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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2019

Saturday, 22 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

Present:	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 *ad hoc*	Sean David Murphy
		Anna Petrig
	Registrar	Philippe Gautier

Switzerland is represented by:

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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:

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

as Co-Agents;

and

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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,
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as Assistants.

THE PRESIDENT: Good afternoon. The Tribunal will continue the hearing in the *M/T "San Padre Pio"* case. We will now hear the second round of oral arguments presented by Nigeria.

May I invite Mr Loewenstein to make the first statement on behalf of Nigeria?

MR LOEWENSTEIN: Mr President, Members of the Tribunal, good afternoon. I have the honour to begin Nigeria's second round presentation. It will be my task to respond to the arguments advanced by Switzerland in relation to the principal issues of fact that divide the Parties.

I begin with the question of the defendants' freedom of movement. Switzerland does not dispute that the defendants received bail, or that, under the terms of bail, the defendants may reside anywhere in Nigeria. The defendants' bail, as I mentioned yesterday, was unopposed by the prosecution. Nonetheless, Switzerland's Agent insisted that their bail is meaningless. Why? Because the Nigerian navy is said to wantonly disregard it.

This is an incendiary accusation. The Agent of Switzerland explained the basis for her confidence in levelling it. It is a document that Switzerland sought permission to introduce into the record on Thursday. Nigeria did not oppose the request. The Agent of Switzerland first invoked the document yesterday. She described it as "shocking." Why? Because she said it shows that no less an authority than the Federal High Court of Nigeria had condemned the navy for having engaged in a "flagrant violation of the order of this court admitting the defendants to bail."[1]

The Agent for Switzerland returned to the same document this morning. She insisted that she need only cite this single document to support her accusation about the navy because, she said, "it would suffice to provide one single occasion where this was not the case to rebut it; and that is what we did, indisputably with the judicial ruling presented during the first round of pleading." In fact, this was the only document that Switzerland has cited. Switzerland's Agent then used the document to dismiss Nigeria's attempt to clarify the situation. She demanded, "How can we have any confidence in their purported new assurances?" She went as far as to question Nigeria's good faith. She said, "The presumption of good faith is important, but it should not run counter to the facts." Sir Michael joined in when he also rubbished Nigeria's assurances.

Mr President, the image that is now on your screen reproduces the same one that Switzerland showed you this morning and included in the Swiss Judges' folder. Switzerland has circled in red the language it seizes upon.

I would now ask that you cast your eyes to the highlighted words in the document's caption. They are "Motion on Notice." Mr President, this is not an order from the High Court of Nigeria. It is a motion filed by the defendants. If it proves anything, it is that the defendants know what to do when they consider their rights under the terms of the court's bail to be violated. In that connection, I observe that the date of the

[1] *Motion on Notice* (Federal High Court of Nigeria, 26 May 2018), Switzerland's Judges' folder, round 1, tab 11.

motion is 26 June 2018, nearly a full year ago. The defendants have evidently had no occasion to complain to the court since then.

Mr President, Nigeria's delegation has listened patiently. However, I must tell you that Nigeria's surprise at Switzerland's questioning of its attempts to clarify the situation through its offering of assurances is verging into frustration. This is a matter that the Agent of Nigeria will address.

I now turn to the Agent of Switzerland's comments regarding alleged improprieties in the Nigerian court proceedings, which she said yesterday are characterized failures to properly communicate with the accused. The only support for that accusation that she cited was to claim that in the cargo forfeiture proceeding the owner had not been properly designated as a defendant. The Agent said that "a judge found in his favour." This is wrong. Again, she has confused a motion with a court order. The charterer advanced this argument before the Federal High Court in a motion.[2] However, the Court denied the motion.[3] You will see the relevant citation to the record in the footnote.

I turn now to address Switzerland's assertion that Nigeria refuses to allow healthcare providers to visit the defendants on the vessel. Our first response is that, for the reasons just discussed, there is nothing to prevent the defendants from going ashore to visit doctors, or anyone else. Regardless, Switzerland's assertion is wrong. It appears to rely upon a note from one Felix Oresarya, who had evidently been asked to travel from Lagos to Port Harcourt to examine the defendants.[4] Why a local doctor had not been asked is not explained. As you consider this document, I would respectfully suggest that you keep in mind the Agent of Switzerland's condemnation of hearsay.

You can see a copy on the screen. The note reports that upon arrival in Port Harcourt on a Saturday morning, Dr Oresarya contacted one Mr Chia by phone. Beyond referring to him as "the agent," Mr Chika's identity, role, and employer are not explained. Dr Oresarya reports that they had not obtained the permission from the authority to visit the defendants on the vessel. The "they" and "the authority" are undefined. Dr Oresarya's narrative continues by saying, in the passive voice, that later that day "I was informed that the permission to visit and examine the detainees in their vessel was refused by the authority." Who allegedly informed him of this is not any clearer than his second reference to "the authority." I believe we have also now reached three degrees of hearsay. Dr Oresarya did not wait long. He returned to Lagos the very next morning, on Sunday.

I now address the Agent of Switzerland's argument that under Nigerian law the *"San Padre Pio"* was permitted to bunker at night. In that regard, she relied upon a provision in Nigeria's Petroleum Act. However, as Nigeria explained yesterday, the Nigerian navy is given competence in regard to bunkering at sea by the Armed

[2] *Federal Republic of Nigeria v. Vaskov Andriy et al.*, Ruling (Federal High Court of Nigeria, 9 April 2019), p. 5, Annex 18.
[3] *Ibid.*, p. 7.
[4] Notification and Statement of Claim of the Swiss Federation (6 May 2019) ("Statement of Claim"), Report of Dr Felix Oresanya about the impossibility to examine the Master and the three other officers, dated 28 April 2019, Annex NOT/CH-52.

