SEPARATE OPINION OF JUDGE *AD HOC* PETRIG

1. I have voted in favour of the Provisional Measure Order. Nevertheless, I consider it necessary to clarify my position on the various elements which constitute the provisional measure prescribed in paragraph 146, sub-paragraph (1).

Release of the vessel, its cargo, and the Master and the three officers

2. I consider the release of the vessel, its cargo, *and* the Master and the three officers to be an appropriate measure. I adhere to the reasoning set out in paragraphs 128 to 130 of the Order demonstrating that the requirement of a real and imminent risk of irreparable prejudice is met in the present case. A further argument, which finds its basis in the Convention itself, should be added.

3. Article 56, paragraph 2, of the Convention stipulates that in exercising its rights under the Convention in the exclusive economic zone, the coastal State "shall act in a manner compatible with the provisions of this Convention". Article 225 of the Convention, entitled "Duty to avoid adverse consequences in the exercise of the powers of enforcement", is one of these provisions and reads:

> In the exercise under this Convention of their powers of enforcement against foreign vessels, *States shall not* endanger the safety of navigation or otherwise create any hazard to a vessel, or *bring it to an unsafe port or anchorage*, or expose the marine environment to an unreasonable risk. (emphasis added)

4. Even though the provision is located in Part XII of the Convention on the Protection and Preservation of the Marine Environment, it must also be observed when enforcement powers are exercised by the coastal State under Part V of the Convention. This accrues from the words "under this Convention", which indicate a broader scope of application than the words "under this Part" used in other safeguard provisions of Part XII (for example, in articles 224 and 227 of the Convention). The interpretation that article 225

of the Convention is of general application – and thus applies to enforcement powers exercised on the basis of Part V of the Convention – has already been confirmed by the Tribunal in *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014,* p. 4, at p. 105, para. 373. The obligation of the coastal State not to bring an arrested vessel to an unsafe anchorage is formulated in an absolute fashion.

5. During the hearings, both Parties referred to the fact that the Gulf of Guinea is plagued by piracy and armed robbery against ships.[1] Paragraph 129 of the Order makes reference to the Report on Piracy and Armed Robbery Against Ships (1 January – 31 March 2019) by the International Chamber of Commerce-International Maritime Bureau, according to which 14 of the 38 incidents of piracy and armed robbery against ships worldwide took place in Nigerian waters. As regards the place of detention specifically, the International Chamber of Commerce-Commercial Crime Service notes on its website that "there has been a noticeable increase in attacks/hijackings/kidnapping of crews" off Bonny Island and Port Harcourt and "[v]essels are advised to take additional measures in these high risk waters."[2] As noted in paragraph 129 of the Order, the risk materialized on 15 April 2019, when the *M/T "San Padre Pio"* came under armed attack, endangering the lives of those on board the vessel. Furthermore, Switzerland pointed to another source of risk, which is collisions. It stated that on 5 June 2019, "the *"M/V Invictus"* dragged its anchor and collided twice with the *"San Padre Pio"*" and that "[t]he inspection report indicates that the *"M/V Invictus"* was without crew and had been detained by the Nigerian authorities for over three years."[3] This evidence allows for the conclusion that Bonny Inner Anchorage, where the *M/T "San Padre Pio"* is detained, cannot be considered a safe place for anchorage.

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[1] See, *inter alia*, ITLOS/PV.19/C27/1, p. 9, ll. 14-21, and ITLOS/PV. ITLOS/PV.19/C27/2, p. 8, ll. 38-41, and p. 9, ll. 7-10.
[2] International Chamber of Commerce-Commercial Crime Service, Piracy & Armed Robbery Prone Areas and Warnings, <www.icc-ccs.org/index.php/piracy-reporting-centre/prone-areas-and-warnings> (last viewed 5 July 2019).
[3] ITLOS/PV.19/C27/1, p. 31, ll. 33-38.

6. Article 225 of the Convention prohibits bringing ships to an unsafe anchorage because doing so may have "adverse consequences" for the vessel – as accrues from the title of the provision. The provision thus rests on the assumption that anchorage in an unsafe area *as such* implies a risk of adverse consequences for the vessel and crew. *A fortiori* there is a real and imminent risk of irreparable prejudice present in situations where specific security risks of an unsafe anchorage have already materialized – as in the case at hand. Hence, the requirement of real and imminent risk of irreparable prejudice is clearly fulfilled.

7. The situation in which the detained vessel finds itself is a direct result of the alleged violation by Nigeria of both the freedom of navigation and the exclusive flag State jurisdiction. This situation exposes the crew of the *M/T "San Padre Pio"* to an imminent and real risk to their health, life and liberty. With the release of the vessel, its cargo, and the Master and the three officers, the Tribunal recognizes "the human realities behind disputes of states" (Rosalyn Higgins, *Interim Measures for the Protection of Human Rights*, 36 Columbia Journal of Transnational Law 91 (1998), p. 108) – a reality that raises humanitarian concerns in the case at hand.

Bond or other financial security

8. Since "the Order must protect the rights of both Parties" (*The "Enrica Lexie" (Italy v. India), Order of 24 August 2015, ITLOS Reports 2015,* p. 182, at p. 203, para. 125), the release of the vessel, its cargo, and the Master and three officers must be counterbalanced by means that sufficiently preserve the rights asserted by Nigeria. In my view, the *quid pro quo* package put together by the Tribunal is not entirely satisfactory, but it represents a formula receiving support from a solid majority of judges.

9. Even though the bond has not been adopted within the framework of prompt release proceedings, there is no reason to depart from the principle adhered to in this type of proceedings that the bond should be reasonable, because it is the reasonableness of the bond which ensures that the interest

of the flag State in the release of the vessel, cargo and crew are reconciled with the interest of the coastal State in preserving its asserted rights.

