this Tribunal stated in the recent *Detention of three Ukrainian*
2 *naval vessels* case:

3
4 The Tribunal may not prescribe such measures unless it considers that there is
5 a real and imminent risk that irreparable prejudice may be caused to the rights of
6 the parties to the dispute before the constitution and functioning of the Annex VII
7 arbitral tribunal.¹⁷

8
9 This Tribunal is clear that under article 290, paragraph 5, the time within which the
10 irreparable harm that justifies the measure will occur is the period before the
11 constitution and functioning of the Annex VII tribunal. It is only if harm will occur
12 within that short period that there will be justification for Switzerland's Request.

13
14 Mr President, there is no imminent risk of irreparable harm in this case because
15 there is no evidence that the condition of the vessel will materially or significantly
16 worsen before the constitution and functioning of the Annex VII tribunal. Although
17 Switzerland refers to general advice about laid-up vessels and refers to internal
18 emails about the possible condition of this vessel, it does not adduce any detailed
19 evidence to support its contention that the vessel may become unseaworthy soon. It
20 also fails to take into account that the crew have had constant access to the vessel
21 for the purpose of undertaking necessary maintenance. Switzerland provides no
22 indication that the crew have requested additional support in providing maintenance.
23 By contrast, the detailed expert report obtained by Nigeria comes to the overarching
24 conclusions that (i) whether the vessel has been regularly maintained or not, the
25 condition of the vessel will not significantly deteriorate over the next four months; and
26 that (ii) the repair time or costs will not increase significantly over the next few
27 months.¹⁸

28
29 Mr President, distinguished Members of the Tribunal, for these reasons, Nigeria asks
30 you to find that there is no real and imminent risk of irreparable prejudice to any of
31 the rights of Switzerland that may be relevant.

32
33 Mr President, as I mentioned at the beginning of this presentation, Switzerland's
34 Request for provisional measures invites this Tribunal to enter into terrain that is
35 already properly occupied by other tribunals that are acting in the exercise of
36 functions conferred on them by international law and national law which is seeking to
37 give effect to rights and obligations under international law. Beyond the impact that
38 such a request would have on general considerations of comity that every Tribunal is
39 called upon to follow, in this particular case the provisional measures requested by
40 Switzerland would require this Tribunal to breach two important rules: the obligation
41 not to prejudge the merits of the case when considering requests for provisional
42 measures, on the one hand, and the obligation not to cause irreparable prejudice to
43 the rights of the Respondent, in particular Nigeria's rights and obligations to maintain
44 law and order through the enforcement of its criminal law, on the other.

45

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

¹⁸ Statement in Response of Nigeria, annex 21.

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

5
6 enable the “*San Padre Pio*” to be resupplied and crewed so as to be able to
7 leave, with her cargo, her place of detention and the maritime areas under the
8 jurisdiction of Nigeria and *exercise the freedom of navigation to which her flag*
9 *State, Switzerland, is entitled under the Convention.*¹⁹

10
11 As the wording makes clear, release of the vessel is said to be justified on the basis
12 of the right to freedom of navigation. Through the provisional measures request,
13 Switzerland is asking this Tribunal to make a finding of its rights to freedom of
14 navigation with regard to the matters under dispute. However, this is precisely one of
15 the central matters at issue at the merits phase of this dispute. This can be seen
16 from Switzerland’s own Statement of Claim initiating proceedings before the
17 Annex VII tribunal. The first submission of Switzerland to that tribunal is that it
18 adjudge and declare that

19
20 [B]y intercepting, arresting and detaining the “*San Padre Pio*” without the
21 consent of Switzerland, Nigeria has breached its obligations to Switzerland
22 regarding freedom of navigation as provided for in article 58 read in
23 conjunction with article 87 of UNCLOS.²⁰

24
25 For the Tribunal to grant Switzerland’s first request, it would have to make a
26 determination that, as the Tribunal put it in the *Enrica Lexie* case, “touches upon
27 issues related to the merits of the case”.²¹ Moreover, determining these issues will,
28 as was also recognized in the *Enrica Lexie* case, would be inappropriate since it
29 impermissibly trespasses on a matter committed to another tribunal, the Annex VII
30 arbitral tribunal.

31
32 As the formulation in the *Enrica Lexie* suggests, the obligation not to prescribe
33 provisional measures that may prejudge the merits of the case is a broad one. In the
34 *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte*
35 *d’Ivoire in the Atlantic Ocean*, the Special Chamber of this Tribunal stated that
36 provisional measures “must not prejudice any decision on the merits”.²² In this case,
37 the first request of Switzerland not only touches on the merits or merely prejudices a
38 decision on the merits but is conditional on affirmation by this Tribunal of the claims
39 that it seeks to have adjudicated by the Annex VII tribunal.

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

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

²¹ See also, *Ghana/Cote d’Ivoire, Provisional Measures, Order of 25 April 2015*, para. 98; and *Construction of a Road in Costa Rica along the River San Juan (Nicaragua v. Costa Rica)*, *Order of 23 December 2013, I.C.J. Reports 2013*, p. 404, paras. 20 and 21 (“The Court now turns to the issue whether the provisional measures requested are linked to the rights claimed and do not prejudge the merits of the case.”). The Court observes that this request is exactly the same as one of Nicaragua’s claims on the merits contained at the end of its Application and Memorial in the present case. A decision by the Court to order Costa Rica to provide Nicaragua with such an Environmental Impact Assessment Study as well as technical reports at this stage of the proceedings would therefore amount to prejudging the Court’s decision on the merits of the case.”).

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

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

6
7 Mr President, distinguished Members of the Tribunal, let me now turn to the last
8 ground upon which Nigeria urges you to reject the request of Switzerland – the last
9 but by no means the least important. Switzerland’s second and third requests would
10 cause irreparable prejudice to the rights of Nigeria.