Forces Act. Its authority is independent of and supersedes the Petroleum Act and is derived from Section 217 of the 1999 Constitution (as amended). As a result, the navy's authority to impose restrictions on when bunkering may take place is independent of any rules that may be codified in other statutes.

Mr President, this brings me to the context in which Nigeria's regulation of bunkering in connection with hydrocarbon exploitation in the Nigerian EEZ takes places. The facts are indisputable. The Nigerian regulations to which Switzerland objects have been promulgated and applied in regard to seabed activities undertaken and sponsored by Nigeria. The supplying of fuel via bunkering is an integral part of those operations.

It is equally beyond purview that bunkering for this purpose carries significant risks to the marine environment and to the persons and equipment involved in the process. Regulation and oversight is therefore required. The crux of the dispute, then, concerns not whether such bunkering should be regulated, but by which State. In Switzerland's view, it must be the exclusive jurisdiction of the various flag States whose vessels might from time to time participate in bunkering Nigeria's offshore installations. Nigeria disagrees. For the reasons explained by Dr Smith, the Convention plainly gives this jurisdiction to the coastal State.

That the waters of the Gulf of Guinea suffer from unacceptable levels of criminality is undisputed. Much of the related threats to maritime security can be traced to what the UN Secretary-General referred to in December as petroleum-related crimes.[5]

Mr President, the only matter connected to this general context that Switzerland seems to dispute concerns the Agent for Switzerland's objection to Nigeria observing that stolen and illegally refined Nigerian petroleum is trafficked through Togo, among other places. She said, "No evidence has been provided to support these serious insinuations." The Agent's position is a matter of surprise. These well-established trafficking routes are a matter of common knowledge, and it seems unlikely that the companies with which the Swiss Government is engaging for this case, which are in the business of shipping petroleum products in the Gulf of Guinea, would be unaware of them. With the greatest of respect for our friends on the other side, the Nigerian navy's chief of operations, who is responsible for directing Nigeria's enforcement efforts and who has explained these trafficking patterns for the Tribunal's consideration, did not simply make it up.

The Agent of Switzerland referred to a clearance certificate that appears to have been stamped by customs officials in Togo. She said that this officially contradicts Nigeria's account. She did not explain the putative contradiction. In fact, the document confirms what Nigeria has said: that the *"San Padre Pio"* obtained its cargo in Lomé and that its destination was the Nigeria Offshore Odudu Field.

The Agent of Switzerland also referred to promotional literature from Togo that she said shows that Togo houses "petroleum storage facilities." But, even if true, it says

[5] 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.

nothing about where the petroleum products stored in those facilities may have been extracted or refined.

Mr President, I turn now to provide Nigeria's response to the Tribunal's request that the Parties provide a factual description of the bunkering operations conducted by the *M/T "San Padre Pio"* on 22-23 January 2018. As detailed in the affidavit of Lieutenant Mohammed Hanifa, the Nigerian naval officer on board the Nigerian naval ship *"Sagbama"*, testifies, when the *"San Padre Pio"* was encountered at 8 p.m. it was in the midst of bunkering another vessel. It then proceeded to commence another ship-to-ship fuel transfer with a different vessel at 3 a.m. the next morning.[6] As Nigeria explained yesterday, the vessel was then arrested and escorted from the scene.

The Tribunal has also asked for an elaboration on the right of arrested vessels to be released upon the posting of a bond, a right that the *"San Padre Pio'"*s owner did not seek to exercise. A vessel can be released under the administrative procedure upon the posting of a bond. Owners of a vessel can apply to a court under the inherent jurisdiction of a court provided for in the relevant sections of the 1999 Constitution (as amended). In that regard, litigants may file motions in ongoing judicial proceedings seeking any relief they deem fit. A court can examine the motion and determine either to refuse the relief, grant it, or partially grant or modify the relief.

As we have noted, the owner of the *"San Padre Pio"* decided not to pursue this avenue for obtaining the vessel's release upon the posting of a bond.

Mr President, this concludes my presentation. Thank you very much for your kind attention. I ask that you invite Dr Smith to the podium.

THE PRESIDENT: Thank you, Mr Loewenstein. I now give the floor to Mr Smith to make the next statement.

MR SMITH: Good afternoon, Mr President, distinguished Members of the Tribunal. I would like to take this opportunity to respond to the arguments advanced by Switzerland yesterday and this morning regarding *prima facie* jurisdiction and plausibility.

Let me first turn to *prima facie* jurisdiction. Yesterday, I explained why the Annex VII tribunal manifestly would not have jurisdiction, not even on a *prima facie* basis, over Switzerland's third claim concerning the ICCPR and the Maritime Labour Convention.

Before delving into this question in detail, I would like to emphasize once again that Nigeria is not in any way violating the rights of the crew of the ship. As explained by my colleagues, Mr Loewenstein and Professor Akande, yesterday, the crew regularly leave the ship and then return voluntarily. As noted in the affidavit of Captain Oguntuga, they do not need to be escorted and are not escorted by Nigerian officials when they leave the ship, and they are under no compulsion to return to the ship.

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

Each time they return to the ship it is always on a voluntary basis. If there were any real concern about their safety and the conditions on the ship, they could have simply not returned to the ship on one of the many occasions on which they left. Importantly, they could leave today and not return if so desired. These conditions cannot possibly be called detention.