10. In the case at hand, the Tribunal opted for a bond or other financial security in the form of a bank guarantee in the amount of US$ 14,000,000. It has been estimated that, as of 8 December 2017, the value of the vessel was US$ 10,500,000.[4] However, the value must be assumed to be lower today, not only owing to the vessel's immobilization and lack of full maintenance, but also to the mere passage of time (the estimation relates to the value of the vessel 19 months ago). Switzerland states that at the time of the arrest, the vessel had a remaining cargo of 5,075.056 metric tons of gasoil, valued at around US$ 3,060,000.[5] The value of the vessel and the cargo is, of course, not the only factor to be taken into account when fixing the amount of the bond; another component is certainly a sum to ensure the return of the Master and the three officers should the Annex VII arbitral tribunal find that Nigeria has jurisdiction over them. Still, in light of the figures mentioned above and compared with other decisions of the Tribunal (even taking into account that they were rendered some years ago), the amount of the bond is rather high. This holds all the more true as release has been made dependent upon the fulfilment of a further condition, to which I turn now.

Undertaking to ensure return

11. As per paragraph 146, sub-paragraph (1)(b),

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

[4] Statement of claim, Annex PM/CH-51.
[5] Statement of claim, para. 10.

12. It seems important to clarify the legal nature of this undertaking and to point to some of the practical and legal limitations inherent in this measure.

13. I do agree with the finding in paragraph 141 of the Order that such undertaking "will constitute an obligation binding upon Switzerland under international law." Indeed, the International Court of Justice held that:

> The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (…). It is not merely hortatory or purposive. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* p. 43, at p. 111, para. 162).

14. However, it is equally important to stress that the notion "undertake to ensure" does not entail an obligation of result, but an obligation of conduct. The Seabed Disputes Chamber has had a chance to interpret the notion of "responsibility to ensure" contained in article 139, paragraph 1, of the Convention. It first clarified that in the context of this provision, the term "responsibility" means "obligation" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 30, para. 65). It then went on to interpret the concept of "responsibility to ensure" (which is, as just seen, equal to an "obligation to ensure") and stated:

> The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an *obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result*. To utilize the terminology current in international law, this obligation may be characterized as an *obligation "of conduct"* and not "of result", and as an *obligation of "due diligence"*. (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 41, para. 110) (emphasis added).

This interpretation was endorsed by the Tribunal in the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission,*

Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, at pp. 38-40, paras. 125-129.

15. The case law of the International Court of Justice provides some clarification as to what "parameters operate when assessing whether a State has duly discharged" an obligation of conduct. It has held that the first parameter "is clearly the capacity to influence effectively" the factual situation at hand and specified:

> The State's capacity to influence must also be assessed by legal criteria, since *it is clear that every State may only act within the limits permitted by international law*; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 221, para. 430) (emphasis added)

16. Finally, the International Court of Justice has clarified the circumstances under which a State, upon which an obligation of conduct is incumbent, engages its international responsibility:

> A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State *manifestly* failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 221, para. 430) (emphasis added)

17. In light of this case law, paragraph 146, sub-paragraph (1)(b), should be read as follows:

(a) The undertaking by Switzerland to ensure that the Master and the three officers are available and present at the criminal proceedings in Nigeria is an obligation of conduct – not of result. From this it follows that Switzerland will have duly discharged its obligation if it deploys adequate means, and exercises its best possible efforts to obtain the return of the Master and three officers for legal proceedings in Nigeria.

(b) To assess whether Switzerland has done so, it is necessary to take into account, *inter alia*, the two parameters set out by the International Court of Justice: (i) Switzerland must have the "capacity to influence effectively" the factual situation; and (ii) Switzerland "may only act within the limits permitted by international law", notably those set by international human rights law. The capacity to influence effectively the factual situation and respect for international law in discharging the obligation are, to a great extent, intertwined. Since Switzerland can only act within the limits of international law, its capacity to effectively influence the return of the Master and three officers may be limited. For example, depending on concrete circumstances as they may present themselves in the future, Switzerland may not be able to forcibly keep the Master and the three officers in Switzerland – notably owing to the rights enshrined in the International Covenant on Civil and Political Rights, to which Switzerland and Nigeria are both parties, specifically the right to leave any country granted by virtue of article 12. As a consequence, Switzerland may lose, at least to a large extent, its capacity to influence effectively the return of the Master and the three officers. Furthermore, should they remain in Switzerland, the principle of *non-refoulement* may (unless sufficient assurances are provided by Nigeria) prohibit the return of the Master and the three officers to Nigeria. Overall, abiding by international law may, in specific circumstances, imply that Switzerland does not have the capacity to influence effectively the factual situation – that is, to achieve the return of the Master and the three officers to Nigeria.

(c) Lastly, Switzerland will not incur liability simply because the return of the Master and three officers can ultimately not be achieved, but rather only for having "manifestly failed" to take all measures to achieve their return. Such "manifest failure" will clearly be absent if Switzerland is unable to ensure the presence and ultimate return of the Master and the three officers because it is abiding by international law, notably international human rights law.

18. Overall, this cursory assessment demonstrates that international law may limit Switzerland's legal and practical leeway ("*marge de manœuvre"*)

quite considerably. In my view, paragraph 146, sub-paragraph (1)(b), ought to have made explicit that the return of the Master and the three officers must comply with international law. While such qualification of the undertaking is not necessary – for reasons explained above – it would have made the limits inherent in this undertaking more transparent. Furthermore, it would have placed this component of the measure more clearly within the broader context of international law, notably international human rights law.

(signed) Anna Petrig