11
12 While provisional measures are granted in cases where there would be irreparable
13 prejudice to the rights of the party seeking it, this Tribunal has stated that such
14 measures should equally preserve the respective rights of both parties.²³ Thus,
15 provisional measures will not be granted where they will cause irreparable harm to
16 the rights of the party against which the measures are directed.

17
18 The second request of Switzerland seeks an order that Nigeria not only release the
19 Master and the crew – and we have already shown that they are not in fact
20 detained – but also that they be permitted to leave Nigeria with the vessel, despite
21 the fact that they are the subject of very serious criminal charges. The third request
22 then seeks suspension of the judicial and administrative proceedings against them
23 and that Nigeria refrain from initiating new ones which might aggravate or extend the
24 dispute submitted to the Annex VII tribunal.

25
26 Mr President, Members of the Tribunal, interference, in this case, with ongoing
27 domestic judicial proceedings directed at the enforcement of criminal law intended to
28 maintain law and order and to combat criminality would impermissibly and
29 irreparably interfere with the rights of Nigeria. It would also be a setback for the rule
30 of law and of the internationally recognized efforts to provide stability and security in
31 the Gulf of Guinea.

32
33 More importantly, Nigeria’s prosecution of the Master and three crew members of the
34 “*San Padre Pio*” are for breaches of Nigerian law which not only give effect to the
35 exercise of rights conferred by the Convention, but are also undertaken in
36 compliance with its obligations under the same instrument.

37

²³ *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010, para. 71: (“Considering that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment”); *Delimitation of the Maritime Boundary in the Atlantic Ocean Case (Ghana/Côte d’Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, para. 40: (“Considering that the Chamber must be concerned to safeguard the respective rights which may be adjudged in its Judgment on the merits to belong to either Party”) (emphasis added). *Enrica Lexie (Italy v. India)*, Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015, paras. 125 and 126: (“Considering that the Order must protect the rights of both Parties and must not prejudice any decision of the arbitral tribunal to be constituted under Annex VII; Considering that the first and the second submissions by Italy, if accepted, will not equally preserve the respective rights of both Parties until the constitution of the Annex VII arbitral tribunal as required by article 290, paragraphs 1 and 5, of the Convention”) (emphasis added).

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

4
5 Second, Nigeria also has the obligation, pursuant to article 208, to adopt laws to
6 prevent, reduce and control pollution of the marine environment “arising from or in
7 connection with seabed activities subject to its jurisdiction”. To give effect to such
8 regulations and obtain the ultimate goal of the Convention with regard to the
9 protection of the marine environment, article 214 also establishes State Parties’
10 obligations to enforce such laws. Nigeria takes such obligations very seriously, as its
11 conduct in the course of the events of 23 January 2018 revealed.

12
13 Should the Tribunal order that the Master and three officers of the vessel be
14 permitted to depart from Nigeria, Nigeria would suffer irreparable harm because it
15 may then prove impossible to secure their presence, which would be necessary for
16 the successful conduct of the prosecution. This is particularly likely given that
17 Switzerland, not being their State of nationality, nor their State of residence, or even
18 their employer, cannot guarantee their return to Nigeria. Nigeria’s rights to exercise
19 her sovereign rights under article 56 would be impacted and, more importantly, it
20 would also cause irreparable harm to her obligations to enforce its regulations on the
21 protection of the marine environment from activities in connection with or related to
22 seabed activities.

23
24 Distinguished Members of the Tribunal, you will have observed in the record that the
25 Nigerian courts have been responsive to claims that have been made not only by the
26 crew but also by others involved in the operation of the vessel. As has been
27 indicated, the applications for bail by the crew and that for suspension of the order
28 for interim forfeiture by the charterer have been dealt with in a timely manner.
29 Indeed, the commencement of the trial was delayed by the application made by the
30 crew themselves.²⁴ In these circumstances, there is no reason to order suspension
31 of the proceedings. Indeed, suspension of the proceedings would only serve to
32 prolong the charges that will continue to be pending against the Master and the
33 officers.

34
35 One cannot help but notice that Switzerland complains, quite unjustifiably, that the
36 proceedings have been unduly long, but then requests a suspension which would
37 only serve to lengthen the proceedings even further for the crew. Switzerland
38 argues, again without justification, that Nigeria acts in breach of human rights of the
39 crew members – a matter, as Dr Smith has just explained, that neither this Tribunal
40 nor the Annex VII tribunal have jurisdiction over, even *prima facie* – but then
41 requests a measure which would implicate the obligation of Nigeria to ensure that
42 criminal proceedings are conducted without undue delay.²⁵

43
44 It may be worth noting in passing that this is not a prompt release case and thus not
45 a case where the State has an obligation under the Convention to release the vessel
46 and allow the crew to depart.

24 Statement of Claim, annex 3-1.

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

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

16
17 Mr President, distinguished Members of the Tribunal, for all the reasons given by my
18 colleagues and me, Nigeria urges you to reject all the provisional measures
19 requested by Switzerland.

20
21 Unless I can assist you further, this brings to a close Nigeria's arguments in this first
22 round, and I thank you for your kind attention.

23
24 **THE PRESIDENT:** Thank you, Mr Akande. This concludes the first round or oral
25 arguments by Nigeria. The hearing will continue tomorrow with the second round of
26 arguments by both Parties. We will hear the arguments of Switzerland in the
27 morning, from 10 a.m. until 11.30 a.m., and the arguments of Nigeria from 4.30 p.m.
28 until 6 p.m. I wish you a good evening. The sitting is now closed.

29
30 (The sitting closed at 5.45 p.m.)

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

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

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