Now on the question of *prima facie* jurisdiction, this morning Professor Caflisch started with article 293, paragraph 1, suggesting that it expands the Annex VII tribunal's jurisdiction. He essentially just repeated what he stated yesterday[1] and what was already stated in Switzerland's Statement of Claim.[2] In doing so, he entirely failed to respond to any of the arguments and jurisprudence that Nigeria cited in its Statement in Response[3] and in its oral submissions yesterday on this point.[4]

Let me repeat and be clear that article 293, paragraph 1, is an applicable law provision that does not affect the Annex VII tribunal's jurisdiction.[5] As we noted yesterday, there is unanimity on this front. As the *MOX Plant* Annex VII tribunal held, "There is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand."[6] The *Arctic Sunrise* Annex VII tribunal was more succinct. It stated: "Article 293, paragraph 1, does not extend the jurisdiction of a tribunal."[7]

Professor Caflisch is thus entirely mistaken to invoke article 293, paragraph 1, of UNCLOS in this discussion of jurisdiction. If anything, the fact that he resorted to article 293, paragraph 1, is, as his first argument, revealing.

If we can now move from article 293, paragraph 1, I would like to respond to Professor Caflisch's arguments on article 56, paragraph 2. This morning, just like yesterday, he noted that the phrase "under this Convention" modifies the rights and duties in the first half of article 56, paragraph 2, but emphatically stressed how that phrase is omitted with respect to the rights and duties in the second half of article 56, paragraph 2. This is a classic knife that cuts both ways argument. On the one hand, one could argue that the drafters, having clarified the scope of the rights and duties in the first half of article 56, paragraph 2, found it unnecessary to do so again in the second half. On the other hand, one could argue that the drafters deliberately omitted the phrase in the second half to distinguish it from the first half. Professor Caflisch adopted this latter approach without explaining why the first approach does not apply.

However, even if Professor Caflisch were correct, all it would show is that the rights and duties in the second half of article 56, paragraph 2, include rights and duties

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[1] ITLOS/PV.19/C27/1, p. 16, lines 28-32 (Caflisch).
[2] Switzerland's Statement of Claim, para. 42.
[3] Nigeria's Statement in Response, para. 3.52.
[4] ITLOS/PV.19/C27/2, p. 17, lines 9-14 (Smith).
[5] *MOX Plant (Ireland* v. *United Kingdom)*, Procedural Order No. 3, para. 19; *Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits, paras. 188, 192; *Duzgit Integrity (Malta* v. *São Tomé and Príncipe)*, Award, para. 207.
[6] *MOX Plant (Ireland v. United Kingdom)*, Procedural Order No. 3, para. 19 (emphasis added).
[7] *Arctic Sunrise (Netherlands v. Russia)*, Award on the Merits, para. 188.

outside the Convention. This does not actually address Nigeria's arguments with respect to article 56, paragraph 2, which are that the "due regard" language does not impose an obligation to have complete deference, and that it does not expand the jurisdiction of the Annex VII tribunal.

We noted yesterday that a further reason why the Annex VII tribunal would not have *prima facie* jurisdiction over the third claim is that at the time of the institution of the Annex VII arbitral proceedings, no dispute had crystallized between the Parties over this claim. Yesterday morning Professor Caflisch, in attempting to show that a dispute had crystallized between the Parties, referred to the four *aide-mémoires* sent by Switzerland to Nigeria,[8] and stated "Switzerland repeatedly objected to Nigeria's conduct, explicitly stating that it considered it as violating various provisions of the Convention."[9] The key phrase here is "various provisions". The question is: what are these provisions? We invite the Members of the Tribunal to examine the four *aide-mémoires* referred to by Professor Caflisch. The third and fourth do not specify any provisions of UNCLOS. The first two each specify the same two provisions. You can see the relevant paragraphs on the screen. The first *aide-mémoire* alleges that "the arrest and the detention of the *M/T San Padre Pio* appear inconsistent with articles 58, paragraph 1, and 87 of [UNCLOS] ..."[10] The second *aide-mémoire* alleges that "Switzerland considers the detention of the *M/T San Padre Pio* to be inconsistent with articles 58, paragraph 1, and 87 …"[11] You can see that there had only been exchanges between the Parties concerning articles 58, paragraph 1, and 87 of UNCLOS, which concern the freedom of navigation. None of the *aide-mémoires*, nor any of the other exchanges between the Parties prior to the institution of arbitral proceedings, mention the International Covenant on Civil and Political Rights or the Maritime Labour Convention. More revealingly, none of the exchanges even mention article 56, paragraph 2, of UNCLOS. So even under Switzerland's creative due regard theory, which I address in more detail later, a dispute regarding Switzerland's third claim would not have crystallized between the Parties at the time of the institution of the Annex VII arbitral proceedings. Clearly, this was a new idea that Switzerland's lawyers came up with for the purposes of these proceedings.

This morning, Professor Caflisch attributed the non-crystallization of the dispute to Nigeria's alleged "refus[al] to engage in an exchange of views." According to him, Switzerland "did a maximum to bring about a bilateral discussion about the case." Professor Caflisch was very careful with his words. It is true that Switzerland tried to bring about a discussion of the case, but the case, as Switzerland understood it in its exchanges, only concerned the freedom of navigation under articles 58, paragraph 1, and 87 of UNCLOS. It did not concern the ICCPR or the MLC, and it did not concern article 56, paragraph 2.

Professor Caflisch, perhaps anticipating this weakness, further stated this morning that "in its aide-mémoires, Switzerland constantly referred precisely to *such* rules of international law". Again, I invite the Tribunal to examine the four *aide-mémoires*. The first, second, and fourth refer vaguely to "customary international law" and the third refers to "general principles of international public law". There is no precise referral to

[8] ITLOS/PV.19/C27/1, p. 17, line 27 (Caflisch).
[9] ITLOS/PV.19/C27/1, p. 15, lines 28-29 (Caflisch) (emphasis added).
[10] Switzerland's Statement of Claim, Annex NOT/CH-44.
[11] Switzerland's Statement of Claim, Annex NOT/CH-46.

the ICCPR or the MLC. A State cannot crystallize a dispute simply by stating that another State has violated unspecified principles of international law.

Moreover, even if this dispute had crystallized *quod non*, as I explained yesterday, this dispute clearly concerns the ICCPR and the MLC, not UNCLOS, such that it does not fall within the subject-matter jurisdiction of the Annex VII tribunal. In fact, yesterday morning, Professor Caflisch expressly admitted that its third claim is "based on the ICCPR and the MLC".[12]

In conclusion, then, the third claim manifestly had not crystallized into a dispute at the time of the initiation of the Annex VII arbitral proceedings, and in any case does not concern the interpretation and application of UNCLOS. Therefore, it falls outside the *prima facie* jurisdiction of the Annex VII arbitral tribunal, and the present Tribunal should not prescribe any provisional measures on the basis of this third claim.

This last point is significant and so warrants repetition: the Tribunal should not prescribe any provisional measures on the basis of Switzerland's third claim. A close examination of Switzerland's three claims in its Statement of Claim reveals that the third claim is the only claim that complains of the institution of Nigerian domestic court proceedings against the *"San Padre Pio"* and its officers.[13] As such, since the Annex VII tribunal would not have *prima facie* jurisdiction over the third claim, the Tribunal cannot grant the third provisional measure requested by Switzerland, as it is only linked to the third claim on the merits, not the first or second claim.

Mr President, distinguished Members of the Tribunal, with your permission I will now move on to the issue of plausibility.

This morning our distinguished colleagues representing Switzerland argued that Nigeria is requesting that the Tribunal take a position on the merits of the dispute through our challenge to the plausibility of the rights asserted by Switzerland. I respectfully submit that Switzerland has misunderstood our position. As I stated yesterday, we are not asking the Tribunal to inquire into the merits. Our point, based on the jurisprudence of the Tribunal and the International Court of Justice, is different. We referred the Tribunal to its decision in the *Detention of Naval Vessels* case, in which the Tribunal, in determining whether Ukraine's right to the immunity of warships was plausible, examined whether, on the facts of the case, the vessels in question were actually warships.[14] We also referred to the Judgment of the Court in *Ukraine* v*. Russia,* in which the Court, in determining whether Ukraine's rights to Russia's cooperation in preventing the financing of terrorism was plausible, examined whether, on the facts of the case, the acts in question constituted terrorism financing.[15] Counsel for Switzerland did not mention this or any jurisprudence related to this question.

[12] ITLOS/PV.19/C27/1, p. 16, lines 3-4 (Caflisch).
[13] Switzerland's Statement of Claim, para. 45.
[14] *Detention of three Ukrainian naval vessels (Ukraine* v*. Russian Federation)*, *Provisional Measures, Order (25 May 2019)*, para. 97.
[15] *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.

What we indicated yesterday is that to determine plausibility, the Tribunal must determine whether the rights alleged by Switzerland are applicable to the specific facts of this case. If they are not, then Switzerland's rights are not plausible. Switzerland appears to take issue with our understanding of "plausibility", but an examination of their own pleadings reveals that the authority they rely on – Judge Greenwood's separate opinion in the *Certain Activities* case before the ICJ – succinctly states Nigeria's position,[16] and in no way supports Switzerland's position. Judge Greenwood stated that plausibility requires: "a reasonable prospect that a party will succeed in establishing that it has the right which it claims and that that right is applicable to the case".[17] Yesterday, Switzerland in fact quoted a French translation of this statement by Judge Greenwood, but misquoted it by omitting the language of "applicability" and replacing it with words that cannot be found in the official French translation of Judge Greenwood's opinion.

In determining the plausibility of the rights alleged, the Tribunal does not need to judge the merits of the case. It need only undertake the limited examination of the facts that purport to establish the applicability of the right to the situation at hand.

As we explained yesterday, Switzerland's alleged rights concerning the freedom of navigation and exclusive flag State jurisdiction are not plausible because they are subject to relevant provisions of the Convention in the exclusive economic zone. In particular, article 56, paragraph 1(a), grants Nigeria the sovereign right to regulate and take enforcement action with respect to the management of the natural resources in its exclusive economic zone.. This is the unequivocal holding of the Tribunal in the *M/V "Virginia G"* decision, which, for its clarity, merits quoting again:

> The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take necessary enforcement measures.[18]

Our distinguished friends representing Switzerland did not address this language in any of their pleadings. Rather, Professor Boisson de Chazournes referred you to paragraph 3 of article 56, which indicates: "The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI." As the esteemed Members of the Tribunal are aware, Part VI of the Convention deals with the coastal State's sovereign rights in the continental shelf. Professor Boisson de Chazournes cited no provision in Part VI that limits the rights of the coastal States under Part V.

Switzerland's counsel further attempts to find limits to the enforcement powers related to exclusive economic zone activities for the exploitation, management, and conservation of non-living resources in the provisions regarding living resources and, in particular, the provisions related to fishing. This is a misunderstanding of the

[16] TIDM/PV.19/C27/1, p. 22, fn. 32 (Boisson de Chazournes).
[17] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, *Provisional Measures, Order (8 March 2011)*, Declaration of Judge Greenwood (emphasis added).
[18] *M/V "Virginia G", Judgment*, para. 211 (emphasis added).

relationship between the many provisions on enforcement related to the EEZ in the Convention. The Convention has a general provision granting rights in article 56, paragraph 1(a). As recognized by the Tribunal in the *"Virginia G"* case, this provision allows for the enforcement of laws and regulations in connection with living and non-living resources. It contains no specific limitations. Article 73, referred to by our esteemed colleagues representing Switzerland, which does contain limitations, is a rule of *lex specialis* to establish specific limitations on enforcement "in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone". It makes no mention of, and does not affect, enforcement related to non-living resources.

In fact, the *Arctic Sunrise* Annex VII Tribunal addressed and rejected the very argument of Professor Boisson de Chazournes on this point. The tribunal, after quoting article 73 and noting that "there is no equivalent provision relating to *non*-living resources in the EEZ",[19] the tribunal concluded that "the coastal State's right to enforce its laws in relation to non-living resources in the EEZ" is "clear".[20] Article 73 does not limit those rights

Finally, I would like to respond to Switzerland's creative, though meritless, arguments on the plausibility of its claims concerning the ICCPR and the MLC.

Switzerland appears to have changed track over the course of these proceedings. In its Statement of Claim, Switzerland formulated its third claim using the convoluted language I put on the screen yesterday. I will not read this again but it is on the screen.

As seen on the screen, the only right Switzerland alleged was its so-called "right to seek redress". After its written pleadings and two rounds of oral proceedings, the source and scope of this alleged right is still unknown. Yesterday, Professor Caflisch stated that it is not a reference to diplomatic protection,[21] perhaps because he does not want the exhaustion of local remedies rule to apply. And he also noted that the relevant individual rights "could be those included in article 9 of the ICCPR and those protected by articles IV and V of the Maritime Labour Convention".[22] But he did not clarify the source or the scope of Switzerland's alleged "right to seek redress".

Instead of explaining this right, Switzerland appears to have amended its argument. Both Professor Caflisch and Professor Boisson de Chazournes appear to have moved away from this notion of rights held by Switzerland. Switzerland has instead begun to base its arguments on alleged obligations held by Switzerland, which Nigeria has allegedly failed to give due regard to under article 56, paragraph 2.

For example, as you can see on the screen, today Professor Boisson de Chazournes stated as follows, and I will read the original French first, and to save everybody putting headphones on and then off I will read the English:

[19] *Arctic Sunrise*, Award on the Merits, para. 281.
[20] *Arctic Sunrise*, Award on the Merits, para. 284.
[21] ITLOS/PV.19/C27/1, p. 16, line 39 – p. 17, line 6 (Caflisch).
[22] ITLOS/PV.19/C27/1, p. 16, lines 46-47 (Caflisch).

(Continued in French)

> En vertu de l'article 56, paragraphe 2, de la Convention, il échoit au Nigéria dans l'exercice de ses droits et obligations dans la zone économique exclusive de tenir dûment compte des obligations de l'État du pavillon qui découlent de l'article 94. Cela comprend notamment les obligations conventionnelles auxquelles la Suisse a souscrit, telles que celles inclues dans la Convention du travail maritime ou dans le Pacte international relatif aux droits civils et politiques et qui ont trait aux conditions de travail et de vie de l'équipage.
>
> *(Continued in English)*
> Under article 56, paragraph 2 of the Convention, it is incumbent upon Nigeria when exercising its rights and obligations in the exclusive economic zone to take due account of the *obligations* of the flag State under article 94. This includes in particular treaty obligations to which Switzerland has subscribed such as those included in the Maritime Labour Convention or in the International Covenant on Civil and Political Rights which concern the living and working conditions of the crew.[23]

So Switzerland's third claim is now based, not on an alleged "right of redress", but rather on alleged obligations. Professor Boisson de Chazournes suggests that article 56, paragraph 2, refers to obligations under article 94, which in turn allegedly refers to obligations under the ICCPR and the MLC.

Article 94 is very long and I invite you to read it in full at your leisure. You will see that it imposes many obligations on flag States, such as the obligation to: maintain a register of ships; ensure that the ship has on board nautical charts and navigation equipment; ensure the use of signals; and assume jurisdiction over administrative, technical and social matters.

What you will not see in article 94 is any reference to the MLC or the ICCPR. In fact, there is no reference whatsoever to the civil and political rights enshrined in the ICCPR. The only potentially relevant reference to labour rights is article 94, paragraph 3(b), which provides: "Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard … to … the manning of ships, labour conditions and the training of crews …."[24] Switzerland's only allegation in this regard is that the *"San Padre Pio"* is subject to pirate attacks. That is the only risk to safety that has been mentioned here, but we note that this vessel regularly operates in the Gulf of Guinea loaded with crude oil worth millions of dollars. That means it is constantly subject to pirate attacks, not just when moored, but when sailing. Now, it is under the protection of a Nigerian gunboat and armed soldiers. This is far superior to any protection that Switzerland has ever provided to the *San Padre Pio* when navigating in the dangerous waters of the Gulf of Guinea.

(*Interpretation from French):* Mr President, distinguished Members of the Court, this brings me to the end of my presentation and the second round of Nigeria's presentation. I would like to thank you for your kind attention and for listening to my presentation. Thank you very much.

[23] ITLOS/PV.19/C27/1, p. 22, lines 2-10 (Boisson de Chazournes).
[24] UNCLOS, art. 94, paragraph 3(b).

I now ask that you give the floor to my colleague, Professor Akande.

THE PRESIDENT: Thank you, Mr Smith. I now give the floor to Mr Akande to make the next statement.

MR AKANDE: Mr President, distinguished Members of the Tribunal, my task this afternoon is to respond to the points made by Switzerland regarding the urgency of the situation and in relation to the risk of irreparable harm to the rights of Switzerland.

I will have five points.

The first point that I wish to respond to is Sir Michael Wood's insistence this morning that "it is a most unattractive proposition" to "suggest that somehow paragraph 5 provisional measures are subject to different and tougher requirements". He suggests that this proposition would weaken the provisions of Part XV of UNCLOS. However, both the text of article 290, and the case law of your Tribunal make it abundantly clear that the conditions for the prescription of provisional measures under paragraph 5 of article 290 are not the same as under paragraph 1. Under paragraph 1 such measures may be prescribed to preserve rights "pending the final decision". This means that the Tribunal may consider whether irreparable harm to the rights of the party seeking provisional measures, or to the marine environment would occur at any time until the final decision is rendered. So urgency in that context thus relates to anything that may happen between the present and the rendering of that final decision.

However, as I indicated yesterday, the Tribunal has made it clear, including in your recent decision in the *Detention of Three Ukrainian Naval Vessels* case, that, under paragraph 5, the time within which the irreparable harm that would justify provisional measures must occur is the period between the present and the constitution and functioning of the Annex VII tribunal. In short, something that would be urgent in an application made under paragraph 1, because it would occur before the rendering of the final decision, might not be urgent for this Tribunal under paragraph 5 because it would only occur after the constitution and functioning of the Annex VII tribunal.

It is baffling to see how this approach, which follows from the decisions of your Tribunal, would, as suggested by Sir Michael, weaken the dispute-settlement system under Part XV of UNCLOS. The approach leaves no gaps in protection. Between the initiation of a request for provisional measures and the constitution and functioning of the Annex VII tribunal, this Tribunal performs the important function of ensuring that no rights are irreparably prejudiced. However, from the constitution and functioning of the Annex VII tribunal, that tribunal will take over that task. All that this scheme does is precisely what I said yesterday: it takes into account the proper relationship between this Tribunal and the Annex VII tribunal.

While I am on this point about the time frame for the assessment of urgency, let me address the point that Sir Michael Wood made yesterday that the period between the present and the constitution and functioning of the Annex VII tribunal is some months off. He then listed a series of steps that will have to happen between now and the moment when that tribunal will be able to prescribe provisional measures. By enumerating several stages, he sought to give the impression that the relevant time

frame could quite possibly be lengthy. Distinguished Members of the Tribunal will of course be aware that Annex VII has strict timelines for the constitution of the tribunal. If my maths is accurate – and I would kindly ask that you do not seek an expert opinion from my schoolteachers on this question – under article 7 of Annex VII, the maximum period for the constitution of the tribunal is 104 days from the receipt of the notification of the request for arbitration. So the time period began on 6 May. Again, if my maths is accurate, we are already on day 46 or day 47 of that process.

My point is that the time frame for assessing urgency in this case is short. I will return later to how this point is relevant to the facts of this case.

I now wish to move on to my second point. This morning, Sir Michael responded to the argument that there is a need to respect the fact that the Nigerian courts are acting to give effect to Nigeria's rights and obligations. He said that this simply begs the question and that Nigeria can only carry out its rights and obligations in accordance with international law. The suggestion was that until it is determined that Nigeria does indeed have these rights and obligations in accordance with international law, this tribunal should somehow not take them into account with respect to the indication of provisional measures.

Mr President, distinguished Members of the Tribunal, please permit me to remind you, though I am entirely confident that what I am about to say is very much present in your minds, the rights that Switzerland asserts, and that it says need protection, have also not yet been established. The implication behind Sir Michael's point goes completely against what you have held, which is that provisional measures must preserve the rights of both Parties. It just will not do for Switzerland to suggest that they have unestablished rights which you must protect at this stage and then to suggest that protection of the rights being exercised by Nigerian courts begs the question as to whether those rights exist. Nigeria is confident that you will ensure that the rights of both Parties are not harmed equally.

The third point that I wish to address is the risk of irreparable harm to the crew. Mr President and distinguished Members of the Tribunal, here we simply have a dispute about the facts, and apparently also about how to establish those facts. The main dispute is about whether the crew are in fact detained on the vessel and whether they are present of their own volition. Nigeria maintains that they are not detained on the vessel and they are present there of their own volition. Nigeria has pointed to the terms of bail conditions granted by the Nigerian courts.
Mr Loewenstein has already dealt with the document that Switzerland displayed to suggest that Nigerian courts have found a violation of those bail conditions. As he stated, this was an application to the court, not a court order and, as he pointed out, that application was made a year ago, on the very day when the alleged breach of the bail conditions apparently occurred. No evidence is supplied to this Tribunal of any further applications alleging breaches by the Nigerian authorities of the terms on which bail was granted. We can assume that if there had been allegations of breaches of those bail conditions, the lawyers representing the Master and the crew are aware of how to obtain a remedy.

Switzerland then questions the evidence that has been produced by Nigeria to support the contention that Master and Crew are on the vessel of their own volition

and that they do go ashore unguarded. You were taken to a decision of the International Court of Justice in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia).*[1] Let us look again at that provision:

> The Court has thus held that it must assess "whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events" (ibid.). On this second point, the Court has stated that "testimony of matters not within the direct knowledge of the witness, but known only to him from hearsay, [is not] of much weight" ... Lastly, the Court has recognized that "in some cases evidence which is contemporaneous with the period concerned may be of special value."

First, there is nothing in that paragraph that suggests that statements by State officials will not be given weight. More importantly, that decision does not stand for the proposition that sworn affidavits will not be given weight in circumstances where the other party produces practically no evidence to contradict them. Second, these are affidavits as to facts and as to facts within the direct knowledge of the witnesses. They are to be contrasted with the single letter submitted by Switzerland – the one that Mr Loewenstein showed you earlier and I encourage you to bear the terms of that letter in mind – where a doctor recounts that he was told by a second person that some unidentified third person had not approved that the doctor may visit the Master and crew.

THE PRESIDENT: Mr Akande, I am sorry to interrupt you, but the interpreters have difficulty in following your statement, so can you slow down a little bit. Thank you.

MR AKANDE: Thank you, Mr President.

Third, these affidavits provide evidence which is contemporaneous with the period concerned.

Yesterday Sir Michael argued that "where direct proof of facts is not possible because of the exclusive control of one party, the other party may be allowed 'a more liberal recourse to inferences of fact and circumstantial evidence'."[2] However, the Agent of Switzerland reminded us yesterday that the 12 seamen who were released by Nigeria have been replaced by a new crew, which is rotated at regular intervals. Surely, these other men, who are not under the control of Nigeria, should have been able to provide testimony or affidavits as the facts in dispute. Not a single statement is provided by Switzerland from any of them.

In these circumstances there is no basis to accord a more liberal recourse to inferences.

[1] *I.C.J. Reports 2015,* para 197.
[2] Transcripts (unrevised version), 21 June 2019, a.m., p. 18. (Sir Michael Wood).

If, as Nigeria says, the crew leave the vessel unguarded, every act of them returning to the vessel, however many times, or indeed on however few occasions, demonstrates their voluntary presence on the vessel.

Before I leave the issue of whether irreparable harm is being done to the crew, let me make a point in passing about the conditions of the crew on the vessel. Sir Michael Wood stated that the true picture on board is not rosy at all; that it is bleak and harsh. However, despite this, the Agent for Switzerland tells us that seaman are regularly rotated into these same conditions, and this to simply preserve the economic interests of the owners.

My fourth point, Mr President and distinguished Judges, is a brief one relating to the argument there will be irreparable harm to the vessel and the cargo. This morning, we had an interesting lesson in ethics and moral philosophy from Sir Michael Wood: money is not everything and there are higher values, he told us. I am sure that many of us will agree. However, this does not change the very clear and uniform jurisprudence of international tribunals on this issue. In the Provisional Measures Order of the Special Chamber of this Tribunal in the *Ghana* v. *Côte d'Ivoire* case, it was stated that:

> 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.[3]

Sir Michael referred to all manner of losses that could conceivably occur to the shipowner, the cargo owner, to Switzerland. All of them are economic losses and each of them can be fully compensated by financial reparation.

Mr President, distinguished Judges, my fifth and final point addresses the argument that there will be irreparable harm to the marine environment resulting from the abandonment of a vessel. In particular, the Agent of Switzerland illustrated this argument by drawing a doubtful comparison between a hypothetical, future situation of the *"San Padre Pio"*, and the also hypothetical situation of a vessel known as the *"Anuket Emerald"*. In the words of the Agent of Switzerland: "The probable fate of the *"Anuket Emerald"* is to rust in peace and pollute the environment for decades to come, with all the health risks that that involves for the local population. We earnestly hope that will not happen to the *"San Padre Pio"*."[4]

In response, I will address an issue of law and then some issues of fact – first, the legal issue. I recall this is a request for provisional measures under article 290, paragraph 5, and that as I explained earlier it would need to be shown that any irreparable harm to the marine environment will occur in the few months between now and the constitution and functioning of the Annex VII tribunal; or, at the very minimum, it will need to be shown that irreversible steps that will lead to such harm will occur before then.

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[3] *Ghana/Côte d'Ivoire*, *Provisional Measures, Order of 25 April 2015*, p. 163, para. 89. Emphasis added.

[4] Transcripts (unrevised version), 21 June 2019, a.m., p. 11. (Agent).

There is no evidence at all that anything will happen to the *"San Padre Pio"* which will cause irreparable harm to the marine environment in the few weeks or months before the constitution and functioning of the Annex VII tribunal.

Let me turn to some factual issues which put the claim by Switzerland that the hypothetical future situation of the *"San Padre Pio"* is that it will pose a significant risk of damage to the marine environment very much in doubt.

Mr President and distinguished Members of the Tribunal, you will recall that a picture of the *"Anuket Emerald"* is the only evidence produced by Switzerland to prove that the situation of such vessel has created risks or risks creating prejudice to the marine environment. This picture now before you is said to be taken on 18 July 2018, and it was annexed to the Swiss Request for Provisional Measures,[5] shown on the screen yesterday and included in the Judges' folder.

As Switzerland explained, and Nigeria accepts, that vessel and her crew were charged by Nigeria with illegally trading in petroleum products, and the vessel and her cargo were forfeited at the end of the trial in the Federal High Court, and the subsequent appeal to the Federal Court of Appeal failed. After the period in which appeals to the Supreme Court of Nigeria elapsed and no further appeals were filed, the petroleum products on board the cargo were sold to a buyer. This vessel was blocking a channel used for navigation and was intentionally and safely moved to a beach by the Nigerian navy. The cargo has now been discharged and negotiations are ongoing with regard to the sale of the vessel. As the vessel is now the property of the Federal Government of Nigeria, she has an economic interest in preserving its value and certainly has no intention to abandon it.

Let us look at this picture more closely. Nothing in this picture indicates that it was a tanker wreck on a beach. The vessel is upright and if you look to the right side of the vessel, it appears to anchored. You see the anchor dropped straight down into the water, indicating that this is not an abandoned vessel.

Mr President, distinguished Members of the Tribunal, that concludes my presentation this afternoon. Thank you for your kind attention. May I now request that you invite the Co-Agent of the Federal Republic of Nigeria to make the final submissions on behalf of Nigeria.

THE PRESIDENT: Thank you, Mr Akande.

This brings us to the last stage of the oral arguments of Nigeria.

Article 75, paragraph 2, of the Rules of the Tribunal, provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

[5] Annex PM/CH-12.

I now invite the Co-Agent of Nigeria, Ms Uwandu, to present her concluding remarks and the final submissions of Nigeria.

MS UWANDU: Mr President, highly respected Members of the Tribunal, may I begin by reiterating that Nigeria does not consider itself to have an adversarial relationship with Switzerland. Nigeria remains confident that Switzerland will support Nigeria in its efforts to combat maritime crime in the Gulf of Guinea, including through the recognition of Nigeria's sovereign rights and duty to regulate and exercise valid criminal jurisdiction over illegal activities associated with the extraction of resources from the seabed and subsoil within Nigeria's exclusive economic zone.

Indeed, activities such as illegal bunkering not only undermine Nigeria's ability to protect the marine environment, which is its obligation under the Convention; they are also at odds with Nigeria's efforts to promote sustainable economic development in the country, and cooperate with other States to wipe out the kind of activities such as illegal oil bunkering which are endemic in the Gulf of Guinea and lay at the heart of the insecurity and instability of the region. Mr President, esteemed Members of the Tribunal, Nigeria was conscious of this when it, along with Switzerland, 26 other States, as well as the African Union, the European Union, the IMO and many other intergovernmental organizations, agreed to the G7 Friends of the Gulf of Guinea Rome Declaration on illegal maritime activity in 2007, which committed coastal States to "enhance capacities to achieve prosecutions and prevent all criminal acts at sea".[1] That is precisely what Nigeria is trying to do. Most importantly, Mr President and highly esteemed Members of the Tribunal, it expressly recognized that

> the primary responsibility to counter threats and challenges at sea rests with the States of the region [like Nigeria] and that only a combined effort will allow for a comprehensive response to threats to maritime security. We stand ready to enhance regional and international cooperation.[2]

Mr President, honourable Members of this Tribunal, to conclude Nigeria's oral submissions, I will not repeat the points Nigeria made in the first round or go into the facts in any greater detail. You have our oral and written submissions and evidence on this, and you will have an opportunity to study these at your leisure in your deliberations.

Mr President, highly respected Members of the Tribunal, as mentioned previously on 18 June 2019, the Ministry of Foreign Affairs of Nigeria sent a note verbale to the Embassy of Switzerland in Abuja. In that note verbale, which has been duly acknowledged by our friend from Switzerland, the Ministry of Foreign Affairs formally provided its assurances that the four individual defendants who are being prosecuted before the Federal High Court of Nigeria are not required to remain on board the *M/T "San Padre Pio"* but rather may disembark and board the *M/T "San Padre Pio"* at their pleasure, and are at liberty to travel and reside elsewhere in Nigeria. In order to dispel any confusion, I would like to reiterate and give you my word that the Federal Republic of Nigeria, including the Ministry of Foreign Affairs, the Nigerian navy, the Economic and Financial Crimes Commission and all of the governmental actors are committing to abide by the terms of the bail of the four individual

[1] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 9.
[2] G7++ Friends of the Gulf of Guinea, *Rome Declaration* (26-27 June 2017), para. 10.

defendants, Mr President, who are being prosecuted before the Federal High Court of Nigeria in Port Harcourt Judicial Division. Specifically, Mr President, respected Members of the Tribunal, we provide assurances that Messrs Andriy Vaskov, Mykhaylo Garchev, Vladysla Shulga and Ivan Orlovkyi, under the terms of their bail, are not required to remain on board the *M/T "San Padre Pio"*, but rather may disembark and board the *M/T "San Padre Pio"* at their pleasure and are at liberty to travel and reside elsewhere in Nigeria.

Mr President, Members of the Tribunal, on behalf of the Federal Republic of Nigeria, I therefore most respectfully request that the International Tribunal for the Law of the Sea reject all of the Swiss Confederation's requests for provisional measures.

May I conclude by thanking you, Mr President and highly esteemed Members of the Tribunal, and the Registrar and his excellent staff, for arranging this hearing so quickly at such short notice, and for exceptionally agreeing to sit even on a Saturday to deal with the hearing in such an efficient manner. The work of the translators and the Registry staff has been exemplary and we are equally grateful for that. We also thank the Agent, Counsel and advocates of the Swiss Confederation for their co-operation.

Mr President, highly esteemed Members of the Tribunal, this concludes the oral argument on behalf of Nigeria. We thank you all very much for your attention.

THE PRESIDENT: Thank you, Ms Uwandu.

We have now reached the end of the hearing. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Switzerland and Nigeria. I would also like to take this opportunity to thank both the Agent of Switzerland and the Co-Agent of Nigeria for their exemplary spirit of co-operation.

The Registrar will now address questions in relation to documentation.

THE REGISTRAR (*Interpretation from French*)**:** Thank you, Mr President. In accordance with article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the control of the Tribunal, correct the minutes of their oral arguments or statements, without however changing their meaning or scope. Any such corrections concern the verified version of the minutes in the checked version in the official language used by the Party concerned. These corrections should be submitted to the Registry as soon as possible, at the latest by Tuesday 25 June 2019, 6 p.m. Hamburg time.

THE PRESIDENT *(Continued in English)***:** Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The date for the reading of the order in this case is tentatively set at 6 July 2019. The Agents of the Parties will be informed reasonably in advance of any change to this date.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the order.

The hearing is now closed.

(*The sitting closed at 5.50 p.m.